



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

August 27, 2013 Government Records Council Meeting

John Cokos
Complainant

Complaint No. 2012-319

v.

Township of Deptford Police Department (Gloucester)
Custodian of Record

At the August 27, 2013 public meeting, the Government Records Council (“Council”) considered the August 20, 2013 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 did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, 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. The Custodian’s response was legally insufficient because the Custodian failed to respond in writing to each item contained in the Complainant’s OPRA request and failed to indicate the specific basis for denial of access thereto. N.J.S.A. 47:1A-5(g). *See also Paff v. Willingboro Board of Education (Burlington)*, GRC Complaint No. 2007-272 (May 2008).
3. Since the Custodian certified that she provided the record responsive to request item number 1 to the Complainant, and there is no evidence in the record to refute the Custodian’s certification, the Custodian did not unlawfully deny access to said record. N.J.S.A. 47:1A-6.
4. Notwithstanding the Custodian’s “deemed” denial, she did not unlawfully deny access to request items numbered 2 through 15 because the Custodian certified that the records are nonexistent and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. *See Pusterhofer v. New Jersey Department of Education*, GRC Complaint No. 2005-49 (July 2005).



5. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by not responding to the Complainant's request in a timely manner, and violated N.J.S.A. 47:1A-5(g) by providing an insufficient response, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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 27th Day of August, 2013

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: August 29, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 27, 2013 Council Meeting**

**John Cokos¹
Complainant**

GRC Complaint No. 2012-319

v.

**Township of Deptford Police Department (Gloucester)²
Custodial Agency**

Records Relevant to Complaint: Complainant requests to pick up the following items:

1. A viewable DVD 12-00000003:004 submitted to me by the Deptford Township Police Department via the Municipal Records Clerk on October 4, 2012 as part of a common law request of release of government documents.
2. Copy of patrol vehicle mobile video recording ("MVR") for the vehicle assigned to Officer Matthew Principato and Detective Edward Kiermier on November 10, 2011.
3. Copy of MVR for the assigned Drug Unit Vehicle which was on the scene November 10, 2011, at the request of Officer Principato and or Detective Kiermier.
4. Copy of MVR and/or voice recording for the vehicle that transported the Complainant to the Deptford Township Police Department.
5. The computer aided dispatch ("CAD") summary log or similar reports for activities on November 10, 2011.
6. The police daily duty log for Friday 10, 2011, from 9:00 a.m. until 1:00 p.m., which includes all police officers, supervisors, and civilians working during that time and their assignments.³
7. Police telephone recordings from all recorded phone extensions from thirty (30) minutes prior to my interdiction stop on Bankbridge Road in Sewell, Deptford Township, until thirty (30) minutes thereafter.

¹ No legal representation listed on record.

² Represented by Albert Marmero, Esq., of Long Marmero & Associates, LLP (Woodbury, NJ).

³ In this request item, as well as in request items numbered 8 and 10, the Complainant failed to provide a full date; however, it is likely the Complainant is referring to November 10, 2011, because that was the date referenced in request items numbered 2, 3 and 5.

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8. Police radio transmissions on all frequencies and channels from thirty (30) minutes prior to the interdiction stop until thirty (30) minutes thereafter on Friday 10, 2011.
9. CAD entries for the shift that worked at the time of the interdiction stop and the drug scene investigation and arrest for the possession of crack cocaine.
10. Duty roster for police employees working the shift during the interdiction stop on Friday 10, 2011, including employees, all personnel that aided in the Drug Unit identification of the substance presumed to be crack cocaine, and vehicle assignments but excluding undercover officers.
11. Identification of the on scene officer (John Doe, name unknown) of the Drug Unit who was called to the scene that day.
12. Personnel (John Doe's unknown to me), supervisors, and assisting personnel that processed the substance determined on scene to be crack cocaine and the results of the investigation, including but not limited to evidence reports, lab reports, and any written or recorded narratives concerning the process used to determine the nature of the suspected substance.
13. Identification of any police officers present that day that may have been drug recognition experts at the scene or involved in the processing of the suspected substance.
14. Any written material maintained by the Deptford Township Police Department outlining the standard operating procedures concerning practices and procedures for confronting citizens with digital recording devices and the guidelines and training in place for the activity of video recording of police officers in public.
15. The procedural process involved in field operations concerning identification of substances presumed to be drugs.

Custodian of Records: Dina Zawadski, Clerk
Request Received by Custodian: November 30, 2012
Response Made by Custodian: December 13, 2012
GRC Complaint Received: December 14, 2013

Background⁴

Request and Response:

On November 30, 2012, the Complainant submitted an Open Public Records Act (“OPRA”) request seeking the above-listed records. On December 13, 2012, the ninth (9th) business day following receipt of said request, the Custodian responded in writing informing the

⁴ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

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Complainant that the DVD he requested has been made available for him to pick up. The Custodian also informs the Complainant that several copies of the DVD had been made for him and that the Township invites him to view the DVD in the Township Clerk's office.

Denial of Access Complaint:

On December 14, 2012, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant states that he provided his records request to the Custodian on November 29, 2012, but that he never received a response to the request.⁵ The Complainant requests an *in camera* inspection of the Deptford Township Police Department records to determine whether records he requested are in the possession of the municipality.

Statement of Information:

On December 20, 2012, the Custodian filed a Statement of Information ("SOI"). The Custodian certifies that she received the Complainant's OPRA request on November 30, 2012, and that she responded to the request on December 13, 2012.⁶

The Custodian certifies that, in response to a prior request from the Complainant, she disclosed to him the record responsive to request item number 1; however, the Complainant stated that the record was corrupted or not copied correctly and he could not view it. For that reason, the Custodian certifies she again made a copy of the DVD available for the Complainant to pick up, as per his preferred delivery method set forth in his November 30, 2012 OPRA request. The Custodian further certifies that the DVD plays fine on Township equipment, and as an additional means of accommodating the Complainant, she invited the Complainant to view the record at the municipality.

The Custodian certifies that the record responsive to request item number 1 in unredacted form was picked up by the Complainant on December 17, 2012. The Custodian also certifies that the records responsive to request items numbered 2 through 15 are nonexistent and she cannot therefore grant or deny access to those records. The Custodian further certifies that records responsive to request item numbers 5, 7, 8 and 9 may be available from Gloucester County because the County performs all dispatching services for the Deptford Township Police Department.

Additional Information:

On December 26, 2012, the Complainant submitted a response to the Custodian's SOI. The Complainant states that he does not want request item number 1, rather he wants MVR recordings. The Complainant states that such recordings must exist if the Deptford Police Department follows SOP (sic). The Complainant requests that the GRC depose the parties to the

⁵ The OPRA request is time stamped as received by the Custodian on November 30, 2012.

⁶ The Custodian addressed four (4) of the Complainant's requests in the SOI, only one of which was the request which formed the basis for this complaint. Confusion regarding the records requested, and those disclosed/denied, necessitated a supplemental certification which the Custodian provided on May 13, 2013.

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complaint. The Complainant states that he is sending two (2) videos to the GRC which are relevant to the complaint.⁷

Analysis⁸

Timeliness

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). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. *Id.* 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).

The Custodian certified that she received the Complainant's OPRA request on November 30, 2012. The Custodian also certified that a response to the request was sent to the Complainant on December 13, 2013, which was the ninth (9th) business day following the Custodian's receipt of the request. Accordingly, the Custodian failed to respond to the Complainant's request within the statutorily mandated seven (7) business day period.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, 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.

Sufficiency of Response

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 specifically states that a custodian "shall indicate the specific basis [for denial of access]..." N.J.S.A. 47:1A-5(g). Further, in Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), the GRC held that "...[t]he Custodian's response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5.g."

⁷ The GRC did not receive any videos from the Complainant.

⁸ There may be other OPRA issues in this matter; however, the Council's analysis is based solely on the claims made in the Complainant's Denial of Access Complaint.

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.

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Here, the Custodian only addressed request item number 1, a DVD, in her response. Therefore, the Custodian's response failed to address each item contained in the Complainant's OPRA request individually and failed to indicate the specific basis for denial of access thereto.

As such, the Custodian's response was legally insufficient because the Custodian failed to respond in writing to each item contained in the Complainant's OPRA request and failed to indicate the specific basis for denial of access thereto. N.J.S.A. 47:1A-5(g). See also Paff, supra.

Unlawful Denial of Access

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 Custodian certified that, in response to the Complainant's November 30, 2012 request, she made a copy of request item number 1 available for the Complainant to pick up. The Custodian further certified that she also informed the Complainant that he could view the record at the municipality. The Custodian certified that the Complainant picked up the record responsive to request item number 1 in unredacted form on December 17, 2012.

Therefore, since the Custodian certified that she provided the record responsive to request item number 1 to the Complainant, and there is no evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to said record. N.J.S.A. 47:1A-6.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the custodian certified that no records responsive to the complainant's request for billing records existed and the complainant submitted no evidence to refute the custodian's certification regarding said records. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian's certification, there was no unlawful denial of access to the requested records.

Here, the Custodian certified that she determined that the records responsive to the Complainant's request items numbered 2 through 15 are nonexistent and therefore the Custodian cannot grant or deny access to said records. The Custodian further certified that the records responsive to request item numbers 5, 7, 8 and 9, although nonexistent at the local level, may be available from the County because they perform dispatching services for the Police Department.

Therefore, notwithstanding the Custodian's "deemed" denial, she did not unlawfully deny access to request items numbered 2 through 15 because the Custodian certified that the records are nonexistent and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. See Pusterhofer, supra.

Knowing & Willful

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 “... [i]f 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 violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by not responding to the Complainant’s request in a timely manner, and violated N.J.S.A. 47:1A-5(g) by providing an insufficient response, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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 did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, 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. The Custodian's response was legally insufficient because the Custodian failed to respond in writing to each item contained in the Complainant's OPRA request and failed to indicate the specific basis for denial of access thereto. N.J.S.A. 47:1A-5(g). *See also Paff v. Willingboro Board of Education (Burlington)*, GRC Complaint No. 2007-272 (May 2008).
3. Since the Custodian certified that she provided the record responsive to request item number 1 to the Complainant, and there is no evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to said record. N.J.S.A. 47:1A-6.
4. Notwithstanding the Custodian's "deemed" denial, she did not unlawfully deny access to request items numbered 2 through 15 because the Custodian certified that the records are nonexistent and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. *See Pusterhofer v. New Jersey Department of Education*, GRC Complaint No. 2005-49 (July 2005).
5. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by not responding to the Complainant's request in a timely manner, and violated N.J.S.A. 47:1A-5(g) by providing an insufficient response, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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: John E. Stewart, Esq.

Approved By: Brandon D. Minde, Esq.
Executive Director

August 20, 2013