



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

July 27, 2021 Government Records Council Meeting

David Weiner
Complainant

Complaint No. 2020-129

v.

County of Essex
Custodian of Record

At the July 27, 2021 public meeting, the Government Records Council (“Council”) considered the July 20, 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. 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 third (3rd) extended time frame results in a “deemed” denial of the said 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). See also Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). However, the GRC declines to order disclosure because the Custodian did so on August 18, 2020.
2. The Custodian’s failure to respond within the third (3rd) extended time frame 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 ultimately provided the Complainant the only responsive record in existence on August 19, 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 27th Day of July 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 29, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 27, 2021 Council Meeting**

**David Weiner¹
Complainant**

GRC Complaint No. 2020-129

v.

**County of Essex²
Custodial Agency**

Records Relevant to Complaint: Copies of:

1. “Any documents delineating” the total number of Division of Family Assistance and Benefits (“DFAB”) employees “known to be currently, and formerly,” infected with COVID-19.
2. “Any documents delineating” the titles of DFAB employees “known to be currently, and formerly,” infected with COVID-19.
3. “Any documents delineating” the DFAB offices of those employees “known to be currently, or formerly,” infected with COVID-19.

Custodian of Record: Olivia Schumann, Esq.
Request Received by Custodian: May 7, 2020
Response Made by Custodian: May 7, 2020
GRC Complaint Received: July 13, 2020

Background³

Request and Response:

On May 7, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On the same day, the Custodian responded in writing extending the response time frame through May 28, 2020 due on “effort(s) to contain the spread of the novel coronavirus.” On May 28, 2020, the Custodian responded in writing extending the time frame through June 18, 2020 due to the lack of in-office DFAB staff due to the ongoing public health emergency. On June 18, 2020, the Custodian responded in writing extending the response time frame through July 9, 2020 due to the on-going public health emergency.

¹ No legal representation listed on record.

² No legal representation listed on record.

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.

Denial of Access Complaint:

On July 13, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian extended the response time frame through July 9, 2020 but failed to respond by that date.

Supplemental Responses:

On July 29, 2020, the Custodian responded in writing extending the response time frame through August 19, 2020 due to the on-going public health emergency. The Complainant responding acknowledging the extension but noting that he already filed a Denial of Access Complaint. The Custodian responded stating “[t]hat’s fine” and that the “request hadn’t become due then.”

On August 18, 2020, the Custodian e-mailed Essex County Counsel Courtney Gaccione and Robin Magrath asking if they were maintaining records responsive to the subject OPRA request, noting that if so, she never received copies of them for disclosure. On August 18, 2020, Ms. Gaccione e-mailed the Custodian a one-page document entitled “Essex County Employee Positive COVID-19 List by Department” (“List”) with redactions for all numbers except those for DFAB. Ms. Gaccione stated that the County of Essex (“County”) did not maintain a list breaking the numbers into specific titles or offices. On August 19, 2020, the Custodian responded in writing disclosing the List to the Complainant.

Statement of Information:

On September 1, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on May 7, 2020. The Custodian certified that both herself and Ms. Gaccione searched for potentially responsive records. The Custodian certified that after seeking multiple extensions due to the ongoing public health emergency, she responded in writing on August 19, 2020 disclosing the List

The Custodian contended that the Council has previously held that no unlawful denial of access occurred when a custodian certifies that they disclosed all responsive records. Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005); Owens v. Mt. Holly Twp. (Burlington), GRC Complaint No. 2013-233 (February 2014). The Custodian certified that here, Ms. Gaccione located only the List and stated that no additional records existed. See Gaccione Cert. ¶ 4, 8. The Custodian thus argued that the evidence of record supports that no unlawful denial of access occurred.

Additionally, the Custodian argued that the County lawfully redacted all non-DFAB information under the “inter-agency or intra-agency advisory, consultative, or deliberative [“ACD”] material” exemption. N.J.S.A. 47:1A-1.1. The Custodian contended that in Educ. Law Ctr. v. N.J. Dep’t of Educ., 198 N.J. 274, 280 (2009), the New Jersey Supreme Court, held that a public agency could exempt access to factual data used to assist same in policy considerations. The Custodian argued that because the Complainant only sought data for DFAB, redacting the remaining information and overall infection totals was lawful because it was integral in the

County's decision-making process in return-to-work plans and other COVID-19 preventative policies. The Custodian thus argued that she disclosed the record to balance the need to exempt access to all information while still disclosing that information sought by the Complainant.

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 Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5th) business day after receipt of the complainant's March 19, 2007 OPRA request seeking an extension of time until April 20, 2007. However, the custodian responded again on April 20, 2007, stating that the requested records would be provided later in the week. Id. The evidence of record showed that no records were provided until May 31, 2007. Id. The GRC held that:

The Custodian properly requested an extension of time to provide the requested records to the Complainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) . . . however . . . [b]ecause the Custodian failed to provide the Complainant access to the requested records by the extension date anticipated by the Custodian, the Custodian violated N.J.S.A. 47:1A-5(i) resulting in a "deemed" denial of access to the records.

[Id.]

Here, the Custodian initially responded on three (3) occasions extending the response time frame, with a final response due on July 9, 2020. The Complainant filed the instant complaint on July 13, 2020 arguing that the Custodian failed to respond to the subject OPRA request within the third (3rd) extended time frame. Thereafter, on July 29, 2020, the Custodian requested an additional time extension to respond. The Complainant noted at that time that a complaint had already been filed, but the Custodian responded stating "that's fine" and that she had not yet completed the OPRA request. On August 19, 2020, the Custodian disclosed the List to the Complainant. In the

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.

SOI, the Custodian certified to her various responses and that the record disclosed was the only record that existed.⁵

Upon review of the evidence of record in this complaint, a “deemed” denial of access occurred. The Custodian’s first three (3) responses were timely and she was required to respond by July 9, 2020. However, the Custodian did not ultimately respond again until July 29, 2020. Thus, the facts here are similar to those discussed in Kohn, GRC 2007-124 and support a “deemed” denial of access.

Therefore, the Custodian did not bear her burden of proof that she 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 third (3rd) extended time frame results in a “deemed” denial of the said request 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 Kohn, GRC 2007-124. However, the GRC declines to order disclosure because the Custodian did so on August 19, 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 currently before the Council, the Custodian’s failure to respond within the third (3rd) extended time frame 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 ultimately provided the Complainant the only

⁵ The GRC will not address the redactions made to the List because the Complainant did not raise that issue during the pendency of this complaint.

responsive record in existence on August 19, 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.

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. 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 third (3rd) extended time frame results in a "deemed" denial of the said 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). See also Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). However, the GRC declines to order disclosure because the Custodian did so on August 18, 2020.
2. The Custodian's failure to respond within the third (3rd) extended time frame 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 ultimately provided the Complainant the only responsive record in existence on August 19, 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

July 20, 2021