



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

March 28, 2017 Government Records Council Meeting

Laura Cintron
Complainant

Complaint No. 2016-1

v.

NJ Department of Human Services,
Ancora Psychiatric Hospital
Custodian of Record

At the March 28, 2017 public meeting, the Government Records Council (“Council”) considered the March 21, 2017 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 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian has borne his burden of proof that he lawfully denied access to items 1-4 described in the Complainant’s November 16, 2015 OPRA request because he certified that his office does not maintain any existing records responsive to the request, and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. N.J.S.A. 47:1A-6; Pusterhofer v. NJ Dep’t. of Educ., GRC 2005-49 (July 2005).
3. The Custodian lawfully denied access under OPRA to the requested PAR/PES for the referenced individual. *See* N.J.S.A. 47:1A-6. The Complainant requested personnel records that are exempt from disclosure under OPRA, and she does not qualify as an “individual in interest” under N.J.S.A. 47:1A-10. *See* Kovalcik v. Somerset County Pros. Office, 206 N.J. 581, 594 (2011); N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor’s Office; 405 N.J. Super. 386, 389 (App. Div. 2009); Hewitt v. Longport Police Dep’t, GRC Complaint No. 2004-148 (March 2005); Mapp v. Borough of Roselle (Union), GRC Complaint No. 2009-334 (November 30, 2010).
4. Although the Custodian unlawfully denied access to the requested records by failing to respond to the Complainant within seven (7) business days after receipt of the



OPRA request, thereby resulting in a deemed denial, he ultimately certified that his office does not maintain any existing records responsive to items 1-4 of the request and lawfully denied access to the record requested in item 5, pursuant to N.J.S.A. 47:1A-10. 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 28th Day of March, 2017

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: March 31, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 28, 2017 Council Meeting**

**Laura Cintron¹
Complainant**

GRC Complaint No. 2016-1

v.

**NJ Department of Human Services, Ancora Psychiatric Hospital²
Custodial Agency**

Records Relevant to Complaint: Copies of the following:

- 1) Hard copy of promotional log and/or access report from the Ancora Psychiatric Hospital Personnel database, listing the names of all employees promoted from January 2008 to present and including their previous titles, new title, and salaries.
- 2) Affirmative Action statistical data for individuals listed on the Ancora Psychiatric Hospital promotional log and/or access report, i.e., gender, race, and ethnicity from January 2008 to present.
- 3) Information Technology Department Access report directly related to promotions and indicating transactions/alterations made to the Access Personnel database from January 2008 to present, with dates of changes and usernames.
- 4) Disclosure forms of relatives/cohabitants in the workplace for all employees promoted from January 2008 to present (completed by employees to comply with Administrative Order 4:05 Code of Ethics), for the following units: Administrative and Clerical, Food Service, Human Resources, Information Technology Department, Mailroom, Maintenance, Safety Department and Staff Development and Training.
- 5) Performance Assessment Review (PAR/PES) for Mona Fredlund, Personnel Asst. 1, reflecting job duties from January 2008 to present and/or documentation validating Mona Fredlund, administered under the promotional process, during this time period under Human Resource Manager Alfred Filippini's supervision.

Custodian of Record: Jeffrey Nielsen

Request Received by Custodian: November 16, 2015

Response Made by Custodian: December 9, 2015

GRC Complaint Received: January 4, 2016

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Melissa Bayly.

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Background³

Request and Response:

On November 16, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 9, 2015, the Custodian responded in writing to deny the entire request. The Custodian contended, with respect to items 1 and 2, that Ancora Psychiatric Hospital (“APH”) did not maintain a running log of the requested information nor did they have the requested information in their database. With respect to item 3, the Custodian argued that the IT Department was unable to provide the changes that were made regarding promotions because that data is not “specifically captured” each time a promotion occurs. The Custodian argued, with respect to item 4, that APH’s Human Resources Department did not maintain a log or database of employees who have been promoted and could therefore not provide the requested forms. Finally, with respect to item 5, the Custodian argued that PAR/PES assessments for a specific employee were exempt from disclosure pursuant to N.J.S.A. 47:1A-10, which exempts most documentation contained in an employee’s personnel file.

That same day, the Complainant wrote to the Custodian, objecting to the response. She attached a copy of the State’s Record Retention Schedule and disputed that records responsive to her request did not exist.

Denial of Access Complaint:

On January 4, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). She stated the records requested were well within the scope of OPRA and are being requested to “conduct an audit for transparency purposes.” The Complainant asserted that the Custodian’s denial of access was unlawful. Specifically, with respect to item 2, she contended that the requested item did in fact exist, in order to comply with federal and state EEOC laws. With respect to item 3, she asserted that the requested record was a report collected by the Office of Information Technology. She added that the “premise” that a Human Resources Department would not have a running log of promotions is “illogical.”

The Complainant argued with respect to item 4, seeking disclosure forms of relatives/cohabitants, that these forms are located in “Section 1 of the Personnel folder” and that the Custodian could easily access those forms. With respect to item 5, she stated that she no longer sought the PAR/PES for the referenced individual, but instead “required” documentation confirming the individual was the Administrator of the promotional process from January 2008 to present and that Mr. Fillippini was her supervisor. The Complainant made no other legal arguments.

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:

On February 12, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on November 16, 2015. The Custodian averred that the request sought records related to APH and because each state psychiatric hospital has an on-site OPRA custodian, he forwarded the request to APH’s custodian, Charlene Ruberti. The Custodian certified that he instructed Ms. Ruberti to determine if records responsive to the request existed. The Custodian certified that Ms. Ruberti responded to him on November 18, 2015, informing that Director of Personnel Alfred Filippini had prepared a response. Mr. Filippini noted that no responsive records existed with respect to items 1 to 4 of the request. As to item 5, Mr. Filippini advised that the requested records were exempt from disclosure, as they were personnel records exempt under N.J.S.A. 47:1A-10. The Custodian certified that he responded in writing on December 1, 2015, denying the request because no responsive records existed for “the majority” of the request and additionally because personnel records are confidential pursuant to N.J.S.A. 47:1A-10.

The Custodian certified that upon receipt of the Complainant’s December 9, 2015 e-mail objecting to his response, he once again contacted Ms. Ruberti to review the Complainant’s objections and determine if any fully or partially responsive records existed. He certified that Ms. Ruberti e-mailed Mr. Filippini, who confirmed on December 11, 2015, that no responsive records existed.

The Custodian certified that upon receipt of the Complainant’s Denial of Access Complaint, he contacted Mr. Filippini a third time, and Mr. Filippini reiterated his earlier responses, namely that no records responsive to the majority of the request exist. The Custodian also certified that Mr. Filippini at this time advised that manual lists of promotional information were once maintained, until December 2010. He certified that the manual lists prior to December 2010 were destroyed, and therefore the lists from January 2008 to December 2010 could not be provided. Additionally, the Custodian was further informed that manual lists were destroyed in a flood from a water leak occurring over Easter weekend in 2013.

The Custodian’s Counsel argued that, with respect to items 1 through 4 of the request, the Custodian had certified as to his multiple contacts with the staff at APH, and the consistent response was that no responsive records exist. Counsel argued that because the Custodian had certified that no responsive records existed for items 1 through 4, and there is no evidence to the contrary, there can be no unlawful denial of access. *See Pusterhofer v. NJ Dep’t. of Educ.*, GRC 2005-49 (July 2005).

The Custodian’s Counsel additionally argued that, with respect to item 5 of the request, seeking PAR/PER information for a specific employee, the Custodian properly denied this request pursuant to N.J.S.A. 47:1A-10, which provides that a public employee’s personnel records shall not be considered a government record and shall not be made available for public access, except in limited circumstances that do not apply in the instant matter. *See Kovalcik v. Somerset County Pros. Office*, 206 N.J. 581, 594 (2011).

Additional Submissions:

On February 23, 2016, the Complainant wrote to the GRC in response to the Custodian's SOI. She reiterated the Custodian's statement that the requested promotional log was "kept manually prior to 2010" and was destroyed due to water damage. She questioned Mr. Fillippini's statement that the facility no longer retained this information, "even electronically."

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

In the instant matter, the Custodian certified that he received the Complainant's OPRA request on November 16, 2015, and forwarded the request to APH's on-site OPRA Custodian, Charlene Ruberti. The Custodian certified that Ms. Ruberti responded to him on November 18, 2015, advising of Director of Personnel Alfred Filippini's response. The Custodian thereafter certified that he responded to the Complainant on December 1, 2015, ten (10) business days after receipt of the request.

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 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.

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.

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Items 1-4

The Council has previously found that, in light of a custodian's certification that no records responsive to the request exist, and where no evidence exists in the record to refute the custodian's certification, no unlawful denial of access occurred. *See Pusterhofer*. Here, the Custodian certified in his SOI that upon receipt of the Complainant's OPRA request, he forwarded the request to Ms. Ruberti, who then sent a response from Mr. Filippini advising that no records responsive existed with respect to items 1-4. The Custodian certified that following receipt of the Complainant's December 9, 2015 e-mail objecting to his response, he once again contacted Ms. Ruberti to review the Complainant's objections and determine if any fully or partially responsive records existed. He certified that Ms. Ruberti e-mailed Mr. Filippini, who confirmed on December 11, 2015, that no responsive records existed.

The Custodian then certified that following receipt of the Complainant's Denial of Access Complaint, he contacted Mr. Filippini a third time, and Mr. Filippini reiterated his earlier responses, namely that no records responsive to the majority of the request exist. The Custodian also certified that Mr. Filippini at this time advised that manual lists of promotional information were once maintained, until December 2010. He certified that the manual lists prior to December 2010 were destroyed, and therefore the lists from January 2008 to December 2010 could not be provided. Additionally, the Custodian was further informed that manual lists were destroyed in a flood from a water leak occurring over Easter weekend in 2013.

Therefore, the Custodian has borne his burden of proof that he lawfully denied access to items 1-4 described in the Complainant's November 16, 2015 OPRA request because he certified that his office does not maintain any existing records responsive to the request, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. N.J.S.A. 47:1A-6; *Pusterhofer*, GRC 2005-49.

Item 5

OPRA provides that:

[T]he personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access

N.J.S.A. 47:1A-10.

When dealing with personnel records, OPRA begins with a presumption against disclosure and "proceeds with a few narrow exceptions that . . . need to be considered." *Kovalcik*, 206 N.J. at 594. These are:

[A]n individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of any pension received shall be government record;

[P]ersonnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and

[D]ata contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.

N.J.S.A. 47:1A-10.

The GRC has stated that:

N.J.S.A. 47:1A-10 is a codified version of Executive Order 11 (1974) and [it] has been applied and understood that [the] only individuals who have access to personnel and pension records are specific public officials and the person who is the subject of the personnel file. An “individual in interest” is to mean the person who is the subject of the personnel file

Hewitt v. Longport Police Dep’t, GRC Complaint No. 2004-148 (March 2005); Mapp v. Borough of Roselle (Union), GRC Complaint No. 2009-334 (November 30, 2010).

The Appellate Division in N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor’s Office; 405 N.J. Super. 386, 389 (App. Div. 2009) also agreed that the only personnel information a public entity is authorized to disclose are the specific items listed in N.J.S.A. 47:1A-10, and that such an entity has an obligation to safeguard from public access a citizen’s personal information when disclosure thereof would violate the citizen’s reasonable expectation of privacy. *See Id.* at 390.

Here, the Complainant sought the Performance Assessment Review (“PAR/PES”) for a specific individual for an identified time period. The Custodian denied those requests based on OPRA’s exemption for personnel records. *See N.J.S.A. 47:1A-10.*

The PAR/PES at issue are likely part of the referenced individual’s personnel files. *See N. Jersey Media Grp.*, 405 N.J. Super. at 390. The requested records do not fall within any of the delineated categories of personnel documents and information that can be disclosed pursuant to N.J.S.A. 47:1A-10. *See Id.* at 390. Specifically, the Complainant is not the subject of the personnel files containing the requested PAR/PES. Rather, the referenced employee would be the “individual in interest” for the sake of OPRA’s exception to N.J.S.A. 47:1A-10. *See Hewitt*, GRC 2004-148; Mapp, GRC 2009-334.

Therefore, the Custodian lawfully denied access under OPRA to the requested PAR/PES for the referenced individual. *See N.J.S.A. 47:1A-6*. The Complainant requested personnel records that are exempt from disclosure under OPRA, and she does not qualify as an “individual

in interest” under N.J.S.A. 47:1A-10. See Kovalcik, 206 N.J. at 594; N. Jersey Media Grp. 405 N.J. Super. at 389; Hewitt, GRC 2004-148; Mapp, GRC 2009-334.

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 unlawfully denied access to the requested records by failing to respond to the Complainant within seven (7) business days after receipt of the OPRA request, thereby resulting in a deemed denial, he ultimately certified that his office does not maintain any existing records responsive to items 1-4 of the request and lawfully denied access to the record requested in item 5, pursuant to N.J.S.A. 47:1A-10. 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 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 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

2. The Custodian has borne his burden of proof that he lawfully denied access to items 1-4 described in the Complainant’s November 16, 2015 OPRA request because he certified that his office does not maintain any existing records responsive to the request, and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. N.J.S.A. 47:1A-6; Pusterhofer v. NJ Dep’t. of Educ., GRC 2005-49 (July 2005).
3. The Custodian lawfully denied access under OPRA to the requested PAR/PES for the referenced individual. *See* N.J.S.A. 47:1A-6. The Complainant requested personnel records that are exempt from disclosure under OPRA, and she does not qualify as an “individual in interest” under N.J.S.A. 47:1A-10. *See* Kovalcik v. Somerset County Pros. Office, 206 N.J. 581, 594 (2011); N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor’s Office; 405 N.J. Super. 386, 389 (App. Div. 2009); Hewitt v. Longport Police Dep’t, GRC Complaint No. 2004-148 (March 2005); Mapp v. Borough of Roselle (Union), GRC Complaint No. 2009-334 (November 30, 2010).
4. Although the Custodian unlawfully denied access to the requested records by failing to respond to the Complainant within seven (7) business days after receipt of the OPRA request, thereby resulting in a deemed denial, he ultimately certified that his office does not maintain any existing records responsive to items 1-4 of the request and lawfully denied access to the record requested in item 5, pursuant to N.J.S.A. 47:1A-10. 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: Husna Kazmir
Staff Attorney

March 21, 2017