



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

April 26, 2016 Government Records Council Meeting

Clifford Wares
Complainant

Complaint No. 2014-363

v.

Passaic County Office of the Public Defender
Custodian of Record

At the April 26, 2016 public meeting, the Government Records Council (“Council”) considered the April 19, 2016 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 requests. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA requests, 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 requests 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 dated October 31, 2007). However, GRC declines to order disclosure of requested Item Nos. 1-4 and 6-12 as the Custodian certifies, and the records reflects, that she provided those records to the Complainant on November 21, 2014, and December 17, 2014.
2. Notwithstanding the Custodian’s “deemed” denial, she has borne her burden of proving she did not unlawfully deny access to the Verizon phone call records sought in the Complainant’s OPRA requests. N.J.S.A. 47:1A-6. The Custodian certified that such records could not be located, and the Complainant submitted no competent, credible evidence to refute the certification. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005); Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint Nos. 2013-147, 2013-201, 2013-298 & 2013-301 (September 2014).
3. In this matter, the Custodian failed to respond timely to the Complainant’s OPRA requests, resulting in a “deemed” denial of access. N.J.S.A. 47:1A-5(i); Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007). However, the Custodian subsequently provided responsive records for Item Nos. 1-4 and 6-12 of the Complainant’s OPRA requests on November 21, 2014, and December 17, 2014. The Custodian also certified that they could not locate any responsive records regarding Item No. 5, and the Complainant failed to provide any evidence to rebut the certification. Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).



2005); Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint Nos. 2013-147, 2013-201, 2013-298 & 2013-301 (September 2014). 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, 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 26th Day of April, 2016

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: May 2, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 26, 2016 Council Meeting**

**Clifford Wares¹
Complainant**

GRC Complaint No. 2014-363

v.

**Passaic County Office of the Public Defender²
Custodial Agency**

Records Relevant to Complaint: Original documents:

1. All Interstate Agreement Paperwork
2. Letter from the Federal Public Defender's Office
3. All maps of Smith Clove Park from Village of Monroe, Town of Monroe, and Orange County
4. All pictures of driver's license, social security card, license plates, title, registration, Browns Point Park, A and P, Bank, Sears, truck, car, etc.
5. All Verizon phone call detail records
6. E-mail letter from Carol Swan, New York State Extradition Specialist, about pre-culyer hearing
7. All Orange County grand jury court transcripts. And all Orange County motion papers
8. Ulster County Jail property papers
9. Kaitlyn Camperlino police interview transcript; need pages 45 and up
10. My whole, fully completed criminal case file indictment #12-08-00644-I, docket #11-004863-001
11. PCF, Inc. employment application
12. Grand jury audio/video proceedings with grand jury transcript

Custodian of Records: Judith Fallon

Request Received by Custodian: October/November 2014³

Response Made by Custodian: November 21, 2014; December 17, 2014

GRC Complaint Received: October 27, 2014

Background⁴

Request and Response:

On or around August, September, and October 2014, the Complainant submitted multiple Open Public Records Act ("OPRA") requests seeking the above-mentioned records. There is no evidence in the record demonstrating that the Custodian responded to any of the submitted OPRA requests prior to the filing of this complaint.

¹ No legal representation listed on record.

² No legal representation listed on record.

³ Neither the Complainant nor the Custodian provided an exact date of receipt of the OPRA requests.

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.

Denial of Access Complaint:

On October 27, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he submitted multiple OPRA requests to the Custodian in August, September, and October 2014, and had not received a response to any of them. The Complainant did not include copies of the OPRA request but listed the records sought in a letter included with his Complaint.

Statement of Information:

From November 6, 2014 through December 11, 2014, the matter was held in mediation proceedings. On December 19, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian made no mention having knowledge of the Complainant’s OPRA requests prior to receiving the Denial of Access Complaint. The Custodian then certified that she provided the Complainant with his criminal case file (Item No. 10), on November 21, 2014, asserting that the record contained all the Complainant’s other request Items except for Item No. 5.⁵ The Custodian included a document signed by the Complainant, acknowledging receipt of the record.

The Custodian also provided a copy of correspondence from the Complainant to the GRC, claiming that certain requested records were still missing from the records provided to him on November 21, 2014. The Complainant claimed that Item Nos. 1, 3, 5, and 7 in part were absent from his criminal case file. On December 17, 2014, the Custodian certified that she provided the Complainant with copies of Item Nos. 1, 3, and 7. The Custodian also provided a copy of the receipt signed by the Complainant for those records. Regarding Item No. 5, the Custodian certified that a search failed to locate the Verizon phone call records.

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).⁶ 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 dated October 31, 2007).

The Complainant asserted that he did not receive a response from the Custodian for any of his OPRA requests made between August and October 2014. There is no evidence in the record that the Custodian provided responsive records to the Complainant prior to the filing of this complaint. Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA requests. N.J.S.A.

⁵ From November 6, 2014, through December 11, 2014, the matter was held in mediation proceedings. Pursuant to Item No. 8 of the signed Mediation Agreement Form, the Custodian waived all confidentiality regarding the disclosure of responsive records during the mediation process.

⁶ 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.

47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA requests, 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 requests pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC No. 2007-11. However, GRC declines to order disclosure of requested Item Nos. 1-4 and 6-12 as the Custodian certifies, and the record reflects, that she provided those records to the Complainant on November 21, 2014, and December 17, 2014.

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, in light of a custodian's certification that no responsive records to the request could be located, no unlawful denial of access occurred. *See Pusterhofer v. N.J. Dep't of Educ.*, GRC Complaint No. 2005-49 (July 2005); *Valdes v. Union City Bd. of Educ. (Hudson)*, GRC Complaint Nos. 2013-147, 2013-201, 2013-298 & 2013-301 (September 2014).

Here, the Custodian certified that a search of the Complainant's case file failed to locate the Verizon phone call records. The Complainant produced no evidence to rebut the Custodian's certification. Therefore, notwithstanding the Custodian's "deemed" denial, she has borne her burden of proving she did not unlawfully deny access to the Verizon phone call records sought in the Complainant's OPRA requests. N.J.S.A. 47:1A-6. The Custodian certified that such records could not be located, and the Complainant submitted no competent, credible evidence to refute the certification. *See Pusterhofer*, GRC No. 2005-49; *Valdes*, GRC Nos. 2013-147, 2013-201, 2013-298 & 2013-301.

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)).

In this matter, the Custodian failed to respond timely to the Complainant's OPRA requests, resulting in a "deemed" denial of access. N.J.S.A. 47:1A-5(i); Kelley, GRC No. 2007-11). However, the Custodian subsequently provided responsive records for Item Nos. 1-4 and 6-12 of the Complainant's OPRA requests on November 21, 2014, and December 17, 2014. The Custodian also certified that they could not locate any responsive records regarding Item No. 5, and the Complainant failed to provide any evidence to rebut the certification. Pusterhofer, GRC No. 2005-49; Valdes, GRC Nos. 2013-147, 2013-201, 2013-298 & 2013-301. 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, 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 her burden of proof that she timely responded to the Complainant's OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA requests, 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 requests 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 dated October 31, 2007). However, GRC declines to order disclosure of requested Item Nos. 1-4 and 6-12 as the Custodian certifies, and the records reflect, that she provided those records to the Complainant on November 21, 2014, and December 17, 2014.
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3. In this matter, the Custodian failed to respond timely to the Complainant's OPRA requests, resulting in a "deemed" denial of access. N.J.S.A. 47:1A-5(i); Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007). However, the Custodian subsequently provided responsive records for Item Nos. 1-4 and 6-12 of the Complainant's OPRA requests on November 21, 2014, and December 17, 2014. The Custodian also certified that they could not locate any responsive records regarding Item No. 5, and the Complainant failed to provide any evidence to rebut the certification. Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005); Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint Nos. 2013-147, 2013-201, 2013-298 & 2013-301 (September 2014). 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, 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: Samuel A. Rosado
Staff Attorney

April 19, 2016