



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

FINAL DECISION

February 28, 2012 Government Records Council Meeting

Shawn Smith
Complainant

Complaint No. 2010-263

v.

New Jersey Department of Treasury,
Division of Risk Management
Custodian of Record

At the February 28, 2012 public meeting, the Government Records Council ("Council") considered the February 21, 2012 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 although the New Jersey Department of Treasury has already submitted a Statement of Information, in order to prevent the unnecessary expenditure of administrative resources by the GRC to process this matter for the benefit of the parties, said complaint should be dismissed pursuant to Swindell v. New Jersey Department of Environmental Protection and Energy, Bureau of Coastal and Land Use Enforcement, OAL Docket No. ESA 5675-92 (Initial Decision 1993) because the GRC cannot contact the Complainant and because the Complainant has made no attempt to contact the GRC regarding this complaint. *See also Siddeeq v. New Jersey Department of Corrections*, GRC Complaint No. 2009-182 and 2009-183 (November 2009).

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 28th Day of February, 2012

Robin Berg Tabakin, Esq., Chair
Government Records Council



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

Denise Parkinson Vetti, Esq., Secretary
Government Records Council

Decision Distribution Date: March 5, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 28, 2012 Council Meeting**

**Shawn Smith¹
Complainant**

GRC Complaint No. 2010-263

v.

**New Jersey Department of Treasury,
Division of Risk Management²
Custodian of Records**

Records Relevant to Complaint: Copies of tort claims for the following individuals filed with the New Jersey Department of Treasury (“DOT”), Division of Risk Management (“DRM”), Tort Claims Unit:

- Gabriel Iannicone (SBI No. 584482B)
- Mark Bendet
- Ernie Ford
- Timothy Brown, also known as Tyron Danielson (SBI No. 544703B)

Request Made: August 29, 2010

Response Made: September 13, 2010

Custodian: Theresa Adams³

GRC Complaint Filed: September 29, 2010⁴

Background

August 29, 2010

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

September 13, 2010

Ms. Barbara O’Hare’s (“Ms. O’Hare”), Manager of the Government Records Access Unit, response to the OPRA request. On behalf of the Custodian, Ms. O’Hare responds in writing via letter to the Complainant’s OPRA request on the seventh (7th) business day following receipt of such request.⁵ Ms. O’Hare requests an extension of time until September 27, 2010 to process the Complainant’s OPRA request. Ms. O’Hare

¹ No legal representation listed on record.

² Represented by DAG Heather Lynn Anderson, on behalf of the NJ Attorney General.

³ Ms. Barbara O’Hare, Manager of the Government Records Access Unit, was named as the Custodian of Record on the Denial of Access Complaint.

⁴ The GRC received the Denial of Access Complaint on said date.

⁵ The Custodian certifies in the Statement of Information that she received the Complainant’s OPRA request on September 2, 2010.

states that the responsive records have been collected and forwarded to the New Jersey Division of Law & Public Safety (“LPS”) for legal review.

Ms. O’Hare states that if the Complainant disagrees with the extension, he should submit a reply. Ms. O’Hare further states that no response will be deemed as an acceptance of the extension.

September 20, 2010

Letter from the Complainant to Ms. O’Hare. The Complainant states that he does not agree with Ms. O’Hare’s request for an extension of time. The Complainant states that if the extension were approved, access to the responsive records will have been withheld for 27 days. The Complainant states that he believes Ms. O’Hare has delayed access because she assumes that this OPRA request is related to discovery in a pending civil matter.

The Complainant states that he will contact the Government Records Council (“GRC”) regarding his OPRA request.

September 27, 2010

Letter from Ms. O’Hare to the Complainant. Ms. O’Hare states that she is in receipt of the Complainant’s objection to DOT’s request for an extension of time. Ms. O’Hare states that a determination whether the responsive records are subject to disclosure is still under advisement by LPS. Ms. O’Hare states that she will forward a page count and cost quote on or before September 29, 2010.

September 28, 2010

Letter from Ms. O’Hare to the Complainant. Ms. O’Hare states that DOT has located 45 records responsive to the Complainant’s OPRA request. Ms. O’Hare states that the copying cost for the responsive records is \$2.25.

September 29, 2010

Denial of Access Complaint filed with the GRC attaching a letter from Ms. O’Hare to the Complainant dated September 13, 2010.

The Complainant states that he submitted an OPRA request to DOT on September 1, 2010. The Complainant states that Ms. O’Hare responded in writing on September 13, 2010 requesting an extension of time until September 27, 2010 to respond because the responsive records were being reviewed by LPS.

The Complainant argues that Ms. O’Hare withheld access to the responsive records because of his current civil action against the New Jersey Department of Corrections (“DOC”).

The Complainant does not agree to mediate this complaint.

October 6, 2010

Letter from Ms. O’Hare to the Complainant with the following attachments:

- Records responsive to the Complainant's OPRA request.
- Vaughn index.

Ms. O'Hare states that she has attached the records responsive to the Complainant's OPRA request and a Vaughn index identifying those records to which access was denied and the cited legal basis therefor. Ms. O'Hare further states that no records responsive to the Complainant's request for tort claims filed by Mark Bendet or Ernie Ford exist.

November 5, 2010

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

November 8, 2010

E-mail from Ms. O'Hare to the GRC. Ms. O'Hare requests that the GRC confirm that pursuant to an earlier telephone conversation, the deadline for the Custodian to submit the requested SOI is November 15, 2010.

November 8, 2010

E-mail from the GRC to Ms. O'Hare. The GRC confirms the deadline for the Custodian to submit the requested SOI is November 15, 2010.

November 10, 2010

E-mail from the Custodian's Counsel to the GRC. Counsel requests an extension of time to submit the requested SOI.

November 10, 2010

E-mail from the GRC to the Custodian's Counsel. The GRC grants Counsel an extension of time until November 22, 2010 to submit the requested SOI.

November 22, 2010

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated August 29, 2010.
- Letter from the Custodian to the Complainant dated September 13, 2010.
- Letter from the Complainant to the Custodian dated September 20, 2010.
- Letter from the Custodian to the Complainant dated September 27, 2010.
- Letter from the Custodian to the Complainant dated September 28, 2010.
- Letter from the Custodian to the Complainant dated October 6, 2010 (with attachments).
- Ms. O'Hare's legal certification.

The Custodian certifies that her search for the requested records included searching the RISC computer system. The Custodian certifies that once a claim record was found on the system, DOT conducted a search to locate the physical file.

The Custodian also certifies that no records responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management.

The Custodian certifies that on September 2, 2010, Ms. O'Hare forwarded her the Complainant's OPRA request. The Custodian certifies that she immediately forwarded the OPRA request to one of her employees to locate any responsive records. The Custodian certifies that on September 7, 2010, that employee advised that he was able to locate responsive records for Gabriel Iannicone and Timothy Brown. The Custodian certifies that Mark Bendet and Ernie Ford never filed tort claims against the State. The Custodian certifies that she reviewed the records and determined that redactions would be necessary because of the confidential and privileged information contained therein.

The Custodian certifies that on September 27, 2010, the Office of the Attorney General instructed her how to prepare the responsive records for disclosure. The Custodian certifies that she prepared the records and forwarded them to Ms. O'Hare.⁶

Ms. O'Hare certifies that as Manager of the Government Records Access Unit, she is assigned to administratively review and respond to all OPRA requests made to DOT. Ms. O'Hare certifies that she is not the Custodian of Records for DRM. Ms. O'Hare certifies that she received the Complainant's OPRA request on September 1, 2010. Ms. O'Hare certifies that she forwarded the Complainant's OPRA request to the Custodian. Ms. O'Hare certifies that on September 13, 2010, she was informed by the Custodian that an extension of time to respond would be needed to redact the responsive records. Ms. O'Hare certifies that on the same day, she responded to the Complainant requesting an extension of time until September 27, 2010 to respond to this OPRA request.

Ms. O'Hare certifies that on September 27, 2010, she received a response from the Complainant denying her request for an extension of time. Ms. O'Hare certifies that on September 28, 2010, the Custodian advised the Complainant of the number of pages being provided and the copying cost to provide same. Ms. O'Hare certifies that the Complainant filed this complaint on September 29, 2010. Ms. O'Hare certifies that she received the Complainant's payment on October 4, 2010 and provided access the responsive records on October 7, 2010.⁷

The Custodian's Counsel submitted a legal brief in support of DOT's position. Counsel recapitulates the facts of the instant complaint and contends that contrary to the Complainant's arguments, all records responsive not otherwise exempt under OPRA were provided to the Complainant.

Counsel states that OPRA provides that government records "... made, maintained ... kept on file ... or ... received in the course of ... official business" are subject to access unless otherwise exempt. N.J.S.A. 47:1A-1.1. Counsel further states that a custodian must respond in writing either granting or denying access to an OPRA request within seven (7) business days after receipt of same. N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. Counsel states that a custodian's failure to respond within the

⁶ The Custodian also certifies to her actions involving a second (2nd) OPRA request submitted by the Complainant and received by the Custodian on September 30, 2011. The evidence of record indicates that the second (2nd) OPRA request is not at issue in this complaint.

⁷ Ms. O'Hare also certifies to her actions involving a second (2nd) OPRA request submitted by the Complainant which is not at issue in this complaint.

prescribed time frame results in a “deemed” denial. N.J.S.A. 47:1A-5.i. Counsel states 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. *See* Castro v. New Jersey Department of Corrections, GRC Complaint No. 2009-290 (August 2010).

Counsel states that Ms. O’Hare responded to the Complainant in writing on the seventh (7th) business day after receipt of the subject OPRA request requesting an extension of time until September 27, 2010. Counsel contends that DOT adhered to the requirements of N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. Counsel asserts that DOT’s actions do not constitute a “deemed” denial of access because DOT properly requested extensions of time and responded within each extended deadline ultimately providing the responsive records otherwise not exempt under OPRA.

Additionally, Counsel states that numerous cases are clear that “...there can be no presumption of ‘willful’ misconduct arising simply from the failure of a public official to respond in a timely fashion to a request for ... public record[s].” Haelig v. Seaside Heights Bus. Improvement District, GRC Complaint No. 2005-50 (December 2006).

Counsel contends that the GRC has consistently held that in order for a custodian’s conduct to rise to the level of a “knowing and willful” violation of OPRA:

“The following ... must be true ... 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 (Felder 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)).” Castro, at pg. 7. *See also* Haelig, *supra*; Oskay v. New Jersey State Parole Board, GRC Complaint No. 2008-53 (March 2009), Paff v. Cumberland County Sheriff’s Office, GRC Complaint No. 2005-159 (January 2006); Osterman v. City of Trenton and City of Trenton Police Department, GRC Complaint No. 2004-96 (January 2006); Renna v. County of Union, GRC Complaint No. 2005-172 (December 2005); Beaver v. Township of Middletown, GRC Complaint No. 2003-111 (February 2004).

Counsel contends that the Custodian’s actions do not rise to the level of a knowing and willful violation punishable by a civil penalty. N.J.S.A. 47:1A-7.e. and N.J.S.A. 47:1A-11.

Counsel further contends that this complaint is moot because DOT actions were consistent with OPRA’s provisions. Counsel states that controversies that have become

moot or academic prior to judicial resolution ordinarily will be dismissed. Cinque v. New Jersey Department of Corrections, 261 N.J. Super. 242 (App. Div. 1993)(“[F]or reasons of judicial economy and restraint, courts will not decide cases in which the issue is hypothetical, a judgment cannot grant effective relief, or the parties do not have concrete adversity or interest” *Id.* at 243). Counsel states that for an appeal to not be moot, the appellant must have a sufficient stake in the outcome of the appeal and there must be real adversariness between the parties. Application of Boardwalk Regency Corp. for Casino License, 90 N.J. 361, appeal dismissed by Perlman v. Attorney General of New Jersey, 459 U.S. 1081, 103 S. Ct. 562, 74 L. Ed.2d 927 (1982). Counsel states that quasi-judicial bodies have entertained moot matters only in cases where the issue is of public importance and there is a strong likelihood of recurrence. State v. Gartland, 149 N.J. 456, 464 (1997).

Counsel contends that in the present complaint, DOT provided access to all records responsive to the Complainant’s OPRA request which were disclosable under OPRA. Counsel asserts that the brief delay in providing access to the responsive records was due to a legal review for which the Complainant was advised of in Ms. O’Hare’s September 13, 2010 response. Counsel asserts that once the records were provided, the Complainant’s controversy was resolved and this complaint was rendered moot.

October 26, 2011

E-mail from the GRC to Ms. O’Hare.⁸ The GRC states that the SOI refers to two (2) OPRA requests submitted by the Complainant; however, the GRC is only in possession of the Complainant’s August 29, 2010 OPRA request. The GRC requests that Ms. O’Hare provide a copy of the second (2nd) OPRA request dated September [28], 2010.⁹

October 26, 2011

E-mail from Ms. O’Hare to the GRC attaching the Complainant’s OPRA request dated September 28, 2010. Ms. O’Hare states that attached is the Complainant’s second (2nd) OPRA request to which the SOI referred.

October 27, 2011

E-mail from Ms. O’Hare to the GRC. Ms. O’Hare states that the only address DOT has for the Complainant is Southwoods State Prison; however, according to DOC he was released on April 21, 2011.

December 9, 2011

Letter from the GRC to the Complainant. The GRC states that it recently sent the Complainant correspondence that was returned to the GRC as undeliverable. The GRC states that according to DOC’s records, the Complainant was released from Southwoods State Prison on April 21, 2011.

⁸ The GRC sent a copy of this e-mail via U.S. mail to the Complainant; however, it was returned “refused” and “unable to forward.” The GRC also sent correspondence to the Complainant via U.S. mail on October 14, 2010 that was returned.

⁹ The GRC has determined that this OPRA request is not at issue in the instant complaint.

The GRC requests that the Complainant advise whether the GRC can continue to contact him at his previous address. The GRC states that as an alternative, the Complainant may provide a new current address.

December 28, 2011

GRC's letter to the Complainant dated December 9, 2011 is returned for insufficient address and failure to forward.

Analysis

Whether the Council should dismiss this complaint?

OPRA provides that:

“[t]he 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...” N.J.S.A. 47:1A-7.b.

The GRC has attempted to contact the Complainant regarding this complaint with no success at the only two (2) addresses for the Complainant known by the GRC and DOC.

In Swindell v. New Jersey Department of Environmental Protection and Energy, Bureau of Coastal and Land Use Enforcement, OAL Docket No. ESA 5675-92 (Initial Decision 1993), the petitioner appealed the assessment of a penalty pursuant to the Waterfront Development Statute. In response to said appeal, the Office of Administrative Law scheduled a mandatory early settlement conference at which the petitioner failed to appear. In the Administrative Law Judge's ("ALJ") Initial Decision, the ALJ found that:

“[a]fter having given petitioner Swindell every opportunity to contact either the deputy attorney general or this tribunal to afford an explanation for his nonappearance and noncontact regarding this matter subsequent to the filing of his appeal, I **FIND** that petitioner Swindell has unilaterally disregarded his obligations in this matter even though it was he who initiated the process in the first instance. In the process, I **FIND** that petitioner Swindell has, for reasons unknown to this tribunal, caused the expenditure of unnecessary funds in order to prepare for a defense of his appeal, as well as the administrative costs generated at the Office of Administrative Law in order to process this matter for the benefit of the parties.” *Id.*

Similarly in this complaint, the GRC has made several attempts to contact the Complainant with no success and the Complainant has failed to make any attempt to contact the GRC regarding this complaint, which the Complainant initiated on September 29, 2010.

Therefore, although DOT has already submitted an SOI, in order to prevent the unnecessary expenditure of administrative resources by the GRC to process this matter

for the benefit of the parties, said complaint should be dismissed pursuant to Swindell, supra, because the GRC cannot contact the Complainant and because the Complainant has made no attempt to contact the GRC regarding this complaint. *See also* Siddeeq v. New Jersey Department of Corrections, GRC Complaint No. 2009-182 and 2009-183 (November 2009).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that, although the New Jersey Department of Treasury has already submitted a Statement of Information, in order to prevent the unnecessary expenditure of administrative resources by the GRC to process this matter for the benefit of the parties, said complaint should be dismissed pursuant to Swindell v. New Jersey Department of Environmental Protection and Energy, Bureau of Coastal and Land Use Enforcement, OAL Docket No. ESA 5675-92 (Initial Decision 1993) because the GRC cannot contact the Complainant and because the Complainant has made no attempt to contact the GRC regarding this complaint. *See also* Siddeeq v. New Jersey Department of Corrections, GRC Complaint No. 2009-182 and 2009-183 (November 2009).

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

February 21, 2012