



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

June 29, 2021 Government Records Council Meeting

Anonymous
Complainant

Complaint No. 2020-106

v.

Passaic County Sheriff's Office
Custodian of Record

At the June 29, 2021 public meeting, the Government Records Council ("Council") considered the June 22, 2021 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 because of a typo issue with the e-mail address. 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). Notwithstanding, the GRC declines to order disclosure because the Custodian included said response as part of the Statement of Information, which was sent to the Complainant on July 14, 2020.
2. The Custodian's failure to timely respond in writing resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian provided the Complainant all responsive records as part of the Statement of Information on July 14, 2020. 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 29th Day of June 2021

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 1, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 29, 2021 Council Meeting**

**Anonymous¹
Complainant**

GRC Complaint No. 2020-106

v.

**Passaic County Sheriff's Office²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of:³

1. Passaic County Sheriff's Office ("PCSO") "documents, records, and information (including printouts of computerized records)" related to the transfer of Jeffrey Valente from Haledon Police Department to the Passaic County Jail on January 2, 2014 at 2:30 p.m.
2. PCSO "documents, records, and information (including printouts of computerized records)" related to the transfer of Denise Efferen from Haledon Police Department to the Passaic County Jail on November 7, 2014 between 3:53 p.m. and 5:27 p.m.

Custodian of Record: Kelly Ruffel
Request Received by Custodian: April 22, 2020
Response Made by Custodian: April 22, 2020
GRC Complaint Received: May 28, 2020

Background⁴

Request and Response:

On April 17, 2020, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On April 22, 2020, the same day as receipt of the OPRA request, the Custodian responded in writing disclosing multiple responsive records. The Custodian also included an explanation of each redaction by identifying the page number, information redacted, and specific lawful basis for each redaction.

¹ No legal representation listed on record.

² Represented by J. Kevin McDuffie, Esq. (Paterson, NJ).

³ The subject OPRA request is identical to those at issue in Anonymous v. Passaic Cnty. Sheriff's Office, GRC Complaint Nos. 2020-99 and 2020-101, being concurrently adjudicated with this complaint.

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 May 28, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that he sent his OPRA request via U.S. mail on April 18, 2020. The Complainant averred that the Custodian should have received the subject OPRA request by April 22, 2020, allowing for a three (3) business-day transit period. The Complainant argued that as of this day, and twenty-three (23) business days after the potential receipt date, he has yet to receive a response.

Statement of Information:

On July 14, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on April 22, 2020. The Custodian certified that she responded in writing on the same day e-mailing all responsive records with redactions to the Complainant. The Custodian noted that she attached the response and the records responsive to the subject OPRA request. The Custodian averred that said e-mail was returned as undeliverable; the supplied e-mail address may have been inaccurate. The Custodian noted that because of the lack of any other contact information, no additional actions were taken.

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).⁵ 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).

Here, the Complainant contended that the Custodian failed to respond to his OPRA request in a timely manner. In the SOI, the Custodian argued that she responded in writing on the same day as receipt of the subject OPRA request disclosing all responsive records with redactions. The Custodian noted that the response e-mail was undeliverable and that the Complainant may have provided an incorrect address. The Custodian further noted that because she had no additional contact information, no further action was taken.

A review of the subject OPRA request, the Custodian’s response, and Denial of Access Complaint reveals that the response e-mail was undeliverable because of a typo error by the Custodian. Specifically, the inputted e-mail address in the Custodian’s response was missing a “0”

⁵ 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.

in it. It is this typo that caused the message to be undeliverable. Thus, although the Complainant included an accurate e-mail address, the Custodian's error resulted in a delivery failure that was not caught at that time. It is this typo that ultimately results in a "deemed" denial of access.⁶ See also Owoh, Esq. (O.B.O. AADARI) v. City of Asbury park (Monmouth), GRC Complaint No. 2018-211 (August 2020).

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request because of a typo issue with the e-mail address. 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. Notwithstanding, the GRC declines to order disclosure because the Custodian included said response as part of the SOI, which was sent to the Complainant on July 14, 2020.

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 the matter before the Council, the Custodian's failure to timely respond in writing resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian provided the Complainant all responsive records as part of the SOI on July 14, 2020. 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

⁶ The GRC notes that the records sought in the subject OPRA request were also provided to the Complainant on May 29, 2020 in response to the requests at issue in Anonymous, GRC 2020-99, *et seq.*

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 request because of a typo issue with the e-mail address. 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). Notwithstanding, the GRC declines to order disclosure because the Custodian included said response as part of the Statement of Information, which was sent to the Complainant on July 14, 2020.
2. The Custodian's failure to timely respond in writing resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian provided the Complainant all responsive records as part of the Statement of Information on July 14, 2020. 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: Frank F. Caruso
Executive Director

June 22, 2021