



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

February 26, 2019 Government Records Council Meeting

Stacie Percella
Complainant

Complaint No. 2017-140

v.

City of Bayonne (Hudson)
Custodian of Record

At the February 26, 2019 public meeting, the Government Records Council (“Council”) considered the February 19, 2019 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’s failure to timely respond resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian ultimately responded (via Ms. LaGatta) on the ninth (9th) business day after receipt of the subject OPRA request disclosing responsive records. Additionally, the evidence of record does not indicate that the Custodian’s technical violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do 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 26th Day of February, 2019



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: March 1, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
February 26, 2019 Council Meeting**

**Stacie Percella¹
Complainant**

GRC Complaint No. 2017-140

v.

**City of Bayonne (Hudson)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of “all records which reflect City of Bayonne [(“City”)] and/or James M. Davis and Vision Media Marketing” (to include correspondence, invoices, payments, e-mails, *etc.*) from July 1, 2014 to present.

Custodian of Record: Robert Sloan

Request Received by Custodian: June 5, 2017

Response Made by Custodian: June 16, 2017

GRC Complaint Received: June 26, 2017

Background³

Request and Response:

On June 5, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) requests to the Custodian seeking the above-mentioned records. On June 16, 2017, the ninth (9th) business day after receipt of the request, Christina LaGatta responded in writing on behalf of the Custodian advising that she was out of the office. Ms. LaGatta further stated that gathering responsive records took longer than expected; hence the response delay. Ms. LaGatta stated that attached was a full response to the subject OPRA request.

Denial of Access Complaint:

On June 26, 2017, the Complainant a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant argued that the Custodian failed to respond in a timely manner. The Complainant argued that if the City of Bayonne (“City”) knew there was going to be a delay, they should have responded timely stating this fact. The Complainant further argued

¹ No legal representation listed on record.

² Represented by John F. Coffey, II, Esq. (Bayonne, 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.

that notwithstanding the delay, the City's tracking form indicated that the City's search was completed on June 8, 2017.

The Complainant asserted that delayed and untimely responses appeared to be "the norm" for the City. The Complainant further asserted that Ms. LaGatta's absence from work was not a valid reason for delaying the response beyond seven (7) business days. The Complainant also argued that the City should not be "excused" because they admitted their wrong-doing. The Complainant noted that this was her sixth (6th) complaint against the City since April 2017.

Statement of Information:

On July 14, 2017, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on June 5, 2017. The Custodian certified that his search for the records involved forwarding the request to the Public Information Officer, Business Administrator, and Finance Department to search for responsive records. The Custodian certified that, on his behalf, Ms. LaGatta responded in writing on June 16, 2017 disclosing responsive records.

The Custodian argued that the subject request required review by multiple departments encompassing numerous employees. The Custodian further rejected the Complainant's assertion regarding the tracking form: it only proved the Finance Department completed a search on June 8, 2017. The Custodian averred that Ms. LaGatta received responses from the other departments thereafter.

The Custodian argued that there was a technical violation of OPRA; however, it was not knowing and willful in nature. The Custodian noted that the response was two (2) business days late, Ms. LaGatta recognized the delay in her response, and an explanation of the delay was included. The Custodian further noted that Ms. LaGatta could not send a response within the time frame because she was not at work to do so.

Finally, the Custodian asserted that the Complainant, a former employee, filed over "two [(2)] dozen OPRA requests" since December 2015. The Custodian asserted that the City made every effort to comply with those requests. The Custodian noted that the increase in OPRA requests and limited available resources required the City to adopt a policy of using the GRC's response templates to expedite requests going forward.

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).

The Complainant filed the instant complaint asserting that the City failed to respond in a timely manner. In both Ms. LaGatta's response and the SOI, the City admitted to the timeliness violation. Thus, the evidence of records supports that the Custodian's failure to respond until the ninth (9th) business day resulted in a "deemed" denial of access under OPRA.

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.

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)).

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 the matter currently before the Council, the Custodian's failure to timely respond resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian ultimately responded (via Ms. LaGatta) on the ninth (9th) business day after receipt of the subject OPRA request disclosing responsive records. Additionally, the evidence of record does not indicate that the Custodian's technical violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do 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 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's failure to timely respond resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian ultimately responded (via Ms. LaGatta) on the ninth (9th) business day after receipt of the subject OPRA request disclosing responsive records. Additionally, the evidence of record does not indicate that the Custodian's technical violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do 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
Acting Executive Director

February 19, 2019