



State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS

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KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

June 27, 2017 Government Records Council Meeting

Kenneth E. Langdon, Sr.
Complainant

Complaint No. 2016-105

v.

Township of Toms River (Ocean)
Custodian of Record

At the June 27, 2017 public meeting, the Government Records Council (“Council”) considered the June 20, 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’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. Because OPRA does not require custodians to research and compile information to create a record that may be responsive to an OPRA request, the Custodian had no legal duty to create a record containing the information that the Complainant specifically requested. Thus, the Custodian has met the burden of proof that access to the requested records was not unlawfully denied. N.J.S.A. 47:1A-6; MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005). See also Fang v. Dep’t of Transportation, GRC Complaint No. 2006-93 (May 2007), and Kehoe v. NJ Dep’t of Env’tl. Prot., Div. of Fish and Wildlife, GRC Complaint No. 2010-300 (July 2012). Additionally, because the Custodian certified that no records responsive to the Complainant’s request exist, and because there is no credible evidence in the record to refute the Custodian’s certification, the Custodian did not unlawfully deny access to said records. N.J.S.A. 47:1A-6; Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. Although the Custodian failed to respond in writing to the Complainant’s request within the statutorily mandated time frame, resulting in a “deemed” denial of the request, he did respond on the eighth business day following receipt of the request. Additionally, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were 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 27th Day of June, 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: June 30, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 27, 2017 Council Meeting**

**Kenneth E. Langdon, Sr.¹
Complainant**

GRC Complaint No. 2016-105

v.

**Township of Toms River (Ocean)²
Custodial Agency**

Records Relevant to Complaint: Copies of the 2016 tax assessment list summary for each of the following locations: Pelican Island (CVS# 1501-1599), North Beach (CVS# 1601-1699), and Ortley Beach (CVS# 1701-1799).

Custodian of Record: J. Mark Mutter
Request Received by Custodian: February 11, 2016
Response Made by Custodian: February 24, 2016
GRC Complaint Received: April 18, 2016

Background³

Request and Response:

On February 11, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On February 24, 2016, the eighth (8th) business day following receipt of said request, the Custodian responded by forwarding to the Complainant a copy of a February 23, 2016 memorandum from the Tax Assessor to the Custodian that stated that the requested records do not exist.

Denial of Access Complaint:

On April 18, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that on February 11, 2016, he sent the OPRA request to the Custodian and that the Custodian subsequently denied the request because the records were allegedly nonexistent.

¹ No legal representation listed on record.

² Represented by Anthony Merlino, Esq. (Toms River, 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.

The Complainant states that the three sections of the barrier islands for which he is requesting 2016 tax assessment list summaries are all within Toms River Township. The Complainant states that the assessment records for these sections previously provided Toms River residents with an in-depth view of how well recovery from Hurricane Sandy was progressing. The Complainant states that the fact that assessment records were available for over a decade, and were then denied when most useful, raises a question about the validity of the denial.⁴

Statement of Information:

On May 12, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on February 11, 2016, and responded in writing on February 23, 2016. The Custodian certifies that there are no responsive records because the requested records do not exist. The Custodian further certifies that, unlike in previous years, the Township never generated the records for its own use in 2016 and that the Township is not obligated to create a record for a requestor. The Custodian cited Paff v. Galloway Twp., 2016 WL 155127 (App. Div. 2016), for its holding that the municipality was not required to assemble a previously nonexistent record that extracts and compiles electronically-stored information.

Additional Submissions:

On June 7, 2017, in reply to the GRC’s inquiry regarding the nature of the Custodian’s response, the Custodian’s Counsel replied that the memorandum from the Tax Assessor to the Custodian, dated February 23, 2016, was the Custodian’s response to the request. Counsel stated that the memorandum was sent from the Clerk’s Office to the Complainant on February 24, 2016. As proof, Counsel attached a copy of the mailing envelope with a February 24, 2016 date stamp affixed.

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).

⁴ The Complainant attached to the complaint copies of the subject tax list district summaries for 2009 and 2015.

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.

Although the Custodian certified that he responded to the request on February 23, 2016, the evidence of record reveals that he actually responded on February 24, 2016. On February 24, 2016, the Custodian responded by mailing a copy of the Tax Assessor's February 23, 2016 memorandum to the Complainant to serve as notification that the requested records do not exist. February 24, 2016 was the eighth (8th) business day after the date the Custodian certified that he received the request.

Therefore, 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 "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.

In Fang v. Dep't of Transportation, GRC Complaint No. 2006-93 (May 2007), the complainant sought disciplinary action records and specified the particular information that the records had to contain. The custodian certified that no records existed which contained a compilation of the information specified by the complainant in the request. The Council, relying upon the court's decision in MAG, 375 N.J. Super. 534, held that "[b]ecause OPRA does not require custodians to research files to discern which records may be responsive to a request or compile records which do not otherwise exist, the Custodian has met his burden of proof that access to these records was not unlawfully denied pursuant to N.J.S.A. 47:1A-6. *See* [MAG]."

The Council subsequently applied its decision in Fang, GRC 2006-93, to the facts of Kehoe v. NJ Dep't of Env'tl. Prot., Div. of Fish and Wildlife, GRC Complaint No. 2010-300 (July 2012), to reach the same conclusion. The Council went on to determine that the custodian did not unlawfully deny access to the responsive records because he certified "that no records responsive to the Complainant's requests exist, and because there is no credible evidence in the record to refute the Custodian's certification . . ." (*citing* Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005)) Id. at 7. In Pusterhofer, the GRC determined that because the custodian certified that no records responsive to the request existed, and no evidence existed in the record to refute the custodian's certification, there was no unlawful denial of access to the requested records.

Here, similar to the facts of Fang, GRC 2006-93 and Kehoe, GRC 2010-300, the Custodian certified that no records exist for 2016 which contain a compilation of the information specified by the Complainant. Moreover, no credible evidence exists in the record to refute the Custodian's certification. The Custodian further certified that he properly denied access to the

request because OPRA does not require an agency to gather responsive information and create a new document.

Therefore, because OPRA does not require custodians to research and compile information to create a record that may be responsive to an OPRA request, the Custodian had no legal duty to create a record containing the information that the Complainant specifically requested. Thus, the Custodian has met the burden of proof that access to the requested records was not unlawfully denied. N.J.S.A. 47:1A-6; MAG, 375 N.J. Super. 534. See also Fang, GRC 2006-93, and Kehoe, GRC 2010-300. Additionally, because the Custodian certified that no records responsive to the Complainant's request exist, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to said records. 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 (Felder 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, although the Custodian failed to respond in writing to the Complainant's request within the statutorily mandated time frame, resulting in a “deemed” denial of the request, he did respond on the eighth business day following receipt of the request. Additionally, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were 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'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. Because OPRA does not require custodians to research and compile information to create a record that may be responsive to an OPRA request, the Custodian had no legal duty to create a record containing the information that the Complainant specifically requested. Thus, the Custodian has met the burden of proof that access to the requested records was not unlawfully denied. N.J.S.A. 47:1A-6; MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005). *See also* Fang v. Dep't of Transportation, GRC Complaint No. 2006-93 (May 2007), and Kehoe v. NJ Dep't of Env'tl. Prot., Div. of Fish and Wildlife, GRC Complaint No. 2010-300 (July 2012). Additionally, because the Custodian certified that no records responsive to the Complainant's request exist, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to said records. N.J.S.A. 47:1A-6; Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
3. Although the Custodian failed to respond in writing to the Complainant's request within the statutorily mandated time frame, resulting in a "deemed" denial of the request, he did respond on the eighth business day following receipt of the request. Additionally, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were 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: John E. Stewart

June 20, 2017