



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

December 20, 2013 Government Records Council Meeting

Vincent T. Ehmann, Jr.
Complainant

Complaint No. 2013-170

v.

Borough of Belmar (Monmouth)
Custodian of Record

At the December 20, 2013 public meeting, the Government Records Council (“Council”) considered the December 10, 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 her burden of proof that she timely responded to the Complainant’s May 31, 2013 clarification. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s clarified 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. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). *See* Byrnes v. Borough of Rockaway Police Department (Morris), GRC Complaint No. 2011-113 (May 2012).
2. The Custodian violated N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-5(i) by failing to provide to the Complainant copies of the available wire transfers although such records were readily available for disclosure. Kohn v. Township of Livingston (Essex), GRC Complaint No. 2010-303 (Final Decision dated March 27, 2012); N.J.S.A. 47:1A-6. *See also* Wolosky v. Borough of Mount Arlington (Morris), GRC Complaint No. 2010-210 (Interim Order dated November 29, 2011). However, the Council declines to order disclosure of the responsive wire transfers because the evidence of record indicates that the Custodian provided the Complainant with access to same on June 17, 2013.
3. Although the Custodian’s failure to respond to the Complainant’s clarified OPRA request in a timely manner resulted in a “deemed” denial and the Custodian violated N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-5(i) by failing to provide the Complainant with readily available records, the Custodian eventually provided the responsive wire



transfers on June 17, 2013. 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 an 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 20th Day of December, 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: December 23, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 20, 2013 Council Meeting**

**Vincent T. Ehmman, Jr.¹
Complainant**

GRC Complaint No. 2013-170

v.

**Borough of Belmar (Monmouth)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of all purchase orders and payments to Ferriera Construction (not invoices) for work done from October 31, 2012 to December 30, 2012.³

Custodian of Record: April Claudio

Request Received by Custodian: May 6, 2013

Response Made by Custodian: May 9, 2013

GRC Complaint Received: June 10, 2013

Background⁴

Request and Response:

On May 6, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On May 9, 2013, the Custodian responded in writing advising that no purchase orders exist because Ferriera was paid through wire transfer. The Custodian provided a link to invoices showing the amounts paid to Ferriera. The Complainant responding asking the Custodian to provide the wire transfers to Ferriera for debris removal prior to January 2013.

On May 20, 2013, the Custodian responded providing a report showing the wire transfers made to Ferriera with redactions of Ferriera’s banking information. On May 29, 2013, the Complainant advised that the report did not constitute the responsive wire transfers sought and requested the Custodian disclose same. On May 31, 2013, the Complainant reiterated his desire to obtain the responsive wire transfers in a timely fashion. On the same day, the Custodian stated

¹ No legal representation listed on record.

² Represented by Michael R. DuPont, Esq., of McKenna, DuPont, Higgins & Stone, P.C. (Red Bank, NJ).

³ The Complainant requested additional records not at issue here.

⁴ 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.

that she would speak with the Chief Financial Officer (“CFO”) and Administrator to determine if there are any additional records that can be provided.

Denial of Access Complaint:

On June 10, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant states that the Custodian responded to his OPRA request on May 20, 2013 providing him a report he determined to be unresponsive to his OPRA request. The Complainant states that on May 29, 2013, he advised the Custodian that the record provided was not responsive to his clarified request. The Complainant contends he received no records in response to this e-mail or his May 31, 2013 e-mail again advising that the Custodian failed to provide him with wire transfers.

Statement of Information:

On July 22, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that she received the Complainant’s OPRA request on May 6, 2013, and responded on May 9, 2013, providing a link to invoices. The Custodian certifies that she provided the Complainant a report produced by the CFO and Administrator on May 20, 2013. The Custodian certifies that after receiving the Complainant’s May 29 and May 31, 2013 e-mails, she provided the Complainant actual wire transfers (with redactions) produced from the CFO and Administrator on June 17, 2013. The Custodian further certifies that no search was conducted because the CFO had the records readily available.

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. 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).

Additionally, in Byrnes v. Borough of Rockaway Police Department (Morris), GRC Complaint No. 2011-113 (May 2012), the complainant submitted clarification of his OPRA request; however, the custodian did not respond until the ninth (9th) business day. The Council,

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.

⁶ 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.

applying its holding in Mikle v. Burlington County Board of Taxation, GRC Complaint No. 2010-232 (January 2012)(the seven (7) business day time frame provided for in N.J.S.A. 47:1A-5(i) restarts when a requestor provides a custodian with clarification of an OPRA request), determined that although the seven (7) business day time frame was renewed following the custodian's receipt of the complainant's clarification, the custodian's failure to respond within the renewed time frame resulted in a "deemed" denial. Id. at 4.⁷

Here, the Complainant contacted the Custodian on May 9, 2013, clarifying that he wished to receive wire transfers to Ferriera for debris removal prior to January 2013. After the Custodian provided another record on May 20, 2013, the Complainant e-mailed the Custodian on May 29, 2013 and again on May 31, 2013, advising that the record provided was not the wire transfers and that the Custodian must disclose these records. The Custodian acknowledged receipt of the Complainant's e-mails on May 31, 2013; however, the Custodian failed to provide said records until June 17, 2013, or thirteen (11) business days after the Complainant's May 31, 2013 e-mail.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's May 31, 2013 clarification. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's clarified 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. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Kelley, GRC 2007-11. *See* Byrnes, GRC 2011-113.

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.

Further, OPRA mandates that "government records *shall be readily accessible for inspection, copying, or examination* by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded [under OPRA] ... shall be *construed in favor of the public's right of access.*" N.J.S.A. 47:1A-1 (emphasis added).

In Kohn v. Township of Livingston (Essex), GRC Complaint No. 2010-303 (Final Decision dated March 27, 2012), the custodian certified in the SOI that he quickly located responsive records; however, he withheld same until all other records responsive to the complainant's OPRA request were in his possession and available for disclosure. The Council held that the custodian violated OPRA, reasoning that:

⁷ Although purchase orders are immediate access records under N.J.S.A. 47:1A-5(e); however, the GRC declines to address the issue because the Complainant did not raise same in his Denial of Access Complaint. *See* Kohn v. Township of Livingston (Essex) GRC Complaint No. 2012-03 (April 2013).

[T]he Custodian failed to provide copies of those resolutions responsive to the Complainant's OPRA request Item No. 2 which were available pursuant to OPRA's mandate to make government records "readily accessible for inspection, copying or examination." N.J.S.A. 47:1A-5(i) and N.J.S.A. 47:1A-1. Further, the Custodian's withholding of the responsive resolutions which were available for disclosure at the time of the Custodian's initial response until the Custodian obtained all other responsive records placed an unnecessary limitation on "... the public's right of access." N.J.S.A. 47:1A-1.

Id. at 8.

Here, the Complainant clearly articulated in a May 9, May 29 and May 31, 2013 e-mail that he sought wire transfers and was not provided with same. The Custodian subsequently disclosed the responsive transfers on June 17, 2013 and later certified in the SOI that the records were in the CFO's possession and were readily available. Thus, similar to the facts of Kohn, the Custodian violated OPRA by failing to timely provide the responsive wire transfers to the Complainant even though she certified in the SOI that the records sought were readily available.

Therefore, the Custodian violated N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-5(i) by failing to provide to the Complainant copies of the available wire transfers although such records were readily available for disclosure. Kohn, GRC 2010-303; N.J.S.A. 47:1A-6. *See also* Wolosky v. Borough of Mount Arlington (Morris), GRC Complaint No. 2010-210 (Interim Order dated November 29, 2011). However, the Council declines to order disclosure of the responsive wire transfers because the evidence of record indicates that the Custodian provided the Complainant with access to same on June 17, 2013.

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 (*id.*; Marley v.

Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); 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's failure to respond to the Complainant's clarified OPRA request in a timely manner resulted in a "deemed" denial and the Custodian violated N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-5(i) by failing to provide the Complainant with readily available records, the Custodian eventually provided the responsive wire transfers on June 17, 2013. 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 an 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 her burden of proof that she timely responded to the Complainant's May 31, 2013 clarification. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's clarified 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. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). *See* Byrnes v. Borough of Rockaway Police Department (Morris), GRC Complaint No. 2011-113 (May 2012).
2. The Custodian violated N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-5(i) by failing to provide to the Complainant copies of the available wire transfers although such records were readily available for disclosure. Kohn v. Township of Livingston (Essex), GRC Complaint No. 2010-303 (Final Decision dated March 27, 2012); N.J.S.A. 47:1A-6. *See also* Wolosky v. Borough of Mount Arlington (Morris), GRC Complaint No. 2010-210 (Interim Order dated November 29, 2011). However, the Council declines to order disclosure of the responsive wire transfers because the evidence of record indicates that the Custodian provided the Complainant with access to same on June 17, 2013.
3. Although the Custodian's failure to respond to the Complainant's clarified OPRA request in a timely manner resulted in a "deemed" denial and the Custodian violated N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-5(i) by failing to provide the Complainant with readily available records, the Custodian eventually provided the responsive wire transfers on June 17, 2013. 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 an unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso
Senior Case Manager

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

December 10, 2013