



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
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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

Michael West
Complainant

Complaint No. 2013-62

v.

Town of Secaucus (Hudson)
Custodian of Record

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 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, as extended, 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. It is unnecessary for the Council to order disclosure of the requested record because the Custodian disclosed said record to the Complainant on April 18, 2013.
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 provide the Complainant with the record responsive to the request even though the record, a settlement agreement, was significantly different in caption and date than was the requested record. 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 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**

**Michael West¹
Complainant**

GRC Complaint No. 2013-62

v.

**Town of Secaucus (Hudson)²
Custodial Agency**

Records Relevant to Complaint: Copy of a settlement agreement between the United States Department of Justice and the Town of Secaucus on or about March 24, 1993.³

Custodian of Records: Michael Marra

Request Received by Custodian: January 21, 2013⁴

Response Made by Custodian: January 30, 2013

GRC Complaint Received: February 25, 2013

Background⁵

Request and Response:

On January 21, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request seeking the above-listed records. On January 30, 2013, the seventh (7th) business day following receipt of said request, the Custodian responded in writing informing the Complainant that he searched the Town’s record storage facility for the requested record but he could not find it. The Custodian informed the Complainant that he would continue to search and reply to the Complainant in seven (7) business days.

Denial of Access Complaint:

On February 25, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant states that he submitted his records request to the Custodian on January 21, 2013. The Complainant attached to the complaint a

¹ No legal representation listed on record.

² Represented by Michael Witt, Esq., of Chasen Leyner & Lemparello, PC (Secaucus, NJ).

³ There were other records requested that are not relevant to this complaint.

⁴ The Custodian certified in the Statement of Information that the request was received on December 7, 2012 and responded to on December 17, 2012; however, the evidence of record reveals that the request was provided to the Custodian on January 21, 2013, and responded to on January 30, 2013.

⁵ 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.

response from the Custodian dated January 30, 2013, wherein the Custodian informed the Complainant that he searched the Town's record storage facility for the requested record but he could not find it, that he would continue the search, and that he would reply to the Complainant in seven (7) business days. The Complainant contends that the Custodian told him on three (3) occasions that he would search the storage facility but the Custodian has yet to locate the requested record. The Complainant asserts that the Custodian failed to respond to the Complainant's OPRA request within the statutorily mandated time period.

Statement of Information:

On March 25, 2013, the Custodian filed a Statement of Information ("SOI"). Although the Custodian certifies that he received the Complainant's OPRA request on December 7, 2012, and that he responded to the request on December 17, 2012, the evidence of record reveals that the request was provided to the Custodian on January 21, 2013, and that the Custodian responded on January 30, 2013.

The Custodian certifies that he spoke to the Complainant in the municipal building on February 11, 2013, informing him that the record responsive to his request was not located. The Custodian certifies that on February 25, 2013, he again searched an offsite storage facility and located a folder titled "NAACP Agreements."⁶ The Custodian certifies that since the lawsuit which is the subject of the Complainant's request involved the NAACP, he believed that one of the records in the file could be the record responsive to the Complainant's request. The Custodian further certifies that he telephoned the Complainant on the date he located the folder and told him that the folder was available for inspection and that if the requested record is within the folder the Custodian would provide the Complainant with a copy.

The Custodian certifies that the Complainant visited the municipal building on March 6, 2013 and on March 19, 2013. The Custodian certifies that on the former date the Complainant said he was not ready to review the NAACP folder, and on the latter date the Complainant reviewed the folder but did not acknowledge any of the documents were responsive to his request.

Additional Information:

On September 12, 2013, in reply to a request from the GRC, the Custodian's Counsel informed the GRC that on April 18, 2013, the Complainant visited the municipal building, reviewed the NAACP folder, and selected a settlement agreement by and between the National Association for the Advancement of Colored People and the Town of Secaucus dated February 23, 1995, as the record responsive to his request. Counsel stated that the Complainant was provided with a copy of said settlement agreement.

⁶ NAACP is an acronym for the National Association for the Advancement of Colored People.

Analysis⁷

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).⁸ 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).

Here, the Custodian responded in a timely manner in writing to the Complainant's request on January 30, 2013, informing the Complainant that he searched the Town's record storage facility for the requested record but that he could not find it. The Custodian then informed the Complainant that he would continue to search and reply to the Complainant in seven (7) business days. The seventh (7th) business day was February 8, 2013; however, the Custodian did not reply to the Complainant in writing on that date. In fact, the Custodian certified that he did not communicate with the Complainant again until he spoke to the Complainant in the municipal building on February 11, 2013, informing him that the record responsive to his request was not located.

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 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, as extended, 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 "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.

Although the Custodian failed to follow-up on the extension of time he requested in his January 30, 2013 response to the OPRA request resulting in a "deemed" denial, the Custodian

⁷ 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.

⁸ 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.

did continue to search for the requested record. The Custodian's tenacity in searching for the record resulted in the location of a folder which contained a record the Complainant determined was responsive to his request, despite a significant difference in the caption and date of the record. The record was subsequently disclosed to the Complainant on April 18, 2013.

As such, it is unnecessary for the Council to order disclosure of the requested record because the Custodian disclosed said record to the Complainant on April 18, 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 violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian provided the Complainant with the record responsive to the request even though the record, a settlement agreement, was significantly different in caption and date than was the requested record. 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 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, as extended, 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. It is unnecessary for the Council to order disclosure of the requested record because the Custodian disclosed said record to the Complainant on April 18, 2013.
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 provide the Complainant with the record responsive to the request even though the record, a settlement agreement, was significantly different in caption and date than was the requested record. 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: John E. Stewart, Esq.

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

September 17, 2013