



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

November 30, 2010 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2009-247

v.

Town of Guttenberg Police Department (Hudson)
Custodian of Record

At the November 30, 2010 public meeting, the Government Records Council (“Council”) considered the November 23, 2010 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 the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days of when the requested records would be made available pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s written response to the Complainant is inadequate under OPRA, as well as the Custodian’s failure to respond to the Complainant’s request for the Computer-aided dispatching event log for April 18, 2009 from 4:00 pm to 11:59 pm., results in a “deemed denial” of the Complainant’s 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).
2. Because the Custodian has certified that no records exist which are responsive to the Complainant’s request for telephone conversations and radio transmissions, and because the Complainant has provided no credible evidence to refute the Custodian’s certification, the Custodian has not unlawfully denied access to the requested recordings of telephone conversations and radio transmissions. *See Pusterhofer v. New Jersey Department of Education*, GRC Complaint No. 2005-49 (July 2005) N.J.S.A. 47:1A-6.
3. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., provided an insufficient response to the Complainant’s request pursuant to N.J.S.A. 47:1A-5.g. and the Custodian’s failure to respond to the Complainant’s request Item No. 5 resulted in a “deemed” denial of the Complainant’s OPRA request, the Custodian certified that the recordings responsive to request Items No. 1 through No. 4 were not available at the time of the Complainant’s OPRA request because the



Police Department's recording system was damaged and the evidence of record shows that the recording system's hard drive is damaged and no data regarding telephone conversations and radio transmissions was saved to the computer. Thus, the Custodian established a lawful reason for the denial of access to the requested telephone and radio recordings. Therefore, 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.

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 November, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: December 3, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 30, 2010 Council Meeting**

**Richard Rivera¹
Complainant**

GRC Complaint No. 2009-247

v.

**Town of Guttenberg Police Department (Hudson)²
Custodian of Records**

Records Relevant to Complaint:

1. Tape recorded telephone conversations and radio transmissions for September 25, 2008 from 10:00 am to 1:30 pm.
2. Tape recorded telephone conversations and radio transmissions for October 17, 2008 from 11:00 pm to 11:59 pm.
3. Tape recorded telephone conversations and radio transmissions for April 18, 2009 from 7:15 pm to 8:00 pm.
4. Tape recorded telephone conversations and radio transmissions for July 4, 2009 from 6:00 pm to 9:30 pm.
5. Computer-aided dispatching (“CAD”) event log for April 18, 2009 from 4:00 pm to 11:59 pm.

Request Made: July 29, 2009

Response Made: August 5, 2009

Custodian: Albert Cabrera

GRC Complaint Filed: August 26, 2009³

Background

July 29, 2009

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. The Complainant requests that the requested tapes be preserved while the Police Department (“PD”) is determining whether redactions need to be made and the appropriate accommodations for inspection.

July 31, 2009

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the first (1st) business day following receipt of such

¹ No legal representation listed on record.

² Represented by Charles P. Daglian, Esq., of the Law Office of Charles P. Daglian (Jersey City, NJ).

³ The GRC received the Denial of Access Complaint on said date.

request.⁴ The Custodian states that the PD is requesting an extension of time to respond because the requested records are not easily accessible. The Custodian states that the PD will need to seek help from outside sources to gather the requested records.

August 3, 2009

Letter from Mr. Angel Valdes (“Mr. Valdes”), President of Angel Consultants, to the Custodian. Mr. Valdes states that no recordings were found on the PD’s recording system. Mr. Valdes states that the recorder’s hard drive is damaged; thus, no data was saved to the computer. Mr. Valdes states that recovery of any data is impossible.

August 4, 2009

Letter from the Custodian to the Complainant attaching a letter from Mr. Valdes to the Custodian dated August 3, 2009. The Custodian states that pursuant to the attached letter, no recordings could be obtained from the PD’s recorder.

August 26, 2009

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

- Complainant’s OPRA request dated July 29, 2009.
- Letter from Custodian to the Complainant dated July 31, 2009.
- Letter from the Mr. Valdes to the Custodian dated August 3, 2009.
- Letter from the Custodian to the Complainant dated August 4, 2009.

The Complainant states that he submitted an OPRA request to the PD on July 29, 2009. The Complainant states that he went to the PD to retrieve a response on August 5, 2009 and was advised that the requested records were not available because the recording system was damaged.

The Complainant contends that this is not the first time the PD recording system was damaged or that records were purged when same were sought. The Complainant states that in Rivera v. Town of Guttenberg (Hudson), GRC Complaint No. 2006-154 (June 2008) and Rivera v. Town of Guttenberg (Hudson), GRC Complaint No. 2007-05 (June 2008), the GRC referred the complaints to the Office of Administrative Law (“OAL”) and that ultimately both parties came to a settlement. The Complainant requests that the GRC use both complaints to supplement its investigation of the current complaint.

The Complainant does not agree to mediate this complaint.

August 28, 2009

Letter from the Custodian to the Complainant attaching the CAD event log for April 18, 2009 from 4:00 pm to 11:59 pm. The Custodian states that the PD’s response to the Complainant’s OPRA request is completed.

⁴ The PD received the Complainant’s OPRA request on July 30, 2009.

August 31, 2009

Request for the Statement of Information (“SOI”) sent to the Custodian.

September 2, 2009

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated July 29, 2009.
- Letter from the Custodian to the Complainant dated July 31, 2009.
- Letter from the Custodian to the Complainant dated August 4, 2009 attaching a letter from the Mr. Valdes to the Custodian dated August 3, 2009.
- Letter from the Custodian to the Complainant dated August 28, 2009 (with attachments).

The Custodian certifies that his search for the requested records included immediately contacting the Town’s computer consultant to inquire about retrieving the records responsive to request Items No. 1 through No. 4.

The Custodian also certifies in response to the Department of Records and Archives Management (“DARM”) inquiry that it is unknown when the recordings in the computer system were damaged. The Custodian states that there have been a number of issues with the recording system and that the Town addressed the issue on August 24, 2009 by passing a resolution authorizing a contract in the amount of approximately \$5,000 for a new tape recording system for PD calls.

The Custodian certifies that the PD received the Complainant’s OPRA request on July 30, 2009. The Custodian states that he responded in writing on July 31, 2009 requesting an extension of time to respond based on the type of records requested. The Custodian states that he responded to the Complainant on August 4, 2009 advising the Complainant that request Items No. 1 through No. 4 were not available because the PD’s recording system was damaged.

The Custodian avers that he inadvertently failed to respond to request Item No. 5; however, the Custodian forwarded a respond with the records responsive attached at no cost on August 28, 2009.

The Custodian thus certifies that no records responsive to request Items No. 1 through No. 4 exist and the record responsive to request Item No. 5 was provided.

Analysis**Whether the Custodian unlawfully 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 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.

In the matter before the Council, the Complainant submitted an OPRA request on July 29, 2009. The Custodian responded in writing on the first (1st) business day following receipt thereof stating that an extension of time was needed to respond because the requested records were not easily accessible, and further stating that the PD would need to seek help from outside sources to gather the requested 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.⁵ 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. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Although the Custodian herein responded in writing on the first (1st) business day following receipt of the Complainant’s OPRA request, the Custodian’s request for an

⁵ 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 to respond did not contain a specific date upon which the Complainant could expect to receive the requested records. Moreover, the Custodian certified that he inadvertently failed to respond to request Item No. 5, but also certified that records responsive to said request were provided to the Complainant on August 28, 2009.

Therefore, because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days of when the requested records would be made available pursuant to N.J.S.A. 47:1A-5.i., the Custodian's written response to the Complainant is insufficient under OPRA, as well as the Custodian's failure to respond to the Complainant's request for the CAD event log for April 18, 2009 from 4:00 pm to 11:59 pm., results in a "deemed denial" of the Complainant's request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley, supra.

However, the Custodian herein certified in the SOI that the recordings responsive to request Items No. 1 through No. 4 were not available at the time of the Complainant's OPRA request because the PD's recording system was damaged. Moreover, the evidence of record shows that the recording system's hard drive is damaged and no data regarding telephone conversations and radio transmissions was saved to the computer. The evidence of record further shows that recovery of any data is impossible.

The Complainant has asserted that this is not the first time the PD recording system was damaged or that records were purged when same were sought. The Complainant states that in Rivera v. Town of Guttenberg (Hudson), GRC Complaint No. 2006-154 (June 2008) and Rivera v. Town of Guttenberg (Hudson), GRC Complaint No. 2007-05 (June 2008), the GRC referred the complaints to the Office of Administrative Law ("OAL") and that ultimately both parties came to a settlement. The Complainant requested that the GRC use both complaints to supplement its investigation of the current complaint.

Notwithstanding the Complainant's contentions regarding previous actions by the Town, the Custodian's actions in response to additional requests which are not the subject of this complaint have no bearing on said complaint. Hardwick v. NJ Dept. of Transportation, GRC # 2007-164 (February 2008). Moreover, the Complainant's contentions do not rise to the level of competent, credible evidence sufficient to refute the Custodian's certification in this regard.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The custodian responded stating that there was no record of any telephone calls made to the complainant. The custodian subsequently certified that no records responsive to the complainant's request existed. The complainant did not submit any competent, credible evidence to refute the custodian's certification. The GRC determined the custodian did not unlawfully deny access to the requested records because the custodian certified that no records responsive to the request existed.

Therefore, because the Custodian has certified that no records exist which are responsive to the Complainant's request for telephone conversations and radio

transmissions, and because the Complainant has provided no credible evidence to refute the Custodian's certification, the Custodian has not unlawfully denied access to the requested recordings of telephone conversations and radio transmissions. See Pusterhofer, supra. N.J.S.A. 47:1A-6.

Whether the Custodian's deemed denial of the Complainant's OPRA request 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.

In the matter before the Council, although the Custodian herein responded in writing on the first (1st) business day following receipt of the Complainant's OPRA request, the Custodian's request for an extension of time to respond did not contain a specific date upon which the Complainant could expect to receive the requested records making such response insufficient under OPRA, and the Custodian certified that he inadvertently failed to respond to request item No. 5, but also certified that records responsive to said request were provided to the Complainant on August 28, 2009. However, the Custodian herein certified in the SOI that the recordings responsive to request Items No. 1 through No. 4 were not available at the time of the Complainant's OPRA request because the PD's recording system was damaged. Moreover, the evidence of record shows that the recording system's hard drive is damaged and no data regarding telephone conversations and radio transmissions was saved to the computer. The evidence of record further shows that recovery of any data is impossible.

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)).

Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., provided an insufficient response to the Complainant's request pursuant to N.J.S.A. 47:1A-5.g. and the Custodian's failure to respond to the Complainant's request Item No. 5 resulted in a deemed denial of the Complainant's OPRA request, the Custodian certified that the recordings responsive to request Items No. 1 through No. 4 were not available at the time of the Complainant's OPRA request because the PD's recording system was damaged and the evidence of record shows that the recording system's hard drive is damaged and no data regarding telephone conversations and radio transmissions was saved to the computer. Thus, the Custodian established a lawful reason for the denial of access to the requested telephone and radio recordings. Therefore, 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days of when the requested records would be made available pursuant to N.J.S.A. 47:1A-5.i., the Custodian's written response to the Complainant is inadequate under OPRA, as well as the Custodian's failure to respond to the Complainant's request for the Computer-aided dispatching event log for April 18, 2009 from 4:00 pm to 11:59 pm., results in a "deemed denial" of the Complainant's 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).
2. Because the Custodian has certified that no records exist which are responsive to the Complainant's request for telephone conversations and radio transmissions, and because the Complainant has provided no credible evidence to refute the Custodian's certification, the Custodian has not unlawfully denied access to the requested recordings of telephone conversations and radio transmissions. See Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005) N.J.S.A. 47:1A-6.
3. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., provided an insufficient response to the Complainant's request pursuant to N.J.S.A. 47:1A-5.g. and the Custodian's failure to respond to the Complainant's request Item No. 5 resulted in a "deemed" denial of the Complainant's OPRA request, the Custodian certified that the recordings responsive to request Items No. 1 through No. 4 were not available at the time of the Complainant's OPRA request because the Police Department's recording system was damaged and the evidence of record shows that the

recording system's hard drive is damaged and no data regarding telephone conversations and radio transmissions was saved to the computer. Thus, the Custodian established a lawful reason for the denial of access to the requested telephone and radio recordings. Therefore, 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.

Prepared By: Karyn Gordon, Esq.
In House Counsel

Approved By: Catherine Starghill, Esq.
Executive Director

November 23, 2010