



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. 2012-56

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 provide the Complainant with DPF-44s when such records were not specifically requested.
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 jobs 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. 2012-56

v.

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

Records Relevant to Complaint: Electronic copy (via e-mail) of listings of all positions filled, currently being filled, department requests, title changes, lateral moves and department applications for positions between June 10, 2006 and February 14, 2012 for Mercer County Department of Transportation (“DOT”) and Public Works. Include Civil Service Commission (“CSC”) titles (to and from), symbols, ranges and salaries, change dates and request dates.

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, providing current lists for DOT, Public Works, Engineering and Parks. The Custodian further noted that the County does not maintain lists of changes or openings, but that the Complainant could compare the lists. The Custodian finally noted that OPRA does not require the County to compile and maintain such lists.

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 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.

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.

The Complainant submitted a letter to the GRC on April 23, 2012. In said letter, the Complainant asserts that the Custodian partially denied access to the responsive records stating that the County did not maintain a list of changes or openings. The Complainant asserts that the Custodian provided her with a list of active employees year by year and advised the Complainant to compare them, although the Custodian did not provide historical listings from 2006 through 2012 for manual comparison. The Complainant asserts that pursuant to Lacava v. Mercer County Docket No. CSV-10401-07, personnel information can be obtained easily through the County and Municipal Personnel System (“CAMPS”), which is a secure, web-based interface that allows the County and authorities to transmit information to the CSC. The Complainant asserts that for budgetary purposes, title changes would be maintained and can easily be queried and printed through CAMPS.

The Complainant further contends that the CSC, Division of State & Local Operations requires, in addition to other documentation, DPF-44s to fill or backfill positions via new hire, lateral move or promotion. The Complainant asserts that these forms would be required to be maintained on file. 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 current lists of all employees at DOT, Public Works, Engineering and Parks. The Custodian certifies that she further advised the Complainant that the County maintained no other lists for title changes, lateral moves etc.

The Custodian certifies that the Complainant sought a list of employees to include title changes, lateral moves, new hires and department applications for that past six (6) years. The Custodian certifies that she provided the Complainant with all responsive lists in the County’s possession. The Custodian certifies that the County does not have day-to-day, month-to-month, or year-to-year historical lists of employees.

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.

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.

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).

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 Complainant's OPRA request herein sought listings of "... positions filled, being filled, [etc.]" for DOT and Public Works from June 10, 2006 and February 14, 2012. The Custodian responded on March 19, 2012 providing current employees lists noting that the County did not maintain lists of changes or openings.

In a letter to the GRC on April 23, 2012, the Complainant argued that the Custodian failed to provide historical listings, which the County has the ability to print off CAMPS pursuant to a statement made in Lacava. The Complainant further contended that CSC requires DPF-44s to fill or backfill positions via new hire, lateral move or promotion and that these records should be maintained. The Custodian subsequently certified in the SOI that the County does not have day-to-day, month-to-month, or year-to-year historical lists of employees.

The evidence of record supports that the Custodian provided all responsive records and that no other records exist. The Complainant disputed that DPF-44s should be maintained; however, the Complainant did not specifically request these records: her request sought lists. The Complainant also argues that Lacava stands for the position that the Custodian could have used CAMPS to fulfill the Complainant's OPRA request. However, the Complainant did not provide a copy of the case for the GRC to review the applicability of that case to this complaint. Thus the GRC is satisfied that the Complainant failed to provide competent, credible evidence to refute the Custodian's SOI certification.

Therefore, 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 provide the Complainant with DPF-44s when such records were not specifically requested.

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 lists of jobs are not specifically identified as "immediate access" records. 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 jobs 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 provide the Complainant with DPF-44s when such records were not specifically requested.
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 jobs 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