



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

October 28, 2014 Government Records Council Meeting

Cherie LaPelusa
Complainant

Complaint No. 2014-73

v.

City of Bayonne (Hudson)
Custodian of Record

At the October 28, 2014 public meeting, the Government Records Council (“Council”) considered the October 21, 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. Although the Custodian responded in writing to the Complainant’s OPRA request immediately, his response was insufficient because he failed to provide a date certain upon which the Custodian would respond to the Complainant’s OPRA request. N.J.S.A. 47:1A-5(i); Hardwick v. NJ Dep’t of Transp., GRC Complaint No. 2007-164. (February 2008), *See also* Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011). However, the GRC declines to order disclosure of the requested records because same were disclosed on May 12, 2014.
2. While the Custodian violated N.J.S.A. 47:1A-5(g) by failing to provide the responsive records within the extended deadline, he provided same on May 12, 2014, following review by his counsel. 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 28th Day of October, 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 30, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 28, 2014 Council Meeting**

**Cherie LaPelusa¹
Complainant**

GRC Complaint No. 2014-73

v.

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

Records Relevant to Complaint: Electronic copies via email of:

1. Copy of contract between city of Bayonne and Robert Bianchi, Esq.
2. All invoices of Bianchi law firm to Bayonne.
3. All checks, front and back, paid by Bayonne to Robert Bianchi or his "law group."

Custodian of Record: Robert F. Sloan, Esq.

Request Received by Custodian: January 16, 2014

Response Made by Custodian: January 16, 2014

GRC Complaint Received: February 7, 2014

Background³

Request and Response:

On January 16, 2014, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the relevant documents. On January 16, 2014, the Custodian's Counsel responded by letter stating that he had received the request and asked for Complainant to "allow time" for "legal review and processing" of the request. On January 27, 2014, Complainant was verbally advised by the Custodian's Counsel that he would immediately get back to her.

Denial of Access Complaint:

On February 7, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that she submitted her OPRA request on January 16, 2014. She further asserted that, on the same day as her request, the

¹ No legal representation listed on record.

² Represented By Charles D'Amico, Esq. (Bayonne, 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.

Custodian's Counsel sent her a letter advising that he was reviewing the request and processing it. On January 27, 2014, the Custodian's Counsel verbally advised the Complainant that he would reply to the request immediately, but never did.

Supplemental Submissions:

On May 12, 2014, the seventy-ninth (79th) business day after receipt of the request, the Custodian's Counsel responded on behalf of the Custodian disclosing the responsive records to the Complainant.

Statement of Information:

On May 14, 2014, the Custodian filed a Statement of Information ("SOI"). In it, he stated that the previous attorney handling the request, assigned for such work in December 2013 was "relatively new" and "unfamiliar with OPRA." Accordingly, the relevant records were provided to Complainant on May 12, 2014.

Analysis

Sufficiency of Response

OPRA provides that "[i]mmediate access ordinarily shall be granted to budgets, bills, vouchers, contracts, including collective negotiation agreements and individual employment contracts, and public employee salary and overtime information." N.J.S.A. 47:1A-5(e).

OPRA provides that a custodian may have an extension of time to respond to a complainant's OPRA request, but the custodian must provide a date certain. N.J.S.A. 47:1A-5(i). OPRA further requires that should the custodian fail to provide a response on that specific date, "access shall be deemed denied." Id.

In Hardwick v. New Jersey Dep't of Transp., GRC Complaint No. 2007-164 (February 2008), the custodian provided a written response to the complainant's OPRA request on the seventh (7th) business day following receipt of same. The custodian requested an extension of time to respond but failed to notify the complainant of when the requested records would be provided. The Council held that:

[B]ecause the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days of when the requested records would be made available pursuant to N.J.S.A. 47:1A-5(i), the Custodian's written response to the Complainant . . . and the request for an extension of time . . . are inadequate under OPRA and the Complainant's request is "deemed" denied 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 (October 2007)].

Hardwick, GRC 2007-164.

Here, the Custodian's Counsel responded to the Complainant's requests on the same day as the request was made. However, the response merely said more time was needed to process and review the request. The Custodian's Counsel made what amounted to a request of an open ended extension of time. Custodian's Counsel made no further response until he provided an item-specific reply to the Complainant on May 12, 2014, several months after the deadline to respond.

Therefore, although the Custodian responded in writing to the Complainant's OPRA request immediately, his response was insufficient because he failed to provide a date certain upon which he would respond to the Complainant's OPRA request. N.J.S.A. 47:1A-5(i); Hardwick, GRC 2007-164. *See also Bentz v. Borough of Paramus (Bergen)*, GRC Complaint No. 2008-89 (June 2011). However, the GRC declines to order disclosure of the requested records because same were disclosed on May 12, 2014.

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)).

While the Custodian violated N.J.S.A. 47:1A-5(i) by failing to provide the responsive records within the extended deadline, he provided same on May 12, 2014, following review by his counsel. 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. Although the Custodian responded in writing to the Complainant's OPRA request immediately, his response was insufficient because he failed to provide a date certain upon which the Custodian would respond to the Complainant's OPRA request. N.J.S.A. 47:1A-5(i); Hardwick v. NJ Dep't of Transp., GRC Complaint No. 2007-164. (February 2008), *See also* Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011). However, the GRC declines to order disclosure of the requested records because same were disclosed on May 12, 2014.

2. While the Custodian violated N.J.S.A. 47:1A-5(g) by failing to provide the responsive records within the extended deadline, he provided same on May 12, 2014, following review by his counsel. 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, Esq.
Staff Attorney

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

October 21, 2014