



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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FINAL DECISION

April 25, 2007 Government Records Council Meeting

Femaarta Momo
Complainant

Complaint No. 2006-206

v.

NJ Department of State,
Office of Faith Based Initiatives
Custodian of Record

At the April 25, 2007 public meeting, the Government Records Council (“Council”) considered the April 18, 2007 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 violated N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-5.g. by failing to provide the Complainant with a written response stating that the record requested does not exist within the statutorily mandated seven (7) business days therefore creating a “deemed” denial.
2. The Custodian’s actions, most notably the Custodian’s failure to respond to the Complainant’s OPRA request, appear to be negligent and heedless, but the evidence of record does not support a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.a.

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 April, 2007

Vincent P. Maltese, Chairman
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records
Council.

Robin Berg Tabakin, Secretary
Government Records Council

Decision Distribution Date: May 1, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 25, 2007 Council Meeting**

**Femaarta Momo¹
Complainant**

GRC Complaint No. 2006-206

v.

**Department of State, Office of Faith Based Initiatives²
Custodian of Records**

Records Relevant to Complaint: Records indicating how much Temporary Assistance for Needy Families (“TANF”) money was used in the sexual harassment settlement between Patricia Nagbe and Isaac Dorsey.

Request Made: October 22, 2006

Response Made: None.

Custodian: Justin Zimmerman³

GRC Complaint Filed: November 20, 2006

Background

October 22, 2006

Complainant’s Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint listed above.

November 20, 2006

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the Complainant’s OPRA request dated October 22, 2006 attached. The Complainant alleges that there has been no response to this OPRA request.

November 21, 2006

Offer of Mediation sent to both parties. Although the Custodian agreed to mediation, the Complainant requested that the GRC proceed with a full investigation of this complaint.

December 7, 2006

Request for Statement of Information sent to the Custodian.

¹ No legal representation listed on record.

² No legal representation listed on record.

³ At the time of the request, the Custodian was Malik Cupid.

December 14, 2006

Custodian's Statement of Information ("SOI") received. The Custodian asserts that on November 8, 2006, the Complainant faxed a letter requesting the records listed above. The Custodian asserts that there are no records responsive to the Complainant's OPRA request. The Custodian further declares that an audit will take place to investigate this matter and that if there are any findings the information will be provided to the Complainant.

April 4, 2007

The new Custodian provides the GRC with a legal certification stating that the record requested does not exist. The Custodian also provides the GRC with a letter from Kenia Nunez, Internal Auditor, stating that upon review it appears that no TANF funds were used in the settlement of a lawsuit.

Analysis

Whether the Custodian unlawfully denied access to the requested record?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

Further, OPRA provides that:

“...[i]f the custodian is *unable to comply with a request* for access, the custodian shall *indicate the specific basis therefore* on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” (Emphasis added.) N.J.S.A. 47:1A-5.g

Additionally, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian

fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request ...*” (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

The Complainant asserts that she submitted this OPRA request on or about October 22, 2006 for the records indicating how much TANF money was used in the sexual harassment settlement between Patricia Nagbe and Isaac Dorsey. The Complainant alleges that there has been no response to this OPRA request.

The Custodian asserts that the Complainant faxed a letter requesting the records listed above on November 8, 2006. The Custodian asserts that there are no records responsive to the Complainant’s OPRA request. The Custodian provides the GRC with a legal certification on April 4, 2006, stating that the record requested does not exist. The Custodian also provides the GRC with a letter from Kenia Nunez, Internal Auditor, stating that upon review it appears that no TANF funds were used in the settlement of a lawsuit.

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. 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.

OPRA also provides that if a Custodian is unable to comply with a records request, he must notify the Complainant in writing indicating a lawful reason for same pursuant to N.J.S.A. 47:1A-5.g. Additionally, OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days of receipt of said request. As also prescribed under 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.

Because the Custodian in this matter failed to respond to the Complainant’s OPRA request within the statutorily mandated seven (7) business days either granting access, denying access, requesting an extension or seeking clarification of the request, the Complainant’s OPRA request was “deemed” denied. N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i.

Whether the delay in response to the records request rises to the level of a knowing and willful violation of OPRA?

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 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 at 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 (App. Div. 1996) at 107).

The evidence of record indicates that the Custodian violated OPRA by failing to provide a response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days. The Custodian’s actions, most notably the Custodian’s failure to respond to the Complainant’s OPRA request, appear to be negligent and heedless, but the evidence of record does not support a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.a.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian violated N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-5.g. by failing to provide the Complainant with a written response stating that the record requested does not exist within the statutorily mandated seven (7) business days therefore creating a “deemed” denial.

2. The Custodian's actions, most notably the Custodian's failure to respond to the Complainant's OPRA request, appear to be negligent and heedless, but the evidence of record does not support a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.a.

Prepared By:

Rebecca Steese
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

April 18, 2007