



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

January 31, 2017 Government Records Council Meeting

Terri L. Howell
Complainant

Complaint No. 2015-249

v.

Township of Greenwich (Warren)
Custodian of Record

At the January 31, 2017 public meeting, the Government Records Council (“Council”) considered the December 6, 2016 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 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 Council should decline to order disclosure of the responsive records because the Complainant confirmed on October 25, 2016 that she received same.
2. The Custodian’s failure to provide a completed Statement of Information to the GRC, despite more than one request, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian’s failure to respond additionally obstructed the GRC in its efforts to “receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . .” N.J.S.A. 47:1A-7(b).
3. The Custodian failed to respond to the Complainant’s OPRA request within the statutory time frame, thus resulting in a “deemed” denial of access. Additionally, the Custodian’s failure to submit a Statement of Information resulted in a violation of the GRC’s regulations. However, the Complainant confirmed that the Custodian ultimately provided all responsive records. Further, 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 did 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, 2017

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 3, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 31, 2017 Council Meeting**

**Terri Howell¹
Complainant**

GRC Complaint No. 2015-249

v.

**Township of Greenwich (Warren)²
Custodial Agency**

Records Relevant to Complaint: Copies of Resolution No. 2011-95 and meeting minutes dated October 27, 2011.

Custodian of Record: Kimberly Viscomi
Request Received by Custodian: June 30, 2015
Response Made by Custodian: None
GRC Complaint Received: July 31, 2015

Background³

Request and Response:

On June 30, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. The Custodian did not respond.

Denial of Access Complaint:

On July 31, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian never responded to her OPRA request.

Statement of Information:

On August 14, 2015, the GRC requested a completed Statement of Information (“SOI”) from the Custodian. After the Custodian failed to respond within the provided five (5) business days, the GRC sent a “No Defense” letter to the Custodian on August 26, 2015, requesting a

¹ No legal representation listed on record.

² Represented by James Moscagiuri, Esq., of Lavery, Selvaggi, Abromitis & Cohen, P.C. (Hackettstown, NJ). Previously represented by Francesco Taddeo, Esq. (Somerville, 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.

completed SOI within three (3) business days of receipt. On August 31, 2015, the Custodian e-mailed the GRC, stating that she would provide an SOI by 7:00 p.m. On September 9, 2015, the GRC e-mailed the Custodian, advising that it had not yet received the Custodian's SOI. To date, the GRC has not received a response from the Custodian.

Additional Submissions

On October 24, 2016, the Custodian's Counsel e-mailed the GRC, advising that the Complainant had agreed to withdraw the instant complaint. The Custodian's Counsel requested that the Complainant confirm this by responding to all parties.

On October 25, 2016, the Custodian's Counsel again e-mailed the GRC, indicating that the Complainant contacted him to advise that, although she was satisfied with the Custodian's disclosure of records, she wanted the Custodian's timeliness violation to be memorialized. The Custodian's Counsel stated that the Complainant also advised that she would submit a letter to the GRC to confirm all of the foregoing.

On the same day, the Complainant faxed a letter to the Custodian's Counsel, acknowledging that she received the responsive records but stressing that she did not wish to withdraw her complaint. The Custodian's Counsel subsequently forwarded the Complainant's letter to the GRC.

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 Complainant filed the instant complaint, asserting that the Custodian did not respond to her OPRA request. Thereafter, the Custodian failed to submit an SOI. Accordingly, the evidence of record supports that the Custodian violated OPRA by failing to respond in writing in a timely manner.

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

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.

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, GRC 2007-11. However, the Council should decline to order disclosure of the responsive records because the Complainant confirmed on October 25, 2016 that she received same.

Failure to Submit SOI

In crafting OPRA, the Legislature defined the GRC's authority, which includes a statutory mandate to "receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian." N.J.S.A. 47:1A-7(b). To carry out those duties, the GRC promulgated regulations that require custodians to "submit a completed and signed [SOI] form to the Council and the complainant simultaneously that details the custodians' position for each complaint filed with the Council[.]" N.J.A.C. 5:105-2.4(a). The GRC's regulations further require that:

Custodians shall submit a completed and signed SOI for each complaint to the Council's staff and the complainant not later than five business days from the date of receipt of the SOI form from the Council's staff . . . Failure to comply with this time period may result in the complaint being adjudicated based solely on the submissions of the complainant.

N.J.A.C. 5:105-2.4(f).

Finally, the GRC's regulations provide that "[a] custodian's failure to submit a completed and signed SOI . . . may result in the Council's issuing a decision in favor of the complainant." N.J.A.C. 5:105-2.4(g). In Alterman, Esq. v. Sussex Cnty. Sheriff's Office, GRC Complaint No. 2013-353 (September 2014), the custodian failed to provide a completed SOI to the GRC within the allotted deadline. Thus, the Council noted the custodian's failure to adhere to N.J.A.C. 5:105-2.4(a).

In the instant matter, the Custodian did not comply with the GRC's initial request for an SOI. After the expiration of the five (5) business day deadline, the GRC again attempted to obtain a completed SOI from the Custodian by sending a "No Defense" letter and requesting a completed SOI within three (3) business days of receipt. In an e-mail to the GRC on August 31, 2015, the Custodian acknowledged that she intended to submit an SOI by 7:00 p.m. on that day. However, the GRC has yet to receive a completed SOI from the Custodian, even after contacting the Custodian on September 9, 2015, to notify her that she had not yet submitted it.

Accordingly, the Custodian's failure to provide a completed SOI to the GRC, despite more than one request, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian's failure to respond additionally obstructed the GRC in its efforts to "receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . ." N.J.S.A. 47:1A-7(b).

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)).

Here, the Custodian failed to respond to the Complainant’s OPRA request within the statutory time frame, thus resulting in a “deemed” denial of access. Additionally, the Custodian’s failure to submit an SOI resulted in a violation of the GRC’s regulations. However, the Complainant confirmed that the Custodian ultimately provided all responsive records. Further, 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 did 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. 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 Council should decline to order disclosure of the responsive records because the Complainant confirmed on October 25, 2016 that she received same.

2. The Custodian's failure to provide a completed Statement of Information to the GRC, despite more than one request, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian's failure to respond additionally obstructed the GRC in its efforts to "receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . ." N.J.S.A. 47:1A-7(b).
3. The Custodian failed to respond to the Complainant's OPRA request within the statutory time frame, thus resulting in a "deemed" denial of access. Additionally, the Custodian's failure to submit a Statement of Information resulted in a violation of the GRC's regulations. However, the Complainant confirmed that the Custodian ultimately provided all responsive records. Further, 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 did 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

December 6, 2016⁵

⁵ This complaint was prepared for adjudication at the Council's December 13, 2016 meeting but could not be adjudicated due to lack of quorum.