



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

December 15, 2020 Government Records Council Meeting

Peter Michel
Complainant

Complaint No. 2019-153

v.

Borough of Washington (Warren)
Custodian of Record

At the December 15, 2020 public meeting, the Government Records Council (“Council”) considered the December 8, 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 his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s 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). However, the GRC declines to order disclosure because the Custodian did so on August 8, 2019.
2. The Custodian’s failure to timely respond resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian ultimately disclosed to the Complainant the responsive recording on August 8, 2019. 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 15th Day of December 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: December 17, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 15, 2020 Council Meeting**

**Peter Michel¹
Complainant**

GRC Complaint No. 2019-153

v.

**Borough of Washington (Warren)²
Custodial Agency**

Records Relevant to Complaint: Electronic copy via e-mail of the audio recording from the July 8, 2019 “Regular” Land Use Board (“Board”) meeting.

Custodian of Record: Matthew Hall³
Request Received by Custodian: July 15, 2019
Response Made by Custodian: August 8, 2019
GRC Complaint Received: July 30, 2019

Background⁴

Request and Response:

On July 12, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 15, 2019, the Custodian e-mailed Clerk of the Board Patricia Titus noting that he could assist in converting the recording into a .wav file. On the same day, the Complainant responded stating that he possessed a “Liberty player” and that disclosure of the “original multitrack format is fine.”

On July 23, 2019, Municipal Clerk Laurie Barton acknowledged receipt of the subject OPRA request and noted that she would respond within seven (7) business days. On the same day, the Complainant e-mailed Ms. Barton questioning how such a delay in receipt could occur. Ms. Barton stating that she was on vacation, and that the Custodian was handling OPRA requests in her absence. Ms. Barton stated that she would check with the Custodian as to whether he disclosed the recording following their July 15, 2019 e-mail exchange.

¹ No legal representation listed on record.

² Represented by Tara St. Angelo, Esq., of Gebhardt & Kiefer, P.C. (Clinton, NJ).

³ Mr. Hall was designated as Acting Custodian in the absence of Municipal Clerk Laurie Barton.

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.

On July 25, 2019, Ms. Barton e-mailed the Custodian asking him to give her a link to the another recording so that she may provide same to the Complainant. Ms. Barton also asked the Custodian to confirm whether he disclosed the recording responsive to the subject OPRA request. On July 29, 2019, the Custodian asked Ms. Barton to provide him a copy of the recording either on a CD or “thumb drive” so that he may upload the other recording. The Custodian further stated that “the [July 8, 2019] file was given to [the Complainant].”

Denial of Access Complaint:

On July 31, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that he engaged in multiple communications with the Borough of Washington (“Borough”) about the subject OPRA request; but no formal response was made as of July 25, 2019.

The Complainant argued that Ms. Barton’s July 23, 2019 e-mail appeared to be an attempt to “reset the [statutory response] clock.” The Complainant argued that his OPRA request was clear and that any attempts to extend the response deadline should be rejected. The Complainant thus argued that the GRC should follow D’Andrea v. N.J. Dep’t of Cmty. Affairs, Div. of Local Gov’t Serv., GRC Complaint No. 2007-64 (February 2012) and determine that a “deemed” denial of access occurred.

Supplemental Response:

On August 8, 2019, Custodian’s Counsel e-mailed the Custodian and Ms. Barton to confirm whether the responsive recording was provided to the Complainant. On the same day, the eighteenth (18th) business day after receipt of the OPRA request, the Custodian responded in writing providing the Complainant a link to the responsive recording. The Custodian noted that he mistakenly believed he had already disclosed the recording based on a prior disclosure of another recording for a different meeting. The Custodian noted that he was out on bereavement leave during the pendency of the subject OPRA request and did not return to work until July 29, 2019. The Custodian noted that upon his return, he misinformed Custodian’s Counsel and Ms. Barton that he had disclosed the recording. The Custodian apologized for his “inadvertent error” and asked that the Complainant withdraw this complaint.

Statement of Information:

On August 21, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on July 15, 2019. The Custodian certified that his search involved forwarding the request to Ms. Titus to obtain the recording. The Custodian affirmed that once he received the recording, he converted it to an easily accessible format. The Custodian certified that he responded in writing on August 8, 2019 disclosing the recording to the Complainant via e-mail.

The Custodian averred that the delay in receipt of the recording resulted from the Complainant having submitted his request on Friday evening, July 12, 2019, after business hours had ended. The Custodian certified that he obtained the recording and converted same for

disclosure but it was inadvertently not disclosed until after the complaint filing due to extenuating circumstances. The Custodian specifically noted that he was filling in for Ms. Barton, who did not know that he had been working to respond to the request before she communicated with the Complainant on July 23, 2019. The Custodian further noted that due to personal issues, he was on leave from work from July 24-26, 2019. The Custodian stated that during this time, the Complainant submitted four (4) additional OPRA requests, one of which sought the recording of the July 22, 2019 Board meeting. The Custodian averred that upon returning to work, his haste to respond to that request resulted in confusing it with the subject OPRA request. The Custodian asserted that he continued to respond to the other OPRA requests but was unaware of his failure to disclose the recording at issue here until after this complaint was filed.

The Custodian argued that the Complainant disingenuously did not advise the GRC that he received the responsive record. The Custodian asserted that because the Complainant is “not entitled to receive records already in his possession,” the denial claim herein is frivolous and should be dismissed. N.J.S.A. 47:1A-7(e); N.J.S.A. 2A:15-59.1(b)(2); Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008).

The Custodian further contended that although he failed to timely disclose the responsive recording, his actions were not knowing and willful in nature. The Custodian argued that instead, a convergence of business and personal issues led to the delayed disclosure. The Custodian asserted that his actions were “at best, negligent” and did not rise to the knowing and willful threshold.⁵

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 request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

In the matter before the Council, the Complainant submitted his OPRA request late at night on Friday, July 12, 2019. Following correspondence between the parties on July 15, and 23, 2019, the Complainant filed the instant complaint arguing that the Borough failed to provide a proper

⁵ The Custodian also argued that the Complainant was not a prevailing party. However, attorney’s fees are not at issue here because the Complainant is not represented by legal counsel. See e.g. Feld v. City of Orange Twp., 2019 N.J. Super. Unpub. LEXIS 903 (App. Div. April 18, 2019).

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.

response to his OPRA request. On August 8, 2019, the eighteenth (18th) business day after receipt of the OPRA request, the Custodian disclosed the responsive recording to the Complainant. In the SOI, the Custodian certified that he received the Complainant's OPRA request on July 15, 2019 and disclosed the responsive recording on August 8, 2019. The Custodian provided additional context for his delayed response, including business and personal reasons that led to confusion as to whether he ultimately disclosed the recording.

Upon review of the facts presented, the GRC is satisfied that a "deemed" denial of access occurred. While the GRC is sympathetic to the Custodian's personal issues that occurred during the statutory, seven(7) day response period, there was ample time from receipt of the request to the first day of the Custodian's bereavement leave to provide the responsive recording to the Complainant. The delayed disclosure, although resulting from an unfortunate confluence of events, still is a violation of OPRA.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's 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 because the Custodian did so on August 8, 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)).

In the matter before the Council, the Custodian's failure to timely respond resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian ultimately disclosed to the Complainant the responsive recording on August 8, 2019. 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 his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's 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). However, the GRC declines to order disclosure because the Custodian did so on August 8, 2019.
2. The Custodian's failure to timely respond resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian ultimately disclosed to the Complainant the responsive recording on August 8, 2019. 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: Frank F. Caruso
Executive Director

December 8, 2020