



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

April 27, 2021 Government Records Council Meeting

Roger J. McLaughlin, Esq.
(o/b/o Avon Hotel Corp. t/a The Parker House)

Complaint No. 2019-152

Complainant

v.

Borough of Sea Girt (Monmouth)
Custodian of Record

At the April 27, 2021 public meeting, the Government Records Council (“Council”) considered the April 20, 2021 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 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 time period, as extended, 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). See also Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
2. The Custodian denied the Complainant access to the requested records by not disclosing said records in a timely manner. However, the GRC declines to order disclosure of the records because the evidence of record reveals that the Custodian disclosed all responsive non-exempt records to the Complainant on August 13, 2019.
3. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian did provide the Complainant with all non-exempt records responsive to the request. 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 27th Day of April 2021

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: April 29, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 27, 2021 Council Meeting**

Roger J. McLaughlin, Esq.
(o/b/o Avon Hotel Corp. t/a The Parker House)¹
Complainant

GRC Complaint No. 2019-152

v.

Borough of Sea Girt (Monmouth)²
Custodial Agency

Records Relevant to Complaint: Copies for pick-up of “[a]ll correspondence, including emails received by any Borough elected or appointed official pertaining to the Parker House from July 1, 2018 to [May 29, 2019].³

Custodian of Record: Lorraine P. Carafa

Request Received by Custodian: May 29, 2019

Responses Made by Custodian: May 30, 2019, June 10, 2019 and June 24, 2019

GRC Complaint Received: July 30, 2019

Background⁴

Request and Responses:

On May 29, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On May 30, 2019, the first (1st) business day following receipt of said request, the Custodian responded in writing informing the Complainant that the Custodian would require an extension of time until June 28, 2019, in order to gather, review, and cull responsive records.

On June 10, 2019, the Custodian e-mailed the Complainant informing him that due to the extensive nature of the request, an extension of time until July 8, 2019 would be necessary. The Custodian also informed the Complainant that a special service charge may be assessed.

¹ No legal representation listed on record.

² Represented by Ryan Amberger, Esq., of Montenegro, Thompson, Montenegro & Genz, P.C. (Brick, NJ).

³ There were other records requested that are not relevant to this complaint.

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.

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On June 24, 2019, the Custodian e-mailed the Complainant to inform him that due to the volume of potential responsive records, an extension of time until July 25, 2019 would be necessary.

Denial of Access Complaint:

On July 30, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that he submitted his OPRA request to the Custodian on May 29, 2019. The Complainant also stated that the Custodian initially responded to his request by stating that she needed more time and would fulfill the request by July 8, 2019. The Complainant further stated that the Custodian again responded informing him that she needed until July 25, 2019. The Complainant asserted that no records were received as of July 29, 2019.

Supplemental Response:

On August 13, 2019, the Custodian’s Counsel forwarded responsive e-mails to the Complainant. Counsel stated that upon further review, if additional responsive e-mails are located they would be immediately disclosed. Counsel further stated that a number of e-mails were withheld from disclosure pursuant to N.J.S.A. 47:1A-1.1 because they were attorney-client privileged or contained advisory, consultative and deliberative (“ACD”) material.

Statement of Information:

On August 21, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on May 29, 2019 and responded in writing on May 30, 2019. The Custodian further certified that on August 13, 2019, the Borough disclosed to the Complainant all non-exempt responsive records. The Custodian certified that the records responsive to the request consisted of 793 pages of responsive e-mails with attachments. The Custodian certified that she disclosed 259 pages of e-mails in their entirety and withheld from disclosure 534 pages of responsive e-mails because they constituted ACD material or were attorney-client privileged pursuant to N.J.S.A. 47:1A-1.1.

The Custodian’s Counsel stated that the Custodian required several extensions of time to fulfill the Complainant’s records request due to the extensive volume of responsive and potentially responsive records. Counsel stated that the Custodian missed the final July 25, 2019 deadline date because not all of the potentially responsive records had been located by that date; however, Counsel certified that he delivered to the Complainant all responsive non-exempt records by courier service on August 13, 2019.

The Custodian’s Counsel next provided a brief history of litigation at the Parker House, which he stated resulted in a substantial amount of confidential communications with the

Borough's attorneys. Counsel then presented a legal argument justifying the denial of access to ACD material and attorney-client privileged communications.⁵

Additional Submissions:

On August 21, 2019, the GRC e-mailed the Complainant, informing him that in the SOI the Custodian's Counsel certified that he delivered to him all responsive non-exempt records by courier service on August 13, 2019. However, because there were several hundred records at issue, the GRC asked the Complainant to confirm that he received all records responsive to the request and that he was satisfied with the Custodian's legal explanation for records that were certified to be exempt from access. The GRC further informed the Complainant that if he was not satisfied with the disclosure of records or disputed any other issue set forth in the SOI, to forward to the GRC a response to the SOI within five business days.

On August 22, 2019, the Complainant replied to the GRC stating that he would review the records disclosed by the Custodian and respond to the GRC within the time frame set forth by the GRC.⁶

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).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 Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5th) business day after receipt of the complainant's March 19, 2007 OPRA request seeking an extension of time until April 20, 2007. However, the custodian responded again on April 20, 2007, stating that the requested records would be provided later in the week. Id. The evidence of record showed that no records were provided until May 31, 2007. Id. The GRC held that:

⁵ It is unnecessary for the GRC to consider Counsel's legal argument with respect to the denial of ACD and attorney-client privileged material because the Complainant did not dispute the Custodian's explanation and statutory citation for denial of access to those records.

⁶ The Complainant did not further reply to the GRC disputing records withheld from access as ACD and/or attorney-client privileged material.

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.

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The Custodian properly requested an extension of time to provide the requested records to the Complainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) . . . however . . . [b]ecause the Custodian failed to provide the Complainant access to the requested records by the extension date anticipated by the Custodian, the Custodian violated N.J.S.A. 47:1A-5(i) resulting in a “deemed” denial of access to the records.

[Id.]

Here, the Custodian initially responded to the Complainant on the first (1st) business day after receipt of the OPRA request asking for a time extension to respond by June 28, 2019. On June 10, 2019, the Custodian requested a second time extension to respond by July 8, 2019 due to the extensive nature of the request. Thereafter, on June 24, 2019, the Custodian e-mailed the Complainant to inform him that she would need an extension of time until July 25, 2019. The Custodian failed to respond to the Complainant by July 25, 2019, prompting the Complainant to file the within complaint on July 30, 2019. Thus, in keeping with Kohn, GRC 2007-124, the Custodian’s failure to respond prior to the extension expiration resulted in a “deemed” denial.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated time period, as extended, 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. See also Kohn, GRC 2007-124.

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.

Here, the Custodian denied the Complainant access to the requested records by not disclosing said records in a timely manner. However, the GRC declines to order disclosure of the records because the evidence of record reveals that the Custodian disclosed all responsive non-privileged records to the Complainant on August 13, 2019.

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)).

Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian did provide the Complainant with all non-exempt records responsive to the request. 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 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 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 time period, as extended, 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). See also Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
2. The Custodian denied the Complainant access to the requested records by not disclosing said records in a timely manner. However, the GRC declines to order disclosure of the records because the evidence of record reveals that the Custodian disclosed all responsive non-exempt records to the Complainant on August 13, 2019.
3. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian did provide the Complainant with all non-exempt records responsive to the

request. 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: John E. Stewart
Staff Attorney

April 20, 2021