



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

May 31, 2022 Government Records Council Meeting

Harry Michael Uhrig
Complainant

Complaint No. 2020-239

v.

Borough of Roselle Park (Union)
Custodian of Record

At the May 31, 2022 public meeting, the Government Records Council (“Council”) considered the May 24, 2022 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 requests. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA requests either granting access, denying access, seeking clarification or requesting an extension of time immediately results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). Cody v. Middletown Twp. Pub. Sch., GRC Complaint No. 2005-98 (December 2005); Harris v. N.J. Dep’t of Corr., GRC Complaint No. 2011-65 (August 2012).
2. Notwithstanding the Custodian’s “deemed” denial, the Custodian did not unlawfully deny access to the Complainant’s first request 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. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. Although the Custodian failed to respond to the Complainant’s requests in a timely manner which resulted in a “deemed” denial, the Custodian certified that he disclosed all records responsive to the Complainant’s second request on December 31, 2020. N.J.S.A. 47:1A-6.
4. Although the Custodian violated N.J.S.A. 47:1A-5(e), 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 existing records responsive to the Complainant’s requests. 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 31st Day of May 2022

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: June 2, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 31, 2022 Council Meeting**

Harry Michael Uhrig¹
Complainant

GRC Complaint No. 2020-239

v.

Borough of Roselle Park (Union)²
Custodial Agency

Records Relevant to Complaint:

Request dated December 3, 2020 at 6:10 p.m. (“first request”)

From January 2017 through September 1, 2020:

1. “[C]ontract with Montana construction (sic) and the boro (sic) to allow Montana to bring tested or untested dirt in from another town.”
2. “[C]ontract with Montana construction (sic) to fill in culvert between apartments and upper dpw (sic) yard. And if that fill was tested.”
3. “[A]ny and all elevation changes and property surveys. Along with safety procedures taking (sic) to insure of no collapse of area filled in.”³

Request dated December 3, 2020 at 7:47 p.m. (“second request”)

“[A]ny and all Contracts between the boro of Roselle park (sic) and Montana construction (sic) of the work they were performing for the boro (sic) from September 2018–September 2020.”⁴

Custodian of Record: Andrew Casais

Request Received by Custodian: December 4, 2020

GRC Complaint Received: December 18, 2021

Response Made by Custodian: December 31, 2020

¹ No legal representation listed on record.

² No legal representation listed on record.

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

⁴ The Complainant did not specify the preferred type of access or method of delivery.

Background⁵

Requests:

On December 4, 2020, the Complainant submitted two (2) Open Public Records Act (“OPRA”) requests to the Custodian seeking the above-mentioned records.

Denial of Access Complaint:

On December 18, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he submitted two (2) OPRA requests to the Custodian via e-mail on December 3, 2020.⁶ The Complainant further stated that, although the Custodian responded to several other previous e-mailed requests, he failed to respond to the requests that formed the basis of the instant complaint.

Additional Submission:

On December 31, 2020, the Custodian e-mailed the Complainant to apologize for not responding to his OPRA requests in a timely manner. The Custodian informed the Complainant that he had been out of the office since December 24, 2020, and learned of the Complainant’s requests when he received a copy of the complaint from the GRC. The Custodian further informed the Complainant that the requests were not logged in because they were routed to his e-mail “Spam” folder. The Custodian stated that he intended to promptly respond to the requests and asked the Complainant to withdraw the complaint.

Response:

On December 31, 2020, the seventeenth (17th) business day following receipt of the requests, the Custodian responded in writing via e-mail informing the Complainant that there are no records responsive to the items relevant to the complaint comprising the first request. The Custodian informed the Complainant that he was attaching one hundred thirty-eight (138) letter size pages of records responsive to the second request.

Statement of Information:

On December 31, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he was represented by legal counsel; however, no letter of representation was received by the GRC. The Custodian certified that he received the Denial of Access Complaint on December 24, 2020.⁷ The Custodian certified that, upon receiving and reading the complaint, he realized that the Complainant’s OPRA requests had not been logged into the Borough’s OPRA

⁵ 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.

⁶ The evidence of record reveals that the requests were transmitted after regular business hours.

⁷ December 24, 2020 was the date the GRC e-mailed a copy of the complaint to the Custodian. Although the Complainant e-mailed the complaint to the GRC on December 15, 2020, there is nothing in the evidence of record to indicate that the Complainant also transmitted a copy of the complaint to the Custodian.

request tracking log. The Custodian certified that he then checked his e-mail inbox but could not find the Complainant's OPRA requests; however, upon checking his "Spam" folder he found the requests.

The Custodian certified that when he returned to work on December 31, 2020, he transmitted an e-mail to the Complainant apologizing for not responding to his OPRA requests in a timely manner. The Custodian certified that he contacted both the Department of Public Works manager and the Finance Department manager to search for records responsive to the request. The Custodian also certified that the search entailed previous OPRA request responses. The Custodian certified that there are no records responsive to the items relevant to the complaint comprising the first request. The Custodian further certified that the records responsive to the second request consist of one hundred thirty-eight (138) pages, including a purchase order, invoice, voucher/warrant and requisition files for Montana Construction dated from September 1, 2018 until September 30, 2020. The Custodian certified that the responsive records were disclosed to the Complainant in unredacted form on December 31, 2020, which was "16 business days after receipt, 4 business days after realization."

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).⁸ 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).

Likewise, barring extenuating circumstances, a custodian's failure to respond immediately in writing to a complainant's OPRA request for immediate access records, either granting access, denying access, seeking clarification, or requesting an extension of time, also results in a "deemed" denial of the request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i).⁹ See Cody v. Middletown Twp. Pub. Sch., GRC Complaint No. 2005-98 (December 2005) and Harris v. N.J. Dep't of Corr., GRC Complaint No. 2011-65 (August 2012). See also Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007), holding that the custodian was obligated to immediately notify the complainant as to the status of immediate access records.

⁸ 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.

⁹ OPRA lists immediate access records as "budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information." N.J.S.A. 47:1A-5(e). The Council has also determined that purchase orders and invoices are immediate access records. See Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2012-03 (April 2013).

Here, all of the Complainant's request items, except for request item number 3 of the first request, sought contracts. Moreover, the Custodian certified in the SOI that responsive records included a purchase order and a voucher. Contracts, purchase orders and vouchers are immediate access records. The Custodian certified that he did not see the Complainant's requests on the date they were submitted because they were routed to his e-mail "Spam" folder; however, even after he did see the requests, he certified that he did not respond until four (4) business days later.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA requests either granting access, denying access, seeking clarification or requesting an extension of time immediately results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). Cody, GRC 2005-98; Harris, GRC 2011-65.

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.

First request

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 separately addressed each of three (3) request items listed in the Complainant's first request that are relevant to this complaint. The Custodian certified that upon review of files maintained by the Borough of Roselle Park, no records were found to exist for said request items.

As such, notwithstanding the Custodian's "deemed" denial, the Custodian did not unlawfully deny access to the Complainant's first request 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.

Second request

The Custodian certified that the records responsive to the second request consisted of one hundred thirty-eight (138) letter size pages, including a purchase order, invoice, voucher/warrant and requisition files for Montana Construction dated from September 1, 2018 until September 30,

2020. The Custodian certified that he disclosed said records to the Complainant on December 31, 2020.

Therefore, although the Custodian failed to respond to the Complainant's requests in a timely manner which resulted in a "deemed" denial, the Custodian certified that he disclosed all records responsive to the Complainant's second request on December 31, 2020. 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)).

Although the Custodian violated N.J.S.A. 47:1A-5(e), 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 existing records responsive to the Complainant's requests. 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 his burden of proof that he timely responded to the Complainant's OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA requests either granting access, denying

access, seeking clarification or requesting an extension of time immediately results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). Cody v. Middletown Twp. Pub. Sch., GRC Complaint No. 2005-98 (December 2005); Harris v. N.J. Dep’t of Corr., GRC Complaint No. 2011-65 (August 2012).

2. Notwithstanding the Custodian’s “deemed” denial, the Custodian did not unlawfully deny access to the Complainant’s first request 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. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. Although the Custodian failed to respond to the Complainant’s requests in a timely manner which resulted in a “deemed” denial, the Custodian certified that he disclosed all records responsive to the Complainant’s second request on December 31, 2020. N.J.S.A. 47:1A-6.
4. Although the Custodian violated N.J.S.A. 47:1A-5(e), 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 existing records responsive to the Complainant’s requests. 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

May 24, 2022