



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

FINAL DECISION

April 25, 2012 Government Records Council Meeting

Hilary Downing
Complainant

Complaint No. 2010-295

v.

New Jersey Department of Children and Family Services
Custodian of Record

At the April 25, 2012 public meeting, the Government Records Council (“Council”) considered the April 18, 2012 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. Although the Custodian responded in writing to the Complainant’s October 28, 2010 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response was legally insufficient because she failed to provide a specific lawful basis for said denial of access. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g. and DeAppolonio, Esq. v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009).
2. The Custodian did not unlawfully deny access to the Complainant’s OPRA request because the requested records are exempt from disclosure pursuant to the provisions of N.J.S.A. 9:6-8.10(a) and N.J.S.A. 47:1A-9.a. N.J.S.A. 47:1A-6. Furthermore, the Complainant failed to show that any exception of N.J.S.A. 9:6-8.10(b) applies in the instant matter to permit her access to the requested records.
3. The Custodian violated N.J.S.A. 47:1A-5.g. by failing to provide a specific lawful basis for a denial of the Complainant’s OPRA request. However, the Custodian bore her burden of proof that the requested records are not disclosable under OPRA pursuant to N.J.S.A. 47:1A-9.a. and N.J.S.A. 9:6-8.10(a). 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, it is concluded that 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 25th Day of April, 2012

Robin Berg Tabakin, Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: April 30, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 25, 2012 Council Meeting**

**Hilary Downing¹
Complainant**

GRC Complaint No. 2010-295

v.

**New Jersey Department of Children and Family Services²
Custodian of Records**

Records Relevant to Complaint: Copies of all letters, memoranda, e-mails and reports related to the abuse case between J.C. (the Complainants' daughter) and any other persons involved in producing these records.

Request Made: October 28, 2010

Response Made: November 3, 2010

Custodian: Aileen Williams

GRC Complaint Filed: November 10, 2010³

Background

October 28, 2010

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in a letter referencing OPRA.

November 3, 2010

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the same business day as receipt of such request.⁴ The Custodian states that access to the requested records is denied because according to New Jersey law, "all records of child abuse or neglect reports and all information obtained by the Division in investigating such reports are confidential."⁵

November 10, 2010

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- Complainant's OPRA request dated October 28, 2010

¹ No legal representation listed on record.

² Represented by DAG Christian A. Arnold, on behalf of the NJ Attorney General.

³ The GRC received the Denial of Access Complaint on said date.

⁴ The Custodian certifies in the SOI that she received the Complainant's OPRA request on November 3, 2010.

⁵ The Custodian does not identify a State statute.

- Custodian's response to the Complainant's OPRA request dated November 3, 2010.

The Complainant states that she requested records pertaining to the investigation of the abuse of her daughter. The Complainant also states that she was denied access to these records. The Complainant also states that the Custodian mentioned a State law that prohibited access to the requested records but the Custodian failed to provide a specific citation to any statute.

November 17, 2010

Offer of Mediation sent to the Complainant.

November 18, 2010

The Complainant agrees to mediation.

November 18, 2010

Offer of Mediation sent to the Custodian.⁶

November 30, 2010

Request for the Statement of Information ("SOI") sent to the Custodian.

December 13, 2010

Letter from GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for an SOI on November 30, 2010 and to date has not received a response. Further, the GRC states that if the SOI is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

December 15, 2010

Facsimile from the Custodian to the GRC. The Custodian apologizes for not responding to the SOI request dated November 30, 2010. The Custodian states that her family doctor pulled her out of work on November 30, 2010 and she was not released from care until December 13, 2010. The Custodian attaches a legal certification. The Custodian certifies that she unintentionally failed to include the citation for the Complainant's OPRA request. The Custodian also certifies that the Complainant's OPRA request was denied pursuant to N.J.S.A. 9:6-8.10(a). The Custodian further certifies that the records responsive are not releasable because they are confidential records.

December 16, 2010

E-mail from the GRC to the Complainant. The GRC forwards the Custodian's facsimile dated December 15, 2010 to the Complainant. The GRC inquires if the Complainant still wishes to proceed with her Denial of Access Complaint.

⁶ The Custodian does not respond to the offer of mediation.

December 16, 2010

E-mail from the Complainant to the GRC. The Complainant states that she still wishes to proceed with her Denial of Access Complaint. The Complainant also states that pursuant to N.J.S.A. 9:6-8.10(b)(12), “[t]he department may and upon written request, shall release the records and reports referred to in [N.J.S.A. 9:6-8.10(a)]...Any person appealing a department service or status action or a substantiated finding of child abuse or neglect and his attorney or authorized lay representative upon a determination by the department or the presiding Administrative Law Judge that such disclosure is necessary for a determination of the issue on appeal.”⁷ The Complainant states that she is entitled to these confidential records on behalf of her daughter. The Complainant also states that her attorney has these records but she does not.

December 16, 2010

E-mail from the GRC to the Custodian. The GRC informs the Custodian that the Complainant still wishes to proceed with her Denial of Access Complaint. The GRC states that the Custodian must submit the SOI by December 23, 2010.

January 12, 2011

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated October 8, 2010
- Letter from the Custodian to the Complainant dated November 3, 2010

The Custodian certifies that she did not search for any records responsive to the Complainant’s OPRA request. The Custodian also certifies that the records responsive to the Complainant’s OPRA request must be kept on file for ninety-nine (99) years in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management.

The Custodian certifies that the Complainant filed an OPRA request for a copy of an investigation report prepared by the Department of Children and Families (“DCF”) Institutional Abuse Investigation Unit. The Custodian also certifies that this investigation is related to her minor daughter. The Custodian further certifies that pursuant to N.J.S.A. 9:6-8.10(a) “all records of child abuse reports...and all information obtain by [DCF] in investigating such reports...shall be kept confidential.” The Custodian argues that this record is not subject to public access and is exempt from disclosure.

The Custodian certifies that there are exceptions to the confidentiality requirements of N.J.S.A. 9:6-8.10(a). The Custodian also certifies that the Complainant has not stated which exception applies. The Custodian further certifies that one such exception is “[t]he legal counsel of a child [or] parent... when information is needed to discuss the case with the department in order to make decisions relating to or concerning the child.” N.J.S.A. 9:6-8.10a(b)(17). The Custodian additionally certifies that DCF

⁷ N.J.S.A. 9:6-8.10a. states “All records of child abuse reports...all information obtained by [DCF] in investigating such reports including reports received...and all reports of findings forwarded to the child abuse registry...shall be kept confidential and may be disclosed only under the circumstances expressly authorized ... herein.”

closed the matter involving the Complainant's daughter several years ago, thus there is no ongoing DCF involvement to which this exception could apply.

Analysis

Whether the Custodian's response to the Complainant's OPRA request was sufficient?

OPRA provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g.

Further, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

In the instant complaint, the Custodian responded to the Complainant in writing on the same business day as receipt of the instant OPRA request. However, the evidence of record indicates that the Custodian denied the Complainant access to the requested records stating that according to New Jersey law, the records the Complainant sought were confidential. The evidence of record additionally indicates that the Custodian failed to identify an applicable State statute as the specific lawful basis for denying access.

In DeAppolonio, Esq. v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009), the complainant argued in the Denial of Access Complaint that although the custodian responded in writing in a timely manner, the custodian failed to provide some of the records responsive and further failed to provide a specific lawful basis for denying access to the missing records.

The GRC held that:

“... the Council's decisions have repeatedly supported this statutory mandate by holding that custodians must provide a legally valid reason for any denial of access to records. See Seabrook v. Cherry Hill Police Department, GRC Complaint No. 2004-40 (April 2004), Rosenblum v. Borough of Closter, GRC Complaint No. 2005-16 (October 2005) and Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (October 2005). The Council also held that for a denial of access to be in

compliance with OPRA, it must be specific and must be sufficient to prove that a custodian's denial is authorized by OPRA. See Morris v. Trenton Police Department, GRC Complaint No. 2007-160 (May 2008). Here, while the Custodian's response to the Complainant's request was within the time allowed by N.J.S.A. 47:1A-5.i., his response was not in compliance with OPRA because it failed to provide a specific basis for denying the Complainant access to certain records pursuant to N.J.S.A. 47:1A-5.g. and the Council's decisions in Seabrook, *supra*, Rosenblum, *supra*, Paff, *supra* and Morris, *supra*." *Id.* at pg. 7.

Therefore, although the Custodian responded in writing to the Complainant's OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response was legally insufficient because she failed to provide a specific lawful basis for said denial of access. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g. and DeAppolonio, *supra*.

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*" (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ..." (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

"...[t]he public agency shall have the burden of proving that the denial of access is authorized by law..." N.J.S.A. 47:1A-6.

OPRA also provides:

"The 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..." N.J.S.A. 47:1A-9.a.

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 complaint, the Custodian certified in the SOI that the Complainant filed an OPRA request for a copy of an investigation report prepared by DCF’s Institutional Abuse Investigation Unit. The Custodian also certified that this investigation was related to the Complainant’s minor daughter. The Custodian further certified that pursuant to N.J.S.A. 9:6-8.10(a) “all records of child abuse reports...and all information obtained by [DCF] in investigating such reports...shall be kept confidential.”

Conversely, the Complainant argued that pursuant to N.J.S.A. 9:6-10(b)(12), “[DCF] may and upon written request, shall release the records and reports referred to in [N.J.S.A. 9:6-8.10(a)]...any person *appealing* a department service or status action or a substantiated finding of child abuse or neglect and his attorney or authorized lay representative upon a determination by the department or the presiding Administrative Law Judge that such disclosure is necessary for a determination of the issue on appeal” (Emphasis added). The Complainant stated that pursuant to this statute, she should be entitled to these records on behalf of her daughter.

Pursuant to N.J.S.A. 47:1A-9.a., the statutory exemptions from disclosure of N.J.S.A. 9:6-8.10(a) have not been abrogated by OPRA. Therefore, short of any applicable exception to that statute, that statutory exemption was properly asserted by the Custodian to deny access to the requested records.

The records requested by the Complainant are exempt from disclosure under OPRA as a matter of law. The Custodian certified that the records responsive to the Complainant’s request cannot be disclosed pursuant to the confidentiality provisions of N.J.S.A. 9:6-8.10(a), which provides that all records of child abuse reports, all information obtained by the DCF in investigating such reports, and all reports of findings forwarded to the child abuse registry “shall be kept confidential and may be disclosed only under the circumstances expressly authorized ... herein.”

The Complainant has not submitted any evidence to the GRC to establish that any of the exceptions in N.J.S.A. 9:6-8.10(b) that provide for the disclosure of the records, apply to her Denial of Access Complaint.⁸ The Complainant’s argument that she is

⁸ The statute’s exemptions allow disclosure of such records to:

- (1) A public or private child protective agency authorized to investigate a report of child abuse or neglect;
 - (2) A police or other law enforcement agency investigating a report of child abuse or neglect;
 - (3) A physician who has before him a child whom he reasonably suspects may be abused or neglected or an authorized member of the staff of a duly designated regional child abuse diagnostic and treatment center which is involved with a particular child who is the subject of the request;
 - (4) A physician, a hospital director or his designate, a police officer or other person authorized to place a child in protective custody when such person has before him a child whom he reasonably suspects may be abused or neglected and requires the information in order to determine whether to place the child in protective custody;
 - (5) An agency, whether public or private, including any division or unit in the Department of Human Services or the Department of Children and Families, authorized to care for, treat, assess, evaluate or supervise a child who is the subject of a child abuse report, or a parent, guardian, resource family parent or
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other person who is responsible for the child's welfare, or both, when the information is needed in connection with the provision of care, treatment, assessment, evaluation or supervision to such child or such parent, guardian, resource family parent or other person and the provision of information is in the best interests of the child as determined by the Division of Youth and Family Services;

(6) A court or the Office of Administrative Law, upon its finding that access to such records may be necessary for determination of an issue before it, and such records may be disclosed by the court or the Office of Administrative Law in whole or in part to the law guardian, attorney or other appropriate person upon a finding that such further disclosure is necessary for determination of an issue before the court or the Office of Administrative Law;

(7) A grand jury upon its determination that access to such records is necessary in the conduct of its official business;

(8) Any appropriate State legislative committee acting in the course of its official functions, provided, however, that no names or other information identifying persons named in the report shall be made available to the legislative committee unless it is absolutely essential to the legislative purpose;

(9) (Deleted by amendment, P.L.1997, c.175).

(10) A family day care sponsoring organization for the purpose of providing information on child abuse or neglect allegations involving prospective or current providers or household members pursuant to P.L.1993, c.350 (C.30:5B-25.1 et seq.) and as necessary, for use in administrative appeals related to information obtained through a child abuse registry search;

(11) The Victims of Crime Compensation Board, for the purpose of providing services available pursuant to the "Criminal Injuries Compensation Act of 1971," P.L.1971, c.317 (C.52:4B-1 et seq.) to a child victim who is the subject of such report;

(12) Any person appealing a department service or status action or a substantiated finding of child abuse or neglect and his attorney or authorized lay representative upon a determination by the department or the presiding Administrative Law Judge that such disclosure is necessary for a determination of the issue on appeal;

(13) Any person or entity mandated by statute to consider child abuse or neglect information when conducting a background check or employment-related screening of an individual employed by or seeking employment with an agency or organization providing services to children;

(14) Any person or entity conducting a disciplinary, administrative or judicial proceeding to determine terms of employment or continued employment of an officer, employee, or volunteer with an agency or organization providing services for children. The information may be disclosed in whole or in part to the appellant or other appropriate person only upon a determination by the person or entity conducting the proceeding that the disclosure is necessary to make a determination;

(15) The members of a county multi-disciplinary team, established in accordance with State guidelines, for the purpose of coordinating the activities of agencies handling alleged cases of child abuse and neglect;

(16) A person being evaluated by the department or the court as a potential care-giver to determine whether that person is willing and able to provide the care and support required by the child;

(17) The legal counsel of a child, parent or guardian, whether court-appointed or retained, when information is needed to discuss the case with the department in order to make decisions relating to or concerning the child;

(18) A person who has filed a report of suspected child abuse or neglect for the purpose of providing that person with only the disposition of the investigation;

(19) A parent, resource family parent or legal guardian when the information is needed in a department matter in which that parent, resource family parent or legal guardian is directly involved. The information may be released only to the extent necessary for the requesting parent, resource family parent or legal guardian to discuss services or the basis for the department's involvement or to develop, discuss, or implement a case plan for the child;

(20) A federal, State or local government entity, to the extent necessary for such entity to carry out its responsibilities under law to protect children from abuse and neglect;

(21) Citizen review panels designated by the State in compliance with the federal "Child Abuse Prevention and Treatment Act Amendments of 1996," Pub.L.104-235;

(22) The Child Fatality and Near Fatality Review Board established pursuant to P.L.1997, c.175 (C.9:6-8.83 et al.); or

(23) Members of a family team or other case planning group formed by the Division of Youth and Family Services and established in accordance with regulations adopted by the Commissioner of Children and Hilary Downing v. NJ Department of Children & Family Services, 2010-295 – Findings and Recommendations of the Executive Director

entitled to such records on behalf of her minor daughter does not meet any criteria set forth in N.J.S.A. 9:6-8.10(b). Furthermore, Complainant's assertion that the Custodian should disclose the records pursuant to N.J.S.A. 9:6-8.10(b)(12) is incorrect because only DCF or an Administrative Law Judge may determine that disclosure is necessary for a determination of the issue on appeal. The Complainant herein has not provided any evidence to establish that any exception of N.J.S.A. 9:6-8.10(b) applies in the instant matter to permit her access to the requested records.

Therefore, the Custodian did not unlawfully deny access to the Complainant's OPRA request because the requested records are exempt from disclosure pursuant to the provisions of N.J.S.A. 9:6-8.10(a) and N.J.S.A. 47:1A-9.a. N.J.S.A. 47:1A-6. Furthermore, the Complainant failed to show that any exception of N.J.S.A. 9:6-8.10(b) applies in the instant matter to permit her access to the requested records.

Whether the Custodian's insufficient response rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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:

“... If 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,

Families for the purpose of addressing the child's safety, permanency or well-being, when the provision of such information is in the best interests of the child as determined by the Division of Youth and Family Services.

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)).

The Custodian violated N.J.S.A. 47:1A-5.g. by failing to provide a specific lawful basis for a denial of the Complainant's OPRA request. However, the Custodian bore her burden of proof that the requested records are not disclosable under OPRA pursuant to N.J.S.A. 47:1A-9.a. and N.J.S.A. 9:6-8.10(a). 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, it is concluded that 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 Executive Director respectfully recommends the Council find that:

1. Although the Custodian responded in writing to the Complainant's October 28, 2010 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response was legally insufficient because she failed to provide a specific lawful basis for said denial of access. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g. and DeAppolonio, Esq. v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009).
2. The Custodian did not unlawfully deny access to the Complainant's OPRA request because the requested records are exempt from disclosure pursuant to the provisions of N.J.S.A. 9:6-8.10(a) and N.J.S.A. 47:1A-9.a. N.J.S.A. 47:1A-6. Furthermore, the Complainant failed to show that any exception of N.J.S.A. 9:6-8.10(b) applies in the instant matter to permit her access to the requested records.
3. The Custodian violated N.J.S.A. 47:1A-5.g. by failing to provide a specific lawful basis for a denial of the Complainant's OPRA request. However, the Custodian bore her burden of proof that the requested records are not disclosable under OPRA pursuant to N.J.S.A. 47:1A-9.a. and N.J.S.A. 9:6-8.10(a). 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, it is concluded that 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: Harlynn A. Lack, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.

Executive Director

April 18, 2012