



State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS

101 SOUTH BROAD STREET

PO BOX 819

TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

November 14, 2017 Government Records Council Meeting

Jeffrey W. Sauter
Complainant

Complaint No. 2016-89

v.

Township of Colts Neck (Monmouth)
Custodian of Record

At the November 14, 2017 public meeting, the Government Records Council (“Council”) considered the November 8, 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 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 another extension of time within the extended time frame, 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). *See also* Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). Notwithstanding, the Council should decline to order disclosure of records because the Custodian did so between December 30, 2015, and March 4, 2016.
2. The Custodian failed to respond timely to the Complainant’s OPRA request within the ten (10) business day extension set forth in her initial response. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i). However, the Custodian ultimately provided those records responsive to the Complainant’s OPRA request. Further, the evidence of record does not indicate that the Custodian’s violations of OPRA 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 14th Day of November, 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: November 17, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 14, 2017 Council Meeting**

**Jeffrey W. Sauter¹
Complainant**

GRC Complaint No. 2016-89

v.

**Township of Colts Neck (Monmouth)²
Custodial Agency**

Records Relevant to Complaint: Hard copies via pick-up of:

1. The Township of Colts Neck (“Township”) policy, procedure, and forms concerning documenting and reporting a damaged Township-owned vehicle, including but not limited to cars, light trucks, sport utility vehicles (“SUV”), heavy duty trucks, and heavy-duty equipment, or one involved in any type of accident resulting in damage or loss.
2. Completed reports or forms, including police reports submitted to the Township formally reporting an accident, damage, or loss to a Township-owned vehicle or equipment from January 1, 2015, through November 30, 2015.
3. Insurance Fund (*i.e.*, New Jersey Municipal Excess Liability (“MEL”), Joint Insurance Fund (“JIF”), *etc.*) policies, procedures, and forms that the Township is required to submit when a Township-owned vehicle sustains damage, loss, or which was involved in an accident.
4. Completed reports and forms, including police reports submitted to the Township’s Insurance Fund formally reporting an accident, damage, or loss to a Township-owned vehicle or equipment from January 1, 2015, through November 30, 2015.

Custodian of Record: Beth Kara

Request Received by Custodian: December 3, 2015

Response Made by Custodian: December 14, 2015

GRC Complaint Received: March 30, 2016

Background³

Request and Response:

On December 2, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 14,

¹ No legal representation listed on record.

² Represented by Michael J. Giarusso, Esq., of Dilworth Paxson, LLP (Red Bank, 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.

Jeffrey W. Sauter v. Township of Colt’s Neck (Monmouth), 2016-89 – Findings and Recommendations of the Executive Director

2015, the seventh (7th) business day after receipt of the OPRA request, the Custodian responded in writing, obtaining additional time until December 29, 2015, to respond to the Complainant's OPRA request. On December 17, 2015, the Complainant e-mailed the Custodian, objecting to a ten (10) business day extension on the basis that he sought basic records, including policies and procedures in effect at the time of his OPRA request. The Complainant indicated that he would only agree to an extension until December 21, 2015.

On December 30, 2015, the first (1st) business day after the expiration of the extended time frame, Custodian's Counsel responded in writing on behalf of the Custodian. Therein, Counsel provided responses to each requested item. Regarding OPRA request item No. 1, Counsel stated that the Township followed its JIF's policies and procedures for reporting accidents and damages (see response to OPRA request item No. 3). Regarding requested item No. 2, Counsel stated that the Township Police Department provided several accident reports potentially responsive to the Complainant's OPRA request. Counsel further stated that he would need to review and redact those records in accordance with New Jersey Court Rules R. 1:38-7; thus, he would provide copies no later than January 6, 2016. Regarding requested item No. 3, Counsel provided access to the JIF "Manual of Policies and Procedures" regarding auto damage claims, as well as a loss-run sheet detailing the Township's damage claims for 2015. Regarding requested item No. 4, Counsel referred the Complainant to his responses to item Nos. 2 and 3.

On January 8, 2016, the Complainant e-mailed Custodian's Counsel, expressing confusion as to why the responsive records responsive to requested item Nos. 1 and 3 could not be disclosed within the initial seven (7) business days. The Complainant noted that he believed these basic policies should have been readily available. The Complainant also took issue with the additional extension for records responsive to requested item No. 2. The Complainant further noted that he did not receive completed forms as set forth in requested item No. 4.

On January 11, 2016, the Custodian's Counsel responded to the Complainant via e-mail, stating that he would be better able to respond by January 12, 2016. On January 12, 2016, Counsel responded to the Complainant, providing redacted accident reports responsive to requested item No. 2. Counsel further stated that he would review requested item No. 4 again to ensure the Township fully responded and would contact the Complainant on January 15, 2016.

On January 16, 2016, the Complainant e-mailed Custodian's Counsel, seeking a status update on his OPRA request, which had entered its sixth (6th) week. The Complainant also noted that he would retrieve hard copies of those records previously provided electronically. On January 19, 2016, Custodian's Counsel e-mailed the Complainant, advising that the Township was still reviewing its files and would respond if they had any further information.

On January 20, 2016, the Complainant e-mailed Custodian's Counsel, advising that a response to requested item No. 4 was still outstanding. On February 2, 2016, the Complainant sent a letter to the Custodian, seeking a status on the Township's response to requested item No. 4. The Complainant also noted that the Custodian did not provide any reports relating to a February 14, 2015 loss, which would have been responsive to requested item No. 2. On February 25, 2016, the Complainant again sent a letter to the Custodian, this time via certified mail, seeking an update on the status of his OPRA request.

On March 4, 2016, Custodian's Counsel e-mailed the Complainant, disclosing records regarding the February 14, 2015 loss. Additionally, Counsel stated that the Township was denying access to records responsive to requested item No. 4 as "communication[s] between a public agency and its insurance carrier . . ." N.J.S.A. 47:1A-1.1.

Denial of Access Complaint:

On March 30, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC").⁴ The Complainant asserted that the evidence of record here supported that the Custodian "and other Township officials" knowingly and willfully denied him access to his OPRA request, for which all responsive records otherwise not exempt were provided sixty-one (61) business days after submission. The Complainant noted that the Custodian and Counsel failed to respond within the extended time frame on several occasions and eventually failed to provide another date certain on which they would respond. Further, the Complainant asserted that the Custodian and Counsel ignored two (2) letters seeking a status update.

The Complainant alleged that he was troubled by the simplicity of the OPRA request weighed against the Custodian's lack of response. The Complainant noted that four (4) of his seven (7) written communications to the Custodian and Counsel over the fifty-four (54) extended business days (not include the original seven (7) business day time frame) were reminders. The Complainant contended that he believed he would never receive a final response had it not been for his own persistence to obtain status updates.

Statement of Information:

On April 18, 2017, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on December 3, 2015. The Custodian certified that she responded in writing on December 14, 2015, obtaining an extension until December 29, 2015. The Custodian certified that her search began on December 21, 2015, when she reached out to the Township Police Department, JIF, and MEL, seeking access to records responsive to the Complainant's OPRA request. The Custodian affirmed that she followed up with the Police Department, JIF, and MEL on December 29, 2015, and received several responsive records. The Custodian affirmed that she forwarded those records to Custodian's Counsel on the same day. The Custodian certified that Counsel provided a number of records to the Complainant on December 30, 2015, and sought additional time for review. The Custodian certified that over the ensuing three (3) months, she continuously contacted Police Department and JIF to obtain all available records. The Custodian affirmed that Counsel provided the Complainant a final response on March 4, 2016.

The Custodian contended that the evidence of record supported that she performed a good faith effort to comply with the Complainant's OPRA request fully, which was detailed and comprehensive. The Custodian certified that the OPRA request required her to engage multiple individuals, including Police Chief Kevin Sauter, Lt. Frank Leccese, other members of the Police

⁴ The Complainant did not take issue with the Custodian's denial of item No. 4 as part of his Denial of Access Complaint.

Department, MEL, and JIF in an extended dialogue. The Custodian affirmed that the timeline provided as part of the SOI illustrated the complex method required to fulfill the OPRA request. The Custodian argued that the Complainant's OPRA request necessarily required extensions but stressed that each time records became available, the Township disclosed them to the Complainant as soon as they were ready.

The Custodian contended that her good faith effort to comply was evident in the fact that responsive records were not in her immediate possession. The Custodian asserted that, contrary to the Complainant's Denial of Access Complaint allegations, the Township routinely kept him apprised of the status of his OPRA request and disclosed records as they became available. Further, the Custodian asserted that the Complainant never indicated that he would file a Denial of Access Complaint.

Additional Submissions:

On May 1, 2016, the Complainant submitted to the GRC a response to the SOI. Therein, the Complainant began by arguing that the Custodian's SOI timeline provides that she did not endeavor to provide all responsive records timely. The Complainant noted that the Custodian sought her first extension at 5:32 p.m. on the seventh (7th) business day. The Complainant also noted that the Custodian's timeline proved that she did not start gathering records until December 21, 2015. The Complainant contended that the Custodian's timeline hardly proved that the Custodian made a good faith effort to provide responsive records timely. The Custodian also contended that the Custodian did not provide supporting documentation for her timeline. He thus questioned the veracity of the timeline and argued that, at the very least, the Custodian should be required to submit the supporting documentation.

Further, the Complainant contended that the SOI timeline did not support that the Custodian acted in good faith. To the contrary, he argued that the timeline demonstrated the Custodian's knowing and willful conduct throughout the pendency of the subject OPRA request. The Complainant contended that receiving otherwise simplistic records almost a month and three (3) months after submission of the request does not constitute a good faith effort to comply with OPRA. The Complainant also reiterated from the Denial of Access Complaint that only his persistent follow-up communications spurred disclosure. The Complainant argued that the SOI timeline clearly showed the Township's culture of delaying responses and then obstructing access; such a culture is knowing and willful in nature.

Regarding OPRA request item Nos. 1 and 3, the Complainant contended that it should not have taken multiple extensions to provide the responsive policies, procedures, and forms. The Complainant expressed concern that the Township, a long-time member of the JIF and MEL, did not have these records on hand in case of an accident. The Complainant argued that these records should have easily been provided within the original seven (7) business day time frame. The Custodian alleged that the Custodian knowingly and willfully chose to delay production.

Regarding requested item Nos. 2 and 4, the Complainant expressed additional concern that the Township did not possess all records for the five (5) loss events that occurred between January and November 2015. The Complainant asserted that it seemed unreasonable that the

Township could have been confused in providing records for a small number of accidents. The Complainant alleged that the Custodian again knowingly and willfully delayed disclosure of records.

Finally, the Complainant argued that the six (6) deadline, sixty-one (61) business day delay in receiving a final response was unfortunate. The Complainant noted that the reason why he chose to file a complaint is not relevant here. However, he stated that he could have filed during the pendency of the OPRA request.

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).

In Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5th) business day after receipt of the complainant's March 19, 2007 OPRA request, seeking an extension of time until April 20, 2007, to fulfill the complainant's OPRA request. However, the custodian responded on April 20, 2007, stating that the requested records would be provided later in the week, and the evidence of record showed that no records were provided until May 31, 2007. The Council held that:

The Custodian properly requested an extension of time to provide the requested records to the Complainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. . . . however . . . [b]ecause the Custodian failed to provide the Complainant access to the requested records by the extension date anticipated by the Custodian, the Custodian violated N.J.S.A. 47:1A-5.i. resulting in a "deemed" denial of access to the records.

Id.

Here, similar to the facts in Kohn, GRC 2007-124, the Custodian timely responded in writing to the Complainant's OPRA request by requesting an extension until December 29, 2015. Thereafter, however, the Custodian failed to respond in writing to the Complainant until

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.

Jeffrey W. Sauter v. Township of Colt's Neck (Monmouth), 2016-89 – Findings and Recommendations of the Executive Director

December 30, 2015, where Custodian's Counsel provided access to responsive records. The response was one (1) business days after the expiration of the extended deadline to respond.

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 in writing to the Complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting another extension of time within the extended time frame, 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. *See also* Kohn, GRC 2007-124. Notwithstanding, the Council should decline to order disclosure of records because the Custodian did so between December 30, 2015, and March 4, 2016.⁶

Notwithstanding the "deemed" denial, the Complainant took issue with the Custodian's first (1st) extension of ten (10) business days. The GRC has historically determined that, regardless of a requestor's acceptance, a request for an extension to respond is valid and reasonable when a custodian timely responds in writing and provides an anticipated response date. *See* Rivera v. City of Plainfield Police Dep't (Union), GRC Complaint No. 2009-317 (May 2011); Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010). Recently, the Council began determining the reasonableness of extensions where a custodian sought multiple ones spanning months. Ciccarone v. NJ Dep't of Treasury, GRC Complaint No. 2013-280 (Interim Order, dated July 29, 2014). In the instant matter, the GRC finds that the initial ten (10) business day extension more closely aligns to Rivera, and Criscione, than Ciccarone. For this reason, the GRC declines to engage in a lengthier analysis of the extension. Moreover, the GRC notes that it does not reach the issue of the secondary extensions because the Complainant's OPRA request was already "deemed" denied at the time the Custodian sought them.

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

⁶ The GRC notes that the Complainant did not raise the Custodian's redactions and denial of access to records responsive to item No. 4 in his Denial of Access Complaint. Thus, the GRC did not address this denial. Jeffrey W. Sauter v. Township of Colt's Neck (Monmouth), 2016-89 – Findings and Recommendations of the Executive Director

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 timely to the Complainant's OPRA request within the ten (10) business day extension set forth in her initial response. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i). However, the Custodian ultimately provided those records responsive to the Complainant's OPRA request. Further, the evidence of record does not indicate that the Custodian's violations of OPRA 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 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 another extension of time within the extended time frame, 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). *See also* Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). Notwithstanding, the Council should decline to order disclosure of records because the Custodian did so between December 30, 2015, and March 4, 2016.
2. The Custodian failed to respond timely to the Complainant's OPRA request within the ten (10) business day extension set forth in her initial response. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i). However, the Custodian ultimately provided those records responsive to the Complainant's OPRA request. Further, the evidence of record does not indicate that the Custodian's violations of OPRA 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: Frank F. Caruso
Communications Specialist/Resource Manager

November 8, 2017