



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

November 9, 2022 Government Records Council Meeting

John Doey
Complainant

Complaint No. 2021-234

v.

NJ Department of Banking and Insurance
Custodian of Record

At the November 9, 2022 public meeting, the Government Records Council (“Council”) considered the October 27, 2022 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 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. Notwithstanding the “deemed” denial of access, the Custodian did not unlawfully deny access to any responsive records because she certified, and the record reflects, that she disclosed all records that existed. Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010).
3. The Custodian’s failure to timely respond 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 disclosed all responsive records that existed. Additionally, the evidence of record does not indicate that the Custodian’s violations 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 9th Day of November 2022

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: November 15, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 9, 2022 Council Meeting**

**John Doey¹
Complainant**

GRC Complaint No. 2021-234

v.

**N.J. Department of Banking and Insurance²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of “proofs” that all N.J. Department of Banking and Insurance (“DOBI”) employees appointed or hired by the Commissioner or Director of Administration (not including civil service or temporary employees), such as commissioners, assistant commissioners, administrators, executive directors, and supervisors in either an “acting” or “interim” title, completed the “New Jersey Prevention of Discrimination and Harassment in the Workplace Policy” mandatory training for 2018, 2019, and 2020 to include completion certificates and dates of completion.

Custodian of Record: Lauren Wiley
Request Received by Custodian: August 16, 2021
Response Made by Custodian: October 19, 2021
GRC Complaint Received: October 8, 2021

Background³

Request:

On August 16, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.

Denial of Access Complaint:

On October 8, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian failed to timely respond to the subject OPRA request.

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Chandra M. Arkema.

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.

Response:

On October 19, 2021, the forty-fourth (44th) business day after receipt of the OPRA request, the Custodian responded in writing disclosing multiple sign-in sheets from 2019 and a 2020 training attendance list. On the same day, Custodian's Counsel e-mailed the Complainant advising that the Custodian disclosed responsive records and asking him to confirm that he would be withdrawing this Denial of Access Complaint.

On October 20, 2021, the Complainant e-mailed Custodian's Counsel disputing the disclosure because it contained sign-in sheets and not actual certificates. On October 22, 2021, Custodian's Counsel responded disclosing a list of DOBI employees that completed trainings from 2018 through 2021, noting that certificates are not made or maintained by DOBI. Counsel again asked the Complainant to confirm that he was withdrawing this complaint. On the same day, the Complainant again disputed the disclosure as an incomplete list. The Complainant noted that said list indicates that "only 48 DOBI employees completed mandatory training, when DOBI has some approximately 340 employees." (Emphasis in original). The Complainant noted that he would advise Counsel the following week whether he intended to withdraw the complaint to provide her additional time to address his dispute.

Statement of Information:

On November 3, 2021, the Custodian filed a Statement of Information ("SOI") attaching legal certifications from Assistant Commissioner Ila Bhatnagar and Human Resources Manager Adam Stevens. The Custodian certified that she received the Complainant's OPRA request on August 16, 2021. The Custodian certified that her search included having Assistant Commissioner Bhatnagar and her staff review internal Equal Employment Opportunity ("EEO") files for in-person and on-line training records. See Bhatnagar Cert. ¶ 4-5. The Custodian noted that on September 10, 2021, the EEO Officer resigned, no records were retrieved, and no extension was sought due to staffing changes. See Bhatnagar Cert. ¶ 6-7. The Custodian certified that on October 15, 2021, Assistant Commissioner Bhatnagar amassed the responsive records, comprising of only sign-in sheets, and gave them to her. See Bhatnagar Cert. ¶ 8. The Custodian certified that she responded in writing on October 19, 2021 disclosing to the Complainant the records received from Assistant Commissioner Bhatnagar. The Custodian certified that following the Complainant's dispute over the disclosed records, she disclosed on October 22, 2021 a training completion report obtained from Mr. Stevens. See Stevens Cert. ¶ 8.

The Custodian argued that she was not required to respond within seven (7) business days because the Complainant's request did not identify a specific government record. N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 171 (App. Div. 2007). The Custodian stated that instead, the request sought "proofs" including "completion certificates and dates of completion." The Custodian further contended that the Complainant's request was contradictory because it sought employee training records for only those not considered civil service hires; it is arguable that every DOBI employee is a civil service hire. The Custodian further asserted that applicable responsive training records do not differentiate employees as "civil-service hire" or "non-civil service hire;" thereby requiring DOBI to expend extraordinary time and effort to identify each employee's classification.

The Custodian argued that her delay in response was due to changes in personnel and DOBI's attempts to interpret the Complainant's request. The Custodian stated that notwithstanding the delay, she disclosed 543 pages of records to the Complainant on October 19, 2021. The Custodian further certified that once she received the Complainant's "clarifying" e-mail that records sought related to online trainings, she disclosed a training completion report from the Learning Metrics System ("LMS") on October 22, 2021. The Custodian certified that no certificates existed. See Bhatnagar Cert. ¶ 10 Stevens Cert. ¶ 6. The Custodian contended that notwithstanding the Complainant's dispute, she provided all records responsive to the Complainant's OPRA request maintained by DOBI. The Custodian notes that she was not required to create any records or engage in additional conversation with the Complainant regarding the substance of the records. N.J. Builders, 390 N.J. Super. 166. The Custodian argued that this complaint is now moot and should be dismissed accordingly.

Additional Submissions:

On November 4, 2021, the Complainant responded to the Custodian's SOI. Therein, the Complainant contended that DOBI failed to completely respond in over two (2) months since submission of the subject OPRA request. The Complainant further noted that it was not until after he filed this complaint that DOBI endeavored to respond to the OPRA request. The Complainant also contended that DOBI never sought an extension or clarification; however, the Custodian argued in the SOI that his request was invalid.

The Complainant disputed DOBI's position that his request failed to identify specific records or was somehow confusing. The Complainant argued that in fact, he specifically limited the request to supervisory personnel and not all DOBI employees. The Complainant noted that it was his understanding that Commissioners can and will hire outside of "civil service rules." The Complainant noted that his intent was to determine if some hires were permitted to avoid the mandatory training. The Complainant asserted that his review of the records provided the records show that 50 DOBI employees completed training in 2019; Assistant Commissioner Bhatnagar and almost 300 DOBI employees did not complete this training in 2019. The Complainant further asserted that it would not be demanding for each of the employees listed in the training completion report to sign into LMS and download their certificates for disclosure.⁴

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

⁴ The Complainant raises additional questions regarding DOBI's ability to track mandatory training requirements and potential exposures emanating therefrom that are not within the GRC's authority to adjudicate. N.J.S.A. 47:1A-7.

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).

In this matter, the Complainant submitted the subject OPRA request on August 16, 2021 and later filed the instant complaint alleging that the Custodian failed to respond to it. The Custodian initially responded on October 19, 2021, the forty-fourth (44th) business day after receipt of the OPRA request, and again on October 22, 2021 disclosing records to the Complainant. In the SOI, the Custodian certified that she received the subject OPRA request on August 16, 2021 and did not initially respond until October 19, 2021. The Custodian argued that she was not required to adhere to the seven (7) business day time frame because the request was essentially invalid and cited to N.J. Builders, 390 N.J. Super. 166 in support of her actions.

However, the evidence of record clearly indicates that a "deemed" denial of access occurred here. Obviously, the Custodian failed to respond in writing within seven (7) business days. Additionally, the Custodian's reliance on N.J. Builders is misplaced; the defendant there timely responded obtaining an extension of time and plaintiff subsequently filed their court action during the extended time frame. In concluding that plaintiffs were not a prevailing party, the Appellate Division agreed with the trial court that defendant could not reasonably disclose records within seven (7) business days. Here, the Custodian failed to respond at all prior to the end of the statutory response time frame. Also, neither N.J. Builders nor OPRA allow a custodian to outright ignore the statutory response time frame because a request may be considered overly broad or invalid. Thus, the evidence strongly supports that a "deemed" denial of access occurred here.

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 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

Initially, the GRC notes that notwithstanding the Custodian's disclosure of multiple records, her SOI arguments indicate that she believed the subject OPRA request was invalid. However, in Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012), the court held that the defendant "performed a search and was able to locate records responsive . . ." which ". . . belied any assertion that the request was lacking in specificity or was overbroad." Id. at 177. See also Gannett v. Cnty. of Middlesex, 379 N.J. Super. 205 (App. Div. 2005) (holding that "[s]uch a voluntary disclosure of most of the documents sought . . . constituted a waiver of whatever right

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.

the County may have had to deny Gannett's entire OPRA request on the ground that it was improper.” Id. at 213).

Generally, in situations where a request was overly broad on its face but the custodian was able to locate records, the Council has followed Burke, 429 N.J. Super. 169 in determining that the request contained sufficient information for record identification. See Bond v. Borough of Washington (Warren), GRC Complaint No. 2009-324 (Interim Order dated March 29, 2011); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2010-302 (Interim Order dated January 31, 2012). Here, it is possible that the portion of the request seeking “proofs” was invalid on its face. However, Burke applies here because the Custodian certified to disclosing a significant amount of records on October 19, and 22, 2021. Thus, the GRC will proceed without conducting an analysis on the validity of the subject OPRA request.

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 Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010), the Council found that the custodian did not unlawfully deny access to the requested records based on the custodian’s certification that all such records were provided to the complainant. The Council held that the custodian’s certification, in addition to the lack of refuting evidence from the complainant, was sufficient to meet the custodian’s burden of proof. See also Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005); Holland v. Rowan Univ., GRC Complaint No. 2014-63, *et seq.* (March 2015).

Here, the Complainant sought access to records proving that a specific group of DOBI employees completed a mandatory training over a three (3) period. Following the submission of this complaint, the Custodian disclosed a voluminous number of sign-in sheets for 2019, an attendance list for 2020, and an LMS training completion report covering 2018 through 2020. The Complainant disputed this disclosure, arguing that it appeared incomplete and lacked actual training certificates. In the SOI, the Custodian certified that all records disclosed to the Complainant were those that existed, noting that no training certificates existed. See also Bhatnagar Cert. ¶ 10 Stevens Cert. ¶ 6. The Complainant responded to the SOI again disputing that the disclosed records were complete and further argued that applicable employees could easily access training certificates from LMS.

Upon review of the facts here, the GRC finds sufficient evidence in the record to indicate that notwithstanding the “deemed” denial, the Custodian disclosed all records that existed and no further action is required. The GRC first notes that it is obvious from both the OPRA request and the Complainant’s comments that he limited the scope of employees for which he was seeking training confirmation; however, he also questioned the completeness of the disclosed records based on the total number of DOBI employees over a given year. Such a contradiction weighs in favor of the fact that the Custodian disclosed training records for only those employees falling within the limited employee class as requested. Additionally, the Custodian, Assistant Commissioner

Bhatnagar, and Mr. Stevens all certified that no training certificates existed. The Complainant countered this by asserting that the applicable employees could obtain certificates directly from LMS. However, this assertion appears incorrect: while LMS does offer users the ability to print certificates for certain trainings, this option is not available for the “New Jersey Prevention of Discrimination and Harassment in the Workplace Policy” training modules.⁶ Thus, the GRC is satisfied the Custodian ultimately disclosed all records responsive to the subject OPRA request on October 19, and 22, 2021.

Therefore, notwithstanding the “deemed” denial of access, the Custodian did not unlawfully deny access to any responsive records because she certified, and the record reflects, that she disclosed all records that existed. Danis, GRC 2009-156, *et seq.*

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 (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1983)); 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 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 disclosed all responsive records that existed. Additionally, the evidence of record does not indicate that the Custodian’s violations 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

⁶ In an effort to independently confirm whether certificates could be obtained through LMS, the GRC accessed and reviewed its own training records on October 19, 2022. The GRC found during that review that the “New Jersey Prevention of Discrimination and Harassment in the Workplace Policy” training does not provide an option to print a certificate upon completion.

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 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. Notwithstanding the "deemed" denial of access, the Custodian did not unlawfully deny access to any responsive records because she certified, and the record reflects, that she disclosed all records that existed. Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010).
3. The Custodian's failure to timely respond 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 disclosed all responsive records that existed. Additionally, the evidence of record does not indicate that the Custodian's violations 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

October 27, 2022