



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

May 24, 2011 Government Records Council Meeting

Robin B. Magargal
Complainant

Complaint No. 2010-81

v.

New Jersey Department of Military & Veteran's Affairs
Custodian of Record

At the May 24, 2011 public meeting, the Government Records Council ("Council") considered the April 20, 2011 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. 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 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), the Custodian certifies she has provided the Complainant with all records responsive.
2. Pursuant to N.J.S.A. 47:A-7.b., the issue of the validity and authenticity of the requested records is beyond the jurisdiction of the GRC. See Kwanzaa v. Dep't. of Corrections, GRC Complaint No. 2004-167 (November 2004), Gillespie v. Newark Public Schools, GRC Complaint No. 2004-106 (March 2005) and Anonymous v. Twp. of Monroe, GRC Complaint No. 2006-160 (April 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 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), the Custodian certified in the Statement of Information that she provided the Complainant with all records responsive on April 26, 2010. Furthermore, pursuant to N.J.S.A. 47:A-7.b., the issue of the validity and authenticity of the requested records is beyond the jurisdiction of the GRC. See Kwanzaa v. Dep't. of Corrections, GRC Complaint No. 2004-167 (November 2004), Gillespie v. Newark Public Schools, GRC Complaint No. 2004-106 (March 2005) and Anonymous v. Twp. of Monroe, GRC Complaint No. 2006-160 (April 2008). It is therefore 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 as the evidence in the record does not indicate that the



Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate.

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 24th Day of May, 2011

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: June 1, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 24, 2011 Council Meeting**

**Robin B. Magargal¹
Complainant**

GRC Complaint No. 2010-81

v.

**New Jersey Department of Military & Veteran's Affairs²
Custodian of Records**

Records Relevant to Complaint: Copies of:

1. Any and all job postings for positions held by the New Jersey Department of Military and Veteran's Affairs, whether full or part time, in the clerical or personnel title series from April 2008 through May 2009."
2. A copy of any results, *i.e.*, names, for actual hirings into those publicly held government positions, whether or not officially posted.

Request Made: April 9, 2010

Response Made: April 26, 2010³

Custodian: Loreta Sepulveda⁴

GRC Complaint Filed: April 23, 2010⁵

Background

April 9, 2010

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.

April 23, 2010

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching a copy of the Complainant's OPRA request dated April 9, 2010.⁶ The Complainant asserts that the Custodian never responded to her request.

The Complainant declines mediation of this complaint.

¹ No legal representation listed on record.

² Represented by DAG Michael J. Kennedy, on behalf of the NJ Attorney General.

³ In the Statement of Information, the Custodian certified that she received the request on April 13, 2010 and forwarded it to Human Resources, the appropriate division for a response .

⁴ The request and complaint were sent to the Personnel Archives Division Custodian, Barbara Dearden (now retired). Loreta Sepulveda is the Custodian of the Human Resources Division, the proper custodian of the requested records.

⁵ The GRC received the Denial of Access Complaint on April 26, 2010.

⁶ Also attached is additional documentation not relevant to the adjudication of this matter.

April 26, 2010

Custodian's response to the OPRA request. The Custodian received the Complainant's OPRA request on April 13, 2010. The Custodian responds in writing to the Complainant's OPRA request on the ninth (9th) business day following the Custodian's receipt of such request. The Custodian states that the Complainant's OPRA request is complete and will be mailed to the Complainant upon receipt of \$2.69 for the cost of copies and postage.⁷

April 26, 2010

E-mail from the Complainant to New Jersey Department of Military and Veteran's Affairs ("DMAVA") Personnel Archives Custodian, Barbara Dearden. The Complainant states that she is in receipt of the Custodian's April 26, 2010 letter that acknowledges the Complainant's OPRA request. The Complainant asserts that she wrote to the Custodian a month prior to this OPRA request and the Custodian completely ignored her.

April 29, 2010

E-mail from the Complainant to the GRC. The Complainant states that she received the Custodian's response to the OPRA request and copies of the responsive records in the mail on the afternoon of April 28, 2010. The Complainant asserts that the records received are unacceptable and do not comply with what she requested. The Complainant maintains that her personal knowledge and search for current employees verifies that the received documentation is inadequate. The Complainant asserts that the Custodian is aware that the Complainant has received inadequate information and that it was done purposely.

May 10, 2010

E-mail from the Complainant to the GRC. The Complainant argues that she believes that the Custodian is denying the proper records and is purposely supplying her with dishonest and invalid records to withhold information.

May 10, 2010

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

May 13, 2010

Custodian's SOI with the following attachments:⁸

- Complainant's OPRA request dated April 9, 2010
- Letter from the Custodian to the Complainant dated April 26, 2010
- Certification of Loreta Sepulveda dated May 18, 2010
- A copy of the DMAVA OPRA Request Log

The Custodian certifies that the vacancy postings have a records retention requirement of three (3) years. Barbara Dearden certifies that she is employed by the New Jersey DMAVA and that her job title is Chief of Administrative Services. Ms. Dearden certifies that she serves as the Records Custodian for the DMAVA. Ms. Dearden states that on or about April 13, 2010, the Human Resources Division forwarded to her attention an OPRA request that was faxed on April 9, 2010 from the Complainant. Ms. Dearden certifies that she does not work in the Human

⁷ The record does not indicate when the Complainant paid the copying costs associated with the requested records.

⁸ Barbara Dearden, Chief of Administrative Services, also provided a certification as part of the SOI.

Resources Division and therefore did not receive the Complainant's OPRA request the day the Complainant sent it. Ms. Dearden certifies that the DMAVA website provides contact information for the Records Custodian which included the Custodian's e-mail and mailing address. Ms. Dearden certifies that the website does not list a fax number for the Custodian because it is not the DMAVA's policy to accept OPRA requests by fax.

Ms. Dearden certifies that she entered the OPRA request into the tracking system on April 13, 2010, which she maintains made a response due on April 22, 2010. Ms. Dearden states that she was out of the office due to illness on April 22, 2010. She states that April 23, 2010, the following day, was a scheduled day off for DMAVA. The Custodian certifies that this means that most DMAVA offices, excluding the Veteran's Homes, are closed because the agency is on an Alternate Work Plan.

Ms. Dearden certifies that on April 26, 2010, she notified the Complainant that the cost of copying her request was \$2.96. Ms. Dearden states that she mailed out the requested records to the Complainant once she received the copying fee. Ms. Dearden further certifies that the records sent to the requestor on April 27, 2010 were deemed responsive to the request by the DMAVA Human Resources Division.

Loreta Sepulveda, the Custodian of the DMAVA Human Resources Division, also provides a legal certification. The Custodian certifies that she is employed with DMAVA as the Director of the Human Resources Division. The Custodian certifies that Ms. Dearden forwarded the Complainant's OPRA request to her. The Custodian certifies that she interpreted the Complainant's OPRA request as seeking the job postings and the names of the individuals who were hired, whether or not the notice of the positions' availability was actually posted. The Custodian certifies that since the filing of the Complainant's complaint in this matter, the Complainant has neither provided clarification nor amended her request.

The Custodian argues that regardless of how the request is characterized, she now understands that the Complainant seeks the names of individuals hired into clerical or personnel job title series from April 2008 to May 2009. The Custodian certifies that she has attached the responsive record to the SOI.⁹

May 21, 2010

Complainant's response to the Custodian's SOI. The Complainant states that she is unsatisfied with the information contained in the Custodian's SOI. The Complainant states that the postings, flyers, and announcements for all of these jobs should be provided. The Complainant maintains that the responsive records should include worksites, job requirements, work hours, and pay/benefit arrangements.¹⁰

February 23, 2011

The GRC's e-mail to the Custodian. The GRC requests that the Custodian send a legal certification as to whether or not she supplied the Complainant all the records that are responsive to the request and whether or not additional records responsive to such request exist.

⁹ The record indicates that the Custodian also forwarded a copy of the SOI with the relevant attachments to the Complainant.

¹⁰ The Complainant submitted additional correspondence which is irrelevant to the adjudication of this matter . Robin B. Magargal v. New Jersey Department of Military & Veteran's Affairs, 2010-81 – Findings and Recommendations of the Executive Director

February 24, 2011

Custodian Counsel's e-mail to the GRC attaching Custodian's legal certification. The Custodian certifies that there were two job postings for the clerical or personnel job title series openings from April 2009 through May 2009. The Custodian certifies that the Complainant was given copies of these postings and now has in her possession all of the responsive government records.

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.

In regards to delivery to the appropriate custodian of record, OPRA provides:

"[a] request for access to a government record shall be in writing and hand delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian". N.J.S.A. 47:1A-5.g.

OPRA also provides:

"Any 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.

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.

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.¹¹ 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).

In the matter before the Council, the evidence of record indicates that the Custodian responded in writing to the Complainant's OPRA request on the ninth (9th) business day following the Custodian's receipt of such request stating that the Complainant's OPRA request was complete and would be mailed to the Complainant upon receipt of \$2.69 for the cost of copies and postage.

Accordingly, the Custodian's failure to respond in writing to the Complainant's request by denying access, granting access, requesting an extension of time or requesting clarification of said request within the statutorily mandated seven (7) business days constitutes 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).

As part of the Statement of Information, the Custodian certified that she provided all records responsive to the Complainant's request on April 26, 2010; such records were received by the Complainant on April 28, 2010. The Complainant disputes the content of such records and states that the DMAVA is purposely supplying her with dishonest and invalid records to withhold information. However, the Complainant's allegations do not rise to the level of competent, credible evidence sufficient to overcome the Custodian's certification.

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:A-7.b. Accordingly, disputes concerning the validity and authenticity of records are not within the jurisdiction of the GRC.

In cases where the Complainant questions the accuracy and completeness of records supplied to them, the Council has held that OPRA limits the Council's concern to issues surrounding the right of access to government records, as the Council does not have the jurisdiction to determine the validity of a record. *See, Gillespie v. Newark Public Schools*, GRC Complaint No. 2004-106 (March 2005).

In Kwanzaa v. Dep't. of Corrections, GRC Complaint No. 2004-167 (November 2004), the Complainant requested "a copy of [his] NJ State term [that includes] work credits, minimum credits, commutation credit, lost commutation credits, restored commutation credits and jail credits." After the Custodian provided the Complainant the requested records, the Complainant asserted that he did not believe that the information contained in the records was accurate. The

¹¹ 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.
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GRC held that the veracity and accuracy of the information contained in the records was not within the Council's jurisdiction pursuant to N.J.S.A. 47:A-7.b.

Furthermore and consistent with Kwanzaa and Gillespie, the Council addressed the issue of whether the GRC has authority to regulate how an agency maintains its files or which records the agency must maintain in Anonymous v. Twp. of Monroe, GRC Complaint No. 2006-160 (April 2008). In Anonymous, the Complainant requested Zoning Board Rules. After the Custodian certified the records did not exist, the Complainant asserted that the township should have these records and they should be available to members of the public. Upon review of these facts, the GRC held that "the Council does not oversee the content of documentation" pursuant to N.J.S.A. 47:A-7(b).

Accordingly, pursuant to N.J.S.A. 47:A-7.b and Kwanzaa, Gillespie, and Anonymous, the issue of the validity and authenticity of the requested records is beyond the jurisdiction of the GRC.

Whether the Custodian's delay in access to the requested records 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, 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'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 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), the Custodian certified in the SOI that she provided the Complainant with all records responsive on April 26, 2010. Furthermore, pursuant to N.J.S.A. 47:A-7.b., the issue of the validity and authenticity of the requested records is beyond the jurisdiction of the GRC. See Kwanzaa v. Dep't. of Corrections, GRC Complaint No. 2004-167 (November 2004), Gillespie v. Newark Public Schools, GRC Complaint No. 2004-106 (March 2005) and Anonymous v. Twp. of Monroe, GRC Complaint No. 2006-160 (April 2008). It is therefore 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 as the evidence in the record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. 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 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), the Custodian certifies she has provided the Complainant with all records responsive.
2. Pursuant to N.J.S.A. 47:A-7.b., the issue of the validity and authenticity of the requested records is beyond the jurisdiction of the GRC. See Kwanzaa v. Dep't. of Corrections, GRC Complaint No. 2004-167 (November 2004), Gillespie v. Newark Public Schools, GRC Complaint No. 2004-106 (March 2005) and Anonymous v. Twp. of Monroe, GRC Complaint No. 2006-160 (April 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 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), the Custodian certified in the Statement of Information that she provided the Complainant with all records responsive on April 26, 2010. Furthermore, pursuant to N.J.S.A. 47:A-7.b., the issue of the validity and authenticity of the requested records is beyond the jurisdiction of the GRC. See Kwanzaa v. Dep't. of Corrections, GRC Complaint No. 2004-167 (November 2004), Gillespie v. Newark Public Schools, GRC Complaint No. 2004-106 (March 2005) and Anonymous v. Twp. of Monroe, GRC Complaint No. 2006-160 (April 2008). It is therefore 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 as the evidence in the record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate.

Prepared By: Darryl C. Rhone
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

April 20, 2011