



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 Nos. 2012-60 and 2012-61

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. Because the Custodian certified in the SOI that no records responsive to the Complainant’s two (2) OPRA requests exist and because the Complainant did not submit any evidence to refute the Custodian’s certification in this regard, the Custodian did not unlawfully deny access to the requested records. *See* Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
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 “historical listings” are “immediate access” records because said records are not specifically identified under OPRA as such.
4. Although 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; the Custodian did not unlawfully deny access to the responsive records because same do not exist. *See* Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). 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. 2012-60 & 61

v.

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

Records Relevant to Complaint: Electronic copy (via e-mail) of the following:

1. Historical listings of dates and numbers of employees scheduled or requested to participate in reasonable suspicion testing from 2006 to February 14, 2012 for Mercer County Department of Transportation (“DOT”) and Public Works.³
2. Historical listing of dates and numbers of employees scheduled for random drug testing from 2006 to February 14, 2012 to include number of employees who were no-show or sick on testing day, number of employees who consistently miss, are out sick, or a no-show on scheduled testing days regardless if they are scheduled to take tests.

Request Made: February 14, 2012

Response Made: February 15, 2012

GRC Complaint Filed: March 7, 2012⁴

Background⁵

The Complainant hand-delivered two (2) OPRA requests 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 records responsive to both OPRA requests and advising that names of individuals drug tested were redacted to protect same under the Health Information & Accountability Act (“HIPAA”).

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 Complainant requested additional records that are not at issue in this complaint.

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

⁵ 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 regarding OPRA request No. 1, the Custodian failed to provide the historical list advising that the County does not maintain same. The Complainant contends that the County's own policy requires that they submit a semi-annual report to the County Executive, which should include information regarding testing and historical listings of reasonable suspicion testing. Drug Free Workplace Policy Sec. 7.11. The Complainant further contends that federal regulations require the County to maintain records regarding drug and alcohol testing that should be readily available to any department of transportation, State or local officials with regulatory authority over the County. Federal Motor Carrier Safety Administration ("FMCSA") §382.405. 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.

Regarding OPRA request No. 2, the Complainant argues that the Custodian partially complied by providing random selection forms (with redactions). The Complainant asserts that per FMCSA regulations, the random testing rate is 50% of drivers holding a Commercial Driver's License ("CDL") assuming the Custodian County has a minimum of 96 drivers with CDLs. The Complainant contends that excluded are the historical listings of employees consistently out sick or no show on random drug testing days. The Complainant contends that FMCSA §382.405 requires records reflecting why an employee was selected for testing. The Complainant again 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 ("SOP") for these two (2) complaints on May 25, 2012. In the SOIs, the Custodian certifies she received the Complainant's OPRA requests 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 some records not at issue herein.

Regarding OPRA request No. 1, the Custodian certifies that the County does not maintain a list by number per year of reasonable suspicion testing, nor is the County required to maintain such a list. The Custodian further certifies that, by definition, a "reasonable suspicion" test is not scheduled and would not be ordered if an employee were not at work acting suspicious.

Regarding OPRA request No. 2, the Custodian certifies that she provided all responsive records that are maintained by the County. The Custodian certifies that the County does not maintain a historical listing of employees consistently out or a no show on random drug test days, nor does the law require such a list.

Analysis⁶

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).

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 two (2) OPRA requests herein sought "historical listings" of dates for scheduled or requested to participate in reasonable suspicion testing from 2006 to February 14, 2012 and a similar list for employees that were out sick or a no-show on scheduled testing days. The Custodian responded on March 19, 2012 providing records. The Complainant subsequently submitted a letter to the GRC on April 23, 2012 contending that the County has an internal policy requiring submission a semi-annual report to the County Executive that should contain the

⁶ 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.

responsive information. The Complainant further contended that FMCSA §382.405 requires records reflecting why an employee was selected for testing.

However, in the SOI, the Custodian certified that she provided the Complainant with all responsive records. The Custodian further certified that by definition, a “reasonable suspicion” test is not scheduled and would not be ordered if an employee were not at work acting suspicious. The Custodian further certified that the County did not maintain nor is required by law to maintain a historical listing of employees consistently out or a no show on random drug test days.

The evidence of record supports that the Custodian’s SOI certification that the County does not maintain the requested historical listings. Although the Complainant argued that the information should be in a semi-annual report, the Complainant did not request these reports specifically and thus the Custodian was not required to provide same after the fact. Additionally, whether the County is adhering to FMCSA §382.405 is not within the GRC’s authority to adjudicate. N.J.S.A. 47:1A-7(b) and Barile v. Stillwater Township (Sussex), GRC Complaint No. 2007-92 (Interim Order dated February 25, 2009). Further, the Complainant offered no competent, credible evidence to refute the Custodian’s SOI certification that she provided all responsive records.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought a copy of a telephone bill from the custodian in an effort to obtain proof that a phone call was made to him by an official from the Department of Education. The custodian provided a certification in his submission to the GRC that certified that the requested record was nonexistent and the complainant submitted no evidence to refute the custodian’s certification. The Council subsequently determined that “[t]he Custodian has certified that the requested record does not exist. Therefore, the requested record cannot (sic) be released and there was no unlawful denial of access.”

Thus, because the Custodian certified in the SOI that no records responsive to the Complainant’s two (2) OPRA requests exist and because the Complainant did not submit any evidence to refute the Custodian’s certification in this regard, the Custodian did not unlawfully deny access to the requested records. See Pusterhofer, *supra*.

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 “historical listings” are not specifically identified “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 “historical listings” 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).

Although 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; the Custodian did not unlawfully deny access to the responsive records because same do not exist. *See Pusterhofer, supra*. 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. Because the Custodian certified in the SOI that no records responsive to the Complainant's two (2) OPRA requests exist and because the Complainant did not submit any evidence to refute the Custodian's certification in this regard, the Custodian did not unlawfully deny access to the requested records. *See Pusterhofer v. New Jersey Department of Education*, GRC Complaint No. 2005-49 (July 2005).
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 "historical listings" are "immediate access" records because said records are not specifically identified under OPRA as such.
4. Although 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; the Custodian did not unlawfully deny access to the responsive records because same do not exist. *See Pusterhofer v. New Jersey Department of Education*, GRC Complaint No. 2005-49 (July 2005). 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