



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

FINAL DECISION

May 29, 2012 Government Records Council Meeting

Dianne Rankin
Complainant

Complaint No. 2011-81

v.

Township of Delaware (Hunterdon)
Custodian of Record

At the May 29, 2012 public meeting, the Government Records Council (“Council”) considered the May 22, 2012 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’s response was not timely and a violation of N.J.S.A. 47:1A-5.e. because the Custodian failed to immediately respond to the Complainant’s request for legal bills pursuant to Herron v. Township of Montclair (Essex), GRC Complaint No. 2006-178 (February 2007).
2. The Custodian’s response to the Complainant’s OPRA request informing the Complainant that there were no responsive records to her request constituted an insufficient response and the Custodian’s later grant of access to responsive records indicates that the Custodian did not conduct a sufficient search for the requested records. See Schneble v. New Jersey Department of Environmental Protection, GRC Complaint No. 2007-220 (April 2008). Furthermore, although the Custodian argued that the Complainant’s request was unclear, the GRC has held that a Custodian’s request for clarification of a Complainant’s OPRA request is a lawful response and conforms to the duties placed upon a custodian in N.J.S.A. 47:1A-5.g. See Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). Accordingly, the Custodian has failed to meet her burden of proving that her initial denial of access was lawful as mandated by N.J.S.A. 47:1A-6.
3. The Custodian’s response was not timely because the Custodian had an obligation to *immediately* respond to the Complainant’s OPRA request for invoices, which are immediate access records. See Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007). In addition, the Custodian conducted an insufficient search and mistakenly informed the Complainant that there were no records responsive to her request. However, the Custodian later provided the responsive records to the Complainant. Accordingly, the evidence of record does not indicate that the Custodian’s



violations of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, it is concluded that the Custodian's actions do 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 29th Day of May, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: June 4, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 29, 2012 Council Meeting**

**Dianne Rankin¹
Complainant**

GRC Complaint No. 2011-81

v.

**Township of Delaware (Hunterdon)²
Custodian of Records**

Records Relevant to Complaint:

All legal and other costs directly or indirectly related to the Complainant's small claims court action against the Township of Delaware ("Township").

Request Made: September 10, 2010

Response Made: September 15, 2010

Custodian: Judith Allen

GRC Complaint Filed: March 24, 2011³

Background

September 10, 2010

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

September 15, 2010

Custodian's response to the OPRA request. The Custodian responds in writing via e-mail to the Complainant's OPRA request on the third (3rd) business day following receipt of such request. The Custodian states that there are no applicable charges.

February 22, 2011

E-mail from the Custodian to the Complainant. The Custodian states that she was initially unclear about the Complainant's OPRA request. The Custodian asserts that she believes that her response that there were no applicable charges was sufficient because the Complainant's request is for "all legal and other costs" and not for copies of any bills or invoices. The Custodian asserts that she would be happy to assist the Complainant.

March 5, 2011

E-mail from the Complainant to the Custodian. The Complainant states that the Custodian correctly told her that the Complainant would not incur any charges based

¹ Represented by Scott Bullock, Esq. (Lyndhurst, NJ).

² Represented by Victoria D. Britton, Esq., of Mason, Griffin, & Pierson, PC (Princeton, NJ).

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

upon her small claims matter. The Complainant further asserts that her request seeks *all* legal costs. The Complainant asserts that the Custodian's February 22, 2011 e-mail indicates that there were some costs that the Township knew about that were related to her request. The Complainant states that she is filing a Denial of Access Complaint with the GRC.

March 7, 2011

E-mail from the Custodian to the Complainant. The Custodian states that in response to the Complainant's March 5, 2011 e-mail, attached are all legal bills from July 1, 2010 to December 31, 2010. The Complainant asserts that the bills include two (2) payments related to the Complainant's August 2010 small claims court matter.

March 24, 2011

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- Invoice from the law firm of Mason, Griffin & Pierson dated August 16, 2010
- Purchase Order dated August 30, 2010
- Complainant's OPRA request dated September 10, 2010
- E-mail from the Custodian to the Complainant dated September 15, 2010
- E-mail from the Custodian to the Complainant dated February 22, 2011
- E-mail from the Complainant to the Custodian dated March 5, 2011
- E-mail from the Custodian to the Complainant dated March 7, 2011

The Complainant states that she made this OPRA request on September 10, 2010. The Complainant alleges that the Custodian telephoned her on September 14, 2010 and informed her that there would be no cost associated with the OPRA request. The Complainant states that she verified this lack of cost in writing on September 15, 2010.⁴

The Complainant does not agree to mediate this complaint.

April 8, 2011

Request for the Statement of Information ("SOI") sent to the Custodian.

April 14, 2011

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated September 10, 2010
- Letter from the Custodian to the Complainant dated September 15, 2010⁵

The Custodian certifies that her search for records revealed two invoices from the Township Attorney dated July 2010 and August 2010. The Custodian certifies that these invoices have a six (6) year retention schedule. The Custodian argues that the Complainant did not request legal invoices but instead sought the costs for her court

⁴ The Complainant also references additional OPRA requests that are not at issue in the instant complaint.

⁵ The Custodian attached additional documentation that is not relevant to the adjudication of the instant complaint.

appearance. The Custodian certifies that there was no cost to the Complainant for her appearance and that she so advised the Complainant.

The Custodian argues that OPRA requires only the disclosure of “identifiable” government records and does not include general requests for information. The Custodian maintains that the Complainant’s request merely sought general information. The Custodian certifies that despite this, she still attempted to provide the Complainant with information responsive to her request. The Custodian certifies that a request for a specific record was never made to the Township.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

“Immediate access ordinarily shall be granted to budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.” (Emphasis added). N.J.S.A. 47:1A-5.e.

OPRA also 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.

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 places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

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.⁶ 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).

Requests for records such as bills and invoices require an immediate response. In Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007), the Council held that the “immediate access language of OPRA (N.J.S.A. 47:1A-5.e.) suggests that the Custodian was still obligated to immediately notify the Complainant...” Inasmuch as OPRA requires a custodian to respond within a statutorily required time frame, when immediate access records are requested, a custodian should immediately respond to the request for those records, granting or denying access, requesting additional time to respond or requesting clarification of the request.

In the instant matter, the Complainant’s OPRA request sought “all legal and other costs directly or indirectly related to [her] small claims court action against the Township.” The Complainant filed her OPRA request on September 10, 2010. On September 15, 2010, the third (3rd) business day following the Custodian’s receipt of said request, the Custodian sent the Complainant an e-mail informing her that no records existed that were responsive to her request. While the Custodian’s response was within the seven (7) business days prescribed in OPRA, the Council finds that the Complainant’s request seeking legal and other costs qualifies as a request for bills. The request for bills falls under N.J.S.A. 47:1A-5.e.’s provision that requires a Custodian to give an immediate response to requests for bills (*i.e.*, invoices).

Therefore, the Custodian’s response was not timely and a violation of N.J.S.A. 47:1A-5.e. because the Custodian failed to immediately respond to the Complainant’s request for legal bills pursuant to Herron v. Township of Montclair (Essex), GRC Complaint No. 2006-178 (February 2007).

Moreover, the Council finds that the Custodian’s response to the Complainant’s OPRA request was insufficient as it precipitated from an insufficient search. The Complainant filed her OPRA request on September 10, 2010. The Custodian first informed the Complainant on September 15, 2010 that no records existed responsive to her request for “all legal and other costs directly or indirectly related to [her] small claims court action against the Township.” On February 22, 2011, the Custodian e-mailed the Complainant stating that she initially did not understand the Complainant’s request. The Custodian further stated that she was not aware that the Complainant’s request sought invoices. On March 7, 2011, the Custodian provided the Complainant with invoices

⁶ 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.

responsive to the Complainant's request. The Council has held that such a response is indicative of an insufficient search.

In Schneble v. New Jersey Department of Environmental Protection, GRC Complaint No. 2007-220 (April 2008), the custodian initially responded to the complainant's OPRA request by stating that no records responsive existed. The complainant, however, submitted with the Denial of Access Complaint e-mails that were responsive to her request. The custodian certified that upon receipt of the e-mails attached to the Denial of Access Complaint, the custodian again searched through DEP files and this time located records responsive to this request. The GRC held that because the custodian performed an inadequate initial search, the custodian unlawfully denied the Complainant access to the requested records. *See also*, Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (January 2011).

Here, as in Schneble, the Custodian initially denied the Complainant's request and responded stating that there were no records responsive to said request. Similar to Schneble, after the Custodian and Complainant exchanged e-mails on February 22, 2011 and March 5, 2011, it became apparent to the Custodian that she was indeed in possession of records responsive to the Complainant's request. As in Schneble, the Custodian conducted a further search and subsequently provided the Complainant with responsive records.

Therefore, the Custodian's response to the Complainant's OPRA request informing the Complainant that there were no responsive records to her request constituted an insufficient response and the Custodian's later grant of access to responsive records indicates that the Custodian did not conduct a sufficient search for the requested records. *See* Schneble v. New Jersey Department of Environmental Protection, GRC Complaint No. 2007-220 (April 2008). Furthermore, although the Custodian argued that the Complainant's request was unclear, the GRC has held that a Custodian's request for clarification of a Complainant's OPRA request is a lawful response and conforms to the duties placed upon a custodian in N.J.S.A. 47:1A-5.g. *See* Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). Accordingly, the Custodian has failed to meet her burden of proving that her initial denial of access was lawful as mandated by N.J.S.A. 47:1A-6.

Whether the Custodian's actions rise 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 (Fielder 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).

In the instant matter, the Custodian’s response was not timely because the Custodian had an obligation to *immediately* respond to the Complainant’s OPRA request for invoices, which are immediate access records. *See Herron v. Township of Montclair*, GRC Complaint No. 2006-178 (February 2007). In addition, the Custodian conducted an insufficient search and mistakenly informed the Complainant that there were no records responsive to her request. However, the Custodian later provided the responsive records to the Complainant. Accordingly, the evidence of record does not indicate that the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, it is concluded that the Custodian’s actions do 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’s response was not timely and a violation of N.J.S.A. 47:1A-5.e. because the Custodian failed to immediately respond to the Complainant’s request for legal bills pursuant to Herron v. Township of Montclair (Essex), GRC Complaint No. 2006-178 (February 2007).
2. The Custodian’s response to the Complainant’s OPRA request informing the Complainant that there were no responsive records to her request constituted an insufficient response and the Custodian’s later grant of access to responsive records indicates that the Custodian did not conduct a sufficient search for the requested records. *See Schneble v. New Jersey Department of Environmental Protection*,

GRC Complaint No. 2007-220 (April 2008). Furthermore, although the Custodian argued that the Complainant's request was unclear, the GRC has held that a Custodian's request for clarification of a Complainant's OPRA request is a lawful response and conforms to the duties placed upon a custodian in N.J.S.A. 47:1A-5.g. See Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). Accordingly, the Custodian has failed to meet her burden of proving that her initial denial of access was lawful as mandated by N.J.S.A. 47:1A-6.

3. The Custodian's response was not timely because the Custodian had an obligation to *immediately* respond to the Complainant's OPRA request for invoices, which are immediate access records. See Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007). In addition, the Custodian conducted an insufficient search and mistakenly informed the Complainant that there were no records responsive to her request. However, the Custodian later provided the responsive records to the Complainant. Accordingly, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, it is concluded that the Custodian's actions do 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: Darryl C. Rhone
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

May 22, 2012