



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

June 30, 2015 Government Records Council Meeting

Scott Coulson
Complainant

Complaint No. 2014-270

v.

Town of Kearny Fire Department (Hudson)
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 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).
2. The Custodian’s initial response to the Complainant’s OPRA request, informing him that all responsive records could be retrieved on June 27, 2014, constitutes an insufficient search and an unlawful denial of access to the records that were subsequently located. N.J.S.A. 47:1A-6; Schneble v. NJ Dep’t of Env’t Prot., GRC Complaint No. 2007-220 (April 2008); Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 2013).
3. With respect to Item No. 1, the Custodian certified that she disclosed the responsive records, and the Complainant has not provided any competent, credible evidence to refute the Custodian’s certification. The Custodian therefore did not deny access to Item #1. The GRC has no authority over the content of a record. Kwanzaa v. Dep’t of Corr., GRC No. 2004-167 (March 2005). *See also* Valdes v. Twp. of Belleville (Hudson), GRC Complaint No. 2010-258 (March 2012).
4. Notwithstanding the Custodian’s “deemed” denial, all records responsive to Items #2, 4, and 5 were disclosed between the filing of the Complaint on July 25, 2014, and October 6, 2014. Therefore the GRC declines to order disclosure because all of the responsive records have been disclosed.



5. Although the Custodian failed to respond to the request in a timely manner, used the wrong e-mail address, and conducted an insufficient search, thereby resulting in an unlawful denial of access, the Custodian did conduct a subsequent search and located and provided responsive records to the Complainant. 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 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**

**Scott Coulson¹
Complainant**

GRC Complaint No. 2014-270

v.

**Town of Kearny Fire Department (Hudson)²
Custodial Agency**

Records Relevant to Complaint:

1. "Copy of the current Certificate of Occupancy for Fire station #4, located at John Millar Way."
2. "Documents from the Town Council meetings, engineers, architects and Health Dept. which closed Station 4 Firehouse . . . [from] about late 2006, early 2007."
3. "Documents from the Town Council Meetings, Engineers, Architects and Health Dept. which reopened Station 4 Firehouse on John Millar Way."
4. "All of the names and titles of the persons contacted in order to retrieve this information."
5. "The OSHA reports filed do [sic] to complaints about the condition of Station 4 Firehouse in 2006-2007."

Custodian of Record: Patricia Carpenter

Request Received by Custodian: June 6, 2014

Response Made by Custodian: June 18, 2014, June 26, 2014, and June 27, 2014

GRC Complaint Received: July 25, 2014

Background³

Request and Response:

On June 6, 2014, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian to seek the above-mentioned records. On the OPRA request form, the Complainant provided his name, street address, a phone number, and an e-mail address. The Complainant did not indicate a preferred method of delivery, although the form listed several options. On June 18, 2014, eight (8) business days following receipt of the request, the Deputy Town Clerk sent an e-mail to the Complainant to request an extension of time until June 26,

¹ No legal representation listed on record.

² Represented by Gregory Castano, Sr., Esq. (Fairfield, 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.

2014 – an additional six (6) business days. On that date, the Deputy Clerk sent another e-mail to advise the Complainant that the requested records were “available for retrieval” and that the cost of duplication would be \$7.55. The next day, on June 27, 2014, the Deputy Clerk sent a third e-mail to advise the Complainant that she located and copied additional records at an additional cost of \$.40, thus increasing the total copying costs to \$7.95⁴, and that all records were ready for retrieval. Of note, the Deputy Clerk sent all three e-mails to clsn@yahoo.com. Although that address is similar to the one listed by the Complainant, it is not the correct address. None of the three e-mails were received owing to the use of the wrong address.

Denial of Access Complaint:

On July 25, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that he submitted a multi-part OPRA request on June 6, 2014, but he never received a written response. Based on a prior experience with the Custodian, the Complainant concluded that the Custodian had perhaps used the incorrect e-mail address of clsn@yahoo.com. The Complainant sent a test e-mail to that address on June 25, 2014, which immediately bounced back as undeliverable.

Statement of Information:

On August 14, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the OPRA request on June 6, 2014. The Custodian stated that her office had sent the Complainant three (3) separate e-mails, one each on June 18, June 26, and June 27, 2014. The SOI included 159 pages of what she certified were responsive records, including a Certificate of Occupancy (“C.O.”), municipal resolutions, Town Council minutes, lease agreements, violation notices, and various documents from engineers, architects, and health officials. Also included were various other records relating to structural damage of the Central Avenue Firehouse, its subsequent closure, and its eventual relocation, all of which occurred between 2005 and 2007. The Custodian stated that she never heard from the Complainant and that the records were never picked up.

Additional Submissions:

On October 6, 2014, the Complainant e-mailed the GRC to dispute the Custodian’s SOI. The Complainant stated that he never received the Custodian’s written response and did not receive any records until after he had filed the Denial of Access Complaint. Recalling that the Custodian made a similar mistake in a prior OPRA request, he speculated that the Custodian had perhaps sent her responses to the wrong e-mail address, rather than to the e-mail address he had listed on his request form. He indicated that he had corrected the Custodian’s mistake at the time of the prior OPRA request.

With respect to request Item No. 1, the Complainant stated that the Custodian provided the C.O for the wrong structure. With respect to Item No. 2, the Complainant affirmed that the Custodian provided the proper records. With respect to Item No.3, the Complaint alleges that the Custodian provided documents for the wrong address. The Complainant added that the

⁴ The record is unclear as to whether the Complainant ever paid the copying fee, despite having received the records.

responsive records for Item No. 3 were from the 2013-2014 timeframe. The Complainant asked that the Custodian be compelled to provide the proper C.O. (for the structure at John Millar Way) and a correct reply to Item No. 3.⁵

On February 9, 2015, the GRC sent a letter to the Custodian to request additional information deemed necessary to adjudicate the Complaint. N.J.A.C. 5:105-2.4(1). Specifically, the GRC asked the Custodian to address the following:

1. Provide all documents sent to the Complainant in response to his request.
2. Respond to the Complainant's allegation that the wrong C.O. was provided.
3. Respond to the allegation that the wrong records were produced in response to request item No. 3.
4. Explain why the incorrect e-mail address was used when the OPRA request form explicitly listed the correct address.

Following an approved request for extension, the Custodian responded on March 3, 2015, by providing the GRC with copies of all the records provided to the Complainant. Further, she certified that one of those records, the C.O. for the Firehouse located at John Millar Way, is indeed the C.O. he requested. She further stated that the documents relating to "the relocation of the fire department to 42 Hackensack Ave., Kearny" are the same documents which respond to the Firehouse relocating to John Millar Way. She noted that the "Firehouse on John Millar Way and the Firehouse on Hackensack Avenue are both officially known as Firehouse 4." The Custodian offered no explanation as to why her office used the wrong e-mail address or why their system did not indicate that the e-mail had been returned as undeliverable.

On March 17, 2015, the Complainant contacted the GRC in response to the Custodian's certification. He reiterated that the Custodian provided the wrong C.O. He further stated that the records provided in response to Item No. 3 relate to a different relocation that occurred in or about 2007. Instead, he sought records related to the reopening of the Firehouse on John Millar Way, which occurred in 2013, after the Firehouse at 42 Hackensack Avenue had been damaged by Super Storm Sandy in October 2012.

On March 31, 2015, in response to the Complainant's e-mail from March 17, 2015, the Custodian provided additional records, consisting of twenty-eight (28) pages and dating from 2013. Included were reports concerning mold analysis and remediation at the John Millar Way location. The Custodian stated these records were only recently provided to her by the Fire Department.

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.

⁵ The Complainant made no further comment regarding requested Item Nos. 4 and 5.

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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

In the present case, the Complainant hand delivered his OPRA request on June 6, 2014. The evidence of record reveals the Custodian tried to respond to the Complainant on June 18, 2014, albeit to the wrong e-mail address. Nonetheless, the Custodian failed to respond to the request within the statutorily mandated seven (7) business days.

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.

Insufficient Search

The Council has maintained that a Custodian must perform a complete search for the requested records before responding to an OPRA request, as doing so will help ensure that the Custodian's response is accurate and has an appropriate basis in law. In Schneble v. NJ Dep't of Env't Prot., GRC Complaint No. 2007-220 (April 2008), the custodian initially responded to the complainant's OPRA request by stating that no records responsive existed. The complainant, however, submitted e-mails that were responsive to her request with the Denial of Access Complaint. The custodian certified that, upon receipt of the e-mails attached to the Denial of Access Complaint, the custodian again searched through DEP files and located records responsive to the request. The GRC held that because the custodian performed an inadequate initial search, the custodian unlawfully denied access to the requested records. *See also* Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (January 2011).

In Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 2013), the Custodian initially responded by providing the Complainant with two (2) responsive records and advising that no other records were located. However, subsequent to the filing of his complaint, the Custodian performed another search and located four (4) additional records.

Here, the Custodian certified that by June 27, 2014, she had retrieved all the responsive records regarding the items in Complainant's request. However, on March 31, 2015, she provided the GRC and the Complainant with another set of records, these dating from 2013, the subject of which was a mold remediation project for the Firehouse at John Millar Way. The subsequent records clearly relate to the reopening of the Firehouse. Although the Custodian

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.

states that the records only recently came to her attention, the newly discovered records existed at the time of the initial OPRA request and search for records, which occurred in June 2014. Moreover, the Custodian did not state what efforts she previously undertook to try to obtain these specific records. Therefore, as in Weiner and Schneble, the Custodian failed to conduct an adequate search to locate all responsive records prior to his initial response. Accordingly, the Custodian's failure to conduct a sufficient search for all requested records constitutes an unlawful denial of access. *See also* Scheeler v. Woodbine Bd. of Educ., GRC Complaint No. 2014-59 (January 2015).

Therefore, the Custodian's initial response, informing the Complainant that all responsive records could be retrieved on June 27, 2014, constitutes an insufficient search and an unlawful denial of access to the twenty eight (28) pages of records subsequently located. N.J.S.A. 47:1A-6. Schneble, GRC 2007-220; Weiner, GRC 2013-52.

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

The Complainant contends that the Custodian provided the wrong C.O. The Custodian certified that all responsive records were retrieved for the Complainant on June 27, 2014. The first record listed in the Document Index of the SOI is the C.O. for Fire Station #4 on John Millar Way. The C.O. identifies the building's location at "Rear Lincoln Hwy/RDWY 2, Block 294 Lot 14.01," which was the same description given by the Complainant. The Complainant, however, argues that the C.O. provided by the Custodian related to trailers for temporary housing. However, the Custodian has twice certified that the document is indeed the appropriate C.O., which clearly identifies the location identified by the Complainant.

The Complainant contends there is a discrepancy in the content of the C.O. However, the GRC has no authority over the content of records. N.J.S.A. 47:1A-7 (b). Kwanzaa v. Dep't of Corr., GRC No. 2004-167 (March 2005) (holding that the Council "does not oversee the content of documentation" but does oversee the disclosure and non-disclosure of documents). *See also* Valdes v. the Twp. of Belleville (Hudson), GRC Complaint No. 2010-258 (March 2012). Based on the evidence of records, the Custodian did not unlawfully deny access to the requested C.O.

Items No. 2, 3, 4 and 5

The Complainant affirmed that the Custodian provided the responsive records for Item No. 2 and remained silent as to items #4 and 5. With respect to Item No. 3, the Custodian updated her two prior certifications to reflect that a subsequent search by the Fire Department

revealed an additional twenty-eight (28) pages of materials, which she provided to the Complainant on March 31, 2015. The Complainant has provided no evidence to refute that the Custodian eventually provided all the relevant records for these requested items.

Notwithstanding the Custodian's "deemed" denial, all records responsive to request items #2, 4, and 5 were disclosed between the filing of the Complaint, July 25, 2014, and October 6, 2014. Therefore the GRC declines to order disclosure because all of the responsive records for those items have been disclosed.

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 failed to respond to the request in a timely manner and conducted an insufficient search, the Custodian did conduct a subsequent search and located and provided responsive records to the Complainant. 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 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. The Custodian's initial response to the Complainant's OPRA request, informing him that all responsive records could be retrieved on June 27, 2014, constitutes an insufficient search and an unlawful denial of access to the records that were subsequently located. N.J.S.A. 47:1A-6; Schneble v. NJ Dep't of Env't Prot., GRC Complaint No. 2007-220 (April 2008); Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 2013).
3. With respect to Item No. 1, the Custodian certified that she disclosed the responsive records, and the Complainant has not provided any competent, credible evidence to refute the Custodian's certification. The Custodian therefore did not deny access to Item #1. The GRC has no authority over the content of a record. Kwanzaa v. Dep't of Corr., GRC No. 2004-167 (March 2005). *See also* Valdes v. Twp. of Belleville (Hudson), GRC Complaint No. 2010-258 (March 2012).
4. Notwithstanding the Custodian's "deemed" denial, all records responsive to Items #2, 4, and 5 were disclosed between the filing of the Complaint on July 25, 2014, and October 6, 2014. Therefore the GRC declines to order disclosure because all of the responsive records have been disclosed.
5. Although the Custodian failed to respond to the request in a timely manner, used the wrong e-mail address, and conducted an insufficient search, thereby resulting in an unlawful denial of access, the Custodian did conduct a subsequent search and located and provided responsive records to the Complainant. 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: Ernest Bongiovanni
Staff Attorney

Reviewed By: Joseph Glover
Executive Director

June 23, 2015