



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

July 29, 2014 Government Records Council Meeting

Derek Fenton
Complainant

Complaint No. 2013-359

v.

NJ Department of Health
Custodian of Record

At the July 29, 2014 public meeting, the Government Records Council (“Council”) considered the July 22, 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 her burden of proof that she 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 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 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).
2. The Complainant failed to demonstrate that he was authorized to receive the requested records because he failed to establish that he is an eligible person as listed in N.J.S.A. 26:8-62(a), N.J.A.C. 8:2A-2.1(a). Further, the Complainant failed to identify the records sought with the degree of specificity required by the agency; therefore, he was not eligible to receive the records for informational purposes pursuant to N.J.A.C. 8:2A-2.2. As such, the Custodian lawfully denied the Complainant access to the requested records pursuant to N.J.S.A. 26:8-62(a) and N.J.A.C. 8:2A-2.2, applicable to OPRA by operation of N.J.S.A. 47:1A-9(a).
3. Although the Custodian failed to bear her burden of proving that she timely responded to the Complainant’s OPRA request which resulted in a “deemed” denial of said request, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian’s actions 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 29th Day of July, 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: July 31, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 29, 2014 Council Meeting**

**Derek Fenton¹
Complainant**

GRC Complaint No. 2013-359

v.

**State of New Jersey Department of Health²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of a computerized set of death records containing the name, address, age or birthdate of every deceased Passaic County resident 18 years of age or older.

Custodian of Record: Genevieve Raganelli
Request Received by Custodian: April 22, 2013
Response Made by Custodian: June 11, 2013
GRC Complaint Received: December 11, 2013

Background³

Request and Response:

On April 22, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 11, 2013, the thirty-fifth (35th) business day following receipt of said request, the Custodian responded in writing informing the Complainant that his request was denied. The Custodian cited Executive Order No. 9 (Hughes), Executive Order No. 18 (McGreevey), N.J.S.A. 26:8-62, and N.J.A.C. 8:2A-2.2 in support of the denial. The Custodian asserted that the laws precluding disclosure are applicable to OPRA under N.J.S.A. 47:1A-9. The Custodian also denied the Complainant access to the requested records because the Custodian stated that the request was overly broad.

Denial of Access Complaint:

On December 11, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that he filed his request on April 22, 2013, and that the Custodian responded to the request on June 11, 2013.

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Brigid O’Neill.

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.

The Complainant contends that Executive Order No. 9 (Hughes) exempts from disclosure records concerning morbidity, mortality and reportable diseases. The Complainant states that he is not seeking such information, but rather he is seeking the same type of information contained in a death certification which is deemed public information under N.J.A.C. 8:2A-2.2(a).

The Complainant states that Executive Order No. 18 (McGreevey) also does not prevent disclosure of the requested records because the Executive Order concerns misuse of official identifying records and vital records which are not part of the Complainant's request.

The Complainant further asserts that N.J.S.A. 26:8-62, which lists certain categories of persons entitled to receive certified copies of death records and provides that the State Registrar shall authenticate the identity of the requestor and the requestor's relationship with the subject of the vital record does not apply because the Complainant is not seeking copies of death certificates. The Complainant contends that the records he has requested are public records pursuant to N.J.A.C. 8:2A-2.2(a).

The Complainant states that the Custodian's assertion that the requested records are not subject to disclosure under N.J.A.C. 8:2A-2.2 is not a valid reason for denying access to the records because the regulation only applies to death certificates and not the records the Complainant has requested. The Complainant states that dissemination of the type of records he is seeking is an important part of the the election process.

Statement of Information:

On January 17, 2014, the Custodian filed a Statement of Information ("SOI"). The Custodian certifies that she received the Complainant's OPRA request on April 22, 2013, and that she telephoned the Complainant during the week of April 29, 2013 to discuss the need for an extension of time. The Custodian certifies that she subsequently e-mailed the Complainant on May 14, 2013 to request an additional ten (10) day extension of time. The Custodian certifies that she responded to the Complainant on June 11, 2013, denying his request.

The Custodian certifies that Executive Order No. 18 (McGreevey) underscores the threat to public safety caused by the "misuse of official identifying records..." The Custodian further certifies that in accordance with that Executive Order, the statutes and regulations governing the registration of Vital Statistics in New Jersey provide safeguards regarding who can access vital records, such as death records, due to their sensitive and private nature. The Custodian specifically cites N.J.S.A. 26:8-62(a) and N.J.A.C. 8:2A-2.2(g), which the Custodian asserts prohibit the release of the information contained within death records, unless the requestor is authorized to receive the full record.

The Custodian also certifies that, pursuant to N.J.A.C. 8:2A-2.2(a), a death certification containing information obtained from the death record may be issued, for informational purposes only if the requestor is first able to identify the record sought. The Custodian certifies that for a requestor to identify the record as required by the regulation, the requestor must submit a REG-27 form approved by the agency. The Custodian attached a REG-27 form to the SOI. The form

requires the requestor/applicant to set forth certain information, including the name of the deceased, the date of death, the place of the event, and the names of the deceased's parents.

The Custodian certifies that the Complainant did not demonstrate that he was authorized to receive the requested records because he failed to establish that he is an eligible person as listed in N.J.S.A. 26:8-62(a). Further, the Custodian certifies that the Complainant failed to identify the contents of the records sought pursuant to N.J.A.C. 8:2A-2.2(a); therefore, he was not eligible to receive the records for informational purposes. The Custodian certifies that for these reasons she denied the Complainant access to the requested records pursuant to N.J.S.A. 26:8-62(a) and N.J.A.C. 8:2A-2.2, as applicable to OPRA under N.J.S.A. 47:1A-9(a).

Additional Submissions:

On April 22, 2014, the Complainant submitted to the GRC via e-mail a link to a newspaper article which he asserts supports his argument for disclosure of the requested records. By reply e-mail, the GRC informed the Complainant that the GRC does not rely upon newspaper articles in the adjudication of denial of access complaints.

On May 23, 2014, the Complainant submitted to the GRC a letter in which he states that the records he is seeking are public documents under 42 USC 1973gg-6(i)(1). The Complainant asserts that this law stipulates that all records concerning implementation of programs and activities conducted for the purpose of ensuring the accuracy of official lists of eligible voters are to be made available for public inspection.

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).

Here, the Custodian failed to respond in writing within the required seven (7) business days granting access, denying access, seeking clarification or requesting an extension of time. Although the Complainant certified that she telephoned the Custodian to request an extension of time on a date between April 29, 2013 and May 3, 2013, there is nothing in the evidence of record to indicate that she confirmed the telephone conversation in writing. The Custodian was

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.

not within the statutorily-mandated response time, or any properly requested extension thereof, when she e-mailed the Complainant on May 14, 2013 to request an additional ten (10) day extension of time. Accordingly, the evidence of record reveals that the Custodian failed to respond in writing to the Complainant's request until the thirty-fifth (35th) business day following receipt of said request.

Therefore, the Custodian did not bear her burden of proof that she 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 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 OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

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.

OPRA also provides:

[t]he provisions of [OPRA] shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order."

N.J.S.A. 47:1A-9(a).

N.J.S.A. 26:8-1 defines a vital record as, *inter alia*, death records from which vital statistics are provided. Further, N.J.S.A. 26:8-62(a) provides that "[t]he State registrar or local registrar shall, upon request, supply [to certain persons]...a certified copy, *or release of the data and information of that record* registered under the provisions of N.J.S.A. 26:8-1 et seq. (Emphasis added.) N.J.S.A. 26:8-62(d) provides that the Commissioner shall designate specifications for forms for the issuance of vital records as well as issue regulations for the enforcement of N.J.S.A. 26:8-1 et seq.

One such regulation, N.J.A.C. 8:2A-2.1(a), provides in relevant part: [t]he State Registrar or a local registrar may only issue a certified copy of a death record to a person who satisfies the following requirements:

1. The person is able to identify the record;

2. The person provides, at a minimum, all of the information requested on the Vital Statistics and Registration form entitled “Application for a Certification or a Certified Copy of a Vital Record,” available from the Department...
3. The person produces documentation verifying that he or she is : i. [t]he parent of the subject of the death record; ii. [t]he subject’s legal guardian or legal representative; iii. [t]he subject’s spouse or domestic partner; iv. [t]he subject’s child, grandchild or sibling, if of legal age; v. [t]he a State or Federal agency requesting the record for official purposes; vi. [a] person requesting the record pursuant to a court order; or vii [a] person requesting the record under emergent circumstances, as determined on a case-by-case basis by the Commissioner...

N.J.A.C. 8:2A-2.1(a).

Further, N.J.A.C. 8:2A-2.2(a) provides that “...certifications containing information obtained from the death record to requestors not identified in N.J.A.C. 8:2A-2.1(a) [may be provided] so long as those requestors are first able to identify the record sought.” Identifying the record sought requires the requestor to provide, at a minimum, all of the information requested on the “Application for a Certification or a Certified Copy of a Vital Record.” N.J.A.C. 8:2A-2.1(a)(1).

Here, the Custodian certified that the Complainant did not demonstrate that he was authorized to receive the requested records because he failed to establish that he is an eligible person as listed in N.J.S.A. 26:8-62(a), and the regulation promulgated thereunder, N.J.A.C. 8:2A-2.1(a). Conversely, the Complainant asserts that the provisions of N.J.S.A. 26:8-62 only apply to copies of death certificates and not the records he is seeking.

The Complainant misinterprets N.J.S.A. 26:8-62. This statute is not limited to copies of death certificates, but rather encompasses vital records which include death records from which vital statistics are provided. N.J.S.A. 26:8-1. Moreover, N.J.S.A. 26:8-62(a) provides for release of the data and information from death records. As such, N.J.S.A. 26:8-1 et seq. is applicable to the class of records the Complainant has requested, and the Complainant is not eligible to receive the requested records under this statute because he failed to establish that he is an eligible person as identified within the statute.

The Complainant also contends, however, that the records he has requested are public records subject to disclosure pursuant to N.J.A.C. 8:2A-2.2(a). The Complainant is correct that, pursuant to the provisions of this regulation, information obtained from death records may be disclosed to requestors *not* identified in N.J.A.C. 8:2A-2.1(a). The Complainant is required though to identify the records sought. Here, the Complainant merely requested death records for every deceased Passaic County resident 18 years of age or older. The Commissioner, as required under N.J.S.A. 26:8-62(d) designated specifications for forms for the issuance of vital records. These forms, which the Custodian identified as REG-27 forms, contain prompts for certain specific information. Identifying the record sought requires the Complainant to provide, at a

minimum, all of the information requested on the form; however, the Complainant failed to provide the required information, thus he failed to identify the records sought with the degree of specificity required by the agency.

Accordingly, the Complainant failed to demonstrate that he was authorized to receive the requested records because he failed to establish that he is an eligible person as listed in N.J.S.A. 26:8-62(a), N.J.A.C. 8:2A-2.1(a). Further, the Complainant failed to identify the records sought with the degree of specificity required by the agency; therefore, he was not eligible to receive the records for informational purposes pursuant to N.J.A.C. 8:2A-2.2. As such, the Custodian lawfully denied the Complainant access to the requested records pursuant to N.J.S.A. 26:8-62(a) and N.J.A.C. 8:2A-2.2, applicable to OPRA by operation of N.J.S.A. 47:1A-9(a).

Finally, the Complainant did copy the Custodian's Counsel with the May 22, 2014 letter citing the United States Code provision which he asserted supported his argument for disclosure of the requested records. The United States Code provision the Complainant cited provides as follows:

Each State shall maintain for at least 2 years and shall make available for public inspection and, where available, photocopying at a reasonable cost, all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters, except to the extent that such records relate to a declination to register to vote or to the identity of a voter registration agency through which any particular voter is registered.

42 USC 1973gg-6(i)(1).

The Custodian's Counsel did not respond to the Complainant's submission; however, the GRC will not consider the federal provision in the adjudication of this complaint because the Complainant failed to demonstrate any nexus between "records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters" and the records he requested.

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 (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)).

Here, although the Custodian failed to bear her burden of proving that she timely responded to the Complainant's OPRA request which resulted in a "deemed" denial of said request, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions 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. The Custodian did not bear her burden of proof that she 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 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 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).
2. The Complainant failed to demonstrate that he was authorized to receive the requested records because he failed to establish that he is an eligible person as listed in N.J.S.A. 26:8-62(a), N.J.A.C. 8:2A-2.1(a). Further, the Complainant failed to identify the records sought with the degree of specificity required by the agency; therefore, he was not eligible to receive the records for informational purposes pursuant to N.J.A.C. 8:2A-2.2. As such, the Custodian lawfully denied the Complainant access to the requested records pursuant to N.J.S.A. 26:8-62(a) and N.J.A.C. 8:2A-2.2, applicable to OPRA by operation of N.J.S.A. 47:1A-9(a).
3. Although the Custodian failed to bear her burden of proving that she timely responded to the Complainant's OPRA request which resulted in a "deemed" denial of said request, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate.

Therefore, the Custodian's actions 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: John E. Stewart, Esq.

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

July 22, 2014