



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

September 29, 2020 Government Records Council Meeting

Rhonda Peters
Complainant

Complaint No. 2017-33

v.

Township of Mansfield (Warren)
Custodian of Record

At the September 29, 2020 public meeting, the Government Records Council (“Council”) considered the September 22, 2020 Supplemental 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 the Council should accept the Honorable John P. Scollo’s, Administrative Law Judge, Initial Decision “**CONCLUD[ING]** that the Complainant] has failed to comply with the [OAL’s] Order dated July 17, 2020” *Id.* at 4. Further, the Council should accept the ALJ’s order that this complaint be “**DISMISSED WITH PREJUDICE.**” Thus, no further adjudication is required.

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 29th Day of September 2020

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: October 1, 2020



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
September 29, 2020 Council Meeting**

**Rhonda Peters¹
Complainant**

GRC Complaint No. 2017-33

v.

**Township of Mansfield (Warren)²
Custodial Agency**

Records Relevant to Complaint: Hardcopies of: road construction techniques that were designed and implemented (for the road along 38 Roosevelt Rd., Port Murray, N.J.) by the Mansfield Township (“Township”) Engineers, Mace Consulting Engineers in 1988-1992 which should include:

- Excavation mode
- Constriction Staking
- Clearing and Grubbing of the Road Construction Area
- General Equipment Considerations
- Bulldozer in Road Construction
- Installed drainage frames
- Hydraulic Excavator in Road Construction (if applicable)
- Subgrade Construction
- Subgrade Excavation with Bulldozer
- Fill Construction
- Compaction
- Subgrade Construction with Excavator
- Filter Window Construction (if applicable)
- Operating cost per hour

Custodian of Record: Dena Hrebenak

Request Received by Custodian: December 27, 2016

Response Made by Custodian: N/A

GRC Complaint Received: February 16, 2017

¹ Represented by Joshua L. Thomas, Esq., of Joshua L. Thomas & Associates (Chadds Ford, PA). Previously represented by Christian Barth, Esq., of Mattleman, Weinroth & Miller, P.C. (Cherry Hill, NJ).

² Represented by James F. Moscagiuri, Esq. of Lavery, Selvaggi, Abromitis, & Cohen (Hackettstown, NJ).

Background

July 30, 2019 Council Meeting:

At its July 30, 2019 public meeting, the Council considered the July 23, 2019 Supplemental Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian failed to comply with the Council's April 30, 2019 Interim Order. Specifically, the Custodian sought an extension of time to respond, which the GRC granted. However, on the last day of the extended deadline, while the Custodian responded that she had not received responsive records, she failed to seek an additional extension or provide a certification in accordance with the Council's Order.
2. "The Council shall, pursuant to New Jersey Rules Governing the Courts, R. 4:67-6, have the authority to enforce compliance with the orders and decisions issued by the Council." N.J.A.C. 5:105-2.9(c). The Council's April 30, 2019 Interim Order to disclose responsive records or certify that none were located is enforceable in the Superior Court if the Complainant decides to exercise that option. R. 4:67-6.
3. The Custodian's failure to timely respond to the request resulted in "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian failed to properly comply with the Council's April 30, 2019 Interim Order, resulting in the GRC being unable to determine whether an unlawful denial of access occurred. Therefore, it is possible that the Custodian actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, the complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.
4. Because the issue of whether the Custodian unlawfully denied access to records remains open, the GRC is unable to determine whether the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. Thus, for administrative ease, the Office of Administrative Law should determine whether the Complainant is a prevailing party and if so, the total amount of the fee award.

Procedural History:

On August 1, 2019, the Council distributed its Interim Order to all parties. On November 1, 2019, the complaint was transmitted to the Office of Administrative Law.

On September 4, 2020, the Honorable John P. Scollo, Administrative Law Judge ("ALJ"), issued an Initial Decision:

CONCLUD[ING] that because the [Complainant] has failed to comply with the [OAL's] Order dated July 17, 2020, the [Custodian's] unopposed Motion Dismiss Complaint Number 2017-33 with Prejudice must be granted.

[Id. at 4.]

The ALJ further “**ORDERED** that GRC Complainant Number 2017-33, filed by [the Complainant], and filed under OAL Docket Number GRC-15940-19, be and hereby is **DISMISSED WITH PREJUDICE.**” Id.

Analysis

Administrative Law Judge's Initial Decision

The Administrative Procedures Act (“APA”) provides that:

The head of the agency, upon a review of the record submitted by the [ALJ], shall adopt, reject or modify the [Initial Decision] no later than 45 days after receipt of such recommendations . . . Unless the head of the agency modifies or rejects the report within such period, the decision of the administrative law judge shall be deemed adopted as the final decision of the head of the agency.

[N.J.S.A. 52:14B-10(c).]

The ALJ's findings of fact are entitled to deference from the GRC because they are based upon the ALJ's determination of the credibility of the parties. “The reason for the rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses and, consequently, is better qualified to judge their credibility.” In the Matter of the Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div. 1989) (certif. denied 121 N.J. 615 (1990)). The Appellate Division affirmed this principle, underscoring that, “under existing law, the [reviewing agency] must recognize and give due weight to the ALJ's unique position and ability to make demeanor-based judgments.” Whasun Lee v. Bd. of Educ. of the Twp. of Holmdel, Docket No. A-5978-98T2 (App. Div. 2000), slip op. at 14. “When such a record, involving lay witnesses, can support more than one factual finding, it is the ALJ's credibility findings that control, unless they are arbitrary or not based on sufficient credible evidence in the record as a whole.” Cavalieri v. Bd. of Tr. of Pub. Emp. Ret. Sys., 368 N.J. Super. 527, 537 (App. Div. 2004).

The ultimate determination of the agency and the ALJ's recommendations must be accompanied by basic findings of fact sufficient to support them. State, Dep't of Health v. Tegnazian, 194 N.J. Super. 435, 442-43 (App. Div. 1984). The purpose of such findings “is to enable a reviewing court to conduct an intelligent review of the administrative decision and determine if the facts upon which the order is grounded afford a reasonable basis therefor.” Id. at 443. Additionally, the sufficiency of evidence “must take into account whatever in the record fairly detracts from its weight”; the test is not for the courts to read only one side of the case and, if they find any evidence there, the action is to be sustained and the record to the contrary is to be ignored

(citation omitted). St. Vincent's Hosp. v. Finley, 154 N.J. Super. 24, 31 (App. Div. 1977).

In the matter before the Council, the ALJ's Initial Decision, set forth as "Exhibit A," determined that:

The [Custodian] sent discovery requests to the [Complainant]. The [Complainant] did not serve discovery requests upon the [Custodian]. Since the [Custodian] was not served with discovery requests, the [Custodian] is deemed not to be in default of its discovery obligations. The [Complainant] has not yet responded to the [Custodian's] discovery requests (Interrogatories and Requests for Production of Documents dated December 12, 2019). The [OAL] held a status conference on February 3, 2020, part of which was devoted to urging the [Complainant] to complete her discovery obligations. [Custodian's] counsel has sent correspondence to the [Complainant's] counsel in an attempt to obtain the discovery in question. The [OAL] also sent several correspondences (dated April 10, 2020; May 19, 2020; and June 2, 2020 to the [Complainant's] counsel urging him to speak with his client to urge her to fulfill her discovery obligations. On April 10, 2020, [Complainant's Counsel] responded to the [OAL] stating that he was still waiting to hear back from his client about her discovery obligations and about whether she had found substitute counsel to represent her.

Despite numerous correspondences from [Custodian's] counsel and from the [OAL], and despite the entry of an Order of Dismissal without prejudice on July 17, 2020, the [Complainant] has neither produced discovery nor filed a Motion for Reconsideration of the [OAL's] July 17, 2020 Order of Dismissal without Prejudice.

Having had the opportunity to review the [Custodian's] Motion to Dismiss with Prejudice dated August 12, 2020, I **FIND** it to have been properly filed. The [OAL] has not received anything from the [Complainant's] counsel in opposition or in any way addressing the Motion to Dismiss with Prejudice, I **FIND** that said Motion is unopposed.

[Id. at 3-4.]

Based on the foregoing, the ALJ "**ORDERED** that GRC Complaint Number 2017-33 . . . be and hereby is **DISMISSED WITH PREJUDICE.**" Id. at 4.

Here, the ALJ fairly summarized the procedural and factual background in the Initial Decision, explaining why he concluded that the Complainant failed to comply with her discovery obligations and the Order of Dismissal dated July 17, 2020. The ALJ also explained that the Complainant failed to submit any opposition to the Custodian's Motion to Dismiss with Prejudice dated August 12, 2020. The ALJ's conclusions are aligned and consistent with those determinations. As such, the GRC is satisfied it can ascertain which facts the ALJ accepted as true, and further, finds that those facts provide a reasonable basis for the ALJ's conclusions.

Therefore, the Council should accept the ALJ's Initial Decision "**CONCLUD[ING** that the Complainant] has failed to comply with the [OAL's] Order dated July 17, 2020" Id. at 4. Further, the Council should accept the ALJ's order that this complaint be "**DISMISSED WITH PREJUDICE.**" Thus, no further adjudication is required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Council should accept the Honorable John P. Scollo's, Administrative Law Judge, Initial Decision "**CONCLUD[ING** that the Complainant] has failed to comply with the [OAL's] Order dated July 17, 2020" Id. at 4. Further, the Council should accept the ALJ's order that this complaint be "**DISMISSED WITH PREJUDICE.**" Thus, no further adjudication is required.

Prepared By: Samuel A. Rosado
Staff Attorney

September 22, 2020



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PHILIP D. MURPHY
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LT. GOVERNOR SHEILA Y. OLIVER
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INTERIM ORDER

July 30, 2019 Government Records Council Meeting

Rhonda Peters
Complainant

Complaint No. 2017-33

v.

Township of Mansfield (Warren)
Custodian of Record

At the July 30, 2019 public meeting, the Government Records Council (“Council”) considered the July 23, 2019 Supplemental Findings and Recommendations of the Council Staff 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 failed to comply with the Council’s April 30, 2019 Interim Order. Specifically, the Custodian sought an extension of time to respond, which the GRC granted. However, on the last day of the extended deadline, while the Custodian responded that she had not received responsive records, she failed to seek an additional extension or provide a certification in accordance with the Council’s Order.
2. “The Council shall, pursuant to New Jersey Rules Governing the Courts, R. 4:67-6, have the authority to enforce compliance with the orders and decisions issued by the Council.” N.J.A.C. 5:105-2.9(c). The Council’s April 30, 2019 Interim Order to disclose responsive records or certify that none were located is enforceable in the Superior Court if the Complainant decides to exercise that option. R. 4:67-6.
3. The Custodian’s failure to timely respond to the request resulted in “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian failed to properly comply with the Council’s April 30, 2019 Interim Order, resulting in the GRC being unable to determine whether an unlawful denial of access occurred. Therefore, it is possible that the Custodian actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, the complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.
4. Because the issue of whether the Custodian unlawfully denied access to records remains open, the GRC is unable to determine whether the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. Thus, for administrative ease, the Office of Administrative Law should determine whether the Complainant is a prevailing party and if so, the total amount of the fee award.

Interim Order 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 1, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Rhonda Peters¹
Complainant**

GRC Complaint No. 2017-33

v.

**Township of Mansfield (Warren)²
Custodial Agency**

Records Relevant to Complaint: Hardcopies of: road construction techniques that were designed and implemented (for the road along 38 Roosevelt Rd., Port Murray, N.J.) by the Mansfield Township (“Township”) Engineers, Mace Consulting Engineers in 1988-1992 which should include:

- Excavation mode
- Constriction Staking
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- Operating cost per hour

Custodian of Record: Dena Hrebenak

Request Received by Custodian: December 27, 2016

Response Made by Custodian: N/A

GRC Complaint Received: February 16, 2017

Background

April 30, 2019 Council Meeting:

At its April 30, 2019 public meeting, the Council considered the April 23, 2019 Findings

¹ Represented by Christian Barth, Esq., of Mattleman, Weinroth & Miller, P.C. (Cherry Hill, NJ).

² Represented by Michael Lavery, Esq., of Lavery, Selvaggi, Abromitis, & Cohen (Hackettstown, NJ).

and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found 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 dated October 31, 2007).
2. The Custodian may have unlawfully denied access to the requested records. N.J.S.A. 47:1A-6. Thus, the Custodian must complete her search for responsive records and provide those that exist to the Complainant. Should the Custodian not locate any responsive records, she must certify to this fact.
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver³ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁴ to the Council Staff.⁵**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On May 2, 2019, the Council distributed its Interim Order to all parties. Thereafter, the Government Records Council ("GRC") did not receive a response from the Custodian but received an error message from Custodian's Counsel's e-mail address. On May 23, 2019, the GRC re-distributed its Interim Order to the Custodian and to Counsel's updated e-mail address.

³ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁴ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁵ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

On May 30, 2019, the Custodian responded to the GRC, stating that the responsive records were in the possession of a law firm that previously handled the matter. The Custodian attached a copy of the letter sent to the law firm request the file that contained said records. On May 31, 2019, the GRC replied to the Complainant, stating that notwithstanding the Custodian's efforts to locate responsive records, she was still required to comply with the Council's Interim Order within the allotted deadline. The GRC also stated that should the Custodian require additional time to locate the responsive records, she needed to make a formal request in writing.

On May 31, 2019, the Custodian responded via e-mail, requesting a time extension so that the law firm could locate the file. The GRC granted an additional five (5) business days so that the Custodian could comply with the Interim Order and stated that any further extension requests must show cause.

On June 7, 2019, the Custodian responded to the Council, stating that no response has been received from the law firm.

Analysis

Compliance

At its April 30, 2019 meeting, the Council ordered the Custodian to provide those records that may have been unlawfully withheld from access or submit a certification if they could not be produced. The Council further ordered the Custodian to submit a certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Council Staff. On May 2, 2019, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on May 9, 2019.

On May 23, 2019, the GRC re-submitted the Council's Interim Order using updated contact information and set a new deadline to comply. On May 30, 2019, the fifth (5th) business day after receipt of the Council's Order, the Custodian informed the GRC that the responsive records were being held by a law firm previously representing the township in the matter, and that a request for the records had been sent to the firm. The GRC responded the next day, stating that compliance was still required from the Custodian and extending the time to respond to until June 7, 2019. The GRC also noted that should the Custodian not be able to locate the records, she was still required to submit a certification in accordance with the Council's Order.

On June 7, 2019, the last day of the extended deadline for response, the Custodian e-mailed the GRC stating that the firm still had not provided any responsive records. However, the Custodian did not request an additional extension or provide a certification.

Therefore, the Custodian failed to comply with the Council's April 30, 2019 Interim Order. Specifically, the Custodian sought an extension of time to respond, which the GRC granted. However, on the last day of the time extension, the Custodian failed to respond. She had not received the records from the previous law firm. Notwithstanding, she failed to seek an additional extension or provide a certification in accordance with the Council's Order.

Council’s April 30, 2019 Interim Order is Enforceable

“The Council shall, pursuant to New Jersey Rules Governing the Courts, R. 4:67-6, have the authority to enforce compliance with the orders and decisions issued by the Council.” N.J.A.C. 5:105-2.9(c). The Council’s April 30, 2019 Interim Order to disclose responsive records or certify that none were located is enforceable in the Superior Court if the Complainant decides to exercise that option. R. 4:67-6.

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)).

Here, the Custodian’s failure to timely respond to the request resulted in “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian failed to properly comply with the Council’s April 30, 2019 Interim Order, resulting in the GRC being unable to determine whether an unlawful denial of access occurred. Therefore, it is possible that the Custodian actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, the complaint should be referred to the Office of Administrative Law (“OAL”) for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Prevailing Party Attorney’s Fees

Because the issue of whether the Custodian unlawfully denied access to records remains open, the GRC is unable to determine whether the Complainant is a prevailing party entitled to an

award of a reasonable attorney's fee. Thus, for administrative ease, the OAL should determine whether the Complainant is a prevailing party and if so, the total amount of the fee award.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Custodian failed to comply with the Council's April 30, 2019 Interim Order. Specifically, the Custodian sought an extension of time to respond, which the GRC granted. However, on the last day of the extended deadline, while the Custodian responded that she had not received responsive records, she failed to seek an additional extension or provide a certification in accordance with the Council's Order.
2. "The Council shall, pursuant to New Jersey Rules Governing the Courts, R. 4:67-6, have the authority to enforce compliance with the orders and decisions issued by the Council." N.J.A.C. 5:105-2.9(c). The Council's April 30, 2019 Interim Order to disclose responsive records or certify that none were located is enforceable in the Superior Court if the Complainant decides to exercise that option. R. 4:67-6.
3. The Custodian's failure to timely respond to the request resulted in "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian failed to properly comply with the Council's April 30, 2019 Interim Order, resulting in the GRC being unable to determine whether an unlawful denial of access occurred. Therefore, it is possible that the Custodian actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, the complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.
4. Because the issue of whether the Custodian unlawfully denied access to records remains open, the GRC is unable to determine whether the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. Thus, for administrative ease, the Office of Administrative Law should determine whether the Complainant is a prevailing party and if so, the total amount of the fee award.

Prepared By: Samuel A. Rosado
Staff Attorney

July 23, 2019



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INTERIM ORDER

April 30, 2019 Government Records Council Meeting

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At the April 30, 2019 public meeting, the Government Records Council ("Council") considered the April 23, 2019 Findings and Recommendations of the Council Staff 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 dated October 31, 2007).
2. The Custodian may have unlawfully denied access to the requested records. N.J.S.A. 47:1A-6. Thus, the Custodian must complete her search for responsive records and provide those that exist to the Complainant. Should the Custodian not locate any responsive records, she must certify to this fact.
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Council Staff.³**

¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

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4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
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On The 30th Day of April 2019

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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: May 2, 2019

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GOVERNMENT RECORDS COUNCIL**

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

**Rhonda Peters¹
Complainant**

GRC Complaint No. 2017-33

v.

**Township of Mansfield (Warren)²
Custodial Agency**

Records Relevant to Complaint: Hardcopies of:

Road construction techniques that were designed and implemented (for the road along 38 Roosevelt Rd., Port Murray, N.J.) by the Mansfield Township (“Township”) Engineers, Mace Consulting Engineers in 1988-1992 which should include:

- Excavation mode
- Constriction Staking
- Clearing and Grubbing of the Road Construction Area
- General Equipment Considerations
- Bulldozer in Road Construction
- Installed drainage frames
- Hydraulic Excavator in Road Construction (if applicable)
- Subgrade Construction
- Subgrade Excavation with Bulldozer
- Fill Construction
- Compaction
- Subgrade Construction with Excavator
- Filter Window Construction (if applicable)
- Operating cost per hour

Custodian of Record: Dena Hrebenak

Request Received by Custodian: December 27, 2016

Response Made by Custodian: N/A

GRC Complaint Received: February 16, 2017

¹ Represented by Christian Barth, Esq., of Mattleman, Weinroth & Miller, P.C. (Cherry Hill, NJ).

² Represented by Michael Lavery, Esq., of Lavery, Selvaggi, Abromitis, & Cohen (Hackettstown, NJ).

Background³

Request and Response:

On December 27, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.

Denial of Access Complaint:

On February 16, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that several weeks after filing her request, she called the Township by telephone for a status update. The Complainant stated that the Custodian was unavailable, but instead spoke with the Deputy Registrar. The Complainant then stated that she reached out to the Custodian by phone once more without success, then contacted Complainant’s Counsel.

The Complainant attached a letter dated January 16, 2017 sent by Complainant’s Counsel to the Custodian, contending that the Complainant had not received a response to her OPRA request. Thereafter, the Complainant stated that she successfully contacted the Custodian by phone.

The Complainant then stated that after not receiving any further response from the Custodian after their telephone conversation, she filed the instant complaint alleging a denial of access.

Statement of Information:

On April 6, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on December 27, 2016. The Custodian certified that she conducted a search of the Township’s records from zoning, the clerk’s office, engineering, tax assessor, and planning and zoning board. The Custodian certified that the search had been extensive without positive results. The Custodian asserted that the requested records were housed by a previous engineer at his private office and not at a Township office.

The Custodian certified that as of the date of the SOI, she was still searching for responsive records that have been turned over by the previous engineer. The Custodian stated that the only responsive record located thus far was a letter from the Complainant to the then-Mayor of the Township in 2008, and a response thereto from the previous engineer. The Custodian asserted that she did not deny access but explained that the requested records were not made in any cohesive order as they were handed over *en masse* from the previous engineer.

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.

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 dated October 31, 2007).

In the instant matter, the parties agree that the Custodian received the Complainant's OPRA request on December 27, 2016. However, there is no evidence in the record demonstrating that the Custodian responded to the Complainant in writing, either granting or denying access, or extended the time to respond. Instead, the Complainant asserted that she sought status updates from the Custodian via telephone. Additionally, the Complainant provided evidence that Complainant's Counsel sent a letter to the Custodian on January 16, 2017, seeking a status update from the Custodian, with no indication of the Custodian providing a written response to same.

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.

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.

In the instant matter, the Custodian asserted that her search for responsive records had not concluded at the time she provided her SOI. The Custodian did not assert an affirmative denial of access to the records sought but contended that the search has only produced correspondence from the Complainant to the then-Mayor, and the previous engineer's response.

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.

Therefore, the Custodian may have unlawfully denied access to the requested records. N.J.S.A. 47:1A-6. Thus, the Custodian must complete her search for responsive records and provide those that exist to the Complainant. Should the Custodian not locate any responsive records, she must certify to this fact.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prevailing Party Attorney's Fees

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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 dated October 31, 2007).
2. The Custodian may have unlawfully denied access to the requested records. N.J.S.A. 47:1A-6. Thus, the Custodian must complete her search for responsive records and provide those that exist to the Complainant. Should the Custodian not locate any responsive records, she must certify to this fact.
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver⁵ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁶ to the Council Staff.⁷**

⁵ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁶ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁷ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado
Staff Attorney

April 23, 2019

record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

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