



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

July 29, 2014 Government Records Council Meeting

Larry A. Kohn
Complainant

Complaint No. 2013-364

v.

Township of Livingston (Essex)
Custodian of Record

At the July 29, 2014 public meeting, the Government Records Council (“Council”) considered the July 22, 2014 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 in writing to a complainant’s clarification 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. *See 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).
2. The Custodian has borne his burden of proving that he did not unlawfully deny access to the requested records because the Complainant’s request is overly broad and would require the Custodian to perform research in order to fulfill it. *See N.J.S.A. 47:1A-6; Burke v. Brandes*, 429 N.J. Super. 169, 172, 176, 177-78 (App. Div. 2012); *MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control*, 375 N.J. Super. 534, 546, 549 (App. Div. 2005).
3. Although the Custodian violated *N.J.S.A. 47:1A-5(g)* and *N.J.S.A. 47:1A-5(i)*, the Custodian did seek clarification from the Complainant and did not unlawfully deny him access to the requested records. 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 29th Day of July, 2014

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 31, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 29, 2014 Council Meeting**

**Larry A. Kohn¹
Complainant**

GRC Complaint No. 2013-364

v.

**Township of Livingston (Essex)²
Custodial Agency**

Records Relevant to Complaint: Submission to the State of N.J. adding Block 5700 Lot 2 to the Green Acres Recreation and Open Space Inventory (“ROSI”).

Custodian of Record: Glen Turtletaub
Request Received by Custodian: November 18, 2013
Response Made by Custodian: November 27, 2013
GRC Complaint Received: December 18, 2013

Background³

Request and Response:

On November 18, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 27, 2013, seven (7) business days later, the Custodian responded via email to the Complainant by stating that the request was overly broad and by seeking clarification.

On December 2, 2013, the Custodian received a letter from the Complainant dated December 1, 2013 asking when he could anticipate a response to his OPRA request. On December 17, 2013, the Custodian provided a letter to the Complainant via email stating that his request had been replied to on November 27, 2013 and listing the email addresses to which the reply had been sent.

On December 18, 2013, the Complainant wrote to the Custodian to state that he checked his email account and corresponding “junk” folder and had not found the Custodian’s November 27, 2013 email, and to ask that the Custodian resend the original response. That same day, the Custodian forwarded the initial response to the Complainant. The Complainant responded hours

¹ No legal representation listed on record.

² Represented by Sharon L. Weiner, Esq. (Riverdale, N.J.)

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.

later reiterating that he had not received the November 27, 2013 correspondence, and by explaining that he was seeking communications made from the Township of Livingston (“Township”) to the State conveying the information required to identify the property in question as “Green Acres.”

Denial of Access Complaint:

On December 18, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that he did not receive any reply from the Custodian to either his initial request or his subsequent letter dated December 1, 2013 to the Custodian inquiring about the status of his request.

Additional Party Submissions

On December 19, 2013, subsequent to the filing of this complaint, the Custodian emailed the Complainant to state that the Township Attorney had been copied on the November 27, 2013 reply and had received it at that time. The Complainant responded that day informing the Custodian that he still wished to receive the requested information via email. In a letter dated December 30, 2013, the Complainant stated that he had clarified his request in his December 18, 2013 email and asked when he could anticipate receiving a response.

Statement of Information:

On February 10, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that he received the request on November 18, 2013 and replied on November 27, 2013. The Custodian argues that the initial request was overly broad, and that the clarification provided by the Complainant in his December 18, 2013 email failed to refine the request or to point the Custodian to a readily identifiable document. *Citing* MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). The Custodian states that ROSI submissions contain many different properties and cover several years. Further, the Custodian notes that there is no index maintained by the Township of what particular parcels are encumbered by the “Green Acres” regulations or have been submitted to the ROSI. As such, the Custodian contends that the Complainant’s request, even in light of the provided clarification, is impermissibly open-ended and would require him to perform research in order to figure out which records might be responsive. *Citing* id. at 549; Donato v. Twp. of Union, GRC Complaint No. 2005-182 (January 2007).

Analysis

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).⁴ 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).

Further, in Wadhams v. Town of Belvidere (Warren), GRC Complaint No. 2010-209 (October 2011), the complainant stated that she did not receive a response from the custodian to either her OPRA request or follow-up email. The custodian, however, certified that the responsive record was timely provided to the complainant. Id. As the record contained no competent, credible evidence to refute the certification, the Council found that there had been no unlawful denial of access. Id. See also Gartner v. Middlesex Borough (Middlesex), GRC Complaint No. 2013-93 (October 2013).

Here, the Custodian certified that he received the Complainant's request on November 18, 2013 and responded on November 27, 2013 seeking clarification. In turn, the SOI submitted by the Custodian contained his November 27, 2013 and December 17, 2013 emails. There exists no evidence in the record to refute the Custodian's certifications regarding his initial timely response.

However, the Complainant did provide clarification to the Custodian via email on December 18, 2013. Upon receipt of this clarification, the Custodian again had seven (7) business days to either grant access, deny access, seek clarification or request an extension of time. The Custodian's December 19, 2013 email reply to the Complainant did none of those things, but instead stated that other parties copied on the November 27, 2013 email had received it, that the Complainant could re-search his emails, and that the parties could communicate via mail or fax. The Custodian did not provide another response to the Complainant.

Therefore, the Custodian's failure to respond in writing to the Complainant's clarification 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. See N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); 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.

The New Jersey Appellate Division has held that:

⁴ 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.

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records “readily accessible for inspection, copying, or examination.”

MAG, 375 N.J. Super. at 546 (citing N.J.S.A. 47:1A-1).

The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past. Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

Id. at 549.

The Court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt” Id. at 549; Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

More recently, the Appellate Division has found a request for “EZ Pass benefits afforded to retirees of the Port Authority, including all . . . correspondence between the Office of the Governor . . . and the Port Authority . . .” to be valid under OPRA because it “was confined to a specific subject matter that was clearly and reasonably described with sufficient identifying information . . . [and] was limited to particularized identifiable government records, namely, correspondence with another government entity, rather than information generally.” Burke v. Brandes, 429 N.J. Super. 169, 172, 176 (App. Div. 2012). The Court noted that the complainant had “narrowed the scope of the inquiry to a discrete and limited subject matter,” and that fulfilling the request would involve “no research or analysis, but only a search for, and production of,” identifiable government records. Id. at 177-78.

Here, the Complainant requested the “submission to [the] state of N.J. adding Block 5700 Lot 2 to the Open Space Database (ROSI).” Following the Custodian’s request for clarification, the Complainant stated that “[i]t is . . . my understanding [that] for a property to be identified as [Green Acres] and be listed on the [ROSI,] the Municipality must communicate the required information to the [State]. It is that communication that I wish to review.” The Custodian, in

turn, stated that ROSI submissions pertain to many different lots covering several years, and that there exists no index maintained by the Township of what particular parcels are encumbered by the “Green Acres” regulations or have been submitted to the ROSI.

As such, taking the Complainant’s initial request and clarification as a whole, the request does not clearly describe with sufficient identifying information any particularized, identifiable government records. *See* Burke, 429 N.J. Super. at 172, 176. Rather, the request seeks information the Complainant believes the Township communicated to the State. Id. at 176. The Complainant’s SOI indicates that fulfilling this request would require him to manually analyze several years’ worth of property files, an undertaking which OPRA does not require. *See* Id. at 177-78; MAG, 375 N.J. Super. at 549.

Therefore, the Custodian has borne his burden of proving that he did not unlawfully deny access to the requested records because the Complainant’s request is overly broad and would require the Custodian to perform research in order to fulfill it. *See* N.J.S.A. 47:1A-6; Burke, 429 N.J. Super. at 172, 176, 177-78; MAG, 375 N.J. Super. at 546, 549.

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 violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian did seek clarification from the Complainant and did not unlawfully deny him access to the requested records. 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's failure to respond in writing to a complainant's clarification 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. *See 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).
2. The Custodian has borne his burden of proving that he did not unlawfully deny access to the requested records because the Complainant's request is overly broad and would require the Custodian to perform research in order to fulfill it. *See N.J.S.A. 47:1A-6; Burke v. Brandes*, 429 *N.J. Super.* 169, 172, 176, 177-78 (App. Div. 2012); *MAG Entm't, LLC v. Div. of Alcoholic Beverage Control*, 375 *N.J. Super.* 534, 546, 549 (App. Div. 2005).
3. Although the Custodian violated *N.J.S.A. 47:1A-5(g)* and *N.J.S.A. 47:1A-5(i)*, the Custodian did seek clarification from the Complainant and did not unlawfully deny him access to the requested records. 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: Robert T. Sharkey, Esq.
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

July 22, 2014