



State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS

101 SOUTH BROAD STREET

PO BOX 819

TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

June 30, 2015 Government Records Council Meeting

Frances Hall
Complainant

Complaint No. 2014-278

v.

Borough of Upper Saddle River (Bergen)
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 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 July 14, July 21, and July 28, 2014, OPRA requests, 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 certified that “information was sent to the Complainant [twice a month] in month of July.” Therefore, the Council declines to order disclosure because the evidence of record indicates that the requested records were ultimately disclosed to the Complainant.
3. Although the Custodian failed to respond in writing to each individual weekly request and failed to bear his burden of proof that he timely responded to the Complainant’s OPRA request, which resulted in a “deemed” denial of the request, he certified that he ultimately disclosed the requested records to the Complainant. Additionally, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian’s actions did 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 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**

**Frances Hall¹
Complainant**

GRC Complaint No. 2014-278

v.

**Borough of Upper Saddle River (Bergen)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of the “Tax Search Export” file produced by the software system in the tax collector’s office, containing taxes billed and other collected data.

Custodian of Record: Rose Vido, Gene P. Leporiere

Request Received by Custodian: Unknown

Response Made by Custodian: None

GRC Complaint Received: August 6, 2014

Background³

Request and Response:

On July 14, July 21, and July 28, 2014, the Complainant submitted Open Public Records Act (“OPRA”) requests to the Custodian, seeking the above-mentioned records. The Custodian failed to respond to the requests.

Denial of Access Complaint:

On August 6, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that since July 14, 2014, and on a weekly basis, she submitted three (3) OPRA requests to the Custodian but had not received any responses. The Complainant also asserted that she had previously filed Denial of Access Complaints against the Custodian but had withdrawn those complaints after being assured she would receive her requested records. The Complainant sends weekly OPRA requests, which she alleges are ignored by the Custodian, who sends the requested documents to her once a month and ignores the weekly requests.

¹ No legal representation listed on record.

² Represented by Robert T. Regan, Esq., (Westwood, 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.

The Complainant alleged that following an incident the previous month, where she was unable to get in touch with the Custodian or any other employee of the tax office, she contacted the Borough Clerk, explaining that if she could not get responses to her weekly requests, she required receipt of the files at least twice a month. The Complainant then asserted that following this discussion, she received an e-mail from the Custodian, agreeing to send her requested records bi-monthly via e-mail. The Complainant stated that she last received a file from the Custodian on July 10, 2014, and “nothing since then.” The Complainant provided email correspondence between herself and the Custodian regarding past OPRA requests.

Statement of Information:

On August 25, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he did not receive any of the three OPRA requests listed by the Complainant. The Custodian certified that he did, however, receive an OPRA request from the Complainant on July 7, 2014. The Custodian certified that faxed requests are received in the “general information” office and distributed to the various appropriate departments, based on the information requested. The Custodian certified that he ultimately sent the requested information to the Complainant twice in the month of July “as per agreement with the Complainant.” The Complainant does not dispute the Custodian’s assertion that he sent the documents to her.

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).

Here, the Complainant asserted that she submitted three (3) OPRA requests on July 14, July 21, and July 28, 2014, but did not receive a response to any of the requests. The Custodian asserts that he did not receive said requests. However, the Custodian’s own certification acknowledges the past history of weekly requests and prior e-mail correspondence concerning an agreement to collate and send the requested records bi-monthly to the Complainant. Furthermore, the Custodian in his certification did not dispute that the requests at issue were received by the “general information” office, indicating the possibility that the Borough did, in fact, receive the requests from July 14, July 21, and July 28, 2014. While past correspondence provided by the Custodian indicates written responses to prior OPRA requests, there is nothing in the evidence of

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.

record to indicate that the Custodian responded to the Complainant's OPRA requests of July 14, July 21, and July 28, 2014, within the statutorily mandated seven-day period, thereby resulting in a "deemed" denial under OPRA.

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 July 14, July 21, and July 28, 2014, OPRA requests, 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.

The Custodian certified that "information was sent to the Complainant [twice a month] in month of July." Therefore, the Council declines to order disclosure because the evidence of record indicates that the requested records were ultimately disclosed to the Complainant.

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 . . . penalties . . ." 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 (Berg); 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)).

Here, although the Custodian failed to respond in writing to each individual weekly request and failed to bear his burden of proof that he timely responded to the Complainant's OPRA request, which resulted in a "deemed" denial of the request, he certified that he ultimately disclosed the requested records to the Complainant. Additionally, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions did 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 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 July 14, July 21, and July 28, 2014, OPRA requests, 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 certified that "information was sent to the Complainant [twice a month] in month of July." Therefore, the Council declines to order disclosure because the evidence of record indicates that the requested records were ultimately disclosed to the Complainant.
3. Although the Custodian failed to respond in writing to each individual weekly request and failed to bear his burden of proof that he timely responded to the Complainant's OPRA request, which resulted in a "deemed" denial of the request, he certified that he ultimately disclosed the requested records to the Complainant. Additionally, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions did 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: Husna Kazmir
Staff Attorney

Approved By: Dawn R. SanFilippo
Deputy Executive Director

June 23, 2015