



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

February 26, 2013 Government Records Council Meeting

Larry A. Kohn
Complainant

Complaint No. 2011-345

v.

Township of Livingston (Essex)
Custodian of Record

At the February 26, 2013 public meeting, the Government Records Council (“Council”) considered the January 22, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). However, the GRC declines to order disclosure of the responsive minutes because the Custodian provided same to the Complainant via e-mail on November 23, 2011.
2. Although the Custodian did not timely respond to the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) thus resulting in a “deemed” denial of access, the Custodian provided the responsive minutes to the Complainant via e-mail on November 23, 2011. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s untimely response did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the



Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 26th Day of February, 2013

I attest the foregoing is a true and accurate record of the Government Records Council.

Robin Berg Tabakin, Esq., Chair
Government Records Council

Decision Distribution Date: February 27, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 26, 2013 Council Meeting**

Larry A. Kohn¹
Complainant

GRC Complaint No. 2011-345

v.

Township of Livingston (Essex)²
Custodian of Records

Records Relevant to Complaint: E-mail copy of closed session minutes for October 17, 2011.

Request Made: November 26, 2011

Response Made: November 23, 2011

Custodian: Glenn Turtletaub

GRC Complaint Filed: November 15, 2011³

Background

November 15, 2011

Denial of Access Complaint filed with the Government Records Council (“GRC”) attaching the Complainant’s OPRA request dated October 26, 2011.

The Complainant states that he submitted an OPRA request to the Township of Livingston (“Township”) on October 26, 2011. The Complainant states that he never received a response.

The Complainant does not agree to mediate this complaint.

December 1, 2011

Custodian’s Statement of Information (“SOI”) with the following attachments:

- Complainant’s OPRA request dated October 26, 2011 with the Custodian’s notes thereon.
- E-mail from the Custodian to the Complainant dated November 23, 2011 (with attachment).

The Custodian certifies that his search for the requested records involved retrieving the responsive minutes and providing same to the Custodian’s Counsel for review and advice.

¹ No legal representation listed on record.

² Represented by Sharon L. Weiner, Esq., of Johnson, Murphy, Hubner (Riverdale, NJ).

³ The GRC received the Denial of Access Complaint on said date.

The Custodian also certifies that no records responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services.

The Custodian certifies that he received the Complainant's OPRA request on October 27, 2011. The Custodian certifies that upon Counsel's advice, the Custodian made the appropriate redactions and provided the responsive minutes to the Complainant on via e-mail on November 23, 2011.⁴ The Custodian certifies that during this time period, the Township was engaged in dealing with significant issues and power outages that forced the Township to rely on generators to conduct business. The Custodian certifies that no computers or nonessential electricity was used during that time.

The Custodian contends that there was no unlawful denial of access and all records were provided to the Complainant consistent with OPRA. The Custodian contends that he did not knowingly and willfully violate OPRA under the totality of the circumstances.

December 12, 2011

Letter from the Complainant to the GRC. The Complainant states that he recently filed multiple complaints against the Custodian. The Complainant asserts that all complaints taken as a group show a clear pattern of noncompliance with OPRA. The Complainant contends that although the Custodian is a lawyer by training, has long worked as the Township's custodian of record, and has testified that he is fully knowledgeable as to the requirements of OPRA, the Custodian has frequently violated same.

The Complainant acknowledges that the Township suffered from a storm; however, many of the OPRA-related issues of which he complains have been consistent since before the storm and have continued since. The Complainant thus requests that the GRC group all 10 complaints together and, under the totality of the circumstances, determine that the Custodian knowingly and willfully violated OPRA.

Analysis

Whether the Custodian timely responded to the Complainant's OPRA request?

OPRA provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5(g).

⁴ The Custodian notes that the responsive minutes were approved at the Council's October 24, 2011 meeting.

Further, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (Emphasis added.) N.J.S.A. 47:1A-5(i).

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). As also prescribed under N.J.S.A. 47:1A-5(i), a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁵ Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

The Custodian herein did not respond to the Complainant’s OPRA request until the nineteenth (19th) business day after receipt of said request. Thus, the Custodian’s untimely response results in a “deemed” denial.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, supra. However, the GRC declines to order disclosure of the responsive minutes because the Custodian provided same to the Complainant via e-mail on November 23, 2011.

Finally, the Complainant submitted a letter to the GRC on December 12, 2011 requesting that the GRC combine a number of complaints filed against the Custodian and determine that, under the totality of the circumstances, the Custodian knowingly and willfully violated OPRA. The consolidation of complaints is solely at the discretion of GRC. In this instance and upon review of all complaints submitted by the Complainant, same will not be consolidated based on the number of complaints and the complexity of the issues therein.

⁵ It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

Whether the Custodian’s untimely response rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that:

“[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ...” N.J.S.A. 47:1A-11(a).

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

“... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Felder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Although the Custodian did not timely respond to the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) thus resulting in a “deemed” denial of access, the Custodian provided the responsive minutes to the Complainant via e-mail on November 23, 2011. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s untimely response did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). However, the GRC declines to order disclosure of the responsive minutes because the Custodian provided same to the Complainant via e-mail on November 23, 2011.

2. Although the Custodian did not timely respond to the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) thus resulting in a "deemed" denial of access, the Custodian provided the responsive minutes to the Complainant via e-mail on November 23, 2011. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's untimely response did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

January 22, 2013⁶

⁶ This complaint was originally prepared for the Council's January 29, 2013 meeting; however, the complaint could not be adjudicated due to lack of quorum.