



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

November 13, 2018 Government Records Council Meeting

John Doe
Complainant

Complaint No. 2017-56

v.

Township of Toms River (Ocean)
Custodian of Record

At the November 13, 2018 public meeting, the Government Records Council (“Council”) considered the November 7, 2018 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 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 two (2) OPRA requests 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 respond 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 did respond to both requests on March 16, and 23, 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 an 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 13th Day of November, 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: November 15, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
November 13, 2018 Council Meeting**

**John Doe¹
Complainant**

GRC Complaint No. 2017-56

v.

**Township of Toms River (Ocean)²
Custodial Agency**

Records Relevant to Complaint: Copy of:³

1. Licenses or authorization to sell used cars at 851 Route 37 West in Toms River, New Jersey.
2. Licenses or authorization to sell used cars at 1095 Route 37 West in Toms River, New Jersey.

Custodian of Record: J. Mark Mutter

Request Received by Custodian: March 6, 2017

Response Made by Custodian: March 16, 2017; March 23, 2017

GRC Complaint Received: March 16, 2017

Background⁴

Request:

On March 6, 2017, the Complainant submitted two (2) Open Public Records Act (“OPRA”) requests to the Custodian seeking the above-mentioned records.

Denial of Access Complaint:

On March 16, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”).⁵ The Complainant asserted that the Custodian failed to respond to either one of his OPRA requests.

¹ No legal representation listed on record.

² Represented by Anthony Merlino, Esq. (Toms River, NJ).

³ The Complainant submitted two (2) individual OPRA requests on the same day.

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.

⁵ The Complainant submitted his complaint to the GRC via e-mail at 8:28 p.m. on October 15, 2017.

John Doe v. Township of Toms River (Ocean), 2017-56 – Findings and Recommendations of the Council Staff

Response:

On March 16, 2017, the eighth (8th) business day after receipt of the second (2nd) OPRA request, the Custodian responded in writing advising that no records responsive to the request for 1095 Route 37 West existed.

On the same day, the Complainant e-mailed Shirley Broome, Secretary, stating that he was waiting on a response to the first (1st) OPRA request. On March 17, 2018, the Complainant again e-mailed Ms. Broome stating that he did not receive a response to the first OPRA request. On March 20, 2017, Ms. Broome forwarded the Complainant's e-mails to the Custodian for review.

On March 23, 2017, the thirteenth (13th) business day after receipt of the first (1st) OPRA request, the Custodian responded in writing advising that no records responsive to the request for 851 Route 37 West existed.

Statement of Information:

On March 30, 2017, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA requests on March 6, 2017. The Custodian affirmed that his search included submitted the request to Community Development. The Custodian certified that Community Development searched their files and determined that no records existed. The Custodian certified that he responded in writing on March 16, and 23, 2017 advising the Complainant that no records existed.

The Custodian first argued that this complaint should be dismissed as materially defective because the Complainant filed anonymously. *See A.A. v. Gramiccioni*, 442 N.J. Super. 276 (App. Div. 2005) (holding that anonymous court actions must be authorized by statute or court rule). The Custodian asserted that the GRC's adjudicatory process should be treated no different than the courts. The Custodian thus contended that although OPRA allows for anonymous requests, it does not provide them an avenue to remain anonymous when filing a complaint before the GRC.

Next, the Custodian argued that this complaint was frivolous. The Custodian contended that he timely responded in writing on March 16, 2017 denying access to the second (2nd) OPRA request because no records existed. The Custodian acknowledged that the response did not address the first (1st) OPRA request, which was inadvertent. The Custodian noted that he moved to cure the deficiency as soon as he was notified of it.⁶

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

⁶ The Custodian also argued that the Complainant should be "sanctioned for misrepresenting the facts" of this complaint to the Council. The GRC notes that its authority is limited to civil penalties assessed to "[a] public official, officer, employee or custodian . . ." N.J.S.A. 47:1A-7(b); N.J.S.A. 47:1A-11. OPRA does not include a sanction provision for complainants.

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).⁷ 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 instant complaint, the Complainant sent his OPRA requests to the Custodian on March 6, 2017. The Custodian certified that he received both requests on that day. The Complainant subsequently filed this complaint in the evening on March 15, 2017 alleging that the Custodian failed to respond in a timely manner. The Custodian certified in the SOI that he responded to the second (2nd) ORPA request on March 16, 2017. The Custodian further certified that due to an inadvertent mistake, he did not respond to the first (1st) OPRA request. The Custodian noted that he endeavored to respond after being notified of this oversight via e-mail. The Custodian certified that he responded thereafter on March 23, 2016.

The GRC’s case law consistently supports that the statutorily mandated response time frame begins the day after the custodian’s receipt of an OPRA request. See Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2009-289 (May 2011); Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-325 (Final Decision dated October 27, 2015). The GRC has memorialized this calculation in its training material, which is available on the GRC’s website. See “A Citizen’s Guide to [OPRA]” (2nd Edition – July 2011); “Handbook for Records Custodians” (5th Edition – January 2011).

Here, the Custodian confirmed receipt of the requests on March 6, 2017. Thus, the first (1st) business day was March 7, 2017. By the GRC’s calculation, the seventh (7th) and final business day to respond expired on March 15, 2017. Further, there is no evidence in the record to suggest that any non-business days occurred in the initial seven (7) business day time frame. For this reason, it is clear that the Custodian failed to respond in the statutory time frame and that a “deemed” denial of both OPRA requests occurred here.

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 two (2) OPRA requests 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

⁷ 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.

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 this matter, the Custodian’s failure to respond 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 did respond to both requests on March 16, and 23, 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 an 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 two (2) OPRA requests 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 respond 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 did respond to both requests on March 16, and 23, 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 an unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

November 7, 2018