



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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FINAL DECISION

March 26, 2008 Government Records Council Meeting

Louis Toscano
Complainant

Complaint No. 2007-296

v.

NJ Department of Labor,
Division of Vocational Rehabilitation Services
Custodian of Record

At the March 26, 2008 public meeting, the Government Records Council (“Council”) considered the March 19, 2008 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’s failure to respond in writing to the Complainant’s OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, as required by N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., results in a “deemed” denial of the complainant’s OPRA request. Kelley v. Township of Rockaway, GRC Complaint No. 2006-176 (October 2007).
2. The Council does not have the authority to determine whether NJ Division of Vocational Rehabilitation Services has correctly followed their records retention policy pursuant to N.J.S.A. 47:1A-7.b. See Chaka Kwanzaa v. Dept of Corrections, GRC Complaint No. 2004-167 (March 2005); Christine Gillespie v. Newark Public Schools, GRC Complaint No. 2004-105 (November 2004); Jay Katinsky v. River Vale Township, GRC Complaint No. 2003-68 (November 2003); Louis Toscano v. NJ Dept of Labor, GRC Complaint No. 2005-59 (September 2005); Van Pelt v. Edison Township Board of Education, GRC Complaint No. 2007-179 (January 2008).
3. Although the Custodian’s failure to provide a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days resulted in a “deemed” denial, it is concluded that 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. However, the Custodian’s unlawful “deemed” denial of access appears negligent and heedless



since she is vested with the legal responsibility of granting and denying access in accordance with the law.

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 March, 2008

Robin Berg Tabakin, Vice Chairman
Government Records Council

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

Janice Kovach
Government Records Council

Decision Distribution Date: March 31, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 26, 2008 Council Meeting**

**Louis Paul Toscano¹
Complainant**

GRC Complaint No. 2007-296

v.

**New Jersey Department of Labor,
Division of Vocational Rehabilitation Services²
Custodian of Records**

Records Relevant to Complaint: The Complainant's entire New Jersey Department of Labor, Division of Vocational Rehabilitation Services ("NJDVRS") case record from May, 1985 to December 26, 2000 in chronological order.³

Request Made: November 3, 2007

Response Made: November 20, 2007

Custodian: Wanda Rivera

GRC Complaint Filed: November 29, 2007

Background

November 3, 2007

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

November 12, 2007

Custodian's Response to the OPRA request. The Custodian responds verbally to the Complainant's OPRA request on the fourth (4th) business day following receipt of such request.

November 20, 2007

Letter from the Custodian to the Complainant. The Custodian states that after speaking with the Complainant by telephone on November 12, 2007, the Custodian learned that the Complainant has previously been provided a copy of the requested records. The Custodian further states that because the case has not been re-opened since that time, no current file exists.

¹ No legal representation listed on record.

² Represented by DAG Brady Montalbano Connaughton, on behalf of the NJ Attorney General.

³ The Complainant also advises that he has already paid \$85 for his case file and received the record in bad condition.

The Custodian states that the requested record has been destroyed in accordance with NJDVRS's records retention procedure. The Custodian further states that contrary to the Complainant's past contention about the condition of the record requested, NJDVRS records are filed in an order which the agency finds operationally expedient and not necessarily in strict chronological order.

November 29, 2007

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- Complainant's OPRA request dated November 3, 2007.
- Letter from the Custodian to the Complainant dated November 20, 2007.⁴

The Complainant states that he submitted an OPRA request to NJDVRS on November 3, 2007. The Complainant states that he received a written response dated November 20, 2007 in which the Custodian advised that the record requested had been destroyed according to NJDVRS's records retention policy.

The Complainant contends that he was notified on December 13, 2006 that the requested record was destroyed, however, the Complainant does not believe that the record was actually destroyed because the record had not been inactive for the six (6) years needed to legally destroy the record. The Complainant contends that NJDVRS illegally destroyed the requested record in retaliation for the Complainant's attempt to reopen his NJDVRS case file, which began in September, 2005. The Complainant contends that NJDVRS's actions are not only a denial of access to the requested record, but a denial of service to the Complainant, as well.

The Complainant agreed to mediate this complaint.

December 18, 2007

Offer of Mediation sent to the Custodian. The Custodian did not respond to the Offer of Mediation.

January 15, 2008

Request for the Statement of Information sent to the Custodian.

January 18, 2008

E-mail from the Custodian's Counsel to the GRC. The Custodian's Counsel requests an extension of time to submit the Statement of Information.

January 18, 2007

E-mail from the GRC to the Custodian's Counsel. The GRC grants the Custodian Counsel's request for an extension of time to submit the Statement of Information until January 30, 2008.

⁴ The Complainant attached additional material not relevant to the adjudication of this complaint.
Louis Paul Toscano v. New Jersey Department of Labor, Division of Vocational Rehabilitation Services, 2007-296 – Findings and Recommendations of the Executive Director

January 29, 2008

Custodian's Statement of Information ("SOI") with the following attachments:

- Complainant's OPRA request dated November 3, 2007.
- Letter from the Custodian to the Complainant dated November 20, 2007.
- 34 C.F.R. § 74.53 – Retention and access requirements for records.
- NJDVRS Administration Memorandum AM 99-011 dated February 10, 2000.
- N.J.S.A. 34:16-33 – Confidential character of records.
- 34 C.F.R. § 361.38 – Protection, use and release of personal information.

The Custodian certifies that the requested record was destroyed five (5) years from the end of fiscal year 2000 (the year in which the Complainant's case file was closed) in accordance with 29 C.F.R. 74.53 and NJDVRS Administrative Memorandum AM 99-011. The Custodian certifies that based on these facts, the Custodian did not need to search for the record requested because the Complainant already had the only existing copy of the requested record.

The Custodian states that she received the Complainant's November 3, 2007 OPRA request on Monday, November 5, 2007. The Custodian states that she verbally replied to the Complainant on November 12, 2007 and supplemented the Custodian's reply with a written response on November 20, 2007 stating that the requested record had been destroyed in accordance with NJDVRS's records retention policy.

The Custodian states that the Complainant acknowledges receipt of the requested record from an earlier request⁵ but is not satisfied with the condition of the record; specifically, that the record contains documents that are out of chronological order. The Custodian asserts that OPRA does not require that records furnished to requesters be organized chronologically.

Additionally, the Custodian states that the requested record was destroyed in accordance with 29 C.F.R. 74.53, which states that the requested record must be retained for a three (3) year period. The Custodian further states that NJDVRS's retention schedule as set forth in AM 99-011 indicates that the requested record should be kept on-site for three (3) years and then moved to archives for two (2) years. The Custodian states that the records may be destroyed after five (5) years. The Custodian finally states that the requested record was closed in 2000, was provided to the Complainant in an OPRA request prior to the end of the five (5) year retention period, and was subsequently destroyed in accordance with NJDVRS records retention policy.

Analysis

Whether the Custodian unlawfully denied access to the requested record?

OPRA provides that:

⁵ See Toscano v. New Jersey Department of Labor, GRC Complaint No. 2005-59 (September, 2005). Louis Paul Toscano v. New Jersey Department of Labor, Division of Vocational Rehabilitation Services, 2007-296 – Findings and Recommendations of the Executive Director

“...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.

OPRA also provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor 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 ...” N.J.S.A. 47:1A-5.g.

OPRA further 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.

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. 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. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1.

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. 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. Further, the custodian’s

response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.

The Custodian responded verbally on the fourth (4th) business day after receipt of the Complainant's OPRA request; however, the Custodian's failure to respond in writing to the Complainant's OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, as required by N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., results in a "deemed" denial of the complainant's OPRA request. Kelley v. Township of Rockaway, GRC Complaint No. 2006-176 (October 2007).

Whether the Government Records Council has authority over a government agency's record retention schedule?

OPRA states that:

"[t]The Government Records Council shall ... receive, hear, review and adjudicate a complaint filed by any person concerning *a denial of access to a government record* by a records custodian..." (Emphasis added.)
N.J.S.A. 47:1A-7.b.

In this case, the Complainant asserts that NJDVRS illegally destroyed the requested record as retaliation against the Complainant for attempting to reopen his NJDVRS case file beginning in September, 2005. Conversely, the Custodian certifies that the requested record was destroyed in accordance with NJDVRS's records retention policy.

OPRA requires that the GRC shall review and adjudicate complaints filed by any person concerning a denial of access to a government record by a record custodian. N.J.S.A. 47:1A-7.b. In the complaint now before the Council, the Custodian certifies in the SOI that the requested record has been destroyed in accordance with NJDVRS's records retention policy while the Complainant asserts that NJDVRS intentionally destroyed the Complainant's case file in order to deny access.

Pursuant to N.J.S.A. 47:1A-7.b., which delineates the Council's powers and duties, the GRC does not have the authority to regulate the manner in which a Township maintains its files or which records a Township must maintain. See Chaka Kwanzaa v. Dept of Corrections, GRC Complaint No. 2004-167 (March 2005)(the GRC does not have authority over the content of a record); Christine Gillespie v. Newark Public Schools, GRC Complaint No. 2004-105 (November 2004)(the GRC does not have the authority to adjudicate the validity of a record); Jay Katinsky v. River Vale Township, GRC Complaint No. 2003-68 (November 2003)(the integrity of a requested record is not within the GRC's authority to adjudicate); Louis Toscano v. NJ Dept of Labor, GRC Complaint No. 2005-59 (September 2005)(the GRC does not have authority over the condition of records provided by a Custodian); Van Pelt v. Edison Township Board of Education, GRC Complaint No. 2007-179 (January 2008)(the GRC does not have authority over which records a government agency must maintain).

The Council, therefore, does not have the authority to determine whether NJDVRS has correctly followed their records retention policy pursuant to N.J.S.A. 47:1A-7.b.

Whether the Custodian’s actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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:

“... If 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).

Although the Custodian’s failure to provide a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days resulted in a “deemed” denial, it is concluded that 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. However, the Custodian’s unlawful “deemed” denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, as required by N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., results in a "deemed" denial of the complainant's OPRA request. Kelley v. Township of Rockaway, GRC Complaint No. 2006-176 (October 2007).
2. The Council does not have the authority to determine whether NJ Division of Vocational Rehabilitation Services has correctly followed their records retention policy pursuant to N.J.S.A. 47:1A-7.b. See Chaka Kwanzaa v. Dept of Corrections, GRC Complaint No. 2004-167 (March 2005); Christine Gillespie v. Newark Public Schools, GRC Complaint No. 2004-105 (November 2004); Jay Katinsky v. River Vale Township, GRC Complaint No. 2003-68 (November 2003); Louis Toscano v. NJ Dept of Labor, GRC Complaint No. 2005-59 (September 2005); Van Pelt v. Edison Township Board of Education, GRC Complaint No. 2007-179 (January 2008).
3. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, it is concluded that 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. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By:

Frank F. Caruso
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

March 19, 2008