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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

November 9, 2022 Government Records Council Meeting

Linda Kent
Complainant
v.
City of Estell Manor (Atlantic)
Custodian of Record

Complaint No. 2021-184

At the November 9, 2022 public meeting, the Government Records Council ("Council") considered the October 27, 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. 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).

2. The proposed fee of $160.00 for use the City's Information Technology vendor to produce the responsive e-mail logs is lawful and consistent with OPRA. N.J.S.A. 47:1A-5(d); Paff v. Twp. of Galloway, 229 N.J. 340, 354 (2017). See also Anonymous Englishtown Taxpayer v. Borough of Englishtown (Monmouth), GRC Complaint No. 2021-18 (February 2022). For this reason, the Custodian has borne his burden of proof that the charge was warranted and was not required to disclose the responsive e-mail logs until the Complainant remitted payment for same. N.J.S.A. 47:1A-6; Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).

3. 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 lawfully passed onto the Complainant the cost for the City's Information Technology vendor to produce the responsive logs. N.J.S.A. 47:1A-5(d). 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 did 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 9th Day of November 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: November 15, 2022

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
November 9, 2022 Council Meeting

Linda Kent[1] **GRC Complaint No. 2021-184**
Complainant

v.

City of Estell Manor (Atlantic)[2]
Custodial Agency

Records Relevant to Complaint: Copies of:

1. E-mail logs from two (2) e-mail accounts for Joseph Venezia from January 1, 2016 through present.
2. E-mail logs from one (1) e-mail account ("and any other e-mail address used to conduct City [of Estell Manor ("City")] business") for Jennifer Blumenthal from January 1, 2020 to present.
3. E-mail log from one (1) e-mail account for Nelson Dilg from January 1, 2019 to present.
4. E-mail log from one (1) e-mail account for Matthew Olsen from January 1, 2020 to present.
5. E-mail log from one (1) e-mail account for Elizabeth Owen from January 1, 2020 to present.
6. E-mail log from one (1) e-mail account for Julie Sparks from January 1, 2020 to present.
7. E-mail logs from three (3) e-mail accounts ("and any other e-mail address used to conduct [C]ity business") for the Custodian from January 1, 2019 to present.
8. E-mail logs for two (2) e-mail accounts ("and any other e-mail address used to conduct [C]ity business") for Jeff Cornew from January 1, 2019 to present.

Custodian of Record: Judd Moore
Request Received by Custodian: May 17, 2021
Response Made by Custodian: July 28, 2021
GRC Complaint Received: August 6, 2021

Background[3]

Request and Response:

On May 17, 2021, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. The Complainant stated that no

[1] No legal representation listed on record.
[2] Represented by Richard DeLucry, Esq., of Cooper Levenson, P.A. (Atlantic City, 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.

special service charge should apply to "[b]asic reports and e-mail metadata," noting that no public agencies charged a special service charge for similar requests submitted through the "OPRA machine website." On July 26, 2021, the Complainant e-mailed the Custodian seeking a status update on her OPRA request, "which is now over two [(2)] months old."

On July 28, 2021, the fiftieth (50th) business day after receipt of the OPRA request, the Custodian responded in writing stating that upon he would disclose responsive records upon payment of a special service charge of $160.00 for the City's Information Technology ("IT") vendor to "complete this request."

Denial of Access Complaint:

On August 6, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant stated that the Custodian initially failed to respond to her OPRA request. The Complainant stated that two (2) days after seeking a status update, the Custodian responded assessing a charge of $160.00 for the City's IT vendor to produce the responsive logs.

The Complainant argued that the proposed special service charge was a "tactic to avoid" disclosing responsive records. The Complainant further argued that the imposed fee conflicts with "Paff v. Twp. of Galloway, Docket No. L-5428-13." The Complainant noted that in response to a prior OPRA request she received e-mail logs from the City free of charge on June 10, 2020.

Supplemental Response:[4]

On June 13, 2022, Custodian's Counsel e-mailed the parties proposing "a resolution" for the instant complaint. Specifically, Counsel stated that the IT vendor has produced the responsive e-mail logs. Counsel offered to disclose the records and absorb the vendor cost to do so. Counsel noted however that the logs comprise of 370 pages at 35 to 40 entries per page and would need to be reviewed for potentially exempt information. Counsel thus proposed that he could review and disclose the resulting logs to the Complainant by June 24, 2022.

Statement of Information:

On June 14, 2022, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on May 17, 2021. The Custodian certified that his search included providing the OPRA request to the City's IT vendor to produce the logs. The Custodian certified that he responded in writing on July 28, 2021 assessing a $160.00 charge to provide the responsive logs to the Complainant.

The Custodian argued that the City did not have the internal capability to produce the requested logs to the Complainant; thus, he contacted the City's IT vendor to perform the work. The Custodian asserted that the $160.00 charge represented the actual vendor cost to respond to the OPRA request and he lawfully passed same onto the Complainant. N.J.S.A. 47:1A-5(d). The

[4] On August 30, 2021, this complaint was referred to mediation. On May 23, 2022, this complaint was referred back to the GRC for adjudication.

Custodian noted that the Complainant filed this complaint without paying the assessed fee. The Custodian asserted that on June 10, 2022, he directed the vendor to create the logs in an attempt to settle this complaint. The Custodian certified that he received 370 pages of e-mail logs and forwarded them to Counsel for review and redaction where appropriate. The Custodian noted that on June 13, 2022, Counsel e-mailed the Complainant proposing a resolution to this complaint but did not receive a response.

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).[5] 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).

Here the Complainant submitted her OPRA request to the City on May 17, 2021. However, the Custodian did not respond until July 28, 2021, the fiftieth (50^{th}) business day after receipt of the subject OPRA request. The Custodian subsequently certified to these facts in the SOI. Thus, the evidence of record clearly proves that a "deemed" denial of access occurred here.[6]

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.

Special Service Charge

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.

[5] 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.

[6] The GRC notes that at the time of Complainant's OPRA request, the statutory time frame was in abeyance pursuant to N.J.S.A. 47:1A-5(i)(b). However, P.L. 2021, c.104 signed into law on June 4, 2021 rescinded the abeyance except in a limited circumstance. Notwithstanding, the Custodian provided no arguments supporting that his response delay, as least up until June 4, 2021, was reasonable.

Whenever a records custodian asserts that fulfilling an OPRA records request requires an "extraordinary" expenditure of time and effort, a special service charge may be warranted pursuant to N.J.S.A. 47:1A-5(c). In this regard, OPRA provides:

> Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an extraordinary expenditure of time and effort to accommodate the request, the public agency may charge, in addition to the actual cost of duplicating the record, a special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies . . .
>
> [N.J.S.A. 47:1A-5(c).]

OPRA further provides that:

> If a request is for a record . . . (3) requiring a substantial amount of manipulation or programming of information technology, the agency may charge, in addition to the actual cost of duplication, *a special charge that shall be reasonable and shall be based on the cost for any extensive use of information technology . . . that is actually incurred by the agency or attributable to the agency* for the programming, clerical, and supervisory assistance required, or both.
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> [N.J.S.A. 47:1A-5(d) (emphasis added).]

In O'Shea v. Pine Hill Bd. of Educ. (Camden), GRC Complaint No. 2007-192 (February 2009), the complainant requested a copy of an audio recording and charged the complainant for the duplication. The complainant objected to the fee, asserting that it was excessive. However, the custodian certified that the Board of Education did not possess the capability to complete the duplication in-house and provided a cost estimate from outside vendors. The Council found it was reasonable to obtain an estimate from an outside vendor for the actual cost of duplicating the record because the custodian certified that the Board lacked the equipment necessary to otherwise fulfill the complainant's request. N.J.S.A. 47:1A-5(c). See also Mangeri v. Monroe Twp. Bd. of Fire Comm'r of Dist. No. 1 (Middlesex), GRC Complaint No. 2010-70 (Interim Order dated January 25, 2011) (ordering the custodian to obtain a quote for reproduction of a recording or certify if same could not be reproduced).

The Council has also separately addressed the possibility of passing IT professional hourly rates onto a requester. In Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-281, *et seq*. (Interim Order dated October 28, 2014), the complainant sought access to e-mails between multiple individuals over a defined time period. The custodian, utilizing its IT vendor, proposed a charge of $120.00 an hour to retrieve the responsive records. After reviewing the 14-point questionnaire submitted by the Custodian as part of his SOI, the Council invalidated the charge, reasoning that:

> The evidence here indicates that a search for records responsive to the Complainant's OPRA request could be adequately performed by the employee and/or persons identified in the request. As in both [The Courier Post v. Lenape Reg'l High Sch., 360 N.J. Super. 191, 199 (Law Div. 2002)], and [Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-71 (Interim Order dated June 26, 2012)] . . . the GRC is not satisfied that utilizing Network Blade falls within an extraordinary amount of time or effort, or that no other person is capable of searching for the responsive records. Further, although utilizing Network Blade might be the most succinct way to search for all responsive e-mails, the evidence of record does not support that doing so is such a necessity that the Custodian had no other option. Also, given current programs such as Microsoft Outlook®, searching for e-mails/electronic correspondence does not take an IT professional level of expertise.
>
> [Id. at 13-14.]

However, in Anonymous Englishtown Taxpayer v. Borough of Englishtown (Monmouth), GRC Complaint No. 2021-18 (February 2022), the custodian assessed a $360.00 charge for production of e-mail logs passed on from their vendor. The complainant disputed the fee and argued in the Denial of Access Complaint that they previously received e-mail logs free of charge. The custodian maintained in the SOI that the Borough had no internal means of producing the logs and that the prior disclosure was not dispositive because the logs came from a different, less onerous e-mail system. the Council found that a vendor charge to produce e-mail logs was lawful. N.J.S.A. 47:1A-5(d); Paff v. Twp. of Galloway, 229 N.J. 340 (2017); O'Shea, GRC 2007-192.

Initially, the GRC notes that there is no dispute that the requested records are "government records" subject to disclosure in their base form per Paff, 229 N.J. 340. However, the New Jersey Supreme Court did open a pathway for agencies to charge ". . . a service-fee charge when the request for a record requires 'a substantial amount of manipulation or programming of information technology'" and the potential for redactions. Id. at 354 (citing N.J.S.A. 47:1A-5(d)); 358 (citing N.J.S.A. 47:1A-5(a)).

The crux of this complaint is whether the City lawfully passed onto the Complainant the cost of utilizing its IT vendor to produce the responsive e-mail logs. The Complainant argued in the negative, asserting that Paff prohibited such a cost and that the City previously disclosed e-mail logs to her in response to a prior OPRA request free of charge. Conversely, the City argued that it had no internal means to produce the logs. The City also attempted to resolve the issue, albeit well after the filing of this complaint, by offering the logs free of charge because the City asked the IT vendor to produce them absent remittance of the assessed fee.

A basic test derived from the Council's prior decisions on the vendor cost issue show that a public agency cannot rely on mere convenience to pass a third-party vendor cost unto a requestor. See *e.g.* Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-287 (Interim Order dated July 29, 2014). Instead, the agency must bear its burden of proving that use of a third-party vendor was required or essential to fulfill an OPRA request. Further, the agency must be able to show that the associated tasks could not be performed internally without substantive assistance from the vendor.

Considering all facts and how they compare to both Carter, GRC 2013-281, *et seq.* and the more recently decided Anonymous, GRC 2021-18, the GRC views the proposed fee in light of N.J.S.A. 47:1A-5(d) and not as a special service charge related to an extraordinary amount of time and effort contemplated in N.J.S.A. 47:1A-5(c). In reaching this conclusion, the GRC first accepts the City's explanation as to why they required their IT vendor to obtain the responsive logs. Second, the City was not barred from assessing a charge to every OPRA request seeking e-mail logs solely because it did not assess same on a prior similar disclosure. Third, and contrary to the Complainant's assertion, the City's actions here are consistent with the Paff Court's recognition that a charge may apply in certain circumstances as prescribed under N.J.S.A. 47:1A-5(d). The GRC does note that the evidence would have been further supported by an invoice from the IT company, as was provided to the complainant in O'Shea, GRC2007-192 and Anonymous, GRC 2021-18.

The GRC is also persuaded that this complaint is more like Anonymous, which the GRC finds instructive, and can be distinguished from Carter, GRC 2013-281. Specifically, the custodian in Carter never advanced an express technological need to utilize the agency's IT vendor beyond convenience. That air of convenience led the Council to view that charge as like passing on an attorney's rate for review and redaction. Here, the facts are more like the ones explored in Anonymous because both cases required third-party vendor action to produce the responsive records: OPRA plainly supports that the cost could be transferred to a requestor and not borne by the tax-paying public. The GRC notes that this determine is fact-specific: an agency's inability to prove proof of the essential need for third-party vendor participation could result in an invalidation of such a fee.

Accordingly, the proposed fee of $160.00 for use the City's IT vendor to produce the responsive e-mail logs is lawful and consistent with OPRA. N.J.S.A. 47:1A-5(d); Paff, 229 N.J. at 354. See also Anonymous, GRC 2021-18. For this reason, the Custodian has borne his burden of proof that the charge was warranted and was not required to disclose the responsive e-mail logs until the Complainant remitted payment for same. N.J.S.A. 47:1A-6; Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).

Knowing & Willful

OPRA states that "[a] public official, officer, employee or custodian who knowingly and 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. 1983)); 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 this matter, 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 lawfully passed onto the Complainant the cost for the City's IT vendor to produce the responsive logs. N.J.S.A. 47:1A-5(d). 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 did 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).

2. The proposed fee of $160.00 for use the City's Information Technology vendor to produce the responsive e-mail logs is lawful and consistent with OPRA. N.J.S.A. 47:1A-5(d); Paff v. Twp. of Galloway, 229 N.J. 340, 354 (2017). See also Anonymous Englishtown Taxpayer v. Borough of Englishtown (Monmouth), GRC Complaint No. 2021-18 (February 2022). For this reason, the Custodian has borne his burden of proof that the charge was warranted and was not required to disclose the responsive e-mail logs until the Complainant remitted payment for same. N.J.S.A. 47:1A-6; Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).

3. 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 lawfully passed onto the Complainant the cost for the City's Information Technology vendor to produce the responsive logs. N.J.S.A. 47:1A-5(d). 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 did 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

October 27, 2022