



State of New Jersey
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Lt. Governor

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

May 26, 2015 Government Records Council Meeting

Linda Graumann
Complainant

Complaint No. 2014-314

v.

Newfield Police Department (Gloucester)
Custodian of Record

At the May 26, 2015 public meeting, the Government Records Council (“Council”) considered the May 19, 2015 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 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 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 Custodian’s response was insufficient because she failed to respond in writing to each request item contained in the request individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008).
3. The Custodian failed to bear her burden of proving that the denial of access to request item numbers 1 and 2 was authorized by law. N.J.S.A. 47:1A-6. However, the Council declines to order disclosure because the evidence of record reveals that the Custodian delivered said records to the Complainant on September 17, 2014.
4. The Custodian did not unlawfully deny access to request item number 3 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. NJ Dep’t of Educ.*, GRC Complaint No. 2005-49 (July 2005).
5. Although the Custodian failed to respond in writing to each request item contained in the request individually; failed to bear her burden of proof that she timely responded to the Complainant’s OPRA request, which resulted in a “deemed” denial of the



request; and failed to bear her burden of proving that the denial of access to request items numbered 1 and 2 were authorized by law, she did belatedly disclose the records responsive to request items numbered 1 and 2. Additionally, the evidence of record does not indicate that the Custodian's actions 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 26th Day of May, 2015

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: May 28, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 26, 2015 Council Meeting**

**Linda Graumann¹
Complainant**

GRC Complaint No. 2014-314

v.

**Newfield Police Department (Gloucester)²
Custodial Agency**

Records Relevant to Complaint: Copies via e-mail of any and all Police Department incident, operations, or regular police reports concerning Steven Graumann dated July 10, 2014, July 19, 2014. Also, any reports written for a call for police by Steven Graumann in 2006 or 2007 regarding excessive construction noise coming from the Purdy residence around 11:00 p.m.

Custodian of Record: Toni VanCamp
Request Received by Custodian: July 22, 2014
Response Made by Custodian: August 18, 2014³
GRC Complaint Received: September 8, 2014

Background⁴

Request and Response:

On July 22, 2014, the Complainant submitted an official Open Public Records Act (“OPRA”) request form to the Custodian seeking the above-mentioned records.⁵ On August 18, 2014, the nineteenth (19th) business day following receipt of said request, the Custodian responded in writing to inform the Complainant that “the second part” of the request was vague and required clarification.

¹ No legal representation listed on record.

² Represented by John C. Eastlack, Jr., Esq., of Weir & Partners LLP (Cherry Hill, NJ).

³ An undated written response was prepared by Ptl. J. Schaw of the Newfield Police Department on behalf of the Custodian. The Complainant stated that she received the response on August 20, 2014. The Custodian certified that the response was made on or about August 17-18, 2014. August 17, 2014 was a Sunday; therefore the GRC has determined the date of the response to be August 18, 2014.

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 The form used by the Complainant was a Newfield Police Department Government Records Request Form, which prominently named Toni L. VanCamp as the Records Custodian in the heading thereof.

Denial of Access Complaint:

On September 8, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that she submitted her request to the Custodian on July 22, 2014, but never received the requested records.

On the Records Denied List, the Complainant broke her request down into three (3) request items: she listed request item number 1 as a police incident report dated July 10, 2014; she listed request item number 2 as a police incident report dated July 19, 2014; and she listed request item number 3 as an incident report for Steven Graumann’s call regarding construction noise coming from the Purdy residence sometime from September 7, 2006, to February 28, 2007.

The Complainant states that on August 20, 2014, she received a response from Patrolman Schaw informing her that her request for the third item was too vague and that she needed to provide a specific date or complaint number. The Complainant further states that on August 20, 2014, she e-mailed the letter she received from Patrolman Schaw to the Custodian, objecting to the necessity of providing specific dates or complaint numbers for the third request item. The Complainant states that, nonetheless, she did provide the Custodian with additional information to narrow the time frame for the third item.⁶

The Complainant asserts that one week before she filed the complaint, she again followed-up with the Custodian regarding the status of her request. The Complainant states that the Custodian assured her that she spoke with the Police Chief regarding the request.

Statement of Information:

On September 18, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on July 22, 2014, and that Patrolman J. Schaw responded in writing on or about August 17-18, 2014.

The Custodian certifies that within approximately one week from receipt of the Complainant’s request, Patrolman Schaw determined that two (2) incident reports were responsive to the first part of the request. The Custodian certifies that the reports were dated June 10, 2014, and July 19, 2014.⁷ The Custodian further certifies that the Police Department failed to follow the usual practice of disclosing records directly to the requestor and instead placed an envelope containing the records on a cluttered counter in the Clerk’s office, unbeknownst to the Custodian. The Custodian certifies that it was not until the complaint was filed that she located the misplaced records and informed the Complainant to pick up same. The Custodian certifies that she provided the following two records to the Complainant on September 17, 2014: a police incident report dated June 10, 2014, consisting of two (2) pages, and a police incident report dated July 19, 2014, consisting of two (2) pages.

⁶ The Complainant narrowed the time frame from “2006 or 2007” to September 7, 2006 - February 28, 2007.

⁷ In reply to the GRC’s inquiry, the Complainant, via e-mail dated May 15, 2015, confirmed that June 10, 2014, is the correct date of the record responsive to request item number 1.

The Custodian certifies that the Complainant also requested records prepared in 2006 or 2007, which would have been incident reports; however, the request was allegedly vague because "...the Requestor did not have a more specific date other than some time in year 2006/2007."⁸ Moreover, the Custodian certifies that said incident reports would have been series 0036-003 records, which the agency is only required to retain for a period of two years; therefore the records were likely destroyed. The Custodian certifies that, notwithstanding the probability of destruction, the Police Department did conduct a search of its database for 2006-2007 incidents responsive to the Complainant's request but could not find any responsive records in existence.

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).⁹ 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 evidence of record reveals that the Complainant submitted the request to the Custodian on an official OPRA request form. The evidence of record further reveals that Police Department personnel, on behalf of the Custodian, responded in writing solely to request item number 3, informing the Complainant that the request item was vague and required clarification; however, said response was not made until the nineteenth (19th) business day following receipt of the request.

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 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.

⁸ This is not an accurate statement because the Custodian filed the SOI on September 18, 2014; however, by e-mail dated August 20, 2014, and again in the Denial of Access Complaint, verified on September 6, 2014, the Custodian narrowed the timeframe from a twenty-four month period to less than a six month period.

⁹ 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.

Sufficiency of Response

OPRA provides that a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g). Further, in Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008), the GRC held that "...[t]he Custodian's response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5(g).

Here, the Custodian responded to the Complainant's request by informing the Complainant that "the second part" of the request was vague and required clarification. The Custodian completely failed to acknowledge or address the balance of the request.

Therefore, the Custodian's response was insufficient because she failed to respond in writing to each request item contained in the request individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff, GRC 2007-272.

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.

Request item number 1 - Police Department incident, operations, or regular police reports concerning Steven Graumann dated July 10, 2014.

Request item number 2 - Police Department incident, operations, or regular police reports concerning Steven Graumann dated July 19, 2014.

The Custodian certified that Police Department personnel failed to follow their usual practice of disclosing the records directly to the Complainant and instead placed the records responsive to request items numbered 1 and 2 on a cluttered counter inside the Clerk's office. The Custodian certified that consequently the records responsive to the request items sat undiscovered by the Custodian for almost two months when receipt of the complaint prompted her to locate the records and disclose same to the Complainant. The Custodian certified that she disclosed the records to the Complainant on September 17, 2014.

Accordingly, the Custodian failed to bear her burden of proving that the denial of access to request item numbers 1 and 2 was authorized by law. N.J.S.A. 47:1A-6. However, the Council declines to order disclosure because the evidence of record reveals that the Custodian delivered said records to the Complainant on September 17, 2014.

Request item number 3 - reports written for a call for police by Steven Graumann in 2006 or 2007 regarding excessive construction noise coming from the Purdy residence around 11:00 p.m.

In Pusterhofer v. NJ 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 certified that, notwithstanding the fact that the request for this item was vague and that any responsive records were likely destroyed, Police Department personnel conducted a search of their database for 2006-2007 incidents that may have been responsive to the request item; however, it was concluded that responsive records do not exist.

As such, the Custodian did not unlawfully deny access to request item number 3 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.

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 (Berg); 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)).

Here, although the Custodian failed to respond in writing to each request item contained in the request individually; failed to bear her burden of proof that she timely responded to the Complainant's OPRA request, which resulted in a “deemed” denial of the request; and failed to bear her burden of proving that the denial of access to request items numbered 1 and 2 was

authorized by law, she did belatedly disclose the records responsive to request items numbered 1 and 2. Additionally, the evidence of record does not indicate that the Custodian's actions 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 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 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 Custodian's response was insufficient because she failed to respond in writing to each request item contained in the request individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008).
3. The Custodian failed to bear her burden of proving that the denial of access to request item numbers 1 and 2 was authorized by law. N.J.S.A. 47:1A-6. However, the Council declines to order disclosure because the evidence of record reveals that the Custodian delivered said records to the Complainant on September 17, 2014.
4. The Custodian did not unlawfully deny access to request item number 3 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. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
5. Although the Custodian failed to respond in writing to each request item contained in the request individually; failed to bear her burden of proof that she timely responded to the Complainant's OPRA request, which resulted in a "deemed" denial of the request; and failed to bear her burden of proving that the denial of access to request items numbered 1 and 2 were authorized by law, she did belatedly disclose the records responsive to request items numbered 1 and 2. Additionally, the evidence of record does not indicate that the Custodian's actions 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: John E. Stewart

Approved By: Dawn R. SanFilippo
Deputy Executive Director

May 19, 2015