



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

April 26, 2016 Government Records Council Meeting

Harry B. Scheeler, Jr.
Complainant

v.

Borough of Helmetta (Middlesex)
Custodian of Record

Complaint No. 2015-139

At the April 26, 2016 public meeting, the Government Records Council (“Council”) considered the March 22, 2016 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 item No. 1. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond immediately in writing to the Complainant’s OPRA request item No. 1, either granting access, denying access, seeking clarification, or requesting an extension of time, results in a “deemed” denial of the Complainant’s OPRA request. N.J.S.A. 47:1A-5(e); N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Cody v. Middletown Twp. Public Schools, GRC Complaint No. 2005-98 (December 2005); Harris v. NJ Dep’t of Corr., GRC Complaint No. 2011-65 (August 2012); Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-330 (Interim Order dated February 26, 2013). *See also* Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007). However, the Council should decline to order disclosure of any records because the Custodian provided same to the Complainant on May 19, 2015.
2. The Custodian’s failure to respond immediately to the Complainant’s OPRA request item No. 1 resulted in a “deemed” denial. N.J.S.A. 47:1A-5(e); N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian provided the Complainant access to the records responsive to OPRA request item No. 1 on May 19, 2015. 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 26th Day of April, 2016

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: May 2, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 26, 2016 Council Meeting**

**Harry B. Scheeler, Jr.¹
Complainant**

GRC Complaint No. 2015-139

v.

**Borough of Helmetta (Middlesex)²
Custodial Agency**

Records Relevant to Complaint: Copies of:

1. All legal bills submitted for payment in 2015 for the Borough of Helmetta (“Borough”) solicitor, conflict solicitor, and labor counsel.
2. All pending lawsuits and Denial of Access Complaints filed with the Government Records Council (“GRC”).
3. Documents for the Custodian and Deputy Clerk showing vacation, sick and other paid missed days of work in 2014 and 2015.

Custodian of Record: Sandra Bohinski
Request Received by Custodian: May 12, 2015
Response Made by Custodian: May 19, 2015
GRC Complaint Received: May 20, 2016³

Background⁴

Request and Response:

On May 11, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On May 19, 2015, the fifth (5th) business day after receipt of the OPRA request, the Custodian responded in writing providing access to records responsive to all three (3) request items totaling 268 pages.

Denial of Access Complaint:

On May 20, 2016, the Complainant filed a Denial of Access Complaint with the GRC.

¹ No legal representation listed on record.

² Represented by David Clark, Esq., of Gluck, Walrath, LLP (Trenton, NJ).

³ The Complainant verified and e-mailed his complaint to the GRC on May 18, 2015.

⁴ 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 contended that the Custodian violated OPRA by failing to provide him the responsive legal bills immediately. N.J.S.A. 47:1A-5(e); Scheeler, Jr. v. Motor Vehicle Comm'n, GRC Complaint No. 2013-207 (January 2014)(holding that the custodian violated OPRA by failing to properly respond to a request seeking immediate access records until the third (3rd) business after receipt of same). The Complainant thus requested that the GRC: 1) determine that the Custodian violated OPRA by failing to immediately disclose the responsive records; and 2) order disclosure of the records, to include those not falling within the immediate access provision, in accordance with OPRA.

Statement of Information:

On June 3, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on May 12, 2015. The Custodian certified that her search included obtaining files from the Finance Department. The Custodian affirmed that she also checked with the Custodian’s Counsel to ensure that the Borough was in receipt of all responsive bills. The Custodian certified that she responded in writing on May 19, 2015, providing the Complainant access to 268 pages of records. The Custodian certified that the Borough did not employ a deputy clerk.

The Custodian contended that she did not intentionally withhold the responsive bills from the Complainant. The Custodian noted that she was out on May 15, 2015, and that her assistant was out due to a medical emergency on May 18, 2015. Additionally, the Custodian averred that the Borough was inundated with requests at that time and were in the process of preparing twenty-five (25) responses. The Custodian asserted that she was focused on fulfilling the Complainant’s OPRA request item Nos. 2 and 3; thus, she overlooked the “immediate access” nature of OPRA request item No. 1. The Custodian noted that the Complainant sought legal bills for 2014 one (1) week prior, and she provided them immediately.

Analysis

Timeliness

Unless a shorter time period is otherwise provided, a custodian must 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 accordingly 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).⁵ 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).

⁵ 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.

Likewise, barring extenuating circumstances, a custodian's failure to respond immediately in writing to a complainant's OPRA request for immediate access records, either granting access, denying access, seeking clarification, or requesting an extension of time, also results in a "deemed" denial of the request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i).⁶ See Cody v. Middletown Twp. Public Schools, GRC Complaint No. 2005-98 (December 2005); Harris v. NJ Dep't of Corr., GRC Complaint No. 2011-65 (August 2012). See also Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007)(holding that the custodian was obligated to notify the complainant immediately as to the status of immediate access records). Additionally, if immediate access items are contained within a larger OPRA request containing a combination of records that require a response within seven (7) business days and also immediate access records requiring an immediate response, a custodian still has an obligation to respond to immediate access items immediately. See Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-330 (Interim Order dated February 26, 2013).

Here, the Complainant's OPRA request item No. 1 sought "legal bills." The Council has consistently determined that attorney invoices are immediate access records under OPRA. N.J.S.A. 47:1A-5(e); Muska v. Millburn Bd. of Educ., GRC Complaint No. 2004-41 (May 2004); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-204, *et seq.* (Interim Order dated October 26, 2010); Dittrich v. City of Hoboken (Hudson), GRC Complaint No. 2010-279 (February 2012). As such, the Custodian had an obligation to respond to the Complainant's OPRA request item No. 1 immediately, granting or denying access, requesting additional time to respond, or requesting clarification. The evidence of record reveals, however, that the Custodian did not initially respond to the Complainant's request until May 19, 2015, which was the fifth (5th) business day following receipt of the request. Consistent with all decisions above, the Custodian violated N.J.S.A. 47:1A-5(e) by failing to respond immediately to the Complainant's OPRA request item No. 1.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request item No. 1. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond immediately in writing to the Complainant's OPRA request item No. 1, either granting access, denying access, seeking clarification, or requesting an extension of time, results in a "deemed" denial of the Complainant's OPRA request. N.J.S.A. 47:1A-5(e); N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Cody, GRC 2005-98 and Harris, GRC 2011-65; Kohn, GRC 2011-330. See also Herron, GRC 2006-178. However, the Council should decline to order disclosure of any records because the Custodian provided same to the Complainant on May 19, 2015. The GRC need not address the Custodian's actions regarding the Complainant's OPRA request item Nos. 2 and 3. Specifically, said items did not seek immediate access records, the Complainant filed this complaint three (3) business days prior to the expiration of the statutory time frame set forth in N.J.S.A. 47:1A-5(i), and the Custodian provided the Complainant access to all responsive records on May 19, 2015.

⁶ OPRA lists immediate access records as "budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information." N.J.S.A. 47:1A-5(e). The Council has also determined that purchase orders and invoices are immediate access records. See Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2012-03 (April 2013).

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 this matter, the Custodian’s failure to respond immediately to the Complainant’s OPRA request item No. 1 resulted in a “deemed” denial. N.J.S.A. 47:1A-5(e); N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian provided the Complainant access to the records responsive to OPRA request item No. 1 on May 19, 2015. 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 Executive Director 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 item No. 1. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond immediately in writing to the Complainant’s OPRA request item No. 1, either granting access, denying access, seeking clarification, or requesting an extension of time, results in a “deemed” denial of the Complainant’s OPRA request. N.J.S.A. 47:1A-5(e); N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Cody v. Middletown Twp. Public Schools, GRC Complaint No. 2005-98 (December 2005); Harris v. NJ

- Dep't of Corr., GRC Complaint No. 2011-65 (August 2012); Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-330 (Interim Order dated February 26, 2013). *See also* Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007). However, the Council should decline to order disclosure of any records because the Custodian provided same to the Complainant on May 19, 2015.
2. The Custodian's failure to respond immediately to the Complainant's OPRA request item No. 1 resulted in a "deemed" denial. N.J.S.A. 47:1A-5(e); N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian provided the Complainant access to the records responsive to OPRA request item No. 1 on May 19, 2015. 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
Communications Specialist/Resource Manager

April 19, 2016