



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

January 31, 2017 Government Records Council Meeting

David H. Lande, Esq.
Complainant

Complaint No. 2015-377

v.

Middlesex County Municipal Joint Insurance Fund
Custodian of Record

At the January 31, 2017 public meeting, the Government Records Council (“Council”) considered the January 24, 2017 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 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).
2. The Custodian has borne his burden of proof that he lawfully denied access to the requested reports because he certified in the Statement of Information, and the record reflects, that no responsive documents exist. N.J.S.A. 47:1A-6; Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
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. However, the Custodian did not unlawfully deny access to any records because no responsive records existed within the Middlesex County Municipal Joint Insurance Fund. 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**

**David H. Lande, Esq.¹
Complainant**

GRC Complaint No. 2015-377

v.

**Middlesex County Municipal Joint Insurance Fund²
Custodial Agency**

Records Relevant to Complaint: Hardcopies via U.S. mail of:

1. Any and all records and documents relating to requirements for employees of Middlesex County (“County”) returning to work from a work-related accidents/incidents.
2. Any and all records and documents related to any policy requiring a County employee out on workers’ compensation to undergo a functional capacity evaluation or “fit-for-duty” examination prior to returning to work.

Custodian of Record: G. Thomas Kurtz

Request Received by Custodian: November 9, 2015

Response Made by Custodian: None

GRC Complaint Received: November 23, 2015

Background³

Request and Response:

On November 9, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. The Complainant received no written response within seven (7) business days.

Denial of Access Complaint:

On November 23, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian failed to respond to his OPRA request.

¹ No legal representation listed on record.

² Represented by Ed Testino, Esq. (Matawan, 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.

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Statement of Information:

On December 22, 2015, the Custodian filed a Statement of Information (“SOI”).⁴ The Custodian certified that he failed to respond to the Complainant’s OPRA request. The Custodian apologized for this oversight but affirmed that the Middlesex County Municipal Joint Insurance Fund (“MCMJIF”) has no connection to the County. The Custodian certified that the MCMJIF only serves as “the claims adjuster for various *municipalities* within [the County] and surrounding areas.” (Emphasis in original). The Custodian certified that, for this reason, the MCMJIF did not maintain any responsive records.

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).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).

The Complainant filed this complaint, asserting that the Custodian failed to respond to him within the statutorily mandated time frame. In the SOI, the Custodian admitted to, and apologized for, his failure to respond timely to the Complainant’s OPRA request. Thus, the evidence of record supports that the Custodian violated OPRA by failing to respond timely to the Complainant’s OPRA request.

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 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, GRC 2007-11.

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

⁴ The Custodian did not certify to the date on which he received the Complainant’s OPRA request.

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.

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“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 previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. *See Pusterhofer v. NJ Dep’t of Educ.*, GRC Complaint No. 2005-49 (July 2005). Here, the Custodian failed to respond to the subject OPRA request. However, he certified in the SOI that the MCMJIF, an agency separate from the County, did not maintain responsive records regarding the County’s employment records or procedures. Additionally, there is no evidence in the record to refute the Custodian’s certification.

Accordingly, the Custodian has borne his burden of proof that he lawfully denied access to the requested reports because he certified in the SOI, and the record reflects, that no responsive documents exist. N.J.S.A. 47:1A-6; Pusterhofer, GRC 2005-49.

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. However, the Custodian did not unlawfully deny access to any records because no responsive records existed within the MCMJIF. 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 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 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).
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Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

January 24, 2017