



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

October 28, 2014 Government Records Council Meeting

Darian Vitello
Complainant

Complaint No. 2013-204

v.

Borough of Belmar Police Department (Monmouth)
Custodian of Record

At the October 28, 2014 public meeting, the Government Records Council (“Council”) considered the October 21, 2014 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. Neither Chief Palmisano nor the Custodian’s Counsel (on behalf of Chief Palmisano or the Custodian) borne the burden of proof that either timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, this 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 request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). However, the GRC declines to order disclosure of records because Counsel provided the responsive recording to the Complainant (via Ms. Barringer) on July 22, 2013.
2. Although Chief Palmisano failed to respond to the OPRA request and further failed to forward same to the Custodian, the Custodian’s Counsel sent a copy of the responsive record to one of the attorney’s representing the Complainant on July 22, 2013. Additionally, the evidence of record does not indicate that Chief Palmisano’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Chief Palmisano’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 28th Day of October, 2014

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: October 30, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 28, 2014 Council Meeting**

**Darian Vitello¹
Complainant**

GRC Complaint No. 2013-204

v.

**Borough of Belmar Police Department (Monmouth)²
Custodial Agency**

Records Relevant to Complaint: Hard copy via U.S. mail of calls made from the Belmar Police Department recorded line on May 20, 2013 between the hours of 4:00 p.m. and 5:00 p.m. to include a call between the Complainant and Chief Thomas Palmisano.

Custodian of Record: April Claudio

Request Received by Custodian: June 19, 2013

Response Made by Custodian: None

GRC Complaint Received: July 12, 2013

Background³

Request and Response:

On June 19, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to Chief Palmisano of the Belmar Police Department (“BPD”) and Custodian’s Counsel seeking the above-mentioned records.

Denial of Access Complaint:

On July 12, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that he submitted his OPRA request to Chief Palmisano and Custodian’s Counsel. The Complainant asserted that he received no response to his OPRA request; thus, Chief Palmisano failed to comply with the provisions of OPRA.

¹ No legal representation listed on record.

² Represented by James Plosia, Esq., of Apruzzese, McDermott, Mastro & Murphy, P.C. (Warren, NJ).

³ 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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Statement of Information:⁴

On September 24, 2013, Ms. April Claudio, the municipal clerk and Custodian, filed a Statement of Information (“SOI”). Therein, the Custodian’s Counsel submitted a letter brief in support of the Borough of Belmar’s (“Borough”) position. Counsel stated that the Complainant, a former employee of BPD, had several communications with Chief Palmisano in the spring of 2013. Among these communications was a phone call with Chief Palmisano on the Complainant’s cell phone on May 20, 2013 between the hours of 4:00 p.m. and 5:00 p.m. Counsel stated that the Complainant subsequently alleged that, because of the number that appeared on his cell phone, the conversation was on the BPD’s recorded line. Counsel stated that the Complainant initially submitted an OPRA request⁵ for a copy of the conversation, at which point Chief Palmisano advised that the conversation was not on the recorded line as the Complainant alleged and that the BPD had a new phone system.

Counsel averred that a series of communications between the Complainant, Chief Palmisano and himself regarding the phone call preceded the OPRA request at issue here. Counsel asserted that because the Complainant remained convinced that the phone conversation was on the recorded line, he caused two (2) of his attorneys to submit similar requests to his office, one of which was from Jennifer Barringer, Esq., dated July 15, 2013. Counsel stated that on July 22, 2013, he sent a copy of the requested recording to Ms. Barringer via Federal Express, receipt of which she later acknowledged.

Counsel argued that this complaint is without merit because the Complainant received the requested record (via his attorney) on July 22, 2013. Counsel noted that he sent the record to Ms. Barringer prior to the Borough being notified of the filing of this complaint on July 24, 2013. Further, Counsel alleged that there was no issue of timeliness here because the Borough advised the Complainant that additional time would be necessary to obtain the requested recording.

Additional Submissions:

On October 31, 2013, the Custodian’s Counsel asserted that he was made aware that the GRC made several inquiries regarding the Complainant’s allegation that the Borough failed to respond to his OPRA request. Counsel reiterated from the SOI that a copy of the responsive recording was forwarded to Ms. Barringer on July 22, 2013.⁶

On January 16, 2014, Chief Palmisano certified that he spoke with the Complainant on May 20, 2013 on his office line and not the dispatcher line. Chief Palmisano certified that the Complainant believed that the call originated from the dispatch line, which is recorded, because of the number that showed on his cell phone. Chief Palmisano affirmed that, based on his belief, the Complainant persisted in attempting to obtain a recording from the line, only to be advised

⁴ On August 5, 2013, the complaint was referred to mediation. On August 22, 2013, the complaint was referred back from mediation.

⁵ That OPRA request is the subject of Vitello v. Borough of Belmar Police Dep’t (Monmouth), GRC Complaint No. 2013-177 (Interim Order dated December 20, 2013).

⁶ Custodian’s Counsel also reiterated this in his December 26, 2013 letter to the GRC regarding this complaint and Vitello, GRC 2013-177.

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that no records existed.⁷ Further, Chief Palmisano certified that subsequent to that denial, the Complainant submitted the OPRA request at issue herein. Chief Palmisano averred that Custodian's Counsel provided a copy of the responsive recording to Ms. Barringer.

Analysis

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).⁸ 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

The GRC notes that OPRA requires "[a]ny officer or employee of a public agency who receives a request for access to a government record shall forward the request to the custodian [of] record or direct the requestor to the custodian of the record." N.J.S.A. 47:1A-5(h)(emphasis added). Further, an individual's failure to do so could result in a violation of OPRA. See Kossup v. City of Newark Police Dep't, GRC Complaint No. 2006-174 (February 2007)(holding that Lt. Caroline Clark violated OPRA by failing to forward the request or direct the requestor to the proper Custodian of record pursuant to N.J.S.A. 47:1A-5(h)).

As a threshold issue, the Custodian signed the SOI, implying that the Complainant's OPRA request should have been forwarded to her for a response per N.J.S.A. 47:1A-5(h). However, the evidence does not indicate that the Custodian was made aware of this request. Thus, the Custodian could not have responded to an OPRA request that the evidence indicates she did not receive. For this reason, Chief Palmisano, the employee that received the request, is responsible for responding to said request. See George v. NJ Dep't of Env't Prot., Nature & Hist. Res., Div. of Parks & Forestry, Office of Leases, Manor of Skylands, GRC Complaint No. 2008-206 (Final Decision dated June 23, 2009).

The Complainant submitted the OPRA request at issue here to BPD and the Custodian's Counsel on June 19, 2013. Thereafter, the Complainant filed this complaint on July 12, 2013 naming Chief Palmisano and Counsel as the persons to whom he submitted his OPRA request. In the SOI, the Custodian's Counsel stated that the Complainant caused two (2) attorneys to provide the subject record. Counsel stated that on July 22, 2013, he forwarded a copy of the record to Ms. Barringer, one of those attorneys. Further, Chief Palmisano legally certified to these facts on

⁷ See Vitello, GRC 2013-177.

⁸ 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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January 16, 2014. Counsel also alleged that there was no timeliness violation because the Complainant was advised that additional time would be needed to provide the record.

However, there is no evidence in the record that either the Custodian or BPD responded in writing, as required under OPRA, directly to the request at issue here. Further, there is no evidence to support that the Custodian, Chief Palmisano or Counsel (on behalf of either) sought an extension in writing. Thus, Chief Palmisano or Counsel were required to respond within seven (7) business days and failed to do so; the result is a “deemed” denial of the Complainant’s OPRA request.

Therefore, neither Chief Palmisano nor the Custodian’s Counsel (on behalf of Chief Palmisano or the Custodian) borne the burden of proof that either timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, this 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 request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. However, the GRC declines to order disclosure of records because Counsel provided the responsive recording to the Complainant (via Ms. Barringer) on July 22, 2013.

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 (id.; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); 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 Chief Palmisano failed to respond to the OPRA request and further failed to forward same to the Custodian, the Custodian's Counsel sent a copy of the responsive record to one of the attorney's representing the Complainant on July 22, 2013. Additionally, the evidence of record does not indicate that Chief Palmisano's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Chief Palmisano'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. Neither Chief Palmisano nor the Custodian's Counsel (on behalf of Chief Palmisano or the Custodian) borne the burden of proof that either timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, this 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 request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). However, the GRC declines to order disclosure of records because Counsel provided the responsive recording to the Complainant (via Ms. Barringer) on July 22, 2013.
2. Although Chief Palmisano failed to respond to the OPRA request and further failed to forward same to the Custodian, the Custodian's Counsel sent a copy of the responsive record to one of the attorney's representing the Complainant on July 22, 2013. Additionally, the evidence of record does not indicate that Chief Palmisano's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Chief Palmisano'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: Frank F. Caruso
Communications Specialist/Resource Manager

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

October 21, 2014