



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

June 28, 2022 Government Records Council Meeting

Vesselin Dittrich
Complainant

Complaint No. 2021-10

v.

NJ Department of Community Affairs,
Bureau of Homeowner Protection
Custodian of Record

At the June 28, 2022 public meeting, the Government Records Council (“Council”) considered the June 21, 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 request. N.J.S.A. 47:1A-6. Notwithstanding the active public health emergency (“PHE”) at the time of the request, the Custodian admitted that the delay in providing the responsive records after December 21, 2020 was due to an inadvertent oversight, instead of circumstances related to the PHE. See N.J.S.A. 47:1A-5(i)(2). As such, the Custodian’s failure to timely respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification, or requesting an extension of time resulted in a “deemed” denial of access pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). However, the GRC declines to order the Custodian to respond to the Complainant’s request since the evidence of record demonstrates that he responded to the Complainant on January 15, 2021, providing responsive records.
2. The Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to provide a timely response to the Complainant’s OPRA request. However, the Custodian demonstrated that he ultimately responded to the Complainant’s request on January 15, 2021, providing responsive records. 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 28th Day of June 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 30, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 28, 2022 Council Meeting**

**Vesselin Dittrich¹
Complainant**

GRC Complaint No. 2021-10

v.

**New Jersey Department of Community Affairs,
Bureau of Homeowner Protection²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of: “the communications by mail, email, fax, phone or any other communications between Mary Ann Merkh and any and all other employees of the Association Regulation Unit [(“ARU”)], if any, and 931 Park Avenue Condominium Association, Hoboken, NJ 07030, the Association Bard Members, the Association President Evan Cacace, the Association’s attorney Michael Della Rovere, and any and all other Association representatives and agents regarding my request to the Association for ADR of 6/28/2020 and my complaint with ARU of 8/25/2020.”

Custodian of Record: James F. Fahy
Request Received by Custodian: December 11, 2020
Response Made by Custodian: N/A
GRC Complaint Received: January 12, 2021

Background³

Request:

On November 29, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to Mary Ann Merkh seeking the above-mentioned records.

Denial of Access Complaint:

On January 12, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that as of January 12, 2021, no responsive records have been received from the Custodian.

¹ No legal representation listed on record.

² No legal representation listed on record.

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.

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Response:

On January 15, 2021, the Custodian responded to the Complainant's OPRA request in writing, providing forty-one (41) pages of responsive records.

Statement of Information:

On February 5, 2021, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that Ms. Merkh received the Complainant's OPRA request on December 11, 2020. The Custodian certified that because Ms. Merkh was not designated an "essential employee" under the COVID-19 workplace restrictions. The Custodian certified that Ms. Merkh therefore did not receive the request until she reported to the office on December 11, 2020. The Custodian certified that Ms. Merkh copied all applicable records on file and provided them to the Custodian.

The Custodian certified that on or about December 21, 2020, the records were scanned for electronic delivery and correspondence was drafted. The Custodian then certified that the records were inadvertently not sent on December 21, 2020.

The Custodian asserted that when reviewing open OPRA requests, he realized that he had not sent the requested records. The Custodian asserted that on January 15, 2021, the scanned records and correspondence were sent to the Complainant. The Custodian asserted that given the workplace restrictions and reduced staffing, the satisfaction of OPRA requests were taking longer than normal. The Custodian asserted that the records were provided to the Complainant in a timely fashion given the workplace restrictions in place.

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 October 31, 2007).

Additionally, the Legislature amended OPRA on March 20, 2020, in response to the global pandemic. P.L. 2020, c.10. Based on that amendment, N.J.S.A. 47:1A-5(i)(2) now provides that:

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.
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During a period declared pursuant to the laws of this State as a state of emergency, public health emergency, or state of local disaster emergency, the deadlines by which to respond to a request for, or grant or deny access to, a government record under paragraph (1) of this subsection or subsection e. of this section shall not apply, *provided, however, that the custodian of a government record shall make a reasonable effort, as the circumstances permit, to respond to a request for access to a government record within seven business days or as soon as possible thereafter.*

[Id. (Emphasis added).]

Although adjudicated during the pendency of this matter, the GRC finds Dunwell (O.B.O. Borough of Alpha) v. Twp. of Phillipsburg (Warren), GRC Complaint No. 2020-64 (February 2022) pertinent. There, the complainant asserted that the custodian failed to timely provide immediate access records under OPRA. The custodian certified that at the time she received the OPRA request, the municipality was operating with reduced staff and subsequently shutdown temporarily due to the pandemic and could not provide a response until the fifth (5th) business day after receipt. The Council held that although the request was submitted prior to the enactment of N.J.S.A. 47:1A-5(i)(2), the custodian provided sufficient facts and circumstances to reasonably justify the delay in providing access to the immediate access records.

Here, the Custodian certified that the Complainant submitted his OPRA request to Ms. Merkh on November 29, 2020, but certified that she was not in the office as an “essential employee” in accordance with the COVID-19 workplace restrictions. The Custodian thus asserted that she did not receive the request until December 11, 2020, when she returned to the office, copied the records, and sent them to the Custodian. The Custodian then asserted that the records were ready to be sent to the Complainant on or about December 21, 2020 but were inadvertently not sent at the time. The Custodian then stated that it was not until January 15, 2021, or several days after the instant complaint was filed, that the records were sent to the Complainant. The Custodian asserted that the existing workplace restrictions delayed the production of the records.

A review of the evidence demonstrates that the Custodian violated N.J.S.A. 47:1A-5(i). Although the OPRA request was made while a public health emergency (“PHE”) was in effect, and thus the language under N.J.S.A. 47:1A-5(i)(2) applied, the statute still required a “reasonable effort” to provide a response to an OPRA request within the allotted period. The Custodian certified to the workplace restrictions and limited staffing which prevented the OPRA request from being received and processed through December 21, 2020. However, the Custodian admitted that the records were not sent on December 21, 2020 due to an inadvertent oversight, rather than the pandemic related hardships.

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. Notwithstanding the active PHE at the time of the request, the Custodian admitted that the delay in providing the responsive records after December 21, 2020 was due to an inadvertent oversight, instead of circumstances related to the PHE. See N.J.S.A. 47:1A-5(i)(2). As such, the Custodian’s failure to timely respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification, or

requesting an extension of time resulted in a “deemed” denial of access pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). However, the GRC declines to order the Custodian to respond to the Complainant’s request since the evidence of record demonstrates that he responded on January 15, 2021, providing responsive records.

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); 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 instant matter, the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to provide a timely response to the Complainant’s OPRA request. However, the Custodian demonstrated that he ultimately responded to the Complainant’s request on January 15, 2021, providing responsive records. 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. Notwithstanding the active public health emergency (“PHE”) at the time of the request, the Custodian admitted that the delay in providing the responsive records after December 21, 2020 was due to an inadvertent oversight, instead of circumstances related to the PHE. See N.J.S.A. 47:1A-

- 5(i)(2). As such, the Custodian's failure to timely respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification, or requesting an extension of time resulted in a "deemed" denial of access pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). However, the GRC declines to order the Custodian to respond to the Complainant's request since the evidence of record demonstrates that he responded to the Complainant on January 15, 2021, providing responsive records.
2. The Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to provide a timely response to the Complainant's OPRA request. However, the Custodian demonstrated that he ultimately responded to the Complainant's request on January 15, 2021, providing responsive records. 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: Samuel A. Rosado
Staff Attorney

June 21, 2022