State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

September 24, 2013 Government Records Council Meeting

Margaret Costigan
Complainant
v.
Jersey City Housing Authority (Hudson)
Custodian of Record

Complaint No. 2012-274

At the September 24, 2103 public meeting, the Government Records Council ("Council") considered the September 17, 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's failure to respond immediately to the Complainant's OPRA request for the Opinion within seven (7) days or within the requested extension period violated N.J.S.A. 47:1A-5(i) and Shanker v. Borough of Cliffside Park (Bergen), GRC Complaint No. 2007-245 (March 2009), because he failed to specifically state that no records responsive to the request existed at the time of his response. 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 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

2. In his SOI the Custodian states that although Counsel advised him to deny access to the Opinion pursuant to N.J.S.A. 47:1A-1.1, no responsive document to the Complainant's request existed. On December 23, 2012, the Complainant e-mailed the GRC in response to the Custodian's SOI. In her response the Complainant clarifies that she is not seeking counsel's opinion on the entire negotiations, only limited portions of it. Complainant, however, fails to dispute the Custodian's certification that no such document exists or to identify any specific document which would be responsive to her request. Here, the Custodian certified in his SOI that no record responsive to the Complainant's OPRA request exists and the Complainant provided no competent, credible evidence to refute the Custodian's certification. Therefore, the Custodian did not unlawfully deny access to the contract responsive to the Complainant's OPRA request pursuant to Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

3. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by providing an insufficient response to the Complainant's request pursuant to N.J.S.A. 47:1A-5(g) the Custodian provided the Complainant with all records responsive to the request. 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, 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 24th Day of September, 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: September 26, 2013

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
September 24, 2013 Council Meeting

Margaret Costigan[1] **GRC Complaint No. 2012-274**
Complainant

v.

Jersey City Housing Authority (Hudson)[2]
Custodial Agency

Records Relevant to Complaint: Copy of the resolution packet and counsel opinion ("Opinion") on the collective bargaining agreement between the Jersey City Housing Authority ("JCHA") and the Independent Service Workers' of America ("ISWA") for the three (3) year period of April 1, 2011 through March 12, 2014.

Custodian of Record: Kenneth Pinnock, Jr.
Request Received by Custodian: August 30, 2012
Response Made by Custodian: September 7, 2012 and September 28, 2012
GRC Complaint Received: October 4, 2012

Background[3]

Request and Response:

On August 30, 2012, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-referenced documents.

On September 7, 2012, six (6) business days after receipt of the request, the Custodian responded, in writing, to the Complainant forwarding a copy of the resolution packet and advising that a response to her request for the Opinion would be forwarded in approximately seven (7) days. On September 28, 2012, fifteen (15) business days later, the Custodian forwarded to the Complainant a copy of correspondence to the Custodian from his labor attorneys. In said letter the Custodian's Counsel ("Counsel") asserts that the request for labor counsel's opinion is precluded from the definition of government record pursuant to N.J.S.A. 47:1A-1.1, as the record falls within exemption for attorney-client privilege.

[1] No legal representation listed on record.
[2] Michael Doran, Esq., of Cammarata, Nulty, & Garrigan, LLC (Jersey City).
[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.

Denial of Access Complaint:

On October 4, 2012, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). In her complaint, the Complainant acknowledges receipt of the resolution package, but asserts that the Custodian, through Counsel, denied her request for the Opinion because it was exempt as an attorney-client privileged document.

Statement of Information:

On December 14, 2012, the Custodian filed a Statement of Information ("SOI"). The Custodian certifies that he responded to the Complainant, in writing, within six (6) business days of receipt of the Complaint. The Custodian states that on September 7, 2012, he acknowledged the Complainant's OPRA request, provided the resolution packet and stated that he would respond to the balance of the request in approximately seven (7) days.

The Custodian certifies that on September 28, 2012, fifteen (15) business days later, he forwarded the Complainant a copy of a letter from Counsel. Counsel's September 17, 2012 letter provided, in turn, that the requested Opinion is not a government record as defined by N.J.S.A. 47:1A-1.1 as it falls within the purview of the attorney-client privilege. Therefore the Custodian denied Complainant access to the Opinion.

In his SOI the Custodian further certifies that the reference to "Labor Counsel opinion" in the resolution is not a reference to a particular document. The Custodian elaborates that on or about July 11, 2011, the ISWA and the JCHA reached a tentative agreement in the collective bargaining negotiations. The Custodian further provides that the JCHA, by resolution, ratified the agreement during its August Board of Commissioners Meeting. The resolution ratifying the agreement, in turn, provides that the approval is subject to Labor Counsel opinion. The Custodian, however, provides that the language referring to Labor Counsel opinion is *pro forma* and does not refer to a specific document.

The Custodian certifies that he contacted Grace Malley, JCHA Director of Strategic Planning/HR Department, in connection with a search for the requested document. The Custodian certified that Ms. Malley created the resolution and provided a copy of the resolution package for production. The Custodian further certifies that there is no such document which could be characterized or otherwise described as Labor Counsel opinion and that no government record exists that satisfies the Complainant's request.

Finally, the Custodian argues that even if such a document existed it would be exempt from disclosure under OPRA as intra-agency advisory, consultative, or deliberative material; as a record within the attorney-client privilege; or as information generated by or on behalf of public employers . . . in connection with collective negotiations."

On December 23, 2012, the Complainant e-mailed a reply to the Custodian's SOI to the GRC. In her reply, the Complainant clarifies that she is not seeking counsel's opinion on the entire negotiations, but rather, limited portions of it. Complainant, however, fails to dispute the

Custodian's certification that no such document exists or to identify any specific document which would be responsive to her request.

Analysis[4]

Timeliness

A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Regarding the sufficiency of the Custodian's response, OPRA provides that if a custodian cannot comply with a request for records, he "shall indicate the specific basis therefore…" N.J.S.A. 47:1A-5(g). In Shanker v. Borough of Cliffside Park (Bergen), GRC Complaint No. 2007-245 (March 2009), the custodian's counsel responded to the complainant's OPRA request within the statutorily mandated seven (7) business days denying access to the requested record pursuant to N.J.S.A. 47:1A-9, the Open Public Meetings Act and attorney-client privilege exemption. However, counsel later certified in the SOI that the Borough did not receive the requested record until October 16, 2007, after receipt of the complainant's OPRA request and subsequent Denial of Access complaint. The Council, tasked with determining whether counsel's initial response was appropriate under OPRA, held that "Counsel's response was insufficient because he failed to specifically state that the requested record did not exist at the time of the Complainant's September 11, 2007 OPRA request pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Twp. of Berkeley Heights (Union), GRC Complaint No. 2007-271 (November 2008)." Id. at pg. 12.

In the instant matter, the Custodian initially responded to the Complaint's OPRA request on the sixth (6) business day after receipt of the request. In said response, the Custodian, forwarded a copy of the resolution packet and advised that a response to her request for the Opinion would be forwarded in approximately seven (7) days. Fifteen (15) business days later, the Custodian forwarded to the Complainant correspondence from Counsel that asserted that the request for the Opinion is precluded from the definition of government record pursuant to N.J.S.A. 47:1A-1.1, as the record falls within exemption for attorney-client privilege. The Custodian denied access to the Opinion as attorney-client privileged material pursuant to N.J.S.A. 47:1A-1.1.

[4] 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.

[5] 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.

Thereafter, Counsel conducted further inquiry into the matter and determined that no responsive record to the request for the Opinion existed. Accordingly, the Custodian failed to advise the Complainant at the time of his response that no records responsive to the request existed. The Custodian's response herein is similar to the custodian's response in Shanker, GRC 2007-245, and thus the response was insufficient.

The Custodian's failure to respond immediately to the Complainant's OPRA request for the Opinion within seven (7) days or within the requested extension period violated N.J.S.A. 47:1A-5(i) and Shanker, GRC 2007-245, because he failed to specifically state that no records responsive to the request existed at the time of his response. 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 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, GRC 2007-11.

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 "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. N.J. Dep't of Educ., 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 certified 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." Id.

In his SOI, the Custodian states that although Counsel advised him to deny access to the Opinion pursuant to N.J.S.A. 47:1A-1.1, no responsive document to the Complainant's request existed. On December 23, 2012, the Complainant e-mailed the GRC in reply to the Custodian's SOI. In her response, the Complainant clarifies that she is not seeking counsel's opinion on the entire negotiations, only limited portions of it. Complainant, however, fails to dispute the Custodian's certification that no such document exists or to identify any specific document which would be responsive to her request. Here, the Custodian certified in his SOI that no record responsive to the Complainant's OPRA request exists and the Complainant provided no competent, credible evidence to refute the Custodian's certification. Therefore, the Custodian did not unlawfully deny access to the contract responsive to the Complainant's OPRA request pursuant to Pusterhofer, GRC 2005-49.

The Council need not address the Custodian's additional arguments as no responsive records exist.

Knowing & Willful

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)).

Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by providing an insufficient response to the Complainant's request pursuant to N.J.S.A. 47:1A-5(g), the Custodian provided the Complainant with all available records responsive to the request. 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, 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 failure to respond immediately to the Complainant's OPRA request for the Opinion within seven (7) days or within the requested extension period violated N.J.S.A. 47:1A-5(i) and Shanker v. Borough of Cliffside Park (Bergen), GRC Complaint No. 2007-245 (March 2009), because he failed to specifically state that no records responsive to the request existed at the time of his response.

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 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

2. In his SOI the Custodian states that although Counsel advised him to deny access to the Opinion pursuant to N.J.S.A. 47:1A-1.1, no responsive document to the Complainant's request existed. On December 23, 2012, the Complainant e-mailed the GRC in response to the Custodian's SOI. In her response the Complainant clarifies that she is not seeking counsel's opinion on the entire negotiations, only limited portions of it. Complainant, however, fails to dispute the Custodian's certification that no such document exists or to identify any specific document which would be responsive to her request. Here, the Custodian certified in his SOI that no record responsive to the Complainant's OPRA request exists and the Complainant provided no competent, credible evidence to refute the Custodian's certification. Therefore, the Custodian did not unlawfully deny access to the contract responsive to the Complainant's OPRA request pursuant to Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

3. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by providing an insufficient response to the Complainant's request pursuant to N.J.S.A. 47:1A-5(g) the Custodian provided the Complainant with all records responsive to the request. 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, 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

September 17, 2013