



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

March 22, 2013 Government Records Council Meeting

Judith Papiez
Complainant

Complaint No. 2012-54

v.

County of Mercer, Office of County Counsel
Custodian of Record

At the March 22, 2013 public meeting, the Government Records Council (“Council”) considered the March 15, 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. Although the Custodian responded in writing to the Complainant’s OPRA request within statutorily mandated time frame to respond, the Custodian’s written response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), because the Custodian failed to provide a date certain upon which she would respond to the Complainant providing any responsive records. *See also* Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011).
2. Notwithstanding the Custodian’s insufficient response, the Custodian has borne her burden of proving that she provided all responsive records in her possession. N.J.S.A. 47:1A-6. Further, the Custodian was not required to disclose records not specifically identified in the OPRA request nor was she required to give the Complainant explanations about training.
3. Because the language of N.J.S.A. 47:1A-5(e) is clear and unambiguous as to which specific records are classified as “immediate access” records, the GRC declines to determine that lists “... of workplace violence and reasonable suspicion training dates ...” are “immediate access” records because said records are not specifically identified under OPRA as such.
4. The Custodian’s response was insufficient pursuant to N.J.S.A. 47:1A-5(i) because she failed to provide a date certain on which she would respond; however, the Custodian certified that she provided to the Complainant all responsive records available. Additionally, 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, it is concluded that the Custodian’s insufficient



response did 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 22nd Day of March, 2013

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

Robin Berg Tabakin, Esq., Chair
Government Records Council

Decision Distribution Date: March 26, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 22, 2013 Council Meeting**

**Judith Papiez¹
Complainant**

GRC Complaint No. 2012-54

v.

**County of Mercer, Office of County Counsel²
Custodian of Records**

Records Relevant to Complaint: Electronic copy (via e-mail) of a list of workplace violence and reasonable suspicion training dates for all Mercer County Department of Transportation (“DOT”) supervisors, including but not limited to Mr. Chris Markley, Mr. Al Rhodes, Mr. Chris Cerino and Mr. Bill Voorhees. Also include training dates for Department of Personnel (“DOP”) employee Ms. Ollie Young (“Ms. Young”).

Request Made: February 14, 2012

Response Made: February 15, 2012

GRC Complaint Filed: March 7, 2012³

Background⁴

The Complainant hand-delivered an OPRA request to the County on February 14, 2012. The Custodian responded in writing on February 15, 2012, the first (1st) business day after receipt of the subject request, stating that additional time would be necessary to retrieve the responsive records. The Complainant e-mailed the County on March 2, 2012 seeking a status update. The Custodian responded on March 19, 2012 advising that DOP contracted with an outside vendor to provide harassment and discrimination training in 2009. The Custodian advised that this agency trained supervisors who then trained their individual departments. The Custodian stated that Ms. Young received training in November 2008, spring 2009 and September 2010. The Custodian attached three (3) sign-in lists for drug and alcohol training sessions in 2006 and 2008.

The Complainant filed her Denial of Access Complaint with the Government Records Council (“GRC”) on March 7, 2012. In said complaint, the Complainant argues that the

¹ No legal representation listed on record.

² Sarah G. Crowley, Esq., Custodian of Records. No legal representation listed on record.

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

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.

Custodian violated N.J.S.A. 47:1A-5(i) by failing to provide a date certain on which she would respond to the Complainant.

The Complainant submitted a letter to the GRC on April 23, 2012. In said letter, the Complainant asserts that the Custodian partially complied with the OPRA request but failed to include confirmation of training and training dates for workplace violence training. The Complainant further argues that the Custodian failed to provide a copy of the contract with the outside vendor and confirmation of the classes in which Ms. Young was training. The Complainant contends that the Custodian violated N.J.S.A. 47:1A-5(e) by failing to grant immediate access to all responsive records.

The Custodian filed her Statement of Information (“SOI”) on May 25, 2012. In the SOI, the Custodian certifies she received the Complainant’s OPRA request on February 14, 2012. The Custodian certifies she responded on February 15, 2012 stating that she needed an extension of time. The Custodian certifies that she responded again on March 19, 2012 providing three (3) sign-in lists for drug and alcohol training sessions in 2006 and 2008.

The Custodian asserts that the Complainant’s OPRA request sought records reflecting trainings by DOT employees for workplace violence and reasonable suspicion training. The Custodian certifies that she provided dates and records to the Complainant for when training was conducted. The Custodian asserts that the Complainant is now seeking an explanation as to why certain employees completed certain trainings and why they did not participate in other trainings. The Custodian contends that a public agency is not required to answer questions or explain records. New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007). The Custodian certifies that she provided all records in her possession that are responsive to the Complainant’s OPRA request.

Analysis⁵

Sufficiency of the Custodian’s Response

OPRA provides that a custodian may have an extension of time to respond to a complainant’s OPRA request, but the custodian must provide a date certain. N.J.S.A. 47:1A-5(i). OPRA further provides that should the custodian fail to provide a response on that specific date, “access shall be deemed denied.” N.J.S.A. 47:1A-5(i).

In Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), the custodian provided the complainant with a written response to the complainant’s OPRA request on the seventh (7th) business day following receipt of said request. In the response, the custodian requested an extension of time to respond to said request but failed to provide a date certain upon which the requested records would be provided. The Council held that the custodian’s request for an extension of time was inadequate under OPRA pursuant to N.J.S.A. 47:1A-5(i).

⁵ 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.

Here, the Custodian responded in writing to the Complainant's OPRA request on the first (1st) business day after receipt of same stating that additional time would be necessary to retrieve the responsive records. However, the Custodian failed to provide a date certain on which she would respond to the Complainant providing access to any responsive records.

Therefore, although the Custodian responded in writing to the Complainant's OPRA request within statutorily mandated time frame to respond, the Custodian's written response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Hardwick, *supra*, because the Custodian failed to provide a date certain upon which she would respond to the Complainant providing any responsive records. *See also* Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011).

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 OPRA request at issue herein sought "a list of workplace violence and reasonable suspicion training dates ..." The Custodian responded on March 19, 2012 providing three (3) sign-in lists for drug and alcohol training sessions in 2006 and 2008. The Custodian further explained that Ms. Young received training in November 2008, spring 2009 and September 2010. The Complainant sent a letter to the GRC on April 23, 2012 in which she argued that the Custodian failed to include training dates and confirmation for workplace violence, a copy of a contract without an outside vendor and confirmation of dates for Ms. Young.

In the SOI, the Custodian certified that she provided all responsive records in her possession. The Custodian further argued that the Complainant is now seeking an explanation as to why certain employees completed certain trainings and why they did not participate in other trainings: a custodian is not required to answer questions or explain records. NJ Builders, *supra*.

The evidence of record supports that the Custodian provided all responsive records and that no other records exist. Specifically, the Complainant disputed that she was provided with the vendor contract; however, her OPRA request made no mention of the contract. Further, the Complainant disputed that she was not provided with "confirmation of training dates" for Ms. Young and workplace violence training. This portion of the Complainant's dispute appears to seek an explanation from the Custodian similar to the one the Custodian provided as part of her response. The GRC notes that OPRA only operates to make specific identifiable government records accessible and is not tool to siphon information. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). Further, the Complainant offered no competent, credible evidence to refute the Custodian's SOI certification that she provided all responsive records.

Thus, notwithstanding the Custodian's insufficient response, the Custodian has borne her burden of proving that she provided all responsive records in her possession. N.J.S.A. 47:1A-6. Further, the Custodian was not required to disclose records not specifically identified in the OPRA request nor was she required to give the Complainant explanations about training.

Finally, OPRA provides that "immediate access ordinarily shall be granted ..." to certain specific types of government records. N.J.S.A. 47:1A-5(e). Here, the Complainant contended that the Custodian violated N.J.S.A. 47:1A-5(e) by failing to grant immediate access to all responsive records. A review of N.J.S.A. 47:1A-5(e) reveals that a "list workplace violence and reasonable suspicion training dates ..." is not specifically identified as an "immediate access" record. Thus, the GRC must adhere to the clear and unambiguous language of N.J.S.A. 47:1A-5(e) and recognize only those specific records identified as immediate access records.

Therefore, because the language of N.J.S.A. 47:1A-5(e) is clear and unambiguous as to which specific records are classified as "immediate access" records, the GRC declines to determine that lists "... of workplace violence and reasonable suspicion training dates ..." are "immediate access" records because said records are not specifically identified under OPRA as such.

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:

"... 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's response was insufficient pursuant to N.J.S.A. 47:1A-5(i) because she failed to provide a date certain on which she would respond; however, the Custodian certified that she provided to the Complainant all responsive records available. Additionally, 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, it is concluded that the Custodian's insufficient response did 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. Although the Custodian responded in writing to the Complainant's OPRA request within statutorily mandated time frame to respond, the Custodian's written response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), because the Custodian failed to provide a date certain upon which she would respond to the Complainant providing any responsive records. *See also* Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011).
2. Notwithstanding the Custodian's insufficient response, the Custodian has borne her burden of proving that she provided all responsive records in her possession. N.J.S.A. 47:1A-6. Further, the Custodian was not required to disclose records not specifically identified in the OPRA request nor was she required to give the Complainant explanations about training.
3. Because the language of N.J.S.A. 47:1A-5(e) is clear and unambiguous as to which specific records are classified as "immediate access" records, the GRC declines to determine that lists "... of workplace violence and reasonable suspicion training dates ..." are "immediate access" records because said records are not specifically identified under OPRA as such.
4. The Custodian's response was insufficient pursuant to N.J.S.A. 47:1A-5(i) because she failed to provide a date certain on which she would respond; however, the Custodian certified that she provided to the Complainant all responsive records available. Additionally, 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, it is concluded that the Custodian's insufficient response did 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: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

March 15, 2013