



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

November 18, 2014 Government Records Council Meeting

Gregory Byrnes
Complainant

Complaint No. 2014-83

v.

Township of Teaneck (Bergen)
Custodian of Record

At the November 18, 2014 public meeting, the Government Records Council (“Council”) considered the October 21 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not timely respond 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 resulted 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 Kelly v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). However, it is unnecessary for the Council to order disclosure of the requested records because the Custodian did disclose the records to the Complainant on April 1, 2014. *See also* Marinaccio v. Borough of Fanwood (Union), GRC Complaint No. 2012-180 (May 2013).
2. Although the Custodian violated N.J.S.A. 47:1A-5(i) by failing to respond within the statutorily mandated seven (7) business days, she provided the records responsive to the Complainant’s request on April 1, 2014, after learning of her oversight. 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 18th Day of November, 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: November 20, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

Gregory Byrnes¹
Complainant

GRC Complaint No. 2014-83

v.

Township of Teaneck (Bergen)²
Custodial Agency

Records Relevant to Complaint: All e-mails sent or received by Steven M. Gluck on January 23 and 24, 2014.

Custodian of Record: Jamie Evelina

Request Received by Custodian: January 28, 2014

Response Made by Custodian: April 1, 2014

GRC Complaint Received: February 18, 2014

Background³

Request and Response:

On January 28, 2014 the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the relevant documents.

Denial of Access Complaint:

On February 18, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he submitted his OPRA request on January 28, 2014, and that as of the date of filing he had received no response from the custodian.

Supplemental Submissions:

On April 1, 2014, thirty (30) business days after the filing of the Denial of Access Complaint and forty-four (44) business days after submission of the OPRA request, the Custodian disclosed the responsive records to Complainant.

¹ No legal representation listed on record.

² Represented by William F. Rupp Esq., of Winne, Banta & Hetherington (Hackensack, 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.

Statement of Information:

On April 14, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified she received that Complainant’s OPRA request via email on January 28, 2014; however, owing to the number of e-mails she receives daily and other duties, she overlooked that particular email. As a result she did not become aware of the OPRA request until March 7, 2014. The records were then reviewed by legal counsel for Teaneck. The Custodian certified that she personally questioned Mr. Gluck regarding his emails, and that Mr. Gluck confirmed that he had not used his personal email accounts while conducting government business. The Custodian certified that on April 1, 2014, she provided the responsive records to the Complainant.

Additional Submissions

On April 3, 2014, Complainant replied via email to the Custodian’s SOI. He questioned the sufficiency of the Custodian’s search. The Complainant argued that the search was narrow because it was not clear that the Custodian included the personal emails of Mr. Gluck in the event that any government business was conducted by Mr. Gluck while using his personal e-mail accounts.

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 Custodian admitted that she failed to respond in writing in a timely manner to the Complainant’s March 19, 2012 OPRA request. The Custodian certified that she “overlooked” the OPRA request via email on January 28, 2014 by Complainant and therefore she did not respond to it. The Custodian certified that she only became aware of the request when she learned on March 7, 2014 of the OPRA complaint. After a review of the records by Township Counsel she disclosed the requested records to the Complainant on the forty-fourth (44th) business day following receipt of the request.

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.

Accordingly, the Custodian did not timely respond 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 resulted 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, it is unnecessary for the Council to order disclosure of the requested records because the Custodian disclosed the records to the Complainant on April 1, 2014. See Marinaccio v. Borough of Fanwood (Union), GRC Complaint No. 2012-180 (May 2013).

Additionally, the GRC notes that the Complainant argued that the Custodian did not conduct a thorough search because it was unclear whether she checked to determine if Mr. Gluck used his personal email accounts while conducting government business. However, this argument is contrary to the certified evidence provided by the Custodian, who stated she inquired of Mr. Gluck if he used his personal accounts and was told that he had not. Therefore, there is no basis for finding the Custodian conducted an insufficient search.

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(g) and N.J.S.A. 47:1A-5(i) by failing to respond within the statutorily mandated seven (7) business days, she provided the records responsive to the Complainant's request on April 1, 2014, after learning of her oversight. 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 timely respond 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 resulted 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 Kelly v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). However, it is unnecessary for the Council to order disclosure of the requested records because the Custodian did disclose the records to the Complainant on April 1, 2014. *See also* Marinaccio v. Borough of Fanwood (Union), GRC Complaint No. 2012-180 (May 2013).

2. Although the Custodian violated N.J.S.A. 47:1A-5(i) by failing to respond within the statutorily mandated seven (7) business days, she provided the records responsive to the Complainant's request on April 1, 2014, after learning of her oversight. 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, 2014⁵

⁵ This complaint was prepared for adjudication at the Council's October 28, 2014 meeting, but could not be adjudicated due to lack of quorum.

Gregory Byrnes v. Township of Teaneck (Bergen), 2014-83 - Findings and Recommendations of the Executive Director