



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

May 24, 2016 Government Records Council Meeting

Sean P. Vandy
Complainant

v.

Newfield Police Department (Gloucester)
Custodian of Record

Complaint Nos. 2016-74 and
2016-75

At the May 24, 2016 public meeting, the Government Records Council (“Council”) considered the May 17, 2016 Supplemental 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 failure of Officer Conway and/or the Custodian 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 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 October 31, 2007). *See also* Dittrich v. City of Hoboken (Hudson), GRC Complaint No. 2008-04 (March 2009).
2. The Complainant’s OPRA requests seeking access to two (2) entire discovery packages are invalid because they fail to seek identifiable government records. MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30 (App. Div. 2005); N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Redden v. Cape May Cnty. Prosecutor’s Office, GRC Complaint No. 2007-206 (September 2009). Thus, the Custodian did not unlawfully deny access to the Complainant’s requests. N.J.S.A. 47:1A-6.
3. Although Officer Conway and/or the Custodian failed to respond in writing to the Complainant’s OPRA requests in a timely manner, which resulted in a “deemed” denial of the requests, the evidence of record does not indicate that their actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, said 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 24th Day of May, 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 27, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 24, 2016 Council Meeting**

**Sean P. Vandy¹
Complainant**

GRC Complaint Nos. 2016-74 and 2016-75²

v.

**Newfield Police Department (Gloucester)³
Custodial Agency**

Records Relevant to Complaint:

Request dated February 5, 2016, which formed the basis of GRC Complaint No. 2016-74:
“Discover [sic] Package Package (sic) #Complaint 2015 000888”

Request dated February 5, 2016, which formed the basis of GRC Complaint No. 2016-75:
“Discover [sic] Package Package (sic) #Complaint 2014 000286”

Custodian of Record: Toni L. VanCamp
Requests Received by Custodian: February 5, 2016
Response Made by Custodian: February 13, 2016
GRC Complaints Received: March 4, 2016

Background⁴

Requests and Response:

On February 5, 2016, the Complainant submitted two (2) Open Public Records Act (“OPRA”) requests to the Custodian seeking the above-mentioned records. On Saturday, February 13, 2016, the day after the fifth (5th) business day following receipt of said request, Officer Conway on behalf of the Custodian responded telephonically to both requests. Officer Conway left a message, informing the Complainant that after a conversation with the Prosecutor’s Office, he determined that the Complainant is not entitled to an entire discovery package because discovery is only privileged to attorneys. Officer Conway advised the Complainant to file another OPRA request and specify exactly what he is looking for in the

¹ No legal representation listed on record.

² The GRC has consolidated the complaints for adjudication because of the commonality of the parties and issues.

³ Represented by Daniel Rybeck, Esq., of Weir & Partners LLP (Cherry Hill, NJ).

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.

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discovery package. Officer Conway further informed the Complainant that he would “be receiving a letter in a few days [confirming the phone message].”

Denial of Access Complaints:

On March 4, 2016, the Complainant filed with the Government Records Council (“GRC”) Denial of Access Complaints for each one of the two OPRA requests. The Complainant asserts in GRC Complaint No. 2016-74 that he and his attorney had both requested discovery for municipal court case number 2015-000888; however, his attorney received only partial discovery.

The Complainant asserts in GRC Complaint No. 2016-75 that he acted as his own counsel for case number 2014-000286, and although the municipal judge promised him discovery, he did not receive anything. The Complainant states that he wants the “complete discovery along with the police interview.”

In each complaint, the Complainant states that in response to the request he received a voicemail message from Police Officer Conway informing him that because he is not an attorney he is not entitled to discovery. In GRC Complaint No. 2016-75, the Complainant contends that he was promised a letter in response to the request but he never received one.

Statements of Information:

On March 23, 2016, the Custodian filed a separate Statement of Information (“SOI”) for each complaint. Except as otherwise noted, both SOIs are identical.⁵ The Custodian certified that she received the Complainant’s OPRA requests on February 5, 2016, and responded on February 13, 2016.⁶

For each complaint, the Custodian certifies that there are no records responsive to the request and that no records were provided to the Complainant. The Custodian further certifies:

Mr. Vandy was advised by the Newfield Police Department that, pursuant to Bart v. City of Passaic, GRC Complaint No. 2007-162 (April 2008) that he could not [sic] obtain some records from the case file, but needed to specify which records he was seeking, and it was requested that Mr. Vandy clarify what specific records he was seeking. No response was received from Mr. Vandy. Therefore, no further action was taken as Mr. Vandy never responded as to what specific records he was seeking.

⁵ The Custodian attached the wrong request to each SOI.

⁶ The Custodian submitted a DVD as Item No. 8 for each Statement of Information. Each DVD, although labeled with a different GRC complaint number, contains the same video transfer of a person identifying himself as Officer Conway leaving a message for the Complainant in response to the Complainant’s two OPRA requests that formed the basis of these consolidated complaints.

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For GRC Complaint No. 2016-75, the Custodian attached to the SOI a page from the Newfield Police OPRA Log in which the following entry appears: “contacted by phone & advised accordingly.”

Additional Submissions:

On March 29, 2016, the Complainant submitted two (2) letters to the GRC. One letter references GRC Complaint No. 2016-74, and the other letter references GRC Complaint No. 2016-75. Each letter, after reciting the allegations that had already been set forth in the referenced complaint, states that Officer Conway in a video informed the Complainant that he discussed the Complainant’s OPRA request with the Gloucester County Prosecutor and was told that the Complainant was not entitled to the requested records because he is not an attorney. The Complainant states that he called the Prosecutor and was informed that their office does not get involved with local matters. The Complainant also states that Officer Conway stated that he would send the Complainant a letter. The Complainant contends that he never received the letter and asserts that the officer has therefore not been truthful.

On April 8, 2016, the GRC e-mailed the Custodian’s Counsel to inform him that in the video transfer on the DVD submitted with each SOI, the officer made reference to a letter which was to be sent to the Complainant in response to the Complainant’s OPRA requests. The GRC informed Counsel that no such letter was attached to either SOI. The GRC asks Counsel to have the Custodian forward to the GRC a copy of the written response. The Custodian’s Counsel failed to respond to the GRC’s request.

On April 15, 2016, the GRC again e-mailed the Custodian’s Counsel, renewing its request set forth in the April 8, 2016 correspondence. The Custodian’s Counsel failed to respond to the GRC’s second request for a copy of the written response.

Analysis

Timeliness

Unless a shorter time period is otherwise provided, a custodian must 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 accordingly 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).⁷ 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).

⁷ 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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Here Officer Conway, on behalf of the Custodian, responded telephonically to both requests in a timely manner. However, although Officer Conway in his verbal message to the Complainant informed him that he would “be receiving a letter in a few days,” the evidence of record reveals that no such letter was sent either by Officer Conway or the Custodian.

In Dittrich v. City of Hoboken (Hudson), GRC Complaint No. 2008-04 (March 2009), the custodian responded via telephone to the request on the first business day following receipt of the request, informing the complainant that no responsive record exists. The Council determined that, although the custodian’s response was within the statutorily-mandated timeframe, his response was not in writing. As such, the Council found that the custodian’s actions constituted a “deemed” denial of the request.

Therefore, the failure of Officer Conway and/or the Custodian 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 requests pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. *See also* Dittrich, GRC 2008-04.

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.

In the instant complaints, the Complainant is seeking discovery packages for two municipal matters, which he identified as complaint numbers 2014-000286 and 2015-000888. The Complainant stated that he was denied access to the records because Officer Conway, on behalf of the Custodian, informed the Complainant that he discussed the Complainant’s OPRA request with the Gloucester County Prosecutor and was told that the Complainant was not entitled to the requested records because he is not an attorney. The Complainant stated that he determined no such discussion took place with the Gloucester County Prosecutor. Consequently, the Complainant concluded that Officer Conway was not being truthful and therefore the Complainant alleges that he is entitled to the requested records.

There is nothing in the evidence of record to indicate Officer Conway had a discussion with either the Gloucester County Prosecutor or any particular prosecutor regarding the granting or denying of access to the requested records. Officer Conway in his recorded message stated that, following a conversation with the Prosecutor’s Office, he had determined that the Complainant was not entitled to an entire discovery package.

The Custodian certified in the SOI that the Complainant was advised pursuant to Bart v. City of Passaic, GRC Complaint No. 2007-162 (April 2008), that he could obtain some records from the case file but needed to specify which records he was seeking. The Custodian certified that she never received such clarification from the Complainant.

The GRC could not find anything in the evidence of record to confirm the Custodian's averment that the Complainant was provided with a citation to Bart, GRC 2007-162, or to any other legal authority. However, in his recorded message, Officer Conway advised the Complainant to file another OPRA request and specify exactly which records he is seeking within the discovery package. Thus, although Officer Conway implied that the request was overly broad, he never specifically stated that was the reason for denying access.

The availability of records pursuant to discovery or other court rule does not preclude the availability of the same records pursuant to OPRA. *See Mid-Atlantic Recycling Techs., Inc. v. City of Vineland*, 222 F.R.D. 81 (D.N.J. 2004). However, a discovery request is more akin to a "blanket request" for various facts and documents relevant to a particular action, whereas an OPRA request is a request for *specific* government records. The New Jersey courts and the GRC have addressed the level of specificity required for an OPRA request to be considered valid.

The New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records readily accessible for inspection, copying, or examination." MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) (citing N.J.S.A. 47:1A-1) (quotations omitted). The Court reasoned that:

[m]ost significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

Id. at 549 (emphasis added).

The Court further held that "[u]nder OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt In short, OPRA does not countenance open-ended searches of an agency's files." Id. (emphasis added). *See also Bent v. Stafford Police Dep't*, 381 N.J. Super. 30, 37 (App. Div. 2005), N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

The facts in Redden v. Cape May Cnty. Prosecutor's Office, GRC Complaint No. 2007-206 (September 2009), are similar to the facts in the instant complaint. In Redden, the complainant sought access to, *inter alia*, his entire criminal case file. The Council determined that a request for an entire prosecutor's office file was overbroad and in the nature of a blanket

request for a class of various documents rather than a request for specific government records. As such, the Council found that the custodian lawfully denied access to the requested records.

Here, the Complainant's requests seeking access to two (2) entire discovery packages are overbroad and of the nature of blanket requests for various documents rather than requests for specific government records. Therefore they are not valid requests under OPRA.

Accordingly, the Complainant's OPRA requests seeking access to two (2) entire discovery packages are invalid because they fail to seek identifiable government records. MAG, 375 N.J. Super. 534 at 546; Bent, 381 N.J. Super. 30 at 37; N.J. Builders Ass'n, 390 N.J. Super. 166 at 180; Schuler, GRC 2007-151. Thus, the Custodian did not unlawfully deny access to the Complainant's requests. N.J.S.A. 47:1A-6.

Knowing & Willful

OPRA states that “[a] public official, officer, employee or custodian who knowingly and 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 Officer Conway and/or the Custodian failed to respond in writing to the Complainant's OPRA requests in a timely manner, which resulted in a “deemed” denial of the requests, the evidence of record does not indicate that their actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, said 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 failure of Officer Conway and/or the Custodian 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 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 October 31, 2007). *See also* Dittrich v. City of Hoboken (Hudson), GRC Complaint No. 2008-04 (March 2009).
2. The Complainant's OPRA requests seeking access to two (2) entire discovery packages are invalid because they fail to seek identifiable government records. MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30 (App. Div. 2005); N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Redden v. Cape May Cnty. Prosecutor's Office, GRC Complaint No. 2007-206 (September 2009). Thus, the Custodian did not unlawfully deny access to the Complainant's requests. N.J.S.A. 47:1A-6.
3. Although Officer Conway and/or the Custodian failed to respond in writing to the Complainant's OPRA requests in a timely manner, which resulted in a "deemed" denial of the requests, the evidence of record does not indicate that their actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, said 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

May 17, 2016