



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

July 30, 2019 Government Records Council Meeting

Michael Ranallo
Complainant

Complaint No. 2017-222

v.

City of Trenton (Mercer)
Custodian of Record

At the July 30, 2019 public meeting, the Government Records Council (“Council”) considered the July 23, 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 November 1, 2017 clarified OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to properly respond in writing to the Complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time immediately, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody v. Middletown Twp. Pub. Sch., GRC Complaint No. 2005-98 (December 2005); Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007); Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007). Notwithstanding, no further disclosure is required because, through Ms. Staton, the Custodian disclosed the responsive invoice to the Complainant on November 15, 2017.
2. The Custodian’s failure to properly respond immediately to the Complainant’s clarified OPRA request seeking invoices and purchase orders resulted in a violation of OPRA. N.J.S.A. 47:1A-5(e). Notwithstanding, the Custodian, through Ms. Staton, disclosed the responsive invoice to the Complainant on November 15, 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 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 30th Day of July 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: August 2, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
July 30, 2019 Council Meeting**

**Michael Ranallo¹
Complainant**

GRC Complaint No. 2017-222

v.

**City of Trenton (Mercer)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of the following information relating to the “glossy ‘book form’ of the Mayor’s State of the City Address:”

1. Total cost for printing.
2. Who was contracted to create and design the book?

Custodian of Record: Dwayne M. Harris

Request Received by Custodian: November 1, 2017

Response Made by Custodian: November 1, 2017

GRC Complaint Received: November 15, 2017

Background³

Request and Response:

On November 1, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On the same day, the Custodian responded in writing denying the request as invalid because it sought information and not specific records. N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007). The Custodian directed the Complainant to contact Public Information Officer Michael A. Walker. Thereafter, the Complainant e-mailed the Custodian clarifying his OPRA request as follows:

I am requesting any/all documents pertaining to the design printing of the brochure including invoices, purchase orders[,] check copies, communication with vendors, *etc.*

¹ No legal representation listed on record.

² Represented by Lori E. Caughman, Esq. (Trenton, 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.

On November 2, 2017, the Custodian acknowledged receipt of the Complainant's clarification. The Custodian stated that the portions of the clarified requests seeking "any/all documents" and "communications with vendors" was invalid. The Custodian, however, stated that the portion of the OPRA request seeking "invoices, purchase orders, and check copies" was valid and responsive records would be disclosed where "available."

On November 9, 2017, the Complainant e-mailed the Custodian advising that the statutory time frame expired on November 10, 2017 and he wanted to ensure that the City of Trenton ("City") was compliant with OPRA. The Complainant subsequently sent an e-mail to Deputy Municipal Clerk Cordelia Staton seeking a status update on his request, which had a deadline of November 10, 2017.⁴

On November 13, 2017, the Complainant again followed up with Ms. Staton asking if the City would respond by close of business on that day. On the same day, the Custodian asked Ms. Staton to follow up on the Complainant's OPRA request.

Denial of Access Complaint:

On November 15, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant contended that the City "frequently" engaged in noncompliance with OPRA. The Complainant asserted that in this instance, the City failed to respond to his clarified request in a timely manner. The Complainant noted that this is notwithstanding that he e-mailed reminders to the City.

Supplemental Response:

On November 15, 2017, Ms. Staton responded on behalf of the Custodian disclosing an unknown record. On November 16, 2017, the Complainant e-mailed Ms. Staton asserting that he did not see the "total cost for printing" in the record disclosed. Later that day, Ms. Staton forwarded the Complainant the invoice for printing the book.

Between December 1, 2017 and December 4, 2017, the Complainant and Custodian's Counsel exchanged e-mails regarding the City's response. On December 4, 2017, the Complainant noted that he received the records sought "outside of the specified time allowed" under OPRA. The Complainant also questioned the City's failure to provide the GRC a response to this complaint in a timely manner.

Statement of Information:

On December 4, 2017, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on November 1, 2017 and denied access to same as invalid on the same day. The Custodian certified that the Complainant asserted that the last day to respond was November 10, 2017; however, the City was closed in observation of Veteran's Day. The Custodian affirmed that following multiple exchanges with Ms.

⁴ The Complainant sent this e-mail to Ms. Staton after receiving an out-of-office message from the Custodian.

Staton, the City provided the responsive invoice (dated October 31, 2017) to the Complainant via e-mail.

The Custodian noted that the price for printing book was included in the disclosed invoice. The Custodian argued that the Complainant received the responsive record “in a timely fashion.”

Analysis

Immediate Access

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).

Likewise, barring extenuating circumstances, a custodian’s failure to respond immediately in writing to a complainant’s OPRA request for immediate access records, either granting access, denying access, seeking clarification, or requesting an extension of time, also results in a “deemed” denial of the request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i).⁶ See Cody v. Middletown Twp. Pub. Sch., GRC Complaint No. 2005-98 (December 2005) and Harris v. NJ Dep’t of Corr., GRC Complaint No. 2011-65 (August 2012). See also Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007) (holding that the custodian was obligated to notify the complainant immediately as to the status of immediate access records).

Here, the Complainant’s November 1, 2017 clarified OPRA request sought, among other records, “invoices, [and] purchase orders” regarding the printing of books. Such invoices and purchase orders are categorically considered records subject to “immediate access.” N.J.S.A. 47:1A-5(e). The Custodian initially confirmed receipt of the clarification on November 2, 2017 stating that “those are documents that will be provided in response, if they are available.” However, the Custodian did not respond granting access to a responsive invoice until November 15, 2017.

The parties do not dispute that the October 31, 2017 invoice was the record sought, which substantiates that the clarified request sought “immediate access” record. The Custodian here had “an obligation to immediately” respond to a Complainant’s clarified request either granting access, denying access, seeking clarification, or requesting an extension time. See also Kohn v. Twp. of

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.

⁶ OPRA lists immediate access records as “budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.” N.J.S.A. 47:1A-5(e). The Council has also determined that purchase orders and invoices are immediate access records. See Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2012-03 (April 2013).

Livingston (Essex), GRC Complaint No. 2011-330 (Interim Order dated February 26, 2013); Kaplan v. Winslow Twp. Bd. of Educ. (Camden), GRC Complaint No. 2011- 237 (Interim Order dated December 18, 2012). While the Custodian’s November 2, 2017 response was reasonably “immediate,” the Custodian failed to grant access, deny access, seek additional clarification, or obtain an extension of time to a date certain. Instead, the Custodian vaguely stated that invoices and purchase orders would be provided, if available. Thus, said response cannot be interpreted as a proper one under OPRA and all precedential case law, and a violation of N.J.S.A. 47:1A-5(e) has occurred.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant’s November 1, 2017 clarified OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to properly respond in writing to the Complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time immediately, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody, GRC 2005-98; Herron, GRC 2006-178; Harris, GRC 2011-65. Notwithstanding, no further disclosure is required because, through Ms. Staton, the Custodian disclosed the responsive invoice to the Complainant on November 15, 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 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 Custodian’s failure to properly respond immediately to the Complainant’s clarified OPRA request seeking invoices and purchase orders resulted in a violation of OPRA. N.J.S.A. 47:1A-5(e). Notwithstanding, the Custodian, through Ms. Staton,

disclosed the responsive invoice to the Complainant on November 15, 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 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 November 1, 2017 clarified OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to properly respond in writing to the Complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time immediately, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody v. Middletown Twp. Pub. Sch., GRC Complaint No. 2005-98 (December 2005); Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007); Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007). Notwithstanding, no further disclosure is required because, through Ms. Staton, the Custodian disclosed the responsive invoice to the Complainant on November 15, 2017.

2. The Custodian's failure to properly respond immediately to the Complainant's clarified OPRA request seeking invoices and purchase orders resulted in a violation of OPRA. N.J.S.A. 47:1A-5(e). Notwithstanding, the Custodian, through Ms. Staton, disclosed the responsive invoice to the Complainant on November 15, 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 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

July 23, 2019