



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

August 24, 2010 Government Records Council Meeting

Mary Werner
Complainant

Complaint No. 2010-95

v.

New Jersey Department of Law & Public Safety,
Division of Consumer Affairs,
State Board of Psychological Examiners
Custodian of Record

At the August 24, 2010 public meeting, the Government Records Council (“Council”) considered the August 17, 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. The Custodian’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).
2. Because the Custodian certified that no records responsive to the Complainant’s request exist, and because there is no credible evidence in the record to refute the Custodian’s certification, the Custodian did not unlawfully deny access to the requested record pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
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, the Custodian provided a written response to the Complainant’s request on the ninth (9th) business day following receipt of the Complainant’s OPRA request and the Custodian certified that no records exist which are responsive to the Complainant’s OPRA request. 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 24th Day of August, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Stacy Spera, Secretary
Government Records Council

Decision Distribution Date: August 30, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 24, 2010 Council Meeting**

**Mary Werner¹
Complainant**

GRC Complaint No. 2010-95

v.

**New Jersey Department of Law and Public Safety,
Division of Consumer Affairs,
State Board of Psychological Examiners
Custodian of Records²**

Records Relevant to Complaint: One (1) copy of the professional profiles, including both the required and optional information, regarding:

- Flora De Fillipo, Ph.D.
- David Wasser Ph.D.
- Jacob Brown Ph.D.
- Dana Farber Ph.D.

Request Made: March 19, 2010

Response Made: April 13, 2010

Custodian: Robert Campanelli

GRC Complaint Filed: May 1, 2010³

Background

March 19, 2010

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

April 13, 2010

Custodian's response to the OPRA request. The Custodian responds in writing electronically to the Complainant's OPRA request on the ninth (9th) business day following receipt of such request.⁴ The Custodian states that the doctors listed all hold an active license with an expiration date of June 30, 2011. In addition the Custodian states that there are no disciplinary actions against the above-named doctors.

¹ No legal representation listed on record.

² Represented by DAG Steven Flanzman, on behalf of the NJ Attorney General.

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

⁴ The Custodian certifies in the Statement of Information that he received the OPRA request on March 31, 2010; April 2, 2010 was a state holiday.

May 11, 2010

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

- Complainant’s OPRA request dated March 31, 2010
- Letter from the Custodian to the Complainant dated April 12, 2010

The Complainant argues that the New Jersey Health Care Consumer Information Act, P.L. 2003, c. 90, requires profile information on doctors and psychologists, including the medical schools attended, the year the providers’ degree was received, the year the provider was first licensed, the location of office practice sites, and any specialty board certifications. The Complainant contends that the law requires that profile information on doctors and psychologists must be developed, maintained, and made available to the public. In addition, the Complainant also states that she requested these records three (3) times and each time has not been provided the records.

The Complainant does not agree to mediate this complaint.

May 13, 2010

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

May 21, 2010

Custodian’s SOI with the following attachments:

- Complainant’s electronic OPRA request dated August 12, 2009⁵
- Letter from the Custodian to the Complainant dated September 11, 2009

The Custodian certifies that he checked the licensing system to see if any individuals listed on the OPRA request were licensed by the Board. The Custodian further certifies that the search results showed that these individuals were in good standing and no disciplinary actions were taken against them. The Custodian argues that because of this, no documents existed to provide to the requestor. The Custodian states that the Board of Psychological Examiners does not maintain any publicly available profiles on its licensees, and that the applicable law, N.J.S.A. 45:9-22.21 et seq.,⁶ does

⁵ The Custodian originally attached a different OPRA request submitted by the Complainant with his SOI than that which is the subject of this Denial of Access Complaint. The Custodian provided the correct OPRA request to the GRC on July 8, 2010.

⁶ The New Jersey Health Care Consumer Information Act. The Act provides in pertinent part:
“The Division of Consumer Affairs in the Department of Law and Public Safety, in consultation with the State Board of Medical Examiners and the New Jersey State Board of Optometrists, shall collect and maintain information concerning all physicians, podiatrists and optometrists, respectively, licensed in the State for the purpose of creating a profile of each physician, podiatrist and optometrist pursuant to this act. The profiles shall be made available to the public through electronic and other appropriate means, at no charge to the public. The division shall establish a toll-free telephone number for members of the public to contact the division to obtain a paper copy of a physician, podiatrist or optometrist profile and to make other inquiries about the profiles.” N.J.S.A. 45:9-22.21.

not require the Board to do so. The Custodian does point out that the State Board of Medical Examiners and the State Board of Optometrists are required to maintain publicly available profiles.

The Custodian certifies that his response to the Complainant's OPRA request was ready on April 12, 2010, but due to problems with the tracking system, said response was mailed on April 13, 2010.

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.

The Complainant submitted an OPRA request for a copy of the professional profiles for four (4) individuals. The Custodian responded to the OPRA request on the ninth (9th) business day following receipt thereof. The Custodian informed the Complainant that all the doctors listed on the OPRA request hold an active license with an expiration date of June 30, 2011 and that there are no disciplinary actions against any of these doctors.

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.⁷ 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 instant complaint, the Custodian responded to the OPRA request on the ninth (9th) business day following receipt of the Complainant's OPRA request, although the Custodian certified in the SOI that his response to the OPRA request was ready on the eighth (8th) business day but was mailed on the ninth (9th) business day due to problems with the tracking system.

Therefore, the Custodian'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).

The Custodian responded to the Complainant's OPRA request stating that there were no disciplinary actions against the doctors listed. In addition, the Custodian certified in his SOI that that the Board of Psychological Examiners does not maintain any publicly available profiles on their licensees. The Custodian also certified that only the Board of Medical Examiners and the State Board of Optometrists are required to maintain public profiles according to N.J.S.A. 45:9-22.21, et seq.

The New Jersey Health Care Consumer Information Act, N.J.S.A. 45:9-22.21 et seq., provides in pertinent part:

“[t]he Division of Consumer Affairs in the Department of Law and Public Safety, in consultation with the State Board of Medical Examiners and the New Jersey State Board of Optometrists, shall collect and maintain information concerning all physicians, podiatrists and optometrists, respectively, licensed in the State for the purpose of creating a profile of each physician, podiatrist and optometrist pursuant to this act. The profiles shall be made available to the public through electronic and other appropriate means, at no charge to the public. The division shall establish

⁷ 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.

a toll-free telephone number for members of the public to contact the division to obtain a paper copy of a physician, podiatrist or optometrist profile and to make other inquiries about the profiles.” N.J.S.A. 45:9-22.22(a).

Thus, the New Jersey Health Care Consumer Information Act, N.J.S.A. 45:9-22.21 et seq., does not require that the New Jersey Division of Consumer Affairs and/or the New Jersey Board of Psychological Examiners collect or maintain profile information regarding licensed psychologists. Moreover, the Custodian has certified that no records responsive to the Complainant’s OPRA request exist. The Complainant has not provided any evidence 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 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 GRC determined that the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed, and the Complainant provided no evidence to refute the Custodian’s certification.

Therefore, because the Custodian certified that no records responsive to the Complainant’s request exist, and because there is no credible evidence in the record to refute the Custodian’s certification, the Custodian did not unlawfully deny access to the requested record pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

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).

In the instant complaint, the Custodian responded to the Complainant’s OPRA request on the ninth (9th) business day following receipt of such request stating that although the individuals listed on the OPRA request were licensed and in good standing, there were no disciplinary actions against the doctors listed. The Custodian later certified in his SOI that no records responsive to the Complainant’s OPRA request exist because the Board of Psychological Examiners does not maintain public profiles on their licensees and is not required to do so by N.J.S.A. 45:9-22.21 et seq.

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, the Custodian provided a written response to the Complainant’s request on the ninth (9th) business day following receipt of the Complainant’s OPRA request and the Custodian certified that no records exist which are responsive to the Complainant’s OPRA request. 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. The Custodian’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).
2. Because the Custodian certified that no records responsive to the Complainant’s request exist, and because there is no credible evidence in the record to refute the Custodian’s certification, the Custodian did not unlawfully deny access to the requested record pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
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, the Custodian provided a written response to the Complainant’s request on the ninth (9th) business day following receipt of the Complainant’s OPRA request and the Custodian certified that no records exist which are responsive to the Complainant’s OPRA request. 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: Harlynn A. Lack, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

August 17, 2010