



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

July 23, 2013 Government Records Council Meeting

Karen Desoto, Esq.
(for Center For Legal Justice)
Complainant

Complaint No. 2012-243

v.
City of Bayonne (Hudson County)
Custodian of Record

At the July 23, 2013 public meeting, the Government Records Council (“Council”) considered the July 16, 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, supra.
2. Although there was a delay in production of the records, the Custodian did not unlawfully deny access to the Complainant’s OPRA request because he ultimately provided the Complainant with all of the responsive documents in his possession.
3. Although there was a delay in production, since all responsive documents were ultimately produced, 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 23rd Day of July 2013

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: July 26, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 23, 2012 Council Meeting**

Karen Desoto, Esq.¹
(for Center For Legal Justice)
Complainant

GRC Complaint No. 2012-243

v.

City of Bayonne (Hudson County)²
Custodial Agency

Records Relevant to the Complaint: Copies of the following: EEO #4 Form from 1996 through 2012.

Custodian of Record: Robert F. Sloan
Request Received by Custodian: April 21, 2012
Response Made by Custodian: April 30, 2012
GRC Complaint Received: August 15, 2012

Background³

Request and Response:

On April 21, 2012, the Complainant submitted an Open Public Records Act (“OPRA”) request seeking the above-listed records. On April 30, 2012, the sixth (6) business day following receipt of the request, the Custodian responded in writing. He stated that the request for “‘EEO #4 Form from 1996-2012’ [was] too vague” and suggested that the Complainant submit a “more” specific request.

On July 10, 2012, the Complainant forwarded a letter to the Custodian, memorializing the Custodian’s claims that he was “not familiar with . . . EEO #4 forms” and that he needed additional information. The Complainant explains that the EEO #4 forms were required, by law, to be submitted annually, and she suggests that the Business Administrator of the City would likely have the requested forms or access thereto. The Complainant further advises of the nature of, and the City’s filing responsibilities regarding, the EEO #4 forms. The Complainant’s letter does not further inform the Custodian as to the identity of the documents.

¹ No legal representation listed on record.

² Represented by Peter Cecinini, Esq., Bayonne City Hall (Bayonne NJ).

³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

On July 18, 2012, the Custodian replied to the Complainant advising that her request was “currently being processed” but he failed to seek an extension of time or to provide a date certain by which he would respond. On August 31, 2012, thirty-one (31) business days following receipt of the Complainant’s July 10 letter and 128 days from the original request, the Custodian produced the EEO #4 forms for years 2006 through 2012.

Denial of Access Complaint:

On August 15, 2012, the Complainant filed a Denial of Access Complaint (“Complaint”) with the Government Records Council (“GRC”). The Complainant asserts that she had not received the requested EEO #4 forms. The Complainant references two other requests allegedly made in January of 2012 for “documents correlated to insurance matters.” However, neither the Complainant nor the Custodian provided any proof that the January 2012 requests were made. There is no reference to the January requests by the Custodian in his Statement of Information (“SOI”). Based upon the record, the GRC only has one OPRA request before it: the April 21, 2012 request for EEO #4 forms. Accordingly, the GRC will take action only as to the request for the EEO #4 forms.

Statement of Information:

On September 5, 2012, the Custodian filed his SOI in which he certifies that the City replied to Complainant’s request within the statutory seven (7) business days. The Custodian acknowledges his conversation with the Complainant’s paralegal wherein he requested additional clarification of the request. The Custodian certifies that he “processed [the Complainant’s] request” following the Complainant’s providing “clarification” of “which documents she was seeking.”

The Custodian argues that the City, in particular the Law Department, was stretched “very thin” so “it took the City some time to process her [Complainant’s] request.” The Custodian also certifies that he forwarded EEO # 4 forms from 2005⁴ to present, not from 1996-2012 as requested, to the Complainant. Further, the Custodian further certifies that the City does not possess EEO #4 forms prior to 2005.

Analysis⁵

Timeliness:

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). A custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Id.

⁴ The Custodian’s SOI provides that EEO #4 forms were supplied from 2005-present, but his August 31, 2012 covering letter states that the forms were provided for the period from 2006-present. The record is unclear as to whether the Complainant received documents from 2005 or 2006 through 2012.

⁵ There may be other OPRA issues in this matter; however, the Council’s analysis is based solely on the claims made in the Complainant’s Denial of Access Complaint.

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).

The Complainant, on April 21, 2012, requested production of "EEO #4 forms from 1996-2012." The Custodian, within the statutorily permitted seven (7) business days, responded to the Complainant's OPRA request seeking that the Complainant "be more specific as to which identifiable public record [was sought]." The Custodian further provided that "[a]'EEO # 4 Form 1996-2012' is too vague of a request for the City to respond to." On July 10, 2012, the Complainant responded to the Custodian's letter by providing an explanation of who must file EEO # 4 forms (private and public employers) when the forms must be filed (annually), what Federal Legislation requires the filing of the forms (Title VII of the Civil Rights Act), and that the forms contain (employee demographic information). The Complainant's July 10 letter was advisory in nature and provided information regarding legal filing requirements of the City. It did not, however, clarify or further identify the EEO #4 forms.

Notwithstanding the fact that the Complainant's July 10 letter did not further narrow or clarify the request, the Custodian was somehow then able to identify the requested documents. By letter dated July 18, 2012, the Custodian stated that the request "was being processed." However, the Custodian did not provide a time certain for production or seek an extension of time to produce the records.

On August 15, 2012, the Complainant filed this matter. On August 31, 2012 the Custodian produced the EEO #4 forms. The record demonstrates that the Custodian took over a month to respond to the Complainant—thirty-one (31) days from the Complainant's July 10, 2012 letter and 128 days from the original request.

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 as reiterated in her July 10 letter either granting access, denying access, 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.

Unlawful Denial of Access:

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request

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.

“with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought a copy of a telephone bill from the custodian in an effort to obtain proof that a phone call was made to him by an official from the Department of Education. The custodian provided a certification in his submission to the GRC that the requested record was nonexistent and the complainant submitted no evidence to refute the custodian’s certification. The Council subsequently determined that “[t]he Custodian has certified that the requested record does not exist. Therefore, the requested record cannot (sic) be released and there was no unlawful denial of access.”

Here, the Custodian provided the Complainant with all of the responsive documents in his possession. Further, he certified in the SOI that the City does not possess EEO # 4 forms prior to 2005. There is no evidence in the record to refute the Custodian’s assertion that EEO # 4 forms prior to 2005 exist. Accordingly, the GRC is satisfied that no responsive records exist to the Complainant’s OPRA request for pre-2005 EEO # 4 forms.

Although there was a delay in production of the balance of the records, the Custodian did not unlawfully deny access to the Complainant’s OPRA request because he ultimately provided the EEO #4 forms which existed.

Knowing and Willfull

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 “... [i]f 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)).

The Council found that although there was a delay in production, the Custodian did not deny access to the Complainant's OPRA request as all responsive documents were ultimately produced. Therefore, 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 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*.
2. Although there was a delay in production of the records, the Custodian did not unlawfully deny access to the Complainant's OPRA request because he ultimately provided the Complainant with all of the responsive documents in his possession.
3. Although there was a delay in production, since all responsive documents were ultimately produced, 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: Dawn R. SanFilippo, Esq.
Senior Counsel

Approved By: Brandon D. Minde, Esq.
Executive Director

July 16, 2013