



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

January 30, 2018 Government Records Council Meeting

Harold G. Paine
Complainant

Complaint No. 2016-197

v.

Barrington Police Department (Camden)
Custodian of Record

At the January 30, 2018 public meeting, the Government Records Council (“Council”) considered the January 23, 2018 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 dated October 31, 2007).
2. Notwithstanding the Custodian’s “deemed” denial, the evidence in the record demonstrates that the Complainant is restricted from access to the records pursuant to N.J.S.A. 2A:4A-60(a), since the Custodian certified that the matter involves a juvenile and OPRA does not abrogate exemptions on public access to records pursuant to other statutes. See N.J.S.A.47:1A-9(a), and Gabardi v. Voorhees Twp. Police Dep’t (Camden), GRC Complaint No. 2008-259 (December 2009). Thus, there was no unlawful denial of access. N.J.S.A. 47:1A-6. Furthermore, since the records are exempt pursuant to N.J.S.A. 2A:4A-60(a), the Council need not address whether the records are exempt as criminal investigatory records under N.J.S.A. 47:1A-1.1.
3. The Custodian failed to timely respond in writing to the Complainant’s OPRA request, thus resulting in a “deemed” denial of access. N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). However, the requested records are not subject to disclosure to the Complainant pursuant to N.J.S.A. 47:1A-9(a) and N.J.S.A. 2A:4A-60(a). Furthermore, 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 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 30th Day of January, 2018

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 2, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
January 30, 2018 Council Meeting**

**Harold G. Paine¹
Complainant**

GRC Complaint No. 2016-197

v.

**Barrington Police Department (Camden)²
Custodial Agency**

Records Relevant to Complaint: “All details surrounding the arrest of [KCM] on April 10, 2016 at around 6:00 P.M. I am the grandfather of [KCM].”

Custodian of Record: David Uron, A/Chief of Police

Request Received by Custodian: June 6, 2016

Response Made by Custodian: N/A

GRC Complaint Received: July 11, 2016

Background³

Request and Response:

On June 3, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. There is no evidence in the record to show that the Custodian responded to the Complainant prior to filing this complaint.

Denial of Access Complaint:

On July 11, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he is the grandfather of KCM and that his daughter has 50% custody of KCM. He also claimed that the Barrington Police Dep’t (“BPD”) refused to give his daughter information regarding KCM’s arrest despite providing a copy of her divorce documentation.

Statement of Information:

On August 16, 2017, the Custodian filed a Statement of Information (“SOI”). The

¹ No legal representation listed on record.

² Represented by Timothy J. Higgins, Esq., Municipal Solicitor (Cherry Hill, 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.

Custodian certified that the BPD received the Complainant's OPRA request on June 6, 2016, and was placed in the Chief of Police's mailbox. The Custodian claimed that during this time, he was transitioning from Lieutenant to Chief, and was working out of both offices. As a result, the Custodian asserted that the OPRA request had gone unanswered beyond the statutorily required deadline to respond.

Therefore, the Custodian certified that he contacted the Camden County Prosecutor's Office ("CCPO") to obtain guidance on whether the Complainant was entitled to receive the records as they pertained to an active criminal investigation involving a juvenile. He certified that he was told to inform the Complainant that he needed to reach out to the CCPO directly, and that they would determine what information, if any, the Complainant could receive.

The Custodian certified that he reached out to the Complainant in "late June/early July" to explain the situation and the status of the request. The Custodian also advised the Complainant to reach out to the CCPO and to call him should he have any further difficulties. The Custodian stated that he has not heard back from the Complainant as of August 16, 2016. Lastly, the Custodian argued that the records sought are exempt from disclosure as criminal investigatory records pursuant to N.J.S.A. 47:1A-1, et seq., and restrictions on access to juvenile records under N.J.S.A. 2A:4A-60.

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 dated October 31, 2007).

The Custodian acknowledged that he did not respond to the Complainant's OPRA request until after the Complainant filed his complaint. Moreover, there is no evidence in the record demonstrating that the response was made in writing pursuant to N.J.S.A. 47:1A-5(g).

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

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.

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 further provides that:

[t]he provisions of this act . . . shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to . . . 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).]

The Council has previously held that pursuant to N.J.S.A. 2A:4A-60(a), public access to “[s]ocial, medical, psychological, legal and other records of the court and probation division, and *records of law enforcement agencies*” involving juveniles has been substantially restricted. (Emphasis added). See Gabardi v. Voorhees Twp. Police Dep’t (Camden), GRC Complaint No. 2008-259 (December 2009).

In the instant matter, the Complainant sought information surrounding the arrest of his grandson, [KCM], from the Barrington Police Dep’t. Similar to the complainant in Gabardi, although N.J.S.A. 2A:4A-60(a)(3) provides an exception for parents and guardians, the Complainant provided no evidence to show that he has legal guardianship of [KCM]. GRC 2008-259. Additionally, the Complainant provided no evidence to show that he qualifies for any of the other exceptions under N.J.S.A. 2A:4A-60(a), *et seq.*

Accordingly, notwithstanding the Custodian’s “deemed” denial, the evidence in the record demonstrates that the Complainant is restricted from access to the records pursuant to N.J.S.A. 2A:4A-60(a), since the Custodian certified that the matter involves a juvenile and OPRA does not abrogate exemptions on public access to records pursuant to other statutes. See N.J.S.A. 47:1A-9(a), and Gabardi, GRC 2008-259. Thus, there was no unlawful denial of access. N.J.S.A. 47:1A-6. Furthermore, since the records are exempt pursuant to N.J.S.A. 2A:4A-60(a), the Council need not address whether the records are exempt as criminal investigatory records under N.J.S.A. 47:1A-1.1.

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)).

Here, the Custodian failed to timely respond in writing to the Complainant’s OPRA request, thus resulting in a “deemed” denial of access. N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). However, the requested records are not subject to disclosure to the Complainant pursuant to N.J.S.A. 47:1A-9(a) and N.J.S.A. 2A:4A-60(a). Furthermore, 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 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 Council Staff 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 dated October 31, 2007).

2. Notwithstanding the Custodian's "deemed" denial, the evidence in the record demonstrates that the Complainant is restricted from access to the records pursuant to N.J.S.A. 2A:4A-60(a), since the Custodian certified that the matter involves a juvenile and OPRA does not abrogate exemptions on public access to records pursuant to other statutes. See N.J.S.A. 47:1A-9(a), and Gabardi v. Voorhees Twp. Police Dep't (Camden), GRC Complaint No. 2008-259 (December 2009). Thus, there was no unlawful denial of access. N.J.S.A. 47:1A-6. Furthermore, since the records are exempt pursuant to N.J.S.A. 2A:4A-60(a), the Council need not address whether the records are exempt as criminal investigatory records under N.J.S.A. 47:1A-1.1.
3. The Custodian failed to timely respond in writing to the Complainant's OPRA request, thus resulting in a "deemed" denial of access. N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). However, the requested records are not subject to disclosure to the Complainant pursuant to N.J.S.A. 47:1A-9(a) and N.J.S.A. 2A:4A-60(a). Furthermore, 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 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: Samuel A. Rosado
Staff Attorney

January 23, 2018