



State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS
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Commissioner

FINAL DECISION

June 25, 2024 Government Records Council Meeting

Stacie Percella
Complainant

Complaint No. 2022-584

v.

City of Bayonne (Hudson)
Custodian of Record

At the June 25, 2024 public meeting, the Government Records Council (“Council”) considered the June 18, 2024 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 has borne her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Specially, the Custodian, through Counsel, responded to the Complainant’s OPRA request in a reasonably immediate manner extending the response time frame through August 31, 2022. N.J.S.A. 47:1A-5(e); Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-330 (Interim Order dated February 26, 2013); Ranallo v. City of Trenton (Mercer), GRC Complaint No. 2017-222 (July 2019).
2. 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 extended time frame results in a “deemed” denial of said 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 v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). However, the GRC declines to order any further action because the responsive records were disclosed on September 14, 2022.
3. The Custodian’s failure to respond in the second extended time frame resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(i). However, the Custodian did not violate N.J.S.A. 47:1A-5(e) and also all responsive information was disclosed on September 14, 2022. 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 25th Day of June 2024

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 27, 2024

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 25, 2024 Council Meeting**

**Stacie Percella¹
Complainant**

GRC Complaint No. 2022-584

v.

**City of Bayonne (Hudson)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of “[g]overnment documents of the 2 million dollar increase” in employee salaries for the calendar year (“CY”) 2022 municipal budget including “[a]ll names, amount of increase of each employee” and their department.³

Custodian of Record: Madelene C. Medina

Request Received by Custodian: August 12, 2022

Response Made by Custodian: August 15, 2022

GRC Complaint Received: October 20, 2022

Background⁴

Request and Response:

On August 11, 2022, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 15, 2022, the first (1st) business day after receipt of the subject OPRA request, Custodian’s Counsel responded in writing on behalf of the Custodian stating that an extension of time through August 31, 2022 was necessary to respond to the subject OPRA request. On August 24, 2022, Counsel responded in writing to an second e-mail address different from the one noted on the subject OPRA request disclosing copies of the CY 2021 and CY2022 budget. On August 29, 2022, Counsel responded in writing on behalf of the Custodian again seeking an extension of time until September 13, 2022 to respond to the subject OPRA request.⁵

On September 1, 2022, the Complainant e-mailed the Custodian from the second e-mail address stating that she requested “immediate access” salary information and had yet to receive it.

¹ No legal representation listed on record.

² Represented by Jessica H. Connors, Esq. (Bayonne, NJ).

³ The Complainant requested additional records that are not at issue in 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.

⁵ This letter contained a third (3rd) e-mail address; however, the actual response was sent to the e-mail address identified on the subject OPRA request.

The Complainant asserted that the Custodian never sought an extension and failed to respond in the extended time frame. On September 2, 2022, Counsel resent its August 29, 2022 response to the Complainant at the OPRA request listed e-mail address. Counsel noted that the response contained “the incorrect e-mail address” and that the response time frame was extended through September 13, 2022.

On September 6, 2022, the Complainant e-mailed the Custodian from the second e-mail address again asserting a failure to disclose salary information or attempt to obtain another extension of time. On the same day, the Custodian responded to the second e-mail address resending the August 29, 2022 letter. The Complainant responded disputing that the Custodian ever sent said response to her. The Custodian responded advising that it is possible the e-mail address was entered incorrectly. The Custodian apologized for any confusion and noted that a response would be forthcoming as soon as possible. On September 14, 2022, the Custodian responded in writing advising that a response was due by close of business the prior day. The Custodian stated that due to vacations and an unexpected illness, an additional extension until September 20, 2022 was required. On the same day, the Custodian again responded disclosing responsive salary increase information with redactions for social security numbers. N.J.S.A. 47:1A-1.1.

Denial of Access Complaint:

On October 20, 2022, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). Therein, the Complainant asserted that the City of Bayonne (“City”) had a “reputation” for ignoring certain resident OPRA requests, including those from her. The Complainant contended that here, the City refused to disclose the requested employee salary information, which is considered “immediate access” information. N.J.S.A. 47:1A-5(e). The Complainant argued that the City, including the Custodian and Counsel, should be found to have knowingly and willfully violated OPRA and assessed the civil penalty. N.J.S.A. 47:1A-11.

Statement of Information:

On December 12, 2022, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on August 12, 2022. The Custodian certified that her search included sending the OPRA request to the City’s Finance and Payroll Departments to locate responsive records. The Custodian certified that Counsel responded in writing on her behalf seeking multiple extensions with a final response date of September 13, 2022. The Custodian certified that the responsive salary information was disclosed to the Complainant on September 14, 2022.

The Custodian contended that this complaint was the result of a miscommunication between the City and the Complainant. The Custodian argued that the initial response was sent to an e-mail address commonly used by the Complainant to communicate with the City; however, the second response was sent to the e-mail address on the OPRA request. The Custodian noted that the City did not receive an undeliverable notice and the Complainant has used both e-mail

addresses. The Custodian also noted that she was relying on Counsel to address the subject OPRA request.

Additional Submissions:

On December 14, 2022, the Complainant submitted a sur-reply to the SOI. Therein, the Complainant disputed that the City did not receive an undeliverable message when disclosing the responsive salary information. The Complainant further contended that the City is well aware of those e-mail addresses she frequents and cannot now argue that sending a response to a third “inactive” e-mail address placed at the top of the City’s response letters did not result in a delivery failure. The Complainant further reiterated that the City failed to disclose the responsive salary information immediately.

The Complainant questioned why she had to file a complaint to expose the City’s repeated insufficient handling of an OPRA request. The Complainant contended that the City provided false information to the GRC to cover its failure to disclose the responsive records. The Complainant again requested that the GRC assess civil penalties to the City.

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).

Immediate Access

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).⁷ 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.

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.

⁷ 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 invoices are “immediate access” records. See Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2012-03 (April 2013).

Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007) (holding that the custodian was obligated to notify the complainant immediately as to the status of “immediate access” records). Additionally, the Council has held that custodians have “an obligation to immediately” respond to immediate access items within a larger OPRA request either granting access, denying access, seeking clarification, or requesting an extension time. See Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-330 (Interim Order dated February 26, 2013).

In the instant complaint, the Complainant submitted her OPRA request seeking “immediate access” records, namely “salary” on August 11, 2022. The Custodian received the OPRA request on August 12, 2022 (a Friday) and responded on August 15, 2022 (a Monday) extending the response time frame through August 31, 2022. Additional extensions were timely taken through September 13, 2022. Counsel ultimately disclosed responsive records on September 14, 2022. This complaint followed, wherein the Complainant argued that the Custodian violated N.J.S.A. 47:1A-5(e) by failing to disclose the requested salary information immediately. The Custodian did not directly address the “immediate” access issue in the SOI.

Upon review, the GRC finds that Counsel’s response on behalf of the Custodian was reasonably “immediate.” See Ranallo v. City of Trenton (Mercer), GRC Complaint No. 2017-222 (July 2019) (holding that while the custodian’s written response on the first (1st) business day after receipt was reasonable, therein the custodian failed to grant access, deny access, seek additional clarification, or obtain an extension). Further, that response clearly extended the time frame to a date certain, which is one of the acceptable responses per precedential case law. Kelley, GRC 2007-11.

Accordingly, the Custodian has borne her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Specially, the Custodian, through Counsel, responded to the Complainant’s OPRA request in a reasonably immediate manner extending the response time frame through August 31, 2022. N.J.S.A. 47:1A-5(e); Kohn, GRC 2011-330; Ranallo, GRC 2017-222.

Extension of Time

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:

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.]

In this matter, the Complainant submitted her OPRA request on August 11, 2022. As previously noted, the response time frame was extended through August 31, 2022 and September 13, 2022 respectively. However, Counsel did not disclose the requested information until September 14, 2022, one (1) business day after expiration of the second extended response time frame. This complaint followed, wherein the Complainant argued that the Custodian failed to respond within the extended response time frame. In the SOI, the Custodian asserted that miscommunication based on the City's use of two (2) e-mail addresses. The Custodian nonetheless certified that the responsive records were disclosed on September 14, 2022.

Briefly, the GRC must address the trifecta e-mail address discrepancy that appears to be at the center of this complaint. To this issue, the evidence of record provides that the City utilized the e-mail address contained on the OPRA request in the first response. However, the City subsequently sent responses to the second e-mail address, which has been identified by the Complainant in the Denial of Access Complaint. Both e-mail addresses were used interchangeably by both parties throughout the course of the response process. Further, multiple letters attached to those e-mails contained a third e-mail address, which the Complainant claimed was inactive and that the City could not argue that delivery was successful. However, a review of all correspondence submitted by the parties proves that at no point did the City use the third e-mail address referenced by Counsel in response letters. Thus, the inclusion of this third e-mail address on the letter did not impact the response process at any point. The evidence of record instead provides that between both e-mail addresses, the Complainant was aptly advised of the extended time frames through the expiration of the September 13, 2022 expiration.

Having addressed the forgoing, the evidence of record nonetheless supports that a "deemed" denial of access occurred. Specifically, the City originally extended the deadline through August 31, 2022 and on August 29, 2022 extended that response time again to September 13, 2022. However, the Custodian failed to respond by the expiration of said deadline. Instead, the Custodian did not respond until September 14, 2022 through Counsel. Thus, and like Kohn, GRC 2007-124, the Custodian's failure to conform with the September 13, 2022 extended deadline results in a "deemed" denial of access.

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 extended time frame results in a "deemed" denial of said 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. However, the GRC declines to order any further action because the responsive records were disclosed on September 14, 2022.

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 respond in the second extended time frame resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(i). However, the Custodian did not violate N.J.S.A. 47:1A-5(e) and also all responsive information was disclosed on September 14, 2022. 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 has borne her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Specially, the Custodian, through Counsel, responded to the Complainant’s OPRA request in a reasonably immediate manner extending the response time frame through August 31, 2022. N.J.S.A. 47:1A-5(e); Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-330 (Interim Order dated February 26, 2013); Ranallo v. City of Trenton (Mercer), GRC Complaint No. 2017-222 (July 2019).
2. 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 extended time frame results in a “deemed” denial of said 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 v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). However,

the GRC declines to order any further action because the responsive records were disclosed on September 14, 2022.

3. The Custodian's failure to respond in the second extended time frame resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(i). However, the Custodian did not violate N.J.S.A. 47:1A-5(e) and also all responsive information was disclosed on September 14, 2022. 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

June 18, 2024