



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

November 12, 2019 Government Records Council Meeting

Angeline Broomhall
Complainant

Complaint No. 2018-77

v.

City of Millville (Cumberland)
Custodian of Record

At the November 12, 2019 public meeting, the Government Records Council (“Council”) considered the October 30, 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 April 20, 2018 OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to said 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).
2. The Custodian did not unlawfully deny access to the Complainant’s April 18, 2018 request for the contract between the City of Millville and Pennoni Engineers based upon the sufficiency of the disclosed record’s content. See Katinsky v. River Vale Twp., GRC Complaint No. 2003-68 (November 2003). See also Kwanzaa v. Dep’t of Corr., GRC Complaint No. 2004-167 (March 2005) (citing N.J.S.A. 47:1A-7(b)).
3. The Custodian did not unlawfully deny access to the Complainant’s April 18, 2018 request for purchase orders and invoices for Pennoni Engineers because the Custodian certified that such records do not exist, and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. See Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
4. The Complainant’s April 18, 2018 request for vendors of Pennoni Engineers is invalid because it fails to specifically identify a government record. Further, the Complainant’s April 20, 2018 request is invalid because it fails to identify a specific date or range of dates for the requested correspondence and therefore requires research beyond the scope of the Custodian’s duties. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super.

166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). See also Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-119 (Interim Order July 31, 2012); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011). Thus, the Custodian did not unlawfully deny access to the Complainant's requests. N.J.S.A. 47:1A-6.

5. The Custodian failed to respond in a timely manner to the Complainant's April 20, 2018 OPRA request, thereby violating N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). However, 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 12th Day of November 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: November 15, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 12, 2019 Council Meeting**

**Angeline Broomhall¹
Complainant**

GRC Complaint No. 2018-77

v.

**City of Millville (Cumberland)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of records responsive to the following requests:

OPRA request dated April 18, 2018:

1. “The contract between the city (sic) of Millville and Pennoni Engineers signed in 2018.”
2. “Any and all purchase orders and invoices and vendors of Pennoni Engineers.”

OPRA request dated April 20, 2018:

“[C]orrespondence between the state of NJ to/from Marcella Shapard and or the Millville City Commission in regards to funding for the 109 E. Main St (sic) Demolition.”

Custodian of Record: Jeanne M. Hitchner

Requests Received by Custodian: April 18, 2018 and April 20, 2018

Response Made by Custodian: April 20, 2018

GRC Complaint Received: May 7, 2018

Background³

Requests and Response:

On April 18, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 20, 2018, the second (2nd) business day following receipt of said request, the Custodian responded in writing via e-mail informing the Complainant that the requested contract was attached and that there are no records responsive to her request for invoices. The Custodian also disclosed a copy of Resolution No. 28-

¹ No legal representation listed on record.

² Represented by James E. Schroeder, Esq., of Schroeder Law Group (Hammonton, 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.

2018, appointing the engineering firm of Pennoni as engineer for special projects and setting forth the terms for payment of professional services.⁴

On April 20, 2018, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On April 20, 2018, the same day the request was received, the Custodian responded in writing via e-mail informing the Complainant that the request was received.

Denial of Access Complaint:

On May 7, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). On the Records Denied List, the Complainant listed item number 1 as the record(s) sought in her April 20, 2018 request. The Complainant listed as item number 2 the records sought in her April 18, 2018 request. For item number 3, the Complainant listed “[m]issing pages of the Pennoni Contract. One additional page provided however still incomplete.” The Complainant asserted that she received the requested contract; however, same is still incomplete because “. . . it seems that the mandatory pay to play information is still missing.” The Complainant asserted that in response to her April 20, 2019 request, the Custodian did not address the request other than to acknowledge it was received.

Statement of Information:

On May 17, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on April 18, 2018 and responded in writing on April 20, 2018. The Custodian certified that she forwarded the Complainant’s request to her staff and was advised that as of the date of the request there are no records responsive to the request for purchase orders and invoices. The Custodian further certified that she located and disclosed to the Complainant the requested contract, together with the authorizing resolution for same, on April 18, 2018.⁵ The Custodian certified that the records were disclosed in unredacted form. The Custodian further certified that part of the concerns expressed by the Complainant may have been caused by conversion of the contract from an electronically transmitted legal size record to letter size paper when it was printed by the Complainant. With respect to the pay-to-play issue raised by the Complainant, the Custodian certified that pay-to-play was not required pursuant to N.J.S.A. 19:44A-20.4, *et seq.*

The Custodian certified that the first item referenced on the Records Denied List in the Denial of Access Complaint “was not part of the subject OPRA request but was requested in a separate (sic) OPRA request on April 20, 2018.”

⁴ On April 20, 2019, following disclosure of the requested contract, the Complainant noticed the first page was missing and e-mailed the Custodian asking if the first page was redacted. By reply e-mail five minutes later, the Custodian informed the Complainant that the first page of the contract was inadvertently left off of the attachment and that she was now disclosing it to the Complainant.

⁵ The evidence of record reveals that these records were disclosed on April 20, 2018, not April 18, 2018.

Analysis

Timeliness

Unless a shorter time period is otherwise provided, a custodian must grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond accordingly results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁶ 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).

With respect to the Complainant's April 20, 2018 request, the Custodian acknowledged on that date that she received the request. The Complainant stated that as of the date she verified her complaint, May 4, 2018, she had not received a response to the request from the Custodian. Moreover, there is nothing in the evidence of record to indicate that the Custodian ever responded in writing either granting access, denying access, seeking clarification, or requesting an extension of time.⁷

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's April 20, 2018 OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to said 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.

Request dated April 18, 2018, item number 1 - contract between the City and Pennoni Engineers

The evidence of record reveals that on April 20, 2018, the Custodian disclosed to the

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.

⁷ The GRC notes that the Custodian certified in the SOI that the Complainant's April 20, 2018 OPRA request was a different request than the one the Complainant submitted on April 18, 2018. As such, it appears that the Custodian was of the belief that the April 20, 2018 request did not, in part, form the basis of the instant complaint; therefore, it did not need to be addressed in the SOI. The Custodian's understanding is wrong because the Complainant referenced both the April 18, 2018 request and the April 20, 2018 request in the complaint.

Complainant a copy of the requested contract between the City of Millville and Pennoni Engineers. Although the Complainant acknowledged that she did receive the requested contract, she asserted that the record is incomplete because “. . . it seems that the mandatory pay to play information is still missing.” The Custodian certified in the SOI that pay to play was not required pursuant to N.J.S.A. 19:44A-20.4, *et seq.*

In Katinsky v. River Vale Twp., GRC Complaint No. 2003-68 (November 2003), the complainant indicated to the GRC that the records provided to him by the custodian were "incomplete, improper and inaccurate." Conversely, the custodian certified that copies of the requested documents given to the complainant were complete and correct. The Council determined that:

The facts in this case indicate that the custodian provided the requester with the requested documents, and the custodian certified that they were complete, correct and contained no redactions. Therefore, the request in this case has been satisfied. The integrity of the requested documents is outside of the authority of the [Council]. For these reasons, the Council should dismiss the Complaint.

[Id.]

Subsequently, in Kwanzaa v. Dep't of Corr., GRC Complaint No. 2004-167 (March 2005), the complainant was dissatisfied with the record that was disclosed. The Council determined that “. . . [t]he document requested has been disclosed to the Complainant. Pursuant to N.J.S.A. 47:1A-7(b), the content of the document is not in the Council's jurisdiction. Since the requested record has been disclosed, this portion of the complaint should be dismissed.”

Accordingly, the Custodian did not unlawfully deny access to the Complainant's April 18, 2018 request for the contract between the City of Millville and Pennoni Engineers based upon the sufficiency of the disclosed record's content. See Katinsky, GRC 2003-68. See also Kwanzaa, GRC 2004-167 (citing N.J.S.A. 47:1A-7(b)).

Request dated April 18, 2018, item number 2 - purchase orders and invoices of Pennoni Engineers

In Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005), the custodian certified that no records responsive to the complainant's request for billing records existed and the complainant submitted no evidence to refute the custodian's certification regarding said records. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian's certification, there was no unlawful denial of access to the requested records.

Here, the Custodian certified that as of the date of the request there were no records responsive to the Complainant's request for purchase orders and invoices for Pennoni Engineers. Moreover, there is no evidence in the record to refute the Custodian's certification.

As such, the Custodian did not unlawfully deny access to the Complainant's April 18, 2018 request for purchase orders and invoices for Pennoni Engineers because the Custodian certified

that such records do not exist, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. See Pusterhofer, GRC 2005-49.

Request dated April 18, 2018, item number 2 - vendors of Pennoni Engineers

Request dated April 20, 2018 - Correspondence between the state of NJ to/from Marcella Shapard and or the Millville City Commission in regards to funding for the 109 E. Main Street demolition

The New Jersey Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records "readily accessible for inspection, copying, or examination."* N.J.S.A. 47:1A-1.

[MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005)(emphasis added).]

The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

[Id. at 549 (emphasis added).]

The Court further held that "[u]nder OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt . . . In short, OPRA does not countenance open-ended searches of an agency's files." Id. at 549 (emphasis added). See also Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005);⁸ N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Moreover, in Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010), the Council established criteria deemed necessary under OPRA to request an e-mail communication. For such requests to be valid, they must contain: (1) the content and/or subject of the e-mail(s), (2) the specific date or range of dates during which the e-mail(s) were transmitted,

⁸ Affirming Bent v. Stafford Police Dep't, GRC Case No. 2004-78 (October 2004).

and (3) the identity of the sender and/or the recipient thereof. See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-119 (Interim Order July 31, 2012). The Council has also applied the criteria set forth in Elcavage to other forms of correspondence, such as letters. See Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011).

Here, the Complainant's April 18, 2018 request for vendors of Pennoni Engineers is a request for information. The request failed to identify with any specificity or particularity the governmental record sought. As such, the request is invalid.

The Complainant's April 20, 2018 request identified the sender(s) and recipient(s), as well as the subject; however, it does not contain a specific date or range of dates during which the correspondence was transmitted thereby allowing the Custodian to accurately identify each responsive record without performing research.

Thus, the Complainant's April 18, 2018 request for vendors of Pennoni Engineers is invalid because it fails to specifically identify a government record. Further, the Complainant's April 20, 2018 request is invalid because it fails to identify a specific date or range of dates for the requested correspondence and therefore requires research beyond the scope of the Custodian's duties. MAG, 375 N.J. Super. 534 at 546; Bent, 381 N.J. Super. 30 at 37; N.J. Builders Ass'n, 390 N.J. Super. 166 at 180; Schuler, GRC 2007-151. See also Elcavage, GRC 2009-07; Verry, GRC 2011-119; Armenti, GRC 2009-154. Thus, the Custodian did not unlawfully deny access to the Complainant's requests. N.J.S.A. 47:1A-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 failed to respond in a timely manner to the Complainant's April 20, 2018 OPRA request, thereby violating N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). However, 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 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 April 20, 2018 OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to said 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).
2. The Custodian did not unlawfully deny access to the Complainant's April 18, 2018 request for the contract between the City of Millville and Pennoni Engineers based upon the sufficiency of the disclosed record's content. See Katinsky v. River Vale Twp., GRC Complaint No. 2003-68 (November 2003). See also Kwanzaa v. Dep't of Corr., GRC Complaint No. 2004-167 (March 2005) (citing N.J.S.A. 47:1A-7(b)).
3. The Custodian did not unlawfully deny access to the Complainant's April 18, 2018 request for purchase orders and invoices for Pennoni Engineers because the Custodian certified that such records do not exist, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. See Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
4. The Complainant's April 18, 2018 request for vendors of Pennoni Engineers is invalid because it fails to specifically identify a government record. Further, the Complainant's April 20, 2018 request is invalid because it fails to identify a specific date or range of dates for the requested correspondence and therefore requires research beyond the scope of the Custodian's duties. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). See also Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-119 (Interim Order July 31, 2012); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order

dated May 24, 2011). Thus, the Custodian did not unlawfully deny access to the Complainant's requests. N.J.S.A. 47:1A-6.

5. The Custodian failed to respond in a timely manner to the Complainant's April 20, 2018 OPRA request, thereby violating N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). However, 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: John E. Stewart
Staff Attorney

October 30, 2019