



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

Toll Free: 866-850-0511
Fax: 609-633-6337
E-mail: grc@dca.state.nj.us
Web Address:
www.nj.gov/grc

ROBIN BERG TABAKIN, Chair
COMMISSIONER JOSEPH V. DORIA, JR.
COMMISSIONER LUCILLE DAVY
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

July 30, 2008 Government Records Council Meeting

Ali S. Morgano
Complainant

Complaint No. 2008-79

v.

NJ Office of the Public Defender, Essex County
Custodian of Record

At the July 30, 2008 public meeting, the Government Records Council (“Council”) considered the July 23, 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. Because Deputy Public Defender Michael Marucci failed to forward the OPRA request to the Custodian or direct the Complainant to the Custodian he violated N.J.S.A. 47:1A-5.h. See also Mourning v. Department of Corrections, GRC Complaint No. 2006-75 (August 2006) and Vessio v. New Jersey Department of Community Affairs, Division of Fire Safety, GRC Complaint No. 2007-63 (May 2007).
2. Deputy Public Defender Marucci’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 pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
3. Because the records responsive to the Complainant’s request are within files maintained by the Office of the Public Defender and said files are confidential and shall not be open to inspection by any person unless authorized by law, court order, or the State Public Defender pursuant to N.J.S.A. 47:1A-5.k., and because the Custodian has certified that the Complainant cited no authorizing law, court order or permission from the Public Defender granting him access to said files and there is no evidence of record to the contrary; the Custodian has lawfully denied access to the requested records and has met his burden of



proof pursuant to N.J.S.A. 47:1A-6 that the denial of access was authorized by law.

4. Although Deputy Public Defender Marucci violated OPRA by failing to forward the OPRA request to the Custodian or direct the Complainant to the Custodian and by failing to provide a specific basis for denying the Complainant access to the records which resulted in a “deemed denial,” Deputy Public Defender Marucci did respond in writing denying the Complainant’s request on the fourth (4th) business day following receipt of the request which was in fact an invalid request under OPRA. Therefore, it is concluded that Deputy Public Defender Marucci’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, Deputy Public Defender Marucci’s failure to forward the OPRA request to the Custodian or direct the Complainant to the Custodian as well as his failure to provide a specific basis for denying the Complainant access to the records which resulted in a “deemed” denial appears negligent and heedless since he is an officer or employee of a public agency required to comply with the provisions of OPRA.

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 30th Day of July, 2008

Robin Berg Tabakin, Chairman
Government Records Council

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

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: August 1, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 30, 2008 Council Meeting**

**Ali S. Morgano¹
Complainant**

GRC Complaint No. 2008-79

v.

**New Jersey Office of the Public Defender, Essex County²
Custodian of Records**

Records Relevant to Complaint: The names of all polygraph examination companies that have been employed in the years 1988 and 1989 and the records of Cheryl Johnson (a/k/a Cheryl Harris) from Essex County Prosecutor's Office file numbers 88005354 and 880067784 under indictments 3278-10-88 and 0442-02-89 with respect to:

1. Correspondence, letters and documents on disposition recommendations and all prosecutor's documents and notes pertaining to disposition recommendations.
2. Disposition recommendations plea agreement documents and all prosecutor's documents pertaining to disposition recommendations plea agreement notes.
3. June 7, 1988 arrest bail arraignment hearing appearance dates, documents and the name of the presiding judge who conducted the bail arraignment proceedings.
4. July 24, 1988 arrest bail arraignment hearing appearance dates, documents and the name of the presiding judge who conducted the bail arraignment proceedings.
5. The East Callwell (sic) jail annex facility psychological evaluation.
6. The East Callwell (sic) jail annex facility psychiatric report known as "Short Attention Span Disorder Deficit."

Request Made: March 21, 2008

Response Made: March 27, 2008

Custodian: Assistant Public Defender Dale Jones

GRC Complaint Filed: April 5, 2008

Background

March 21, 2008

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in the form of a letter and not on an official OPRA request form.

¹ No legal representation listed on record.

² No legal representation listed on record.

March 27, 2008

Response to the OPRA request. Deputy Public Defender (“DPD”) Michael Marucci of the Essex County Public Defender’s Office responds in writing to the Complainant’s OPRA request on the fourth (4th) business day following receipt of such request.³ DPD Marucci states that access to the requested record is denied because the Complainant has requested any and all documents pertaining to the prosecutor’s recommendations with regard to Indictment Nos. 3278-10-88 and 442-2-89 for Cheryl Johnson a/k/a Cheryl Harris, as well as the bail hearings on the indictments and the polygraph examination administered by the prosecutor. DPD Marucci states that the request is denied because (a) he will not confirm or deny the existence of any such records, (b) that the documents in any such file would be privileged and would not be disclosed without Johnson’s written consent and (c) the records are not within the purview of OPRA.

April 5, 2008

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

- Complainant’s letter request dated March 21, 2008
- Response letter from the Custodian to the Complainant dated March 27, 2008
- Letter from the Complainant to the GRC dated April 5, 2008

The Complainant states he was denied access to the records relevant to this complaint. The Complainant states that he believes the requested records should be subject to a certification with a document index identifying the requested records pursuant to N.J.S.A. 47:1A-5.g., if the records are not otherwise disclosable pursuant to N.J.S.A. 47:1A-1 et seq.

April 15, 2008

Offer of Mediation sent to both parties.

April 17, 2008

Letter from the Custodian to the GRC. The Custodian informs the GRC that the GRC’s letter offering mediation has been referred to him because he is the Custodian for the Office of the Public Defender (“OPD”), not DPD Michael Marucci. The Custodian also informs the GRC that DPD Michael Marucci’s authority is limited to the Essex regional office. The Custodian further informs the GRC that he reviewed DPD Marucci’s response to the Complainant dated March 27, 2008, and that it was sound but should have cited a specific OPRA provision as a basis for denial of access to the requested records. The Custodian does not agree to mediate this complaint.

April 21, 2008

Request for the Statement of Information sent to the Custodian.

April 21 2008

Custodian’s Statement of Information (“SOI”) with the following attachments:

³ DPD Michael Marucci is not the Custodian for the New Jersey Office of the Public Defender. Ali Morgano v. NJ Office of the Public Defender, Essex County, 2008-79 – Findings and Recommendations of the Executive Director

- Complainant’s OPRA request letter dated March 21, 2008
- Letter from DPD Michael Marucci of the Essex County Public Defender’s Office to the Complainant dated March 27, 2008
- Letter from the Custodian to the GRC dated April 17, 2008

The Custodian certifies that he did not conduct a search for the requested records because the OPD is legally exempt from having to disclose them. The Custodian also certifies that the records that may have been responsive to the request must be retained for fifty (50) years in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management.

The Custodian asserts that files of the OPD are exempt from disclosure pursuant to N.J.S.A. 47:1A-5.k. The Custodian also cites N.J.S.A. 2A:158A-12 as a statutory attorney-client privilege applicable to the OPD that has not been abrogated by OPRA. The statute provides in relevant part:

“[a]ll communications between the individual defendant and any person in or engaged by the Office of the Public Defender whether on a case basis or by contract shall be fully protected by the attorney-client privilege...”
N.J.S.A. 2A:158A-12.

The Custodian certifies that the records responsive to the Complainant’s request are sought for a client of the OPD; therefore, the Custodian contends the codified attorney-client privilege is applicable in the instant complaint as a further basis to deny the Complainant access to the requested records.

April 23, 2008

Letter from the Complainant to the GRC. The Complainant states that he has received a copy of the OPD letter to the GRC refusing mediation. The Complainant demands that the Custodian provide a certification with a document index identifying the requested records and stating the legal reason for denying the Complainant access to those records pursuant to N.J.S.A. 47:1A-6.

May 1, 2008

Letter from the GRC to the Complainant. Because it is unclear if the Custodian sent the Complainant a copy of the SOI, the GRC forwards a copy of the Custodian’s SOI to the Complainant.

May 2, 2008

Letter from the Complainant to the GRC. The Complainant states that he is in receipt of the Custodian’s SOI. The Complainant also restates assertions already presented to the GRC in his April 23, 2008, letter.

Analysis

Whether the employee who received the records request violated OPRA by not forwarding the request to the Custodian or directing the requestor to the Custodian pursuant to N.J.S.A. 47:1A-5.h.?

OPRA provides that:

“[a]ny officer or employee of a public agency who receives a request for access to a government record shall forward the request to the custodian of the record or direct the requestor to the custodian of the record.” N.J.S.A. 47:1A-5.h.

The Complainant sent his OPRA request directly to DPD Michael Marucci at the Essex County Public Defender’s Office in Newark, New Jersey. DPD Marucci responded within the statutorily mandated seven (7) business day period denying the Complainant’s request for access to government records; however, he failed to cite a specific basis for such denial as required under OPRA.

The Custodian subsequently informed the GRC that he is the custodian of records for the OPD, not Michael Marucci, whose authority is limited to the Essex regional office. The Custodian further informed the GRC that he reviewed DPD Marucci’s response to the Complainant dated March 27, 2008, and that it was sound but should have cited a specific OPRA provision as a basis for denial of access to the requested records. The Custodian certified that he did not receive the OPRA request upon which the complaint is based until April 16, 2008. This occurred after the denial of access complaint was filed by the Complainant and the GRC offered mediation to the parties.

N.J.S.A. 47:1A-5.h. provides, and the Council has consistently held, that an employee of a public agency who receives an OPRA request must either direct the requestor to the custodian or forward the requestor’s OPRA request to the custodian. In Mourning v. Department of Corrections, GRC Complaint No. 2006-75 (August 2006), the Council determined that because the employee who received an OPRA request did not forward the request to the custodian or direct the requestor to the custodian the employee violated N.J.S.A. 47:1A-5.h. Similarly, in Vessio v. New Jersey Department of Community Affairs, Division of Fire Safety, GRC Complaint No. 2007-63 (May 2007), the Council found that because an employee improperly forwarded the complainant’s OPRA request to the custodian the employee violated N.J.S.A. 47:1A-5.h.

Accordingly, because DPD Michael Marucci failed to forward the OPRA request to the Custodian or direct the Complainant to the Custodian, he violated N.J.S.A. 47:1A-5.h. See Mourning, *supra*, and Vessio, *supra*.

Whether DPD Marucci lawfully denied access to the requested records?

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.

OPRA also 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.

The employee who received the Complainant’s OPRA request, DPD Michael Marucci, acted unilaterally and responded to the Complainant’s request within the statutorily mandated seven (7) business day period; however, DPD Marucci failed to provide a specific basis for denying the Complainant access to the records.

Pursuant to N.J.S.A. 47:1A-5.g., a custodian must indicate the specific basis for a denial of access to government records. Moreover, the Council’s decisions have repeatedly supported this statutory mandate by holding that custodians must provide a legally valid reason for any denial of access to records. *See Timothy Michael Seabrook v. Cherry Hill Police Department*, GRC Complaint No. 2004-40 (April 2004), *Jesse Rosenblum v. Borough of Closter*, GRC Complaint No. 2005-16 (October 2005) and *John Paff v. Township of Plainsboro*, GRC Complaint No. 2005-29 (October 2005). The Council recently held that for a denial of access to be in compliance with OPRA, it must be specific and must be sufficient to prove that a custodian’s denial is authorized by OPRA. *See Corey Morris v. Trenton Police Department*, GRC Complaint No. 2007-160 (May 2008). Here, while DPD Marucci’s denial of the Complainant’s request was within the time allowed by N.J.S.A. 47:1A-5.i., his response was not in compliance with OPRA because it failed to provide a specific basis for denying the Complainant access to the records.

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, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.⁴ 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

⁴ It is the GRC’s position that 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.

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. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Accordingly, DPD Marucci’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. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Whether the Custodian, notwithstanding DPD Marucci’s “deemed” denial, otherwise lawfully denied access to the requested records?

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.

OPRA also provides that:

“[t]he files maintained by the Office of the Public Defender that relate to the handling of any case shall be considered confidential and shall not be open to inspection by any person unless authorized by law, court order, or the State Public Defender.” N.J.S.A. 47:1A-5.k.

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. 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.

The records relevant to this complaint are records that the Custodian certifies are contained within the OPD files concerning a client, Cheryl Johnson a/k/a Cheryl Harris. OPD files are specifically exempt from disclosure pursuant to N.J.S.A. 47:1A-5.k., unless disclosure is authorized by law, court order, or the State Public Defender. The Custodian has certified that the Complainant cited no authorizing law, court order or permission from the Public Defender granting him access to the files of Ms. Johnson and there is no evidence of record to the contrary.

Because the records responsive to the Complainant's request are within files maintained by the Office of the Public Defender and said files are confidential and shall not be open to inspection by any person unless authorized by law, court order, or the State Public Defender pursuant to N.J.S.A. 47:1A-5.k., and because the Custodian has certified that the Complainant cited no authorizing law, court order or permission from the Public Defender granting him access to said files and there is no evidence of record to the contrary; the Custodian has lawfully denied access to the requested records and has met his burden of proof pursuant to N.J.S.A. 47:1A-6 that the denial of access was authorized by law.

Whether DPD Michael Marucci's failure to forward the Complainant's OPRA request to the Custodian or direct the Complainant to the Custodian, and his "deemed" denial of access rises 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, 107 (App. Div. 1996)).

In the instant complaint, the Complainant failed to submit his records request on an official OPRA request form. Rather, the Complainant mailed a letter in the form of an OPRA request directly to DPD Marucci. DPD Marucci responded in writing to the Complainant's OPRA request on the fourth (4th) business day following receipt of the request. By responding directly to the Complainant, however, rather than forwarding the OPRA request to the Custodian or directing the Complainant to the Custodian, DPD Marucci consequently violated N.J.S.A. 47:1A-5.h. Moreover, DPD Marucci's failure to provide a specific basis for denying the Complainant access to the records resulted 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. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Because DPD Marucci responded in writing to the Complainant's OPRA request on the fourth (4th) business day following receipt of the request, denying the Complainant's request, it is concluded that DPD Marucci'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, DPD Marucci's failure to forward the OPRA request to the Custodian or direct the Complainant to the Custodian in violation of N.J.S.A. 47:1A-5.h appears negligent and heedless since he is an officer or employee of a public agency required to comply with the provisions of OPRA.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because Deputy Public Defender Michael Marucci failed to forward the OPRA request to the Custodian or direct the Complainant to the Custodian he violated N.J.S.A. 47:1A-5.h. *See also* Mourning v. Department of Corrections, GRC Complaint No. 2006-75 (August 2006) and Vessio v. New Jersey Department of Community Affairs, Division of Fire Safety, GRC Complaint No. 2007-63 (May 2007).
2. Deputy Public Defender Marucci'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 pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
3. Because the records responsive to the Complainant's request are within files maintained by the Office of the Public Defender and said files are confidential

and shall not be open to inspection by any person unless authorized by law, court order, or the State Public Defender pursuant to N.J.S.A. 47:1A-5.k., and because the Custodian has certified that the Complainant cited no authorizing law, court order or permission from the Public Defender granting him access to said files and there is no evidence of record to the contrary; the Custodian has lawfully denied access to the requested records and has met his burden of proof pursuant to N.J.S.A. 47:1A-6 that the denial of access was authorized by law.

4. Although Deputy Public Defender Marucci violated OPRA by failing to forward the OPRA request to the Custodian or direct the Complainant to the Custodian and by failing to provide a specific basis for denying the Complainant access to the records which resulted in a “deemed denial,” Deputy Public Defender Marucci did respond in writing denying the Complainant’s request on the fourth (4th) business day following receipt of the request which was in fact an invalid request under OPRA. Therefore, it is concluded that Deputy Public Defender Marucci’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, Deputy Public Defender Marucci’s failure to forward the OPRA request to the Custodian or direct the Complainant to the Custodian as well as his failure to provide a specific basis for denying the Complainant access to the records which resulted in a “deemed” denial appears negligent and heedless since he is an officer or employee of a public agency required to comply with the provisions of OPRA.

Prepared By: John E. Stewart
Case Manager/*In Camera* Attorney

Approved By: Catherine Starghill, Esq.
Executive Director

July 23, 2008