



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

September 25, 2012 Government Records Council Meeting

Paul Marinaccio
Complainant

Complaint No. 2011-14

v.

Borough of Fanwood (Union)
Custodian of Record

At the September 25, 2012 public meeting, the Government Records Council (“Council”) considered the September 18, 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:

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 (Interim Order October 31, 2007).
2. Because the Custodian has certified that no video recordings responsive to the Complainant’s OPRA requests exist and there is no credible evidence in the record to refute the Custodian’s certification, pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Custodian has not unlawfully denied the Complainant access to the requested records. N.J.S.A. 47:1A-6.
3. The Custodian failed to respond in writing to the Complainant’s OPRA requests either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, resulting 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. However, the Custodian certified on July 31, 2012 that no video recordings responsive to either of the Complainant’s requests exist and the Complainant has offered no evidence to refute the Custodian’s certification. The evidence of record does not indicate that the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. 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 25th Day of September, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: October 1, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 25, 2012 Council Meeting**

**Paul Marinaccio¹
Complainant**

GRC Complaint No. 2011-14

v.

**Borough of Fanwood (Union)²
Custodian of Records**

Records Relevant to Complaint:

1. All video images recorded between 5:00 p.m. and 6:00 p.m. on January 17, 2009 by the camera mounted on the windshield Policeman Marc Gottlick's ("Policeman Gottlick"), vehicle.
2. All video images recorded between 5:00 p.m. and 6:00 p.m. on January 17, 2009 by the cameras mounted on the windshields of all other police vehicles that were at the junction of Sheelan's Crossing and North Avenue.

Request Made: September 17, 2010

Response Made: None³

Custodian: Eleanor McGovern

GRC Complaint Filed: January 18, 2011⁴

Background

September 17, 2010

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the video recordings relevant to this complaint listed above in a letter referencing OPRA.

January 18, 2011

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

- Complainant's OPRA request dated September 17, 2010
- U.S. Postal Service Confirmation of Delivery receipt dated September 21, 2010.

The Complainant states that he filed an OPRA request seeking "1) all video images recorded between 5:00 p.m. and 6:00 p.m. on January 17, 2009 by the camera

¹ No legal representation listed on record.

² Represented by Dennis Estis, Esq., of Greenbaum, Rowe, Smith & Davis, LLP (Woodbridge, NJ).

³ The Custodian certifies in the Statement of Information that she received the Complainant's OPRA request on September 21, 2010

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

mounted on the windshield Policeman Gottlick, vehicle and 2) all video images recorded between 5:00 p.m. and 6:00 p.m. on January 17, 2009 by the cameras mounted on the windshields of all other police vehicles that were at the junction of Sheelan's Crossing and North Avenue." The Complainant also states that the Custodian did not respond to his OPRA request. The Complainant further states that the requested video recordings provide evidence of Policeman Gottlick committing federal and state crimes. The Complainant additionally states that the video recordings requested provide evidence that Policeman Gottlick wrote a false police report and filed a false criminal charge against the Complainant. Lastly, the Complainant states that on December 20, 2010, Records Analyst Karen Perry ("Ms. Perry") of Records Management Services, informed the Complainant that between 2005 and December 20, 2010, neither the Borough of Fanwood Police Department nor the Custodian filed any requests to dispose of the requested video recordings.⁵

The Complainant does not agree to mediate this complaint.

January 18, 2011

Letter from Chief Trigo to the Custodian. Chief Trigo states that he inquired into the Complainant's OPRA request. Chief Trigo also states that the Complainant was issued a summons on January 17, 2009 for violating Borough Code 212-10G. Chief Trigo further states that the Police Department does not possess any documentation sent by the Complainant requesting discovery or records pursuant to an OPRA request. Chief Trigo additionally states that since there were no video recordings entered into evidence in the Complainant's case. Lastly, Chief Trigo states that since there were no video recordings entered into evidence, the Complainant's incident for which he was issued a summons was not captured on videotape.

January 19, 2011

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

January 26, 2011⁶

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated September 17, 2010
- Letter from Chief Trigo to the Custodian dated January 18, 2011.

The Custodian certifies that she received the Complainant's OPRA request on September 21, 2010. The Custodian also certifies that on September 21, 2010, she forwarded the Complainant's OPRA request to Chief Trigo for a response. The Custodian asserts that Chief Trigo never received the forwarded OPRA request. The Custodian additionally certifies that at the time the Police Department received the Complainant's OPRA request, there was a great deal of activity within the Police

⁵ The Complainant makes additional arguments which are not relevant to the question of access to the video recordings responsive to the Complainant's request.

⁶ The Custodian did not certify to the search undertaken to locate the records responsive or whether any records responsive to the Complainant's OPRA request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007)

Department regarding the transition of dispatchers, so no response was ever made to the request.

The Custodian certifies that the Complainant's incident for which he was issued a summons was not captured on video tape.⁷ The Custodian also certifies that since the incident was not videotaped there are no video recordings responsive to the Complainant's OPRA request. The Custodian further certifies that she did not deny the Complainant's OPRA request; rather she failed to respond to the request.

The Custodian certifies that she assumed the Complainant's request was denied because the Custodian failed to follow-up with Chief Trigo and therefore Chief Trigo failed to respond to the request. The Custodian also certifies that the Complainant did not contact the Custodian regarding his OPRA request until she received a faxed copy of the Complainant's Denial of Access Complaint on January 18, 2011. The Custodian asserts that the video recordings responsive to the request should have been part of the discovery process held in the Borough of Fanwood's Municipal Court, but they were not. The Custodian additionally certifies that the Public Defender could have requested the video recordings at the time of trial and would have therefore known that there no video recordings exist.

May 2, 2012

E-mail from the GRC to the Custodian. The GRC states that in order to properly adjudicate the Complainant's Denial of Access Complaint, it is requesting a legal certification from the Custodian. The GRC states that the Custodian certified in the SOI that she forwarded the Complainant's OPRA request to Chief Trigo for a response. The GRC also states that based on the evidence provided it is unclear if the Police Department has their own records custodian. The GRC requests the Custodian to legally certify if the Police Department has their records custodian or does the Municipal Clerk also act as the Custodian for the Police Department.

June 12, 2012

Letter from the Custodian to the GRC attaching the requested legal certification. The Custodian certifies that she also acts as the custodian for the Police Department.

July 24, 2012

E-mail from the GRC to the Custodian. The GRC states that in order to properly adjudicate the Complainant's Denial of Access Complaint, it is requesting another legal certification from the Custodian. The GRC states that the Custodian certified in the SOI that the Complainant's incident was not captured on videotape. The GRC also states that the Complainant did not request a copy of the videotape from his incident, but rather the Complainant requested "1) all video images recorded between 5:00 p.m. and 6:00 p.m. on January 17, 2009 by the camera mounted on the windshield Policeman Gottlick, vehicle and 2) all video images recorded between 5:00 p.m. and 6:00 p.m. on January 17, 2009 by the cameras mounted on the windshields of all other police vehicles that were at the junction of Sheelan's Crossing and North Avenue." The GRC requests the Custodian to

⁷ The Custodian does not certify if there are no video recordings responsive to the Complainant's OPRA request in her SOI.

legally certify whether there are any video recordings responsive to either of the Complainant's OPRA requests.

July 31, 2012

E-mail from the Custodian to the GRC attaching the requested legal certification. The Custodian certifies that there are no video recordings responsive to either of the Complainant's OPRA requests.⁸

Analysis

Whether the Custodian timely responded to the Complainant's OPRA request?

OPRA provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor 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 ...” N.J.S.A. 47:1A-5.g.

Further, OPRA 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.

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.⁹ 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 (Interim Order October 31, 2007).

⁸ The Custodian also makes additional certifications not relevant to the adjudication of this Denial of Access Complaint. The Complainant's additional certifications are relevant to Marinaccio v. Borough of Fanwood (Union), GRC Complaint No. 2011-226, this complaint has yet to be adjudicated by the Council.

⁹ 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.

In the instant complaint, the Complainant asserted in his Denial of Access Complaint that the Custodian did not respond to his OPRA request. The Custodian certified in the SOI that she forwarded the Complainant's OPRA request to the Police Department for a response and never received a response. The Custodian also certified in the SOI that no response was ever made to the Complainant's OPRA request. The Custodian further certified that she did not deny the Complainant's OPRA request; rather she just failed to respond to it. The Custodian certified on June 12, 2012 via letter that she is the Custodian for the Police Department. Thus, regardless of the Police Department's failure to respond to the Complainant's OPRA request, the Custodian still has the vested responsibility to respond to said request within seven (7) business days.

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, supra.

Whether any video recordings responsive to the Complainant's OPRA request exist?

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 Council has consistently held that there exists no denial of access when a custodian has demonstrated that no records responsive to a complainant's request exist. 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 and the complainant submitted no evidence to refute said certification. The GRC held the custodian did not unlawfully deny access to the requested records because the custodian certified that no records responsive to the request existed.

In the matter before the Council, the Custodian certified in the SOI that the Complainant's incident on January 17, 2009 for which he was issued a summons was not captured on videotape. The GRC requested a legal certification from the Custodian via e-mail on July 24, 2012 requesting the Custodian to legally certify if there are any video recordings responsive to either of the Complainant's OPRA requests. The Custodian certified via an e-mail attachment on July 31, 2012 that there are no video recordings responsive to either of the Complainant's OPRA requests. The Complainant has provided no evidence to the GRC to refute the Custodian's certification.

Therefore, because the Custodian has certified that no video recordings responsive to the Complainant's OPRA requests exist and there is no credible evidence in the record to refute the Custodian's certification, pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Custodian has not unlawfully denied the Complainant access to the requested records. N.J.S.A. 47:1A-6.

Whether the Custodian's failure to respond to the Complainant's OPRA requests rise 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)).

The Custodian failed to respond in writing to the Complainant's OPRA requests either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, resulting 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. However, the Custodian certified on July 31, 2012 that no video recordings responsive to either of the Complainant's requests exist and the Complainant has offered no evidence to refute the Custodian's certification. The evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. 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 (Interim Order October 31, 2007).
2. Because the Custodian has certified that no video recordings responsive to the Complainant's OPRA requests exist and there is no credible evidence in the record to refute the Custodian's certification, pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Custodian has not unlawfully denied the Complainant access to the requested records. N.J.S.A. 47:1A-6.
3. The Custodian failed to respond in writing to the Complainant's OPRA requests either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7)

business days, resulting 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. However, the Custodian certified on July 31, 2012 that no video recordings responsive to either of the Complainant’s requests exist and the Complainant has offered no evidence to refute the Custodian’s certification. The evidence of record does not indicate that the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. 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: Karyn Gordon, Esq.
Acting Executive Director

September 18, 2012