



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

September 30, 2014 Government Records Council Meeting

Cherie LaPelusa
Complainant

Complaint No. 2014-72

v.

City of Bayonne (Hudson)
Custodian of Record

At the September 30, 2014 public meeting, the Government Records Council (“Council”) considered the September 23, 2014 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 seek an extension of time to respond until a date certain results in a “deemed” denial of the Complainant’s OPRA request. *See* N.J.S.A. 47:1A-5(i); Hardwick v. New Jersey Department of Transportation, GRC Complaint No. 2007-164 (February 2008).
2. The Custodian has borne his burden of proving that he did not unlawfully deny access to the requested public employee salary information because he certified that he disclosed all responsive records to the Complainant, the Complainant has not provided any evidence to refute such certification, and the GRC’s powers do not include authority over a record’s accuracy. *See* N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-7(b); Kohn v. Township of Livingston, GRC Complaint No. 2009-203 & 2009-211 (January 2011); LoBosco v. New Jersey Department of Health & Human Services, GRC Complaint No. 2010-64 (October 2010); Kwanzaa v. Department of Corrections, GRC Complaint No. 2004-167 (March 2005); Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005); Toscano, GRC 2005-59; Gillespie v. Newark Public School, GRC Complaint No. 2004-105 (November 2004); Katinsky v. River Vale Township, GRC Complaint No. 2003-68 (November 2003).
3. Although the Custodian violated N.J.S.A. 47:1A-5(i), the Custodian did conduct an additional search in order to satisfy the Complainant’s request and did not unlawfully deny her access to the requested records. Additionally, the evidence of record does



not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and 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 September, 2014

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: October 3, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 30, 2014 Council Meeting**

**Cherie LaPelusa¹
Complainant**

GRC Complaint No. 2014-72

v.

**City of Bayonne (Hudson)²
Custodial Agency**

Records Relevant to Complaint: A complete list of full time, part time, and seasonal employees of the City of Bayonne, including their job titles, hire dates, and salaries.

Custodian of Record: Robert F. Sloan

Request Received by Custodian: January 14, 2014

Response Made by Custodian: January 14, 2014; May 5, 2014

GRC Complaint Received: February 6, 2014

Background³

Request and Response:

On January 14, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. That same day, the Assistant Corporation Counsel for the City of Bayonne (“City”) replied by stating that the request had been forwarded to the City’s Law Division for review and by asking the Complainant to allow time for the City’s response.

On May 5, 2014, subsequent to the filing of this complaint, the Custodian informed the Complainant that the requested records were available for pick-up.

Denial of Access Complaint:

On September 24, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that the records she requested constitute immediate access materials. The Complainant states that she visited the City Clerk’s

¹ No legal representation listed on record.

² Represented by Peter Cecinini, Esq. (Bayonne, N.J.).

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.

office and the City Law Division on January 27, but that the individuals there told her that they did not know the status of the request.

Statement of Information:

On May 5, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that he received the request on January 14, 2014 and responded that day asking for an extension of time to provide a response. The Custodian also certifies that he made the requested records available to the Complainant on May 5, 2014. The Custodian does not offer any additional legal arguments.

Additional Submissions:

On May 6, 2014, the Complainant submitted an email to the GRC contending that the records provided to her are inaccurate.

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).

Requests for certain records require an expedited response, as OPRA also states that “[i]mmediate access ordinarily shall be granted to . . . public employee salary and overtime information.” N.J.S.A. 47:1A-5(e). The Council has held that this language requires a custodian to respond immediately to a requestor either granting or denying access, asking for additional time to respond, or seeking clarification. *See* Gelber v. City of Hackensack (Bergen), GRC Complaint No. 2011-215 (April 2012); Herron v. Twp. of Montclair (Essex), GRC Complaint No. 2006-178 (February 2007).

A custodian additionally has an obligation to provide a requestor with an anticipated deadline date upon which records will be provided. In Hardwick v. N.J. Department of Transportation, GRC Complaint No. 2007-164 (February 2008), the custodian requested, in writing, an extension of time to respond but failed to provide an anticipated date certain upon which the requested records would be provided. The Council subsequently held that the

⁴ A custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

Custodian's request for an extension of time was inadequate under OPRA pursuant to N.J.S.A. 47:1A-5(i). Id.

Here, an attorney for the City responded to the request on the day that it was received by stating that it had been forwarded to the City's Law Division and by asking for additional time to respond. As in Hardwick, however, the Complainant was not provided with an anticipated date at which a more concrete response either granting or denying access, seeking clarification, or requesting another extension of time would be provided. *See* Hardwick, GRC 2007-164.

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 seek an extension of time to respond until a date certain results in a "deemed" denial of the Complainant's OPRA request. *See* N.J.S.A. 47:1A-5(i); Hardwick, GRC 2007-164.

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 found no unlawful denial of access when a custodian certified that he provided all responsive records to complainant, and there existed no credible evidence in the record to refute such certification. *See* Kohn v. Twp. of Livingston, GRC Complaint No. 2009-203 & 2009-211 (January 2011); Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).

Additionally, N.J.S.A. 47:1A-7(b) delineates the Council's powers and duties. Such powers and duties do not include authority over a record's accuracy or whether a record was filed in accordance with existing guidelines. *See* LoBosco v. N.J. Dep't of Health & Human Servs., GRC Complaint No. 2010-64 (October 2010). In Kwanzaa v. Department of Corrections, GRC Complaint No. 2004-167 (March 2005), the Council held that it "does not oversee the content of documentation" but "does oversee the disclosure and non-disclosure of documents." *See also* Toscano v. N.J. Dep't of Labor, GRC Complaint No. 2005-59 (September 2005) (finding GRC does not have authority over condition of records provided by Custodian); Gillespie v. Newark Pub. Sch., GRC Complaint No. 2004-105 (November 2004) (holding GRC does not have authority to adjudicate validity of record); Katinsky v. River Vale Twp., GRC Complaint No. 2003-68 (November 2003) (stating integrity of requested record is not within GRC's authority to adjudicate).

Here, the Custodian certified that he provided the responsive employee information to the Complainant on May 5, 2014. Following her receipt of these records, the Complainant stated that she believed the information contained therein to be inaccurate. However, the Complainant has not provided any evidence to refute the Custodian's certification that he released all responsive

records. Further, the GRC oversees the disclosure of documents but does not have authority over the content of such records. See Kwanzaa, GRC 2004-167.

Therefore, the Custodian has borne his burden of proving that he did not unlawfully deny access to the requested public employee salary information because he certified that he disclosed all responsive records to the Complainant, the Complainant has not provided any evidence to refute such certification, and the GRC's powers do not include authority over a record's accuracy. See N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-7(b); Kohn, GRC 2009-203 & 2009-211; LoBosco, GRC 2010-64; Kwanzaa, GRC 2004-167; Burns, GRC 2005-68; Toscano, GRC 2005-59; Gillespie, GRC 2004-105; Katinsky, GRC 2003-68.

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 violated N.J.S.A. 47:1A-5(i), the Custodian did conduct an additional search in order to satisfy the Complainant's request and did not unlawfully deny him access to the requested records. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and 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 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 seek an extension of time to respond until a date certain results in a "deemed" denial of the Complainant's OPRA request. *See* N.J.S.A. 47:1A-5(i); Hardwick v. New Jersey Department of Transportation, GRC Complaint No. 2007-164 (February 2008).

2. The Custodian has borne his burden of proving that he did not unlawfully deny access to the requested public employee salary information because he certified that he disclosed all responsive records to the Complainant, the Complainant has not provided any evidence to refute such certification, and the GRC's powers do not include authority over a record's accuracy. *See* N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-7(b); Kohn v. Township of Livingston, GRC Complaint No. 2009-203 & 2009-211 (January 2011); LoBosco v. New Jersey Department of Health & Human Services, GRC Complaint No. 2010-64 (October 2010); Kwanzaa v. Department of Corrections, GRC Complaint No. 2004-167 (March 2005); Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005); Toscano, GRC 2005-59; Gillespie v. Newark Public School, GRC Complaint No. 2004-105 (November 2004); Katinsky v. River Vale Township, GRC Complaint No. 2003-68 (November 2003).

3. Although the Custodian violated N.J.S.A. 47:1A-5(i), the Custodian did conduct an additional search in order to satisfy the Complainant's request and did not unlawfully deny him access to the requested records. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

Prepared By: Robert T. Sharkey, Esq.
Staff Attorney

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

September 23, 2014