



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

January 30, 2015 Government Records Council Meeting

Mark Demitroff
Complainant

Complaint No. 2014-184

v.

Buena Vista Township (Atlantic)
Custodian of Record

At the January 30, 2015 public meeting, the Government Records Council (“Council”) considered the January 20, 2015 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 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 v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). *See Colasante v. Cnty. of Bergen*, GRC Complaint No. 2010-18 (Interim Order dated September 27, 2011).
2. Notwithstanding the Custodian’s failure to respond in writing, because she certified in the Statement of Information that the Township provided access to all potentially responsive records in the Township’s possession, the Custodian did not unlawfully deny access to any requested records. Moreover, there is no competent, credible evidence in the record to refute the Custodian’s certification. Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005)(holding that the Custodian did not unlawfully deny access to Complainant’s OPRA request because the Custodian provided all records that existed); Heyman (On behalf of Lisa Richford) v. Cnty. of Mercer, Office of Cnty. Counsel, GRC Complaint No. 2011-249 (December 2012).
3. The Custodian’s failure to respond in writing within the statutorily mandated time frame resulted in a “deemed” denial. However, the Custodian bore her burden of proving that she did not unlawfully deny access to any potentially responsive 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 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 30th Day of January, 2015

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: February 4, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 30, 2015 Council Meeting**

**Mark Demitroff¹
Complainant**

GRC Complaint No. 2014-184

v.

**Buena Vista Twp. (Atlantic)²
Custodial Agency**

Records Relevant to Complaint: Copies of:

1. Proof that Buena Vista Township (“Township”) passed a resolution to launch a preliminary investigation to recommend whether the Richland area is a redevelopment area according to criteria set forth in N.J.S.A. 40A:12A-5.
2. Proof that the Township Planning Board provided proper notice and held a hearing related to Resolution 14-2005 as required by the Local Redevelopment and Housing Law as stated in Ordinance 6-2014.
3. Proof that the Township established a redevelopment area by ordinance.
4. Proof that the Township Committee provided proper notice to residents of Resolution 4-2006 by the Local Redevelopment and Housing Law as stated in Ordinance 6-2014. Particularly, proof that public notice was sent via certified mail.

Custodian of Record: Linda Gonzales

Request Received by Custodian: February 26, 2014

Response Made by Custodian: March 6, 2014

GRC Complaint Received: April 28, 2014

Background³

Request and Response:

On February 25, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 6, 2014, the Complainant inspected records.

¹ No legal representation listed on record.

² Represented by Eric M. Bernstein, Esq., of Eric M. Bernstein & Associates, LLC (Warren, 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 March 11, 2014, the Complainant sent a letter to Susan Quinones, Administrator, advising that he submitted an OPRA request to Township on February 25, 2014 in anticipation of a March 10, 2014 hearing on Ordinance No. 6-2014. The Complainant confirmed that he inspected records on March 6, 2014, and was promised a written response that he had not yet received.

On March 12, 2014, the Custodian responded in writing advising that the Complainant performed an on-site inspection of records responsive to his OPRA request and that the request was deemed fulfilled. The Complainant responded via e-mail disputing that the records he inspected were responsive. The Complainant also noted that Undersheriff Ted Krammer agreed with his assessment that the record the Custodian provided for item No. 1 was not responsive.

On March 13, 2014, the Complainant recapitulated his interaction with the Custodian and again argued that she failed to provide him with responsive records. On the same day, the Complainant returned to the Township to inspect more records. He subsequently memorialized his visit in an e-mail, again contending that records he inspected did not satisfy his request. The Complainant questioned whether the Custodian had any records responsive to his request. The Complainant further noted that he believed no record responsive to item No. 3 existed and expected that the Custodian's response should be that no records exist.

On March 19, 2014, the Custodian responded by e-mail stating that, based on the Complainant's clarification from March 12, 2014, she was providing Resolution 69-2004. On the same day, the Complainant asked the Custodian, via e-mail, to clarify to which item the resolution was responsive. Further, the Complainant requested that the Custodian provide a complete response addressing each item individually.

Denial of Access Complaint:

On April 28, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant stated that, over the course of approximately three (3) weeks, he attempted to obtain records responsive to his request from the Custodian. The Complainant asserted that he inspected records on two (2) occasions and believed none were responsive to his request. Further, the Complainant asserted that he repeatedly asked the Custodian to provide a written response but did not receive it.

Statement of Information:

On June 2, 2014, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on February 26, 2014. The Custodian certified that she made all potentially responsive records available for on-site inspection on March 6, 2014. The Custodian affirmed that she offered to make copies of any records at that time; however, the Complainant repeatedly stated that the records were not responsive to his request.

The Custodian noted that the Complainant asked for a written response several times. The Custodian further asserted that she believed that OPRA does not mandate a "written" response,

just a response. Notwithstanding, the Custodian asserted that although she generally responds in writing, she did not need to here because the Complainant appeared at the Township on his own accord and inspected records. The Custodian thus contended that this situation did not necessitate a written response

Specifically, the Complainant did not identify a method of delivery and appeared at Township Hall twice on March 6, 2014. The Custodian noted that, in his first visit, she asked him to return later in the day once she compiled the responsive records. When the Complainant returned, she granted inspection of the responsive records and offered copies of any records he wished to obtain. The Custodian certified that she advised the Complainant that, contrary to his protests, the records provided represented all potentially responsive records. The Custodian contended that, had the Complainant wished to see another record, he could have clarified his request to identify specific records but failed to do so.

In closing, the Custodian asserted that at no point did she deny access to any records. To the contrary, the Custodian asserted that she provided the Complainant ample opportunities to review all potentially responsive records. Further, the Custodian contended that her actions were not knowing and willful.

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).

Moreover, in Colasante v. Cnty. of Bergen, GRC Complaint No. 2010-18 (Interim Order dated September 27, 2011), the custodian verbally responded and subsequently allowed the complainant to inspect records four (4) business days after receipt of the OPRA request. Notwithstanding both the verbal response and inspection within seven (7) business days, the Council determined that the "Custodian's failure to respond in *writing* . . . result[ed] in a "deemed" denial of the Complainant's request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and [Kelley, GRC 2007-11]." Id. at 7 (emphasis in original).

In the matter currently before the Council, facts similar to those in Colasante, exist. Specifically, the Custodian permitted the Complainant, who appeared of his own volition at the

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.

Township, to inspect potentially responsive records on the seventh (7th) business day. However, the Custodian did not send an actual written response to the Complainant until March 12, 2014, four (4) business days after the expiration of the statutorily mandated timeframe. Notwithstanding that the Complainant inspected records in a timely manner, such inspection does not alleviate the Custodian's requirement to respond in writing.

Therefore, the Custodian did not bear her burden of proof that she 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, GRC 2007-11. *See Colasante*, GRC 2010-18.

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.

OPRA states that in the adjudication of a denial of access complaint, a custodian must bear the burden of proving that any denial of access is authorized by law. N.J.S.A. 47:1A-6. In this matter, the Complainant inspected records and, being dissatisfied with same, filed this complaint to contend that none of the records he inspected were responsive to his request. The Complainant also noted that there is likely no record responsive to OPRA request item No. 3. In the SOI, the Custodian certified that she provided the Complainant all potentially responsive records for inspection. The Custodian also attached the records she provided for inspection to the SOI.

A review of those records attached to the SOI indicates that same are responsive to the Complainant's OPRA request, except that no ordinance responsive to item No. 3 is included. This omission coincides with the Complainant's assertion that he believed none existed.⁵ Thus, the GRC is satisfied that Custodian provided all responsive records and there is no evidence in the record to refute her SOI certification.

Therefore, notwithstanding the Custodian's failure to respond in writing, because she certified in the SOI that the Township provided access to all potentially responsive records in the Township's possession, the Custodian did not unlawfully deny access to any requested records. Moreover, there is no competent, credible evidence in the record to refute the Custodian's certification. Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005)(holding that the Custodian did not unlawfully deny access to Complainant's OPRA request because the Custodian provided all records that existed); Heyman (On behalf of Lisa

⁵ The Custodian's failure to address each request item individually is addressed above.

Richford) v. Cnty. of Mercer, Office of Cnty. Counsel, GRC Complaint No. 2011-249 (December 2012).

The GRC finally notes that the Complainant's request, on its face, is invalid because it failed to identify specific records. Rather, the request sought "proof" of the Township Committee and/or Planning Board's actions regarding the establishment a redevelopment area. Steinhauer-Kula v. Twp. of Downe (Cumberland), GRC Complaint No. 2010-198 (March 2012)(holding that the complainant's request item No. 2 seeking "[p]roof of submission . . ." was invalid). However, the Custodian was clearly able to locate some potentially responsive records; thus, the request was sufficiently clear in this instance. Bond v. Borough of Washington (Warren), GRC Complaint No. 2009-324 (Final Decision dated March 29, 2011); Popkin v. Englewood Bd. of Educ. (Bergen), GRC Complaint No. 2011-263 (December 2012).

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)).

In this matter, the Custodian's failure to respond in writing within the statutorily mandated time frame resulted in a "deemed" denial. However, the Custodian bore her burden of proving that she did not unlawfully deny access to any potentially responsive 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 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 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 v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). *See* Colasante v. Cnty. of Bergen, GRC Complaint No. 2010-18 (Interim Order dated September 27, 2011).
2. Notwithstanding the Custodian's failure to respond in writing, because she certified in the Statement of Information that the Township provided access to all potentially responsive records in the Township's possession, the Custodian did not unlawfully deny access to any requested records. Moreover, there is no competent, credible evidence in the record to refute the Custodian's certification. Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005)(holding that the Custodian did not unlawfully deny access to Complainant's OPRA request because the Custodian provided all records that existed); Heyman (On behalf of Lisa Richford) v. Cnty. of Mercer, Office of Cnty. Counsel, GRC Complaint No. 2011-249 (December 2012).
3. The Custodian's failure to respond in writing within the statutorily mandated time frame resulted in a "deemed" denial. However, the Custodian bore her burden of proving that she did not unlawfully deny access to any potentially responsive 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 unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

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

January 20, 2015