



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

January 7, 2020 Government Records Council Meeting

Brian Riback

Complaint No. 2018-41

v.

Township of Mahwah (Bergen)
Custodian of Record

At the January 7, 2020 public meeting, the Government Records Council (“Council”) considered the December 10, 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 her burden of proof that she timely responded to the Complainant’s February 21, 2018 and February 23, 2018 OPRA requests. 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. Notwithstanding the Custodian’s “deemed” denial, she lawfully denied access to the Complainant’s February 21, 2018 OPRA request seeking correspondence from Steve Sbarra to Mahwah Councilmembers pertaining to a personnel matter. N.J.S.A. 47:1A-6. Specifically, the letter withheld from access discusses a personnel issue and does not contain information subject to disclosure under N.J.S.A. 47:1A-10. See McGee v. Twp. of East Amwell, 416 N.J. Super. 602, 614-15 (App. Div. 2010); Kovalcik v. Somerset Cnty. Prosecutor’s Office, 206 N.J. 581, 594 (2011).
3. Notwithstanding the Custodian’s “deemed” denial, she lawfully denied access to the portion of the Complainant’s February 23, 2018 OPRA request seeking receipts to parties stemming from funds allocated to address a personnel issue. N.J.S.A. 47:1A-6. Such records are not specifically identified as personnel information subject to disclosure under OPRA and acknowledging their existence would contravene the protections afforded to personnel records. N.J.S.A. 47:1A-10; Rodriguez v. Kean Univ., GRC Complaint No. 2013-293 (June 2014); Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004).

4. The Custodian failed to respond to the Complainant's OPRA request in a timely manner resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian lawfully denied access to the Complainant's OPRA requests, as they sought personnel records exempt from disclosure under N.J.S.A. 47:1A-10. Additionally, the evidence of record does not indicate that the Custodian's technical 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 7th Day of January 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: January 9, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 7, 2020 Council Meeting**

**Brian Riback¹
Complainant**

GRC Complaint No. 2018-41

v.

**Township of Mahwah (Bergen)²
Custodial Agency**

Records Relevant to Complaint:

February 21, 2018 OPRA Request:

“Communications between former Council Member Steve Sbarra and any member of the Mahwah Towns Council sent or received between January 1, 2018 to February 21, 2018 with the subject matter pertaining to a personnel matter.”

February 23, 2018 OPRA Request:

“At the November 2017 Town Council meeting, Brian Chewcaskie requested \$20,000 which was to be used to address a Complaint related to a personnel matter. Please provide a copy of this formal complaint, as well as receipts from the appropriate parties, to whom this money was dispersed.”

Custodian of Record: Kathrine G. Coviello

Request Received by Custodian: February 21, 2018; February 23, 2018

Response Made by Custodian: March 9, 2018

GRC Complaint Received: March 13, 2018

Background³

February 21, 2018 Request

On February 21, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.

February 23, 2018 Request and Response

On February 23, 2018, the Complainant submitted an OPRA request to the Custodian

¹ No legal representation listed on record.

² Represented by Bradley D. Tishman, Esq., of Cleary Giacobbe Alfieri Jacobs LLC (Oakland, 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 Executive Director the submissions necessary and relevant for the adjudication of this complaint.

seeking the above-mentioned records. On March 9, 2018, the tenth (10th) business day after receipt, the Custodian responded in writing, stating that Brian M. Chewcaskie, the Mahwah Township Attorney, advised her that the request pertained to a personnel matter and was exempt from OPRA.

Denial of Access Complaint:

On March 13, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). Regarding the February 21, 2018 OPRA request, the Complainant asserted that the Township of Mahwah’s (“Mahwah”) Councilmembers confirmed to him that they had never seen the OPRA request themselves. The Complainant therefore questioned how Mr. Chewcaskie could draw the conclusion that the withheld letter was related to a personnel matter. The Complainant also asserted that he already possessed a copy of the letter at issue and attached same to his complaint. The Complainant asserted that the letter contained no specific information that would deem the letter exempt under OPRA’s personnel exemption. The Complainant contended that the letter only confirmed the existence of a personnel complaint, which would not prohibit disclosure.

Regarding the February 23, 2018 OPRA request, the Complainant argued that he sought two (2) items in the request. The Complainant contended that the first item, the personnel complaint, could fall under OPRA’s personnel exemption. The Complainant then argued that he also sought receipts for expenses stemming from the \$20,000 requested by Mr. Chewcaskie. The Complainant asserted that this portion of the request was either disregarded or improperly denied access under the personnel exemption.

The Complainant then asserted that the personnel matter referenced by Mr. Chewcaskie did not exist and thus the Mahwah Councilmembers were lied to by Mr. Chewcaskie. The Complainant therefore argued that the Custodian could not claim an OPRA exemption if the record did not exist. The Complainant contended that the attached letter demonstrates that no personnel complaint existed at the time of the request.

February 21, 2018 Response

On or around March 2018, the Complainant disputed the contention that the requested letter was exempt as a personnel record. On March 26, 2018, the Custodian responded in writing, apologizing for not responding directly to the February 21, 2018 request sooner. The Custodian provided seven (7) copies of an e-mail correspondence sent to seven (7) Mahwah Councilmembers on February 2, 2018. The Custodian also redacted the sender’s e-mail address. The Custodian further stated that the letter attached to the e-mails was withheld from access as it pertained to a personnel matter. N.J.S.A. 47:1A-10.

Statement of Information:

On April 5, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA requests on February 21, 2018 and February 23, 2018, respectively. Regarding the February 21, 2018 request, the Custodian certified that Mahwah searched each Councilmember’s e-mail domain names on its server to locate potentially

responsive records. However, the Custodian certified that she responded in writing on March 26, 2018, providing seven (7) copies of an e-mail correspondence that was sent to seven (7) Councilmembers. The Custodian certified that she redacted the sender's e-mail address and withheld the attached letter from access.

Regarding the February 23, 2018 request, the Custodian certified that she responded on March 9, 2018, providing a letter from Mr. Chewcaskie stating that the request pertained to a personnel matter and thus is exempt from disclosure under OPRA.

For both requests, the Custodian maintained that they pertained to a personnel matter and was therefore not subject to access under OPRA. N.J.S.A. 47:1A-10. Regarding the disclosed e-mails, the Custodian asserted that the sender's e-mail address was properly redacted to protect personal information, citing Gannett New Jersey Partners v. Cnty. of Middlesex, 379 N.J. Super. 205 (App. Div. 2005). Regarding the withheld letter attached to the e-mails, the Custodian asserted that the record explicitly pertained to a personnel matter, and the information contained within did not fall under the exceptions listed under N.J.S.A. 47:1A-10. The Custodian also referenced McGee v. Twp. of East Amwell, 416 N.J. Super. 602, 614-15 (App. Div. 2010) to note that records can fall under the personnel records exemption even if they are not contained within an employee's personnel file. Additionally, the Custodian contended that in this matter the personnel issue pertains to a confidential employee investigation, so any records relating to same are exempt under OPRA, citing Fenichel v. City of Ocean City, GRC Complaint No. 2009-71 (November 2009) and Allen v. Cnty. of Warren, GRC Complaint No. 2003-155 (March 2004).

Lastly, the Custodian argued that the Complainant did not have a remedy for his request for the withheld letter, as the Complainant demonstrated that he already possessed a copy at the time he filed his complaint.

Additional Submissions:

On April 6, 2018, the Complainant responded to the Custodian's SOI submission. The Complainant asserted that the Custodian failed to distinguish between the term "personnel matter" and "records containing specific information related to a personnel matter." The Complainant asserted that he sought records relating to a personnel matter, and not the specifics or details of the personnel matter itself. The Complainant asserted that the withheld letter did not contain any specifics on a personnel matter, and only mentioned the term "personnel matter," and therefore would not be prohibited from disclosure.

On April 11, 2018, the Counsel for the Custodian e-mailed the GRC. In response to the Complainant's April 6, 2018 e-mail, Counsel wished to provide an additional citation regarding the Complainant's request for the withheld letter. Counsel noted that it was undisputed that the Complainant already possessed the withheld letter. Counsel asserted that in Stop & Shop Supermarket Co., LLC v. Cnty. of Bergen, 450 N.J. Super. 286, 291 (App. Div. 2017), the court held that the requestor's OPRA litigation was moot before it filed its complaint since it already received the documents sought. Counsel argued that the Complainant obtained the withheld letter from a third party, and therefore Counsel requested that the matter be dismissed as moot.

On April 11, 2018, the Complainant responded to Counsel's e-mail. The Complainant maintained that he never received the withheld letter from Mahwah, and that Mr. Chewcaskie lied about the basis for denying access to the letter. The Complainant also stated that he did not possess the letter at the time of the request. Additionally, the Complainant mentioned that his February 23, 2018 OPRA request sought records pertaining to \$20,000 requested from Mahwah by Mr. Chewcaskie at a November 2017 public meeting to address a personnel issue. The Complainant argued that based upon the contents contained in the withheld letter, no such personnel issue existed, and that Mr. Chewcaskie requested money based upon a lie.

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).

Here, the Complainant submitted an OPRA request for records on February 21, 2018 and February 23, 2018, with the Custodian responding on March 9, 2018, the twelfth (12th) and tenth (10th) business after receipt, respectively. However, based upon the evidence in the record, the Custodian's March 9, 2018 response addressed only the February 23, 2018 OPRA request. In the SOI, the Custodian noted that she responded to the February 21, 2018 OPRA request on March 26, 2018. Further, the Complainant's April 11, 2018 e-mail to the GRC indicates that the seven (7) copies of e-mails sent to Mahwah Councilmembers were provided in the March 26, 2018 response. Notwithstanding, the Custodian's March 9, 2018 response was beyond the statutorily mandated seven (7) business day deadline for both OPRA requests, and there is no evidence in the record demonstrating that the Custodian sought an extension of time for either request.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's February 21, 2018 and February 23, 2018 OPRA requests. 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.

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.

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.

Regarding personnel records, OPRA provides that “the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government records and shall not be made available for public access . . .” N.J.S.A. 47:1A-10. Generally, OPRA begins with a presumption against disclosure and “proceeds with a few narrow exceptions that . . . need to be considered.” Kovalcik v. Somerset Cnty. Prosecutor's Office, 206 N.J. 581, 594 (2011). These are:

[A]n individual’s name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of any pension received shall be government record;

[P]ersonnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and

[D]ata contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.

[N.J.S.A. 47:1A-10.]

Withheld Letter

Here, the Complainant’s February 21, 2018 OPRA request sought communications between Steve Sbarra and Mahwah Councilmembers. In response the Custodian provided an e-mail sent to seven (7) Councilmembers, but withheld the attached letter written by Mr. Sbarra, asserting that the letter fell under the personnel records exemption. This complaint followed, wherein the Complainant disputed the denial asserting that the letter only referenced a personnel matter and contended that the personnel matter itself did not exist. The Complainant also attached a copy of the responsive letter, which he obtained through other means, to the Denial of Access Complaint.

Upon review of the letter provided by the Complainant, the GRC is satisfied that it falls under the personnel records exemption. While the letter does not identify a specific employee, it speaks to procedures undertaken in response to an alleged complaint filing, including hiring a judge to investigate the personnel issue. Notwithstanding the claim that no personnel complaint

had been filed, the subject matter of the letter still pertains to a personnel matter. As noted by McGee, the letter need not be placed in an individual's personnel file to qualify under the exemption. 416 N.J. Super. at 614-15. Furthermore, there is nothing in the letter that would fall under the excepted information identified under N.J.S.A. 47:1A-10.

Accordingly, notwithstanding the Custodian's "deemed" denial, she lawfully denied access to the Complainant's February 21, 2018 OPRA request seeking correspondence from Mr. Sbarra to Mahwah Councilmembers pertaining to a personnel matter. N.J.S.A. 47:1A-6. Specifically, the letter withheld from access discusses a personnel issue and does not contain information subject to disclosure under N.J.S.A. 47:1A-10. See McGee, 416 N.J. Super. at 614-15; Kovalcik, 206 N.J. at 594.

Receipts

The Council has determined that records involving employee discipline or investigations into employee misconduct are properly classified as personnel records exempt from disclosure under N.J.S.A. 47:1A-10. In Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004), the Council found that records of complaints or internal reprimands against a municipal police officer were properly classified as personnel records encompassed within the provisions of N.J.S.A. 47:1A-10. For this reason, the Council concluded that ". . . records of complaints filed against [the police officer] and/or reprimands [the officer] received are not subject to public access." Id.

In Rodriguez v. Kean Univ., GRC Complaint No. 2013-293 (June 2014), the complainant sought reimbursement records stemming from an employee misconduct investigation. The custodian asserted that the records were checks provided to the agency because of the investigation. The Council held that in accordance with Merino, the records were lawfully withheld, as even acknowledging their existence would violate OPRA's presumption that personnel records were exempt from disclosure.

In the Complainant's February 23, 2018 OPRA request, he sought a copy of the formal personnel complaint that was mentioned at the November 17, 2017 Mahwah Town Council public meeting. The Complainant also sought receipts for payments to third parties relating to Mr. Chewcaskie's request for \$20,000 to resolve the aforementioned complaint. On March 9, 2018, the Custodian responded in writing stating that the Complainant's request sought personnel information and was therefore exempt under OPRA. The Complainant argued that while a copy of the personnel complaint would fall under the exemption, the requested receipts would not.

Upon review of the evidence, the GRC agrees with the Custodian that receipts for payments made in connection with the complaint filing falls under the personnel records exemption. Like the request in Rodriguez, disclosure of receipts related to the personnel matter could give away the identities of the parties involved, thus running afoul of the protections afforded under OPRA. GRC 2013-296; N.J.S.A. 47:1A-10.

Therefore, notwithstanding the Custodian's "deemed" denial, she lawfully denied access to the portion of the Complainant's February 23, 2018 OPRA request seeking receipts to parties

stemming from funds allocated to address a personnel issue. N.J.S.A. 47:1A-6. Such records are not specifically identified as personnel information subject to disclosure under OPRA and acknowledging their existence would contravene the protections afforded to personnel records. N.J.S.A. 47:1A-10; Rodriguez, GRC 2013-296; Merino, GRC 2003-110.

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 failed to respond to the Complainant’s OPRA request in a timely manner resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian lawfully denied access to the Complainant’s OPRA requests, as they sought personnel records exempt from disclosure under N.J.S.A. 47:1A-10. Additionally, the evidence of record does not indicate that the Custodian’s technical 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 21, 2018 and February 23, 2018 OPRA requests. 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. Notwithstanding the Custodian’s “deemed” denial, she lawfully denied access to the Complainant’s February 21, 2018 OPRA request seeking correspondence from Steve Sbarra to Mahwah Councilmembers pertaining to a personnel matter. N.J.S.A. 47:1A-6. Specifically, the letter withheld from access discusses a personnel issue and does not contain information subject to disclosure under N.J.S.A. 47:1A-10. See McGee v. Twp. of East Amwell, 416 N.J. Super. 602, 614-15 (App. Div. 2010); Kovalcik v. Somerset Cnty. Prosecutor's Office, 206 N.J. 581, 594 (2011).
 3. Notwithstanding the Custodian’s “deemed” denial, she lawfully denied access to the portion of the Complainant’s February 23, 2018 OPRA request seeking receipts to parties stemming from funds allocated to address a personnel issue. N.J.S.A. 47:1A-6. Such records are not specifically identified as personnel information subject to disclosure under OPRA and acknowledging their existence would contravene the protections afforded to personnel records. N.J.S.A. 47:1A-10; Rodriguez v. Kean Univ., GRC Complaint No. 2013-293 (June 2014); Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004).
 4. The Custodian failed to respond to the Complainant’s OPRA request in a timely manner resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian lawfully denied access to the Complainant’s OPRA requests, as they sought personnel records exempt from disclosure under N.J.S.A. 47:1A-10. Additionally, the evidence of record does not indicate that the Custodian’s technical 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, Esq.
Staff Attorney

December 10, 2019