



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

June 25, 2019 Government Records Council Meeting

Ralph Marsh
Complainant

Complaint No. 2017-198

v.

County of Essex
Custodian of Record

At the June 25, 2019 public meeting, the Government Records Council (“Council”) considered the June 18, 2019 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The original 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 original 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 her burden of proof that she lawfully denied access to the Complainant’s OPRA request because she certified in the Statement of Information, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The original 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 lawfully denied access to the request because no records existed. Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). Additionally, the evidence of record does not indicate that original Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original 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 25th Day of June 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: June 28, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
June 25, 2019 Council Meeting**

**Ralph Marsh¹
Complainant**

GRC Complaint No. 2017-198

v.

**County of Essex²
Custodial Agency**

Records Relevant to Complaint: Copies of all records (including correspondence, work orders, and invoices) regarding repairs and/or alterations to the public sidewalk and “tree lawn” abutting 276 West Passaic Avenue in Bloomfield, NJ since June 20, 2016.

Custodian of Record: Valentina Smoot Palchetti³
Request Received by Custodian: October 20, 2017
Response Made by Custodian: November 1, 2017
GRC Complaint Received: October 13, 2017

Background⁴

Request:

On August 23, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 7, 2017, the Complainant sent a follow-up letter, attaching the subject OPRA request, advising that he had not received a response from the County of Essex (“County”). On September 25, 2017, the Complainant sent a second follow-up letter, attaching the subject OPRA request, again reiterating that he did not receive a response from the County.

Denial of Access Complaint:

On October 13, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that he initially submitted his OPRA request on August 23, 2017 via certified mail. The Complainant noted that the County signed for his request on “August 25, 2017.” The Complainant stated that he attempted to obtain

¹ No legal representation listed on record.

² Represented by Courtney Gaccione, Esq. (Newark, NJ).

³ The original Custodian of Record, who was also named on this complaint, was Maite Gaeta.

⁴ 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.

a status to his request via certified mail on September 7, and 25, 2017. The Complainant asserted that the County failed to respond to his request in a timely manner, notwithstanding that it received his request.

Response:

On November 1, 2019, the Custodian responded to the Complainant's OPRA request in writing denying such because no responsive records existed.

Statement of Information:

On November 9, 2017, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on October 20, 2017. The Custodian affirmed that she entered the Complainant's OPRA request into the County's "online OPRA portal" with notifications sent to Public Works and Planning to locate records. The Custodian certified that both divisions advised her on November 1, 2017 that no records existed. The Custodian certified that she responded in writing on November 1, 2017 stating that no responsive records existed.

The Custodian affirmed that at the time the Complainant submitted his initial OPRA request, she was not the custodian of record for the County. The Custodian certified that she received the instant Denial of Access Complaint on or around October 20, 2017. The Custodian affirmed that she personally logged the request in the portal on October 24, 2017 after realizing the County's failure to respond. The Custodian acknowledged that the request was "deemed" denied; however, she noted that she did not become the County's custodian until October 1, 2017. The Custodian asserted that she did her best to respond once she was alerted to the request.

The Custodian certified that both Public Works and Planning conducted searches that yielded no resulting records. The Custodian averred that there could be two (2) reasons for this: 1) no records exist; or 2) the request was invalid. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546-547 (App. Div. 2005).

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

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.

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 matter before the Council, the Complainant sent his OPRA request to the County on August 23, 2017. The OPRA request, which was sent via certified mail to the correct street address, was signed for on August 29, 2017. The Complainant, after not receiving any response, sent his OPRA request twice more to the same address via certified mail. In both instances, employees within the County Counsel's office within where the original Custodian worked signed for the parcels. The Complainant filed this complaint after not receiving a response from the original Custodian. In the SOI, the Custodian certified that she did not receive the OPRA request until the filing of this complaint; she became the County's custodian on October 1, 2017. The Custodian certified that she endeavored to respond to the Complainant and did so on November 1, 2019 advising that no records existed.

The evidence of record supports that the original Custodian violated OPRA by failing to respond to the subject OPRA request within seven (7) business days after receipt. The Complainant provided sufficient evidence that he sent his OPRA request (and both follow-up letters) to the correct address and that staff within County Counsel's office received it. Thus, it is reasonable that the original Custodian received but failed to respond to the OPRA request and follow-up correspondence prior to the end of her tenure as the County's official custodian of record.

Therefore, the original 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 original 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.

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). Here, the Complainant's OPRA request sought records inclusive of correspondence, work-orders and invoices regarding repairs to a sidewalk and "tree lawn" in front of a Bloomfield property. The Custodian denied access to the Complainant's OPRA request, stating that Public Works or Planning had any responsive records. In the SOI, the Custodian certified to this fact, affirming that she sent the request to both departments, who conducted a search that yielded no records. Further, there is no evidence in the record to refute that the Custodian did not possess any responsive records.

Accordingly, the Custodian has borne her burden of proof that she lawfully denied access to the Complainant's OPRA request because she certified in the SOI, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see 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)).

In the matter before the Council, the original 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 lawfully denied access to the request because no records existed. Pusterhofer, GRC 2005-49. Additionally, the evidence of record does not indicate that original Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original 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 original 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 original 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 her burden of proof that she lawfully denied access to the Complainant's OPRA request because she certified in the Statement of Information, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The original 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 lawfully denied access to the request because no records existed. Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). Additionally, the evidence of record does not indicate that original Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original 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
Acting Executive Director

June 18, 2019