



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

February 25, 2014 Government Records Council Meeting

Chamberlin Robinson
Complainant

Complaint No. 2013-234

v.

N.J. Department of Corrections
Custodian of Record

At the February 25, 2014 public meeting, the Government Records Council (“Council”) considered the February 18, 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. The Custodian did not bear his burden of proof that he 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 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. N.J.S.A. 47:1A-5(i); Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
2. The Custodian has borne his burden of proof that he lawfully denied access to the requested record because no such record exists. N.J.S.A. 47:1A-6; Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005); Brown v. New Jersey Department of Corrections, GRC Complaint No. 2007-191 (February 2009).
3. Although the Custodian initially failed to bear his burden of proving that he timely responded to the Complainant’s OPRA request under N.J.S.A. 47:1A-5(i), 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 25th Day of February, 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: February 26, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 25, 2014 Council Meeting**

**Chamberlin Robinson¹
Complainant**

GRC Complaint No. 2013-234

v.

**N.J. Department of Corrections²
Custodial Agency**

Records Relevant to Complaint: “Approximately in June, 2004, while serving my sentence at Albert C. Wagner Correctional Facility and in the recreation yard a fight broke out. Upon returning to Housing Unit E-1, the Special Investigation Division gathered all individuals with tattoos. Having a tattoo, I was instructed to write down what my tattoo signified and sign this statement. This is the record I am requesting a copy of. Please note, as a result of this particular incident, a disciplinary infraction report was also issued.”

Custodian of Record: John Falvey

Request Received by Custodian: May 7, 2013

Response Made by Custodian: May 16, 2013; May 31, 2013

GRC Complaint Received: August 12, 2013

Background³

Request and Response:

On May 7, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned record. On May 16, 2013, seven (7) business days later, the Custodian responded in writing requesting an extension of time to respond until May 30, 2013. On May 31, 2013, the Custodian denied the Complainant’s request, stating that the Complainant’s archived file was retrieved, that the requested statement was not contained in said file, and that the Special Investigations Division (“SID”) also advised the Custodian that the requested record was not found.

¹ No legal representation listed on record.

² No legal representation listed on record.

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.

Chamberlin Robinson v. N.J. Department of Corrections, GRC Complaint No. 2013-234 – Findings and Recommendations of the Executive Director

Denial of Access Complaint:

On August 12, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that he has been erroneously identified as a member of the “Bloods” by the New Jersey Department of Corrections (“DOC”) SID. The Complainant contends that this misidentification is based on a previous statement he signed in June, 2004 explaining a tattoo that he has. The Complainant states that he is seeking a copy of that statement in order to have the “Bloods” label removed.

Statement of Information:

On September 26, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that he received the Complainant’s OPRA request on May 7, 2013, requested a ten (10) business day extension of time to respond on May 16, 2013, and denied the Complainant’s request on May 31, 2013. The Custodian states that if the record existed, it would be maintained in either the Complainant’s Classification file at the Central Reception and Assignment Facility (“CRAF”) or within the files of the SID. The Custodian further states that representatives from CRAF and SID informed him that no responsive record was located. The Custodian argues that no unlawful denial of access occurred because there is not record responsive to the Complainant’s request.

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).⁴ 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).

In Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5th) business day after receipt of the complainant’s March 19, 2007 OPRA request seeking an extension of time until April 20, 2007. However, the custodian responded again on April 20, 2007, stating that the requested records would be provided later in the week. Id. The evidence of record showed that no records were provided until May 31, 2007. Id. The GRC held that:

⁴ 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.

Chamberlin Robinson v. N.J. Department of Corrections, GRC Complaint No. 2013-234 – Findings and Recommendations of the Executive Director

The [c]ustodian properly requested an extension of time to provide the requested records to the [c]omplainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) . . . however . . . [b]ecause the [c]ustodian failed to provide the [c]omplainant access to the requested records by the extension date anticipated by the [c]ustodian, the [c]ustodian violated N.J.S.A. 47:1A-5(i) resulting in a “deemed” denial of access to the records.

Id.

Here, the Custodian properly responded to the Complainant’s request in writing within seven (7) business days requesting a ten (10) business day extension of time to respond. The Custodian next responded eleven (11) business days later. Thus, the Custodian failed to provide the Complainant with a valid response by the requested extension date.

Therefore, the Custodian did not bear his burden of proof that he 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 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. N.J.S.A. 47:1A-5(i); Kohn, GRC 2007-124.

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 Council has previously found that no unlawful denial of access occurred when the custodian certified that no records responsive to the complainant’s request existed. *See Pusterhofer v. N.J. Dep’t of Educ.*, GRC Complaint No. 2005-49 (July 2005); *Brown v. N.J. Dep’t of Corr.*, GRC Complaint No. 2007-191 (February 2009). Here, the Custodian certified that, after inquiring with CRAF and SID representatives, he determined that no responsive record exists.

Therefore, the Custodian has borne his burden of proof that he lawfully denied access to the requested record because no such record exists. N.J.S.A. 47:1A-6; Pusterhofer, GRC 2005-49; Brown, GRC 2007-191.

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 the Custodian initially failed to bear his burden of proving that he timely responded to the Complainant’s OPRA request under N.J.S.A. 47:1A-5(i), 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 his burden of proof that he 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 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. N.J.S.A. 47:1A-5(i); Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
2. The Custodian has borne his burden of proof that he lawfully denied access to the requested record because no such record exists. N.J.S.A. 47:1A-6; Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005); Brown v. New Jersey Department of Corrections, GRC Complaint No. 2007-191 (February 2009).

3. Although the Custodian initially failed to bear his burden of proving that he timely responded to the Complainant's OPRA request under N.J.S.A. 47:1A-5(i), 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: Robert T. Sharkey, Esq.
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.
Senior Counsel

February 18, 2014