



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

August 27, 2019 Government Records Council Meeting

Shawn G. Hopkins
Complainant

Complaint No. 2014-37

v.

Borough of Monmouth Beach (Monmouth)
Custodian of Record

At the August 27, 2019 public meeting, the Government Records Council (“Council”) considered the August 20, 2019 Supplemental 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 Complainant has failed to establish in his request for reconsideration of the Council’s January 31, 2019 Final Decision that either 1) the Council’s decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant failed to establish that the complaint should be reconsidered based on fraud or “new evidence.” The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the evidence of record does not indicate that the Custodian committed fraud. Further, the photographs attached to the request for reconsideration cannot be considered “new evidence” because the Complainant possessed them several months prior to the Council’s Final Decision. Thus, the Complainant’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. In accordance with N.J.A.C. 5:105-2.10(a), the Council should nonetheless reconsider its Final Decision on its own volition to correct conclusion No. 2. See also *i.e.* Gordon v. City of Orange (Essex), GRC Complaint No. 2011-336, *et seq.* (May 2013).
3. Conclusion No. 2 of its January 31, 2019 Final Decision shall be amended to reflect that the Custodian unlawfully denied access to the responsive property photographs, which were in the Borough’s possession at the time of the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Notwithstanding, the Council should decline to order disclosure because the Complainant came into possession of the photographs in August

2018 as part of Hopkins v. Monmouth Cnty. Bd. of Taxation, et al, GRC Complaint No. 2014-01 *et seq.* (June 2018).

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 27th Day of August 2019

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: August 29, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration
**Supplemental Findings and Recommendations of the Executive Director
August 27, 2019 Council Meeting**

**Shawn G. Hopkins¹
Complainant**

GRC Complaint No. 2014-37

v.

**Borough of Monmouth Beach (Monmouth)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of the computer assisted mass appraisal (“CAMA”) data for the Borough of Monmouth Beach (“Borough”) including property photographs.

Custodian of Record: Joyce L. Escalante

Request Received by Custodian: January 6, 2014

Response Made by Custodian: March 4, 2014

GRC Complaint Received: January 21, 2014

Background

January 31, 2019 Council Meeting:

At its January 31, 2019 public meeting, the Council considered the January 22, 2019 Supplemental Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found 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). However, the GRC declines to order disclosure of the responsive CAMA data because the Custodian disclosed same to the Complainant on March 4, 2014 via e-mail.

¹ No legal representation listed on record.

² Represented by Dennis A. Collins, Esq., of Collins, Vella, and Casello, LLC (Farmingdale, NJ).

2. The Custodian has borne her burden of proof that she lawfully denied access to the requested property photographs because she certified, and the record reflects, that no responsive record exists. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The Custodian's failure to respond within the statutory time frame resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian ultimately disclosed responsive CAMA data to the Complainant on March 4, 2014. Further, the Custodian did not unlawfully deny access to the requested photographs because none existed. 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.

Procedural History:

On February 5, 2019, the Council distributed its Final Decision to all parties. On February 15, and 20, 2019, the Complainant e-mailed the Government Records Council ("GRC") advising that he possessed photographs responsive to the subject OPRA request that he received as part of Hopkins v. Monmouth Cnty. Bd. of Taxation, et al., GRC Complaint No. 2014-01 *et seq.* (June 2018). The Complainant asked about his recourse to address what he believed was a false certification.

On February 27, 2019, the GRC responded providing the procedures for challenging a Council decision. The GRC also noted that due to the delay in responding to the Complainant, it would allow the Complainant until March 6, 2019 to submit a request for reconsideration if he so chose.

On March 3, 2019, the Complainant filed a request for reconsideration of the Council's January 31, 2019 Final Decision based on a fraud and "new evidence." The Complainant stated that on January 16, 2019, the GRC sought from the Custodian additional information as to the disclosure of CAMA data and existence of responsive photographs. The Complainant stated that the same day, the Custodian certified that no photographs existed.

The Complainant contended in August 2018, the Monmouth County ("County") Tax Board sent him, among other records, photographs that the Borough used as part of its 2004 assessment. The Complainant argued that these photographs were created by the Borough and submitted to the County in accordance with a shared services agreement. The Complainant thus argued that the Custodian falsely certified that no responsive photographs existed.

On July 22, 2019, the GRC sought additional information from the Custodian. Specifically, the GRC noted that the Complainant, in his request for reconsideration, challenged the Custodian's certification that no photographs existed. The GRC noted that the Complainant included responsive photographs as part of his submission. The GRC thus asked the Custodian to respond to the following:

1. At the time that the Complainant submitted the subject OPRA request, did the Borough have a shared services contract with the County to use Microsystems, LLC for CAMA data?
2. At the time that the Custodian addressed the Complainant's OPRA request in March 2014, did she or the Tax Assessor contact the County about the existence of responsive photographs?
3. Prior to submitting the Statement of Information, did the Custodian contact the County about responsive photographs?
4. Upon receipt of the request for reconsideration, did the Custodian contact the County regarding responsive photographs?

The GRC requested that the Custodian provide her response as a legal certification by no later than July 25, 2019.

On July 25, 2019, the Custodian sent an e-mail to the GRC explaining how the photograph issue evolved from the time she received the subject OPRA request to present. The Custodian further stated that she would ask the Assessor to send the Complainant responsive photographs on a compact disc ("CD"). The Custodian noted that the Assessor would not be in until July 30, 2019.

On July 26, 2019, the GRC advised the Custodian that the submission did not satisfy its request for additional information. The GRC stated that it would provide the Custodian additional time until July 30, 2019 to provide the requested certification responding to each question. The GRC noted that the Custodian may wish to include the contents of her July 25, 2019 e-mail, and a statement clarifying whether additional records were disclosed to the Complainant.

On July 30, 2019, the Custodian responded to the GRC's request for additional information as follows:

1. At the time that the Complainant submitted the subject OPRA request, did the Borough have a shared services contract with the County to use Microsystems for CAMA data?
 - Yes, the Borough had a shared services agreement with the County.
2. At the time that the Custodian addressed the Complainant's OPRA request in March 2014, did she or the Tax Assessor contact the County about the existence of responsive photographs?
 - No, the Assessor believed the photographs were included in the files forwarded to the Custodian for disclosure.
3. Prior to submitting the Statement of Information, did the Custodian contact the County about responsive photographs?
 - No, the Borough did not contact the County.
4. Upon receipt of the request for reconsideration, did the Custodian contact the County regarding responsive photographs?

- No, because at the that time, the Complainant acknowledged that he already received the photographs from the County.

The Custodian further certified to the following explanation from her July 25, 2019 e-mail. The Custodian affirmed that she originally sent the OPRA request to the Assessor upon receipt of it, who in turn forwarded her responsive CAMA data.³ The Custodian affirmed that at that time, the Assessor believed that by following the instructions provided by the Complainant, he would produce the CAMA data inclusive of all photographs. The Custodian certified that upon disclosing the CAMA data files in March 2014, she believed that she was disclosing all records that existed. The Custodian certified that prior to responding to the GRC's January 16, 2019 request for additional information, she reviewed the disclosed CAMA data and found no photographs. The Custodian affirmed that she thus assumed that no photographs existed and certified to such on the same day.

The Custodian stated that the Complainant argued in his request for reconsideration that photographs existed but were never provided. The Custodian affirmed that she spoke with the Assessor again after receiving the GRC's July 22, 2019 request for additional information. The Custodian certified that the Assessor stated that he possessed a CD containing photographs but did not use it earlier because he believed the photographs were contained within the disclosed CAMA data.

Analysis

Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, the Complainant filed the request for reconsideration of the Council's January 31, 2019 Final Decision on March 3, 2019, three (3) days prior to the end of the extended time frame to submit same.

Applicable case law holds that:

“A party should not seek reconsideration merely based upon dissatisfaction with a decision.” D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a “palpably incorrect or irrational basis;” or (2) it is obvious that the finder of fact did

³ The Custodian noted that she did so based on advice of Counsel, who believed the records were disclosable. The Custodian also noted that she disclosed responsive CAMA data on March 4, 2014.

not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, . . . 242 N.J. Super. at 401. “Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.” Ibid.

[In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).]

Additionally, pursuant to N.J.A.C. 5:105-2.10(a), the Council may reconsider any decision it renders, at its own discretion. Id.; Scheeler, Jr. v. N.J. State Police, GRC Complaint No. 2014-57, *et seq.* (December 2014).

Upon review of all facts and evidence submitted here, the GRC concludes that the Complainant did not meet his obligation for reconsideration based on “fraud or “new evidence.” Specifically, the Custodian’s recitation of how the responsive photographs were not originally provided does not amount to the legal definition of “fraud.”⁴ Further, the Complainant provided photographs as part of the request for reconsideration which he obtained in August 2018, several months before the Council’s Final Decision. Thus, these photographs do constitute “new evidence” that did not exist at the time of that the Council decided this matter.

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings, 295 N.J. Super. at 384. The Complainant failed to establish that the complaint should be reconsidered based on fraud or “new evidence.” The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. See D’Atria, 242 N.J. Super. at 401. Specifically, the evidence of record does not indicate that the Custodian committed fraud. Further, the photographs attached to the request for reconsideration cannot be considered “new evidence” because the Complainant possessed them several months prior to the Council’s Final Decision. Thus, the Complainant’s request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D’Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6.

However, in accordance with N.J.A.C. 5:105-2.10(a), the Council should nonetheless reconsider its Final Decision on its own volition to correct conclusion No. 2. See also i.e. Gordon v. City of Orange (Essex), GRC Complaint No. 2011-336, *et seq.* (May 2013) (complainant’s request for reconsideration based on fraud and “new evidence” was denied; however, the Council reconsidered its decision).

⁴ Black’s Law Dictionary defines “fraud” as “[a] false representation of a matter of fact . . . by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury.” Id. (Abridged Fifth Edition) at 337.

Here, the Custodian provided the GRC a certification on July 30, 2019 addressing whether photographs existed and how the Borough ultimately failed to provide them. The Custodian affirmed that the Assessor believed the responsive photographs were included in the CAMA data files. Further, the evidence supports that the Custodian disclosed the records assuming everything included in the files was all that existed. When the Custodian initially certified that no photographs existed, she did so after reviewing the CAMA data and finding no photographs.

Herein lies the disconnect between what the Assessor thought he was providing to the Custodian and what the Custodian ultimately certified to providing to the Complainant on January 16, 2019. Upon receiving the GRC's July 22, 2019 additional information request, the Custodian discussed the issue with the Assessor, who realized for the first time that no photographs were included in the files. The Custodian affirmed that the Assessor also confirmed he had a CD but did not rely on it because of his belief that the photographs were in the data files.

All of the forgoing appears reasonable, but nonetheless results in an unlawful denial of access. N.J.S.A. 47:1A-6. The photographs existed at the time of the OPRA request and thus should have been provided to the Complainant. For this reason, an amendment to conclusion No. 2 of the Final Decision to reflect this unlawful denial of access is warranted.

Accordingly, conclusion No. 2 of its January 31, 2019 Final Decision shall be amended to reflect that the Custodian unlawfully denied access to the responsive property photographs, which were in the Borough's possession at the time of the Complainant's OPRA request. N.J.S.A. 47:1A-6. Notwithstanding, the Council should decline to order disclosure because the Complainant came into possession of the photographs in August 2018 as part of Hopkins, GRC 2014-01 *et seq.*

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Complainant has failed to establish in his request for reconsideration of the Council's January 31, 2019 Final Decision that either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant failed to establish that the complaint should be reconsidered based on fraud or "new evidence." The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the evidence of record does not indicate that the Custodian committed fraud. Further, the photographs attached to the request for reconsideration cannot be considered "new evidence" because the Complainant possessed them several months prior to the Council's Final Decision. Thus, the Complainant's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

2. In accordance with N.J.A.C. 5:105-2.10(a), the Council should nonetheless reconsider its Final Decision on its own volition to correct conclusion No. 2. See also *i.e.* Gordon v. City of Orange (Essex), GRC Complaint No. 2011-336, *et seq.* (May 2013).
3. Conclusion No. 2 of its January 31, 2019 Final Decision shall be amended to reflect that the Custodian unlawfully denied access to the responsive property photographs, which were in the Borough's possession at the time of the Complainant's OPRA request. N.J.S.A. 47:1A-6. Notwithstanding, the Council should decline to order disclosure because the Complainant came into possession of the photographs in August 2018 as part of Hopkins v. Monmouth Cnty. Bd. of Taxation, et al, GRC Complaint No. 2014-01 *et seq.* (June 2018).

Prepared By: Frank F. Caruso
Executive Director

August 20, 2019



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

January 31, 2019 Government Records Council Meeting

Shawn G. Hopkins
Complainant

Complaint No. 2014-37

v.

Borough of Monmouth Beach (Monmouth)
Custodian of Record

At the January 31, 2019 public meeting, the Government Records Council (“Council”) considered the January 22, 2019 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). However, the GRC declines to order disclosure of the responsive CAMA data because the Custodian disclosed same to the Complainant on March 4, 2014 via e-mail.
2. The Custodian has borne her burden of proof that she lawfully denied access to the requested property photographs because she certified, and the record reflects, that no responsive record exists. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The Custodian’s failure to respond within the statutory time frame resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian ultimately disclosed responsive CAMA data to the Complainant on March 4, 2014. Further, the Custodian did not unlawfully deny access to the requested photographs because none existed. 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 31st Day of January, 2019

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 5, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
January 31, 2019 Council Meeting**

**Shawn G. Hopkins¹
Complainant**

GRC Complaint No. 2014-37

v.

**Borough of Monmouth Beach (Monmouth)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of the computer assisted mass appraisal (“CAMA”) data for the Borough of Monmouth Beach (“Borough”) including property photographs.

Custodian of Record: Joyce L. Escalante
Request Received by Custodian: January 6, 2014
Response Made by Custodian: March 4, 2014
GRC Complaint Received: January 21, 2014

Background³

Request and Response:

On January 2, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 6, 2014, the Custodian forwarded the request to the Tax Collector, who in turn forwarded the request to the Tax Assessor.

Denial of Access Complaint:

On January 21, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that he previously requested CAMA data from the Monmouth County (“County”) Tax Board on December 18, 2013.⁴ The Complainant stated that the County advised him to request the data individually from each municipality.

¹ No legal representation listed on record.

² Represented by Dennis A. Collins, Esq., of Collins, Vella, and Casello, LLC (Farmingdale, 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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

⁴ Ibid.

The Complainant argued that the requested CAMA data has been stored in a database that has been paid for and maintained by the County since 1996. The Complainant asserted that the software program utilized for the data helps maintain and calculate assessments. The Complainant asserted his belief that the Borough unlawfully denied access to the requested data because:

- Six (6) municipalities in Monmouth County, Morris County, and Sussex County, as well as all 24 municipalities in Gloucester County, disclosed CAMA data to him. All municipalities utilize Microsystems-NJ.com, L.L.C. (“Microsystems”) as their MODIV/CAMA vendor.
- The software program is funded, maintained, and operated by the County under a 1996 shared services agreement.
- The County accesses various information from the database.
- S-2234, entitled “Monmouth Assessment Demonstration Program,” requires⁵ all municipalities within the County to utilize the MODIV/CAMA program and there is a retention schedule for property record cards (“PRC”).
- Revaluation contracts require firms to deliver PRCs to the municipality, which utilize them to make the data files.
- The Tax Assessor’s handbook refers to permanent PRCs and information that should be contained within an assessor’s files.

Statement of Information:

On March 13, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on January 7, 2014. The Custodian affirmed that she sent the request to the Tax Collector, who in turn forwarded it to the Tax Assessor. The Custodian affirmed that the Borough sent the Complainant responsive CAMA data via e-mail on March 4, 2014.⁶

Response:

On March 4, 2014, the Custodian responded in writing to the Complainant’s OPRA request. Therein, she disclosed to the Complainant five (5) CAMA data files.

Additional Submissions:

On May 4, 2014, the Complainant e-mailed the GRC asking whether the Borough ever submitted an SOI. The Complainant noted that he had not received one. On May 5, 2014, the GRC forwarded the Complainant a copy of the SOI.

⁵ On January 10, 2011, the Senate passed S-2234 (Sca) 1R by a vote of 39-0. On that same date, the bill was received in the Assembly and referred to the Assembly Housing and Local Government Committee. Neither S-2234 nor its Assembly counterpart, A-3227, saw any further action in the Assembly during the 2010-2011 legislative session. The Complainant might instead be referring to S-1213, which Governor Christie signed into law as L. 2013, c. 15, on January 25, 2013.

⁶ The Custodian did not include as part of the SOI a copy of the correspondence sent to the Complainant. Further, the data was not attached to e-mail transmitting the SOI.

On January 16, 2019, the GRC sought additional information from the Custodian. Therein, the GRC noted that the Custodian certified that she provided the responsive CAMA data to the Complainant via e-mail on March 4, 2014. The GRC noted, however, that the Custodian did not attach a copy of that correspondence. Further, the GRC stated that the Custodian did not address whether any responsive pictures existed. The GRC thus requested that the Custodian provide a copy of the response e-mail, as well as a legal certification answering the following question:

1. Did the Borough maintain any photographs responsive to the Complainant's OPRA request at the time of receipt of said request?

The GRC requested that the Custodian provide the request e-mail and certification as soon as possible, but by January 22, 2019.

On the same day, the Custodian responded to the GRC's request for additional information. Therein, the Custodian attached an e-mail chain dated March 4, 2014. The Custodian affirmed that the chain included her e-mail to the Complainant including all five (5) CAMA data files and a forwarded e-mail to Custodian's Counsel confirming disclosure. Additionally, the Custodian certified that at the time that she received the Complainant's OPRA request, the Borough did not maintain responsive photographs.

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).⁷ 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).

The Complainant filed this complaint asserting that the Custodian failed to respond to his OPRA request. In the SOI, the Custodian certified that she received the Complainant's OPRA request on January 6, 2014. However, the Custodian certified that she responded on March 4, 2014, well beyond the seven (7) business days as provided for in OPRA. Thus, the evidence of record supports that a "deemed" denial of access occurred.

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

⁷ 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.

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. However, the GRC declines to order disclosure of the responsive CAMA data because the Custodian disclosed same to the Complainant on March 4, 2014 via e-mail.

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 Council has previously found that, in light of a custodian’s certification that no records responsive to the request exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). Here, the Custodian responded on March 4, 2014 providing access to responsive CAMA data but did not identify whether any photographs existed. The Custodian similarly did not address the existence of photographs in the SOI. Notwithstanding, in response to a request for additional information on January 16, 2019, the Custodian certified that the Borough did not maintain any responsive photographs. Additionally, there is no evidence in the record to refute the Custodian’s certification.

Therefore, the Custodian has borne her burden of proof that she lawfully denied access to the requested property photographs because she certified, and the record reflects, that no responsive record exists. N.J.S.A. 47:1A-6; Pusterhofer, GRC 2005-49.

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 the instant matter, the Custodian's failure to respond within the statutory time frame resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian ultimately disclosed responsive CAMA data to the Complainant via e-mail on March 4, 2014. Further, the Custodian did not unlawfully deny access to the requested photographs because none existed. 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 Council Staff 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). However, the GRC declines to order disclosure of the responsive CAMA data because the Custodian disclosed same to the Complainant on March 4, 2014 via e-mail.
2. The Custodian has borne her burden of proof that she lawfully denied access to the requested property photographs because she certified, and the record reflects, that no responsive record exists. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The Custodian's failure to respond within the statutory time frame resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian ultimately disclosed responsive CAMA data to the Complainant on March 4, 2014. Further, the Custodian did not unlawfully deny access to the requested photographs because none existed. 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
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