



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

June 30, 2015 Government Records Council Meeting

Elmer F. Gould, Sr.
Complainant

Complaint No. 2014-224

v.

Township of Fairfield (Cumberland)
Custodian of Record

At the June 30, 2015 public meeting, the Government Records Council (“Council”) considered the June 23, 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 the Township 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).
2. Notwithstanding the “deemed” denial, the Custodian has not unlawfully denied access to the requested items, because the requests were overly broad and sought information without sufficient identifiers. N.J.S.A. 47:1A-6; MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 549 (App. Div. 2005). “Requests that require the Custodian to conduct research have been deemed as invalid requests under OPRA.” DeAppolonio v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009).
3. The Custodian certified in her SOI that there were no responsive documents. Because the Complainant provided no competent, credible evidence to refute the Custodian’s certification, the Custodian lawfully denied access to said records pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (2005).
4. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian explained that, having started employment in October 2014, she was not the Custodian at the time of the original OPRA request in May 2014. Nor was she the custodian when the Denial of Access Complaint was filed in June 2014. In



addition, she certified that, after a search for documents that might have been created in the previous five years, she could not locate any responsive records. Furthermore, both requested items were invalid as impermissibly overbroad and requiring the Custodian to do research. Based on the foregoing, there is no evidence in the record to demonstrate that the Custodian's actions had a positive element of conscious wrongdoing or were 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 30th Day of June, 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: July 2, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Elmer F. Gould, Sr.
Complainant¹**

GRC Complaint No. 2014-224

v.

**Township of Fairfield (Cumberland)
Custodial Agency²**

Records Relevant to Complaint: For pickup:

1. “Any and all documentation pertaining information about the installation of the water supply pipe from the township hall to the public works garage . . . [including] permits, mark out request and response, inspection report of the underground wire that was cut and repaired, license of the company that did the job, bid quotes for the work, hold harmless agreement and insurance certification . . . authorization to do the work and any other documentation pertaining to the work done on the installation of the water pipe.” (sic)
2. “Any an[d] all documents pertaining to the installed bus shelters on State Highway 49 . . . [including] ordinances [and/or] resolutions with all supporting documentation.”

Custodian of Record: Linda M. Gonzales³

Request Received by Custodian: May 16, 2014⁴

Response Made by Custodian: None

GRC Complaint Received: June 4, 2014

Background⁵

Request and Response:

On May 16, 2014, the Complainant submitted two Open Public Records Act (“OPRA”) requests seeking the above mentioned records. Having received no written response, the Complainant visited the Custodian’s office on May 30, 2014, nine (9) business days following

¹ No legal representation listed of record.

² John G. Carr, Esq. (Woodbury, NJ).

³ The Complaint lists the Custodian as Geneva Griffin. At the time of the OPRA request, the Acting Custodian was Carla Smith. Linda Gonzales became Township Clerk in October 2014.

⁴ In the Statement of Information, the Custodian certified that the Township received the OPRA request on May 16, 2014, but the Complainant listed May 19, 2014, as the date he provided the request to the Custodian.

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.

the Custodian's receipt of the request. The Complainant was then told that the records were not ready and that he "would not get them today."

Denial of Access Complaint:

On June 4, 2014, the Complainant filed a Denial of Access Complaint ("Complaint") with the Government Records Council ("GRC"). The Complainant stated he submitted his OPRA request on May 19, 2014. He further stated that on May 30, 2014, he went to the Township Clerk's office, where Ms. Griffin told him that the "documents were not ready and you will not get them today."

Statement of Information:

On June 23, 2014, the GRC requested a Statement of Information ("SOI"). However, the GRC did not receive a timely response from the Custodian. The GRC later learned that the Township employed several Custodians in a short period and that the current Custodian did not begin employment until October 2014, which was well after the original OPRA request was filed. Owing to the unusually high number of staffing changes since the original request had been filed, the GRC extended the deadline for response. In the Township's SOI, the Custodian admitted that the two previous Township Clerks never responded to the Complainant's OPRA request. She offered no explanation for why they failed to do so. As to Item No. 1, the Custodian stated that, based on the limited search criteria presented, she attempted to search records going back five years and could find no document relating to the installation of the water supply pipe to the Public Works Garage. The Custodian stated that the work was "obviously done," but absent a stated time period, she would be unable to locate responsive records. Regarding Complainant's requested Item No. 2, the Custodian stated that the bus shelters are located on State Highway 49 and are therefore regulated by the New Jersey Department of Transportation ("DOT"). Furthermore, she determined that the bus shelters are made by New Jersey Transit. As for township ordinances or resolutions concerning the shelters, the Custodian stated that she attempted to search all records going back five years and found no responsive records. Therefore, the township could not locate or produce any responsive records.

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).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

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.

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).

Here, the Complainant asserted that he received no written response to his OPRA request. The Custodian admits that neither of the two prior custodians responded to the request. She had no explanation for their failure to respond. Therefore, the Custodian did not bear her burden of proving a timely response to the Complainant's OPRA request. N.J.S.A. 47:1A-6. The 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.

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.

Item No. 1: Documents pertaining to installation of water pipe

The New Jersey Appellate Division has held that:

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."* N.J.S.A. 47:1A-1.

MAG Entm't, LLC v. Div. of Alcoholic Beverage Control 375 N.J. Super. 534, 546 (App. Div. 2005) (emphasis added).

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 (emphasis added).

The Court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt In short, OPRA does not countenance open-ended searches of an agency’s files.” Id. at 549 (emphasis added). See Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005);⁷ New Jersey 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). See also DeAppolonio v. Borough of Deal (Monmouth), GRC Complaint No. 2008-82 (September 2009).

In the instant case, item No. 1 of the Complainant’s OPRA request sought “any and all documentation pertaining [to] information about the installation of the water supply pipe from the township hall to the public works garage...” While the request referenced subject matter and listed examples of documents that might be responsive, it failed to provide specific identifiers, such as, for example, a time frame or parties to the documents. Moreover, the request would require the Custodian to conduct research to determine which documents pertain to, or contain information pertaining to, the installation of the water pipe. This request resembles the facts in MAG, where the court held that a valid OPRA request must seek “identifiable government records” and that “a party cannot satisfy this requirement by requesting all of an agency’s documents.” 375 N.J. Super. at 549. The request is therefore impermissibly open-ended. See MAG, 375 N.J. Super. at 549. The Custodian certified that, despite the lack of specificity and the open-ended nature of the request, she nonetheless attempted to check records as far back as five years and could not identify any responsive record.

Therefore, notwithstanding the Custodian’s “deemed” denial, the Custodian has not unlawfully denied access to requested Item No. 1 of the Complainant’s OPRA request regarding an installed water supply pipe. In that instance, the request was overly broad and requested information without sufficient identifiers. N.J.S.A. 47:1A-6; MAG, 375 N.J. Super. at 549.⁸ Further, “requests that require the Custodian to conduct research have been deemed as invalid requests under OPRA.” DeAppolonio v. Borough of Deal, GRC 2008-62 (2009).

Item No. 2: Documents pertaining to the installed bus shelters on State Highway 49

In Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The custodian responded, certifying that no records responsive to the complainant’s request existed. In reply, the complainant did not provide any evidence to refute the custodian’s certification. The GRC determined that, although the custodian failed to respond to the OPRA request in a timely manner, the custodian lawfully denied access to the requested

⁷ Affirming Bent v. Stafford Police Dep’t, GRC Case No. 2004-78 (October 2004).

⁸ Notwithstanding the lack of specificity in the request, the Custodian certified in her SOI that she checked records dating back five years and could find no records responsive.

records because the custodian certified that no records responsive to the request existed, and the Complainant provided no competent, credible evidence to refute the Custodian's certification.

In O'Shea v. Stillwater Township (Sussex), GRC 2007-253 (Interim Order, dated November 19, 2008), the complainant requested "[a] copy of any ordinance, resolution, or other document that sets the fees for the public to purchase copies of government non-paper records...." The Council found that although the Complainant had identified the type of record sought (e.g., ordinances or resolutions), the Complainant failed to identify a specific date or time period for the requested records. The Council noted, "[f]ulfilling this portion of the Complainant's request goes beyond the Custodian searching her files to locate the specific record requested. The Custodian here would have to research her files to identify which records, if any, are responsive to the Complainant's request."

In the current matter, the Complainant's request for any and all documents "pertaining to the installed bus shelters on State Highway 49" did list types of documents, such as ordinances and resolutions. However, the Complainant sought a wide array of potential records, including "all supporting documents," but failed to provide sufficient identifiers, such as specific dates or time periods. See N.J.S.A. 47:1A-6; MAG, 375 N.J. Super. at 549. Notwithstanding the lack of specificity, the Custodian attempted to check for records dating back five years with no success. The Custodian determined that the shelters are, in fact, located on a State Highway and therefore regulated by the DOT. Based on the limited search criteria available to her, she certified that she found no records responsive to the request. Because the Complainant provided no competent, credible evidence to refute the Custodian's certification, the Custodian lawfully denied access to said records. N.J.S.A. 47:1A-6 and Pusterhofer, GRC No. 2005-49.

Knowing and 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. 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 the instant matter, the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). However, the Custodian explained that, having started employment in October 2014, she was not the custodian of record at the time of the original OPRA request in May 2014. Nor was she the custodian when the Denial of Access Complaint was filed in June 2014. Additionally, the Custodian certified that her search produced no responsive records. Moreover, both requested items were invalid as impermissibly overbroad and requiring the Custodian to do research. Based on the foregoing, there is no evidence in the record to suggest that the Custodian's failure to provide a written response to the Complainant's OPRA request 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 the Township 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).
2. Notwithstanding the "deemed" denial, the Custodian has not unlawfully denied access to the requested items, because the requests were overly broad and sought information without sufficient identifiers. N.J.S.A. 47:1A-6; MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 549 (App. Div. 2005). "Requests that require the Custodian to conduct research have been deemed as invalid requests under OPRA." DeAppolonio v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009).
3. The Custodian certified in her SOI that there were no responsive documents. Because the Complainant provided no competent, credible evidence to refute the Custodian's certification, the Custodian lawfully denied access to said records pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (2005).
4. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian explained that, having started employment in October 2014, she was not the Custodian at the time of the original OPRA request in May 2014. Nor was she

the custodian when the Denial of Access Complaint was filed in June 2014. In addition, she certified that, after a search for documents that might have been created in the previous five years, she could not locate any responsive records. Furthermore, both requested items were invalid as impermissibly overbroad and requiring the Custodian to do research. Based on the foregoing, there is no evidence in the record to demonstrate that the Custodian's actions had a positive element of conscious wrongdoing or were 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: Ernest Bongiovanni,
Staff Attorney

Reviewed By: Joseph Glover
Executive Director

June 23, 2015