



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

August 28, 2018 Government Records Council Meeting

Joyce Blay
Complainant

Complaint No. 2017-02

v.

Township of Lakewood (Ocean)
Custodian of Record

At the August 28, 2018 public meeting, the Government Records Council (“Council”) considered the August 21, 2018 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 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 GRC declines to order disclosure because the Custodian provided the responsive records to the Complainant on January 5, 2017.
2. The Custodian’s failure to respond to the subject OPRA request within the statutory response time frame resulted in a “deemed” denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Notwithstanding, the Custodian disclosed all responsive records to the Complainant on January 5, 2017. 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 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 28th Day of August, 2018

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: August 30, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
August 28, 2018 Council Meeting**

**Joyce Blay¹
Complainant**

GRC Complaint No. 2017-2

v.

**Township of Lakewood (Ocean)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of tax payment records for a particular block and lot for 2004, 2011, 2012, and 2016, as well as the tax exemption file.

Custodian of Record: Kathryn Hutchinson

Request Received by Custodian: December 21, 2016

Response Made by Custodian: January 5, 2017

GRC Complaint Received: January 5, 2017

Background³

Request and Response:

On December 21, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian, copying Clerk’s Office staff members, seeking the above-mentioned records. The Complainant received an “undeliverable” receipt, and e-mailed the Custodian to advise that she would hand-deliver the request if necessary. The Complainant also copied Clerk’s Office staff and the Township of Lakewood’s (“Township”) outgoing Mayor.

On January 3, 2017, the Complainant e-mailed the Custodian stating that she confirmed that the subject OPRA request was received at the December 22, 2016 meeting. The Complainant noted that the seventh (7th) business day was set to expire at the end of the day. On the same day Florence J. Ochs e-mailed the Complainant advising that the Custodian was mistaken in confirming receipt of the subject OPRA request; she had confused the Complainant’s alleged request with a separate request submitted by a different individual. Ms. Ochs stated that a network issue on December 21, 2016 resulted in delivery failures, one of which was the subject OPRA request. The Complainant responded stating that although she received a delivery failure on

¹ No legal representation listed on record.

² Represented by Steven Secare, Esq., of Secare & Hensel, LLC (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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

December 21, 2016, she did not upon making a second attempt, copying the outgoing Mayor. The Complainant reiterated that a response was due by the end of the day.

On January 4, 2017, the Custodian e-mailed the Complainant corroborating Ms. Och's statement that she must have confused the alleged request with a separate one. The Custodian noted that she advised the Complainant numerous times that all requests should be sent to the "Township Clerk" e-mail account. The Custodian stated that the first request was not received because of server issues, and that the second attempt was not sent to the correct e-mail address as directed on the Township's OPRA request form. On the same day, the Complainant e-mailed the Custodian stating that she would allow a one (1) day extension to respond to the subject OPRA request. The Complainant realleged that the Custodian verbally confirmed receipt of the OPRA request on December 22, 2016 and that Ms. Och's contrary statements were "hearsay." In a follow-up e-mail, the Complainant noted that she did send both the initial OPRA request and second attempt to the "Township Clerk" e-mail account.

Denial of Access Complaint:

On January 5, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant stated that she twice submitted the subject OPRA request because the first submission encountered delivery issues. The Complainant noted that she also copied other Clerk's Office employees and the outgoing Mayor on the second submission, and did not receive a delivery failure. The Custodian alleged that despite receiving verbal confirmation on December 22, 2016 from the Custodian that the OPRA request was received, the Custodian failed to respond to it the within the statutory time frame. The Complainant argued that she even gave the Custodian a one (1) day extension, but still received no response.

Supplemental Response:

On January 5, 2017, the ninth (9th) business day after receipt of the request, the Custodian responded in writing via e-mail providing access to the responsive records. The Custodian noted that she received them from the Tax Collector on that day. The Custodian further noted that the Tax Collector was not able to address the OPRA request until midweek because the Township was closed on January 2, and she was off on January 3, 2017.

On the same day, the Complainant responded contending that she would not withdraw her complaint. The Complainant contended that the Custodian's response was already untimely, and that the filing of this complaint prompted the Custodian to disclose records. On January 6, 2017, the Complainant sent a fax to the GRC advising of the Custodian's response. The Complainant requested that the GRC continue with the adjudication to address the Township's failure to timely respond.

Statement of Information:

On January 30, 2017, the Custodian filed a Statement of Information ("SOI") attaching a certification from Marta Harrison. The Custodian certified that she did not receive the Complainant's OPRA request on December 21, 2016 through the proper e-mail address as noted

on the Township's official OPRA request form. See Harrison Cert. The Custodian, however, certified that the request was received through another e-mail address on December 21, 2016. The Custodian certified that after she received an e-mail regarding the subject OPRA request from the Complainant on January 3, 2017, she forwarded it to the Tax Collector for retrieval of the responsive records. The Custodian affirmed that the Tax Collector, who directed her staff not to disseminate information during her absence, was out of the office on January 3, and 4, 2017. The Custodian affirmed that upon her return on January 5, 2017, the Tax Collector retrieved and forwarded the responsive records to her office. The Custodian certified that she responded in writing to the Complainant on the same day providing those records.

The Custodian argued that the subject OPRA request was not received at the proper e-mail address due to a server issue. Further, the Custodian argued that she could not obtain and disclose records until the Tax Collector returned, as property tax information was maintained in that office. The Custodian argued that, taking into account the alleged date of receipt, surrounding circumstances caused her to respond two (2) business days late. The Custodian noted that the circumstances did not justify the delay, but should better explain how it occurred.⁴

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 the complaint currently before the Council, the Complainant alleged that the Custodian failed to timely respond to her OPRA request. In the SOI, the Custodian certified that the Township was having server issues and that the request was not received through the "Township Clerk" e-mail address. However, the Custodian did note that the subject request was received through another e-mail address. The Custodian also admitted that her response was delayed by two (2) business days based on the alleged date of receipt.

In determining whether a violation of OPRA occurred, the GRC first notes that public agencies have the ability to determine specific methods of transmission for OPRA requests so long

⁴ In response to Ms. Harrison's certification regarding the server issues, the Complainant alleged that she also copied the outgoing Mayor's personal employment account. The Complainant disputed that the server issue caused a response delay: the outgoing Mayor received and responded to the e-mail.

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.

as those methods do not present an unreasonable obstruction to access. See Paff v. City of East Orange, 407 N.J. Super. 221, 229 (App. Div. 2009); Dello Russo v. City of East Orange (Essex), GRC Complaint No. 2014-430 (Interim Order dated September 29, 2015). Further, in Paff v. Bordentown Fire Dist. No. 2 (Burlington), GRC Complaint No. 2012-158 (Interim Order dated May 28, 2013), the Council addressed the agency’s specific transmission methods, noting that they included proper contact information on the official OPRA request form.

In this complaint, the Custodian argued that the Complainant failed to submit her OPRA request to the “Township Clerk” e-mail address. Evidence of public notification of that address is included on the Township’s website; thus, requiring a requestor to use that e-mail comports with Paff, 407 N.J. Super. 221 and Paff, GRC 2014-430.⁶ However, in reviewing both the initial OPRA request and second attempt, it is clear that the Complainant followed the Township’s policy by using the correct e-mail address, among others. Thus, while a server issue may have disrupted delivery to that account, the Complainant followed the Township’s proper procedure (even if she also copied other parties). Of additional relevance, the Custodian certified in the SOI that the OPRA request, inclusive of the “Township Clerk” e-mail address, was received through another account on December 21, 2016. It would thus follow that the Custodian should have treated the request as “received” on that date and that the seventh (7th) business day was January 3, 2017. The Custodian confirms as much in the SOI. The Custodian also confirmed that she did not provide a proper response (granting access, denying access, seeking clarification, or requesting an extension of time) within the statutory time frame. Thus, the GRC is persuaded that the Complainant’s OPRA request was “deemed” denied.

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 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 GRC declines to order disclosure because the Custodian provided the responsive records to the Complainant on January 5, 2017.

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

⁶ <http://www.lakewoodnj.gov/department/clerk> (accessed August 2, 2018).

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 the matter currently before the Council, the Custodian’s failure to respond to the subject OPRA request within the statutory response time frame resulted in a “deemed” denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Notwithstanding, the Custodian disclosed all responsive records to the Complainant on January 5, 2017. 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 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 Council Staff 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 GRC declines to order disclosure because the Custodian provided the responsive records to the Complainant on January 5, 2017.

2. The Custodian’s failure to respond to the subject OPRA request within the statutory response time frame resulted in a “deemed” denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Notwithstanding, the Custodian disclosed all responsive records to the Complainant on January 5, 2017. 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 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

August 21, 2018