



State of New Jersey
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Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

February 26, 2020 Government Records Council Meeting

Joyce Blay
Complainant

Complaint No. 2018-30

v.

Township of Lakewood (Ocean)
Custodian of Record

At the February 26, 2020 public meeting, the Government Records Council (“Council”) considered the January 21, 2020 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 her burden of proof that she timely responded to the Complainant’s February 13, 2018 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). However, the GRC declines to order disclosure of records responsive to Item No. 1 because the Custodian disclosed same to the Complainant on March 6, 2018 and March 28, 2018.
2. The Custodian’s failure to locate responsive records to the Complainant’s OPRA request Item No. 2 until after she conducted an additional search resulted in an insufficient search. Thus, the Custodian unlawfully denied access to the legal notice that was responsive to that portion of the Complainant’s OPRA request. N.J.S.A. 47:1A-6; Schneble v. N.J. Dep’t of Env’tl. Protection, GRC Complaint No. 2007-220 (April 2008); Scheeler, Jr. v. Woodbine Bd. of Educ. (Cape May), GRC Complaint No. 2014-59 (Interim Order dated January 30, 2015). However, the GRC declines to order disclosure of those records because the Custodian disclosed same to the Complainant on March 28, 2018.
3. Notwithstanding the Custodian’s “deemed” denial, she has borne her burden of proof that she lawfully denied access to the portion of the Complainant’s OPRA request Item No. 3 seeking proposals submitted to the Township of Lakewood for a contract award. Specifically, the Custodian certified, 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).

4. The Custodian's untimely response and insufficient search resulted in a "deemed" denial of access pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and N.J.S.A. 47:1A-6. However, the Custodian ultimately provided the Complainant with responsive records on March 6, 2018, and all located records on March 28, 2018. The Custodian also lawfully denied access to the Complainant's OPRA request item No. 3 because no records existed. 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 26th Day of February 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: March 3, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 26, 2020 Council Meeting**

**Joyce Blay¹
Complainant**

GRC Complaint No. 2018-30

v.

**Township of Lakewood (Ocean)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of:

1. December 2012 resolution or ordinance adopted by the Lakewood Township (“Lakewood”) Committee to hire DataMap Intelligence for 2012 and 2013;
2. Published copy in an official Lakewood newspaper of the May 2012 legal notice soliciting bids for the work DataMap was contracted to perform in 2012 and 2013 for the township; and
3. All proposals received by Lakewood in response to an advertised legal notice for the work DataMap was selected as the winning bid to perform.

Custodian of Record: Kathryn Hutchinson³
Request Received by Custodian: February 13, 2018
Response Made by Custodian: N/A
GRC Complaint Received: February 26, 2018

Background⁴

Request:

On February 13, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On February 23, 2018, the eighth (8th) business day after submission, Florence Ochs e-mailed the Complainant on behalf of the Custodian stating that the Custodian told her that the Complainant submitted more than one OPRA request,⁵ but did not have it on hand. Ms. Ochs asked the Complainant to re-send the OPRA request.

¹ No legal representation listed on record.

² Represented by Steven Secare, Esq., of Secare & Hensel Law Firm (Toms River, NJ).

³ The current Custodian of Record is Lauren Kirkman.

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 Executive Director the submissions necessary and relevant for the adjudication of this complaint.

⁵ This request is the subject of Blay v. Twp. of Lakewood (Ocean), GRC Complaint No. 2018-29.

That same day, the Complainant responded to Ms. Ochs, stating that she could not re-submit an OPRA request that may have been unlawfully denied. The Complainant told Ms. Ochs to review her e-mails and respond with an extension request if she failed to respond to the OPRA request.

On February 23, 2018, the Custodian replied to the Complainant, stating that in two (2) telephone messages the Complainant said she would resend the e-mailed OPRA request. The Custodian added that neither she nor Ms. Ochs received the request. The Complainant replied that same day, stating that she did not know of the e-mail being referenced in the telephone messages, and asked the Custodian to be more specific.

Denial of Access Complaint:

On February 26, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that after submitting her OPRA request directly to the Lakewood Clerk’s Office, the Custodian, and Ms. Ochs, she never received a response. The Complainant contended that her e-mail went through and she did not receive a delivery failure message.

The Complainant then stated that when asked by the Custodian and Ms. Ochs to resend the request, she refused, asserting that doing so would give Lakewood another seven (7) business days to respond. The Complainant argued that she was unaware of what telephone message the Custodian and Ms. Ochs referenced but maintained that she never received a response to her request.

Response:

On March 5, 2018, the Complainant sent an e-mail to the Custodian regarding her OPRA requests. Therein, the Complainant noted that the Custodian had yet to respond to her February 13, 2018 OPRA request.

On March 6, 2018, the Custodian responded to the Custodian. The Custodian stated that regarding the February 13, 2018 OPRA request, she attached a record in response to Item No. 1. The Custodian then stated that no responsive records exist for Item Nos. 2 and 3.

Statement of Information:

On March 27, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that her office inadvertently missed the e-mail sent by the Complainant, and therefore no response was provided. The Custodian certified that she reached out to the Complainant to ascertain what information she was missing, and that the Complainant left a voicemail message stating that she would resend her request.

The Custodian then argued that the Complainant stated that she was unaware of what message the Custodian was referring to, and then refused to resubmit any OPRA requests.

Additional Submissions:

On March 28, 2018, the Custodian responded to the Complainant, copying the GRC. Therein, the Custodian attached a copy of the Lakewood resolution responsive to request Item No. 1 of the request, as well as a copy of the legal notice announcing the contract award to DataMap. The Custodian also stated that no responsive records exist for request Item No. 3.

On November 7, 2019, the GRC requested additional information from the Custodian. Specifically, the GRC asked whether the Custodian ever located the February 13, 2018 OPRA request, and whether the Custodian still possessed the February 22, 2018 voicemail message sent by the Complainant.

On November 12, 2019, the Custodian responded to the GRC. The Custodian certified that her office ultimately located the February 13, 2018 OPRA request. The Custodian then certified that an employee was given the request response but did not forward it to the Complainant. The Custodian also certified that she was unable to locate the voicemail message. Lastly, the Custodian included a copy of the Lakewood resolution responsive to request Item No. 1 of the request, as well as a copy of the legal notice announcing the contract award given to DataMap.

On November 19, 2019, the GRC again requested additional information from the Custodian. Specifically, the GRC requested a copy of the response that was intended to be sent to the Complainant, and if no copy was available to certify whether responsive records exist for the Complainant's OPRA request Item Nos. 2 and 3.

On November 21, 2019, Ms. Ochs e-mailed the GRC. Therein, Ms. Ochs stated that after searching through various paperwork she located the aforementioned March 28, 2018 correspondence to the Complainant and attached a copy of same.

On December 9, 2019, Lauren Kirkman, the current Custodian of Record, responded to the GRC's request for additional information. The current Custodian certified that she reviewed Lakewood's records and discussed the subject OPRA request with staff. The current Custodian certified that Lakewood responded to the Complainant's February 13, 2018 OPRA request, and attached a copy of the response to her certification.

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).⁶ Thus, a custodian's failure to respond in writing to a complainant's OPRA

⁶ 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.

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).

Here, the Complainant submitted her OPRA request on February 13, 2018, and thereafter filed her complainant on February 26, 2018, claiming she never received a response. In her SOI, the Custodian certified that her office misplaced the OPRA request, and the Complainant would not resubmit the request so it could be processed. However, in response to the GRC’s November 7, 2019 request for additional information, the Custodian certified that her office ultimately located the e-mail containing the OPRA request. Moreover, the evidence in the record indicates that on March 6, 2018, the Custodian responded to the Complainant’s OPRA request, providing records responsive to Item No. 1, and stating that no responsive records exist for Item Nos. 2 and 3.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant’s February 13, 2018 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. However, the GRC declines to order disclosure of records responsive to Item No. 1 because the Custodian disclosed same to the Complainant on March 6, 2018 and March 28, 2018.

Sufficiency of Search

It is the custodian’s responsibility to perform a complete search for the requested records before responding to an OPRA request, as doing so will help ensure that the custodian’s response is accurate and has an appropriate basis in law. In Schneble v. N.J. Dep’t of Env’tl. Protection, GRC Complaint No. 2007-220 (April 2008), the custodian initially stated that no records responsive to the complainant’s OPRA request existed. The custodian certified that after receipt of the complainant’s denial of access complaint, which contained e-mails responsive to the complainant’s request, the custodian conducted a second search and found records responsive to the complainant’s request. The GRC held that the custodian had performed an inadequate search and thus unlawfully denied access to the responsive records. See also Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (January 2011).

Moreover, in Scheeler, Jr. v. Woodbine Bd. of Educ. (Cape May), GRC Complaint No. 2014-59 (Interim Order dated January 30, 2015), the custodian initially responded that no records existed. However, four (4) business days later, the custodian provided responsive records. Applying its prior decisions in Schneble, Lebbing, and Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 2013), the Council held that the custodian performed an insufficient search.

Here, the Custodian initially responded to the Complainant’s OPRA request on March 6, 2018, providing responsive records for Item No. 1 and stating that no responsive records exist for Item Nos. 2 and 3. However, subsequently after filing her SOI, the Custodian provided another

response to the Complainant's request, providing responsive records for Item No. 2. Thus, the evidence of record demonstrates that the Custodian's initial search was insufficient and resulted in an unlawful denial of access. Such a finding is consistent with the Council's decision in Scheeler, Jr., GRC 2014-59 and its progeny.

Accordingly, the Custodian's failure to locate responsive records to the Complainant's OPRA request Item No. 2 until after she conducted an additional search resulted in an insufficient search. Thus, the Custodian unlawfully denied access to the legal notice that was responsive to that portion of the Complainant's OPRA request. N.J.S.A. 47:1A-6; Schneble, GRC 2007-220; Scheeler, Jr., GRC 2014-59. However, the GRC declines to order disclosure of those records because the Custodian disclosed same to the Complainant on March 28, 2018.

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 Item No. 3 sought copies of all proposals received by Lakewood in response to the bid that was ultimately awarded by DataMap. The Custodian failed to respond to the Complainant's request until after the complaint was filed, where on March 6, 2018 the Custodian stated in part that no responsive records exist for Item No. 3. On March 28, 2018, the Custodian provided an additional response where she reiterated that no responsive records exist. Moreover, upon review of the Lakewood resolution responsive to request Item No. 1, it indicates that DataMap was awarded the contract without competitive bidding in accordance with N.J.S.A. 40A:11-5(d). Therefore, it is reasonable to conclude that there would not be responsive records for Item No. 3, as the contract was awarded without soliciting proposals from other vendors. Furthermore, the Complainant has not provided any rebuttal to the evidence in record.

Therefore, notwithstanding the Custodian's "deemed" denial, she has borne her burden of proof that she lawfully denied access to the portion of the Complainant's OPRA request Item No. 3 seeking proposals submitted to Lakewood for a contract award. Specifically, the Custodian certified, 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 currently before the Council, the Custodian’s untimely response and insufficient search resulted in a “deemed” denial of access pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and N.J.S.A. 47:1A-6. However, the Custodian ultimately provided the Complainant with responsive records on March 6, 2018, and all located records on March 28, 2018. The Custodian also lawfully denied access to the Complainant’s OPRA request item No. 3 because no records existed. 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 Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s February 13, 2018 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). However, the GRC declines to order disclosure of records responsive to Item No. 1 because the Custodian disclosed same to the Complainant on March 6, 2018 and March 28, 2018.
2. The Custodian’s failure to locate responsive records to the Complainant’s OPRA request Item No. 2 until after she conducted an additional search resulted in an insufficient search. Thus, the Custodian unlawfully denied access to the legal notice

that was responsive to that portion of the Complainant's OPRA request. N.J.S.A. 47:1A-6; Schneble v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008); Scheeler, Jr. v. Woodbine Bd. of Educ. (Cape May), GRC Complaint No. 2014-59 (Interim Order dated January 30, 2015). However, the GRC declines to order disclosure of those records because the Custodian disclosed same to the Complainant on March 28, 2018.

3. Notwithstanding the Custodian's "deemed" denial, she has borne her burden of proof that she lawfully denied access to the portion of the Complainant's OPRA request Item No. 3 seeking proposals submitted to the Township of Lakewood for a contract award. Specifically, the Custodian certified, 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).
4. The Custodian's untimely response and insufficient search resulted in a "deemed" denial of access pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and N.J.S.A. 47:1A-6. However, the Custodian ultimately provided the Complainant with responsive records on March 6, 2018, and all located records on March 28, 2018. The Custodian also lawfully denied access to the Complainant's OPRA request item No. 3 because no records existed. 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: Samuel A. Rosado
Staff Attorney

January 21, 2020⁷

⁷ This complaint was prepared for adjudication at the Council's January 28, 2020 meeting, but could not be adjudicated due to a lack of quorum.