



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

December 18, 2012 Government Records Council Meeting

Wyatt Kraft
Complainant

Complaint No. 2011-267

v.

County of Hudson
Custodian of Record

At the December 18, 2012 public meeting, the Government Records Council (“Council”) considered the November 20, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian violated N.J.S.A. 47:1A-5.e. by failing to provide immediate access, or provide an immediate response, to the Complainant’s OPRA request for overtime and compensatory time records. Additionally, the Custodian’s failure to respond in writing to the remainder of 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. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Because the Custodian has certified that no records responsive to the Complainant’s OPRA request for phone and computer logs exist and there is no credible evidence in the record to refute the Custodian’s certification, pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Custodian has not unlawfully denied the Complainant access to the requested records. N.J.S.A. 47:1A-6.
3. Because the Custodian has certified that no records responsive to the Complainant’s OPRA request for overtime and comp records for Madelon Michaels and Christian Araujo exist and there is no credible evidence in the record to refute the Custodian’s certification, pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Custodian has not unlawfully denied the Complainant access to the requested records. N.J.S.A. 47:1A-6. Further, the Custodian disclosed the responsive overtime records for Cielo Gutierrez on August 22, 2011, thus the Council need not order disclosure here.



4. The Custodian violated N.J.S.A. 47:1A-5.e. by failing to respond immediately to the Complainant's OPRA request for overtime records. Additionally, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to respond to the remainder of the Complainant's OPRA request within the statutorily mandated seven (7) business days. However, the Custodian ultimately disclosed the responsive overtime records for Cielo Gutierrez, and the Custodian did not unlawfully deny access to all other records responsive because the Custodian certified that no additional responsive records exist. Therefore, it is concluded that 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 18th Day of December, 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: December 20, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 18, 2012 Council Meeting**

Wyatt Kraft¹
Complainant

GRC Complaint No. 2011-267

v.

County of Hudson²
Custodian of Records

Records Relevant to Complaint:

1. Phone logs and computer logs for Madelon Michaels, Cielo Gutierrez and Christian Araujo from January 1, 2011 to present.
2. Overtime or compensatory (“comp”) time records for Madelon Michaels, Cielo Gutierrez and Christian Araujo from January 1, 2011 to present.

Requests Made: June 10, 2011

Responses Made: August 18, 2011 and August 22, 2011

Custodian: Robert J. Pompliano, Esq.

GRC Complaint Filed: August 12, 2011³

Background

June 10, 2011

Complainant’s Open Public Records Act (“OPRA”) requests.⁴ The Complainant requests the records relevant to this complaint listed above on official OPRA request forms.

August 12, 2011

Denial of Access Complaint filed with the Government Records Council (“GRC”) attaching the Complainant’s OPRA requests dated June 10, 2011.

The Complainant states that he submitted his OPRA requests on June 10, 2011. The Complainant states that from June 10, 2011 through August 3, 2011 he spoke to Neil Carroll from the County numerous times. The Complainant states that Mr. Carroll assured the Complainant that he would speak to the Custodian regarding the request. The Complainant states that he has not yet received any response from the Custodian.

Additionally, the Complainant does not agree to mediate this complaint.

¹ No legal representation listed on record.

² No legal representation listed on record.

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

⁴ The Complainant submitted two (2) separate OPRA requests on said date.

August 16, 2011

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

August 18, 2011

Custodian’s response to the OPRA request. The Custodian responds in writing via e-mail to the Complainant’s OPRA request on the forty-seventh (47th) business day following receipt of such request.⁵ The Custodian states that phone logs and computer log records are not maintained pursuant to the requirements of N.J.S.A. 47:1A-1 et seq. Further, the Custodian states that there are no overtime and/or comp time records for Madelon Michaels and Christian Araujo. However, the Custodian states that he has secured the overtime and comp records for Cielo Gutierrez and will submit same through interdepartmental mail if same is acceptable to the Complainant. Additionally, the Custodian questions whether the Complainant will withdraw his Denial of Access Complaint with the GRC.

August 18, 2011

E-mail from Complainant to Custodian. The Complainant states he received a message that the Custodian called on August 12, 2011. The Complainant states that the Custodian may send the records through interoffice mail if it is not a burden to the County. Otherwise, the Complainant states that he would pick up the records.

Additionally, the Complainant states that he reviewed N.J.S.A. 47:1A-1 and does not see where it states that phone call records or internet records are exempt from an OPRA request. The Complainant questions why said records would not be maintained in today’s age of government transparency when phone and internet bills are paid with tax dollars. The Complainant states that he is aware that a phone audit can be performed and that the same should be available for the internet logs.

Finally, the Complainant states that he does not intend to withdraw his complaint with the GRC as his request has yet to be filled.

August 22, 2011

Custodian’s subsequent response to the Complainant’s OPRA requests. The Custodian states that there are no overtime or comp records for Madelon Michaels or Christian Araujo. The Custodian states that there are overtime and comp records for Cielo Gutierrez which are attached to this letter.

Additionally, the Custodian states that the Complainant’s request for computer logs and phone logs do not appear to fall within the definitions of OPRA. The Custodian states that he has been advised that Hudson County does not maintain computer log records or phone log records in its ordinary course; however, the Custodian reserves his right to raise any OPRA exemptions for said records.

August 22, 2011

Custodian’s SOI with the following attachments:

- Complainant’s OPRA requests dated June 10, 2011

⁵ The Custodian certifies in the SOI that he received the Complainant’s OPRA request on June 13, 2011.
Wyatt Kraft v. County of Hudson, 2011-267 – Findings and Recommendations of the Executive Director

- Custodian’s response to the Complainant’s OPRA requests dated August 22, 2011
- Complainant’s Denial of Access Complaint

The Custodian certifies that he believes Neil Carroll received the Complainant’s OPRA requests on or about June 13, 2011 and subsequently forwarded said requests to the Custodian. The Custodian certifies that he responded to the Complainant’s OPRA request on August 22, 2011, but that he believes a response was also provided to the Complainant earlier.⁶ The Custodian certifies that the only records responsive to the Complainant’s requests are overtime records for Sheriff’s Officer Gutierrez which he provided to the Complainant on August 22, 2011. The Custodian also certifies that Hudson County does not maintain computer log records or phone log records.

The Custodian certifies that his search for the requested records included discussions with the Assistant Personnel Employee of the Hudson County Sheriff’s Office, the Director of Weights and Measures and the Assistant Hudson County Counsel.

The Custodian also certifies that in accordance with the Records Destruction Schedule established and approved by Records Management Services, payroll records are to be maintained for seven (7) years.

Analysis

Whether the Custodian timely responded to the Complainant’s OPRA request?

OPRA states that:

“Immediate access ordinarily shall be granted to budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.” (Emphasis added). N.J.S.A. 47:1A-5.e.

OPRA also 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*

⁶ The Custodian does not provide any evidence of a previous response to the Complainant’s OPRA requests.

failure to respond shall be deemed a denial of the request ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

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. As also prescribed under 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. 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. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

However, OPRA also includes a separate provision at N.J.S.A. 47:1A-5.e. which mandates that immediate access shall be provided when a requestor seeks public employee salaries or overtime information.

Here, the Custodian certified that the County received the Complainant’s OPRA request on or about June 13, 2011. Additionally, the Custodian certified that he responded to the Complainant’s OPRA request on August 22, 2011. The Custodian indicated that he believed responses were provided earlier, but the Custodian failed to provide any evidence of earlier responses. As of August 3, 2011 when the Complainant filed his Denial of Access Complaint, the Complainant indicated that he had not yet received any response to his OPRA requests.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian violated N.J.S.A. 47:1A-5.e. by failing to provide immediate access, or provide an immediate response, to the Complainant’s OPRA request for overtime and compensatory time records. Additionally, the Custodian’s failure to respond in writing to the remainder of 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, 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.

⁷ It is the GRC’s position that 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.

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 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.

Complainant’s OPRA Request for Phone and Computer Logs

In e-mails dated August 18, 2011 and August 22, 2011, the Custodian denied access to the Complainant’s OPRA request for phone and computer logs of three (3) employees on the basis that same are not maintained by the County pursuant to the requirements of N.J.S.A. 47:1A-1 et seq. In an e-mail to the Custodian dated August 18, 2011, the Complainant questioned why said records would not be maintained in today’s age of government transparency when phone and internet bills are paid with tax dollars. Additionally, the Complainant stated that he is aware that a phone audit can be performed and that the same should be available for the internet logs. However, in the Custodian’s SOI, the Custodian legally certified that Hudson County does not maintain computer log records or phone log records. Further, the Complainant has provided no competent evidence to contradict the Custodian’s certification.

The Council has consistently held that there exists no denial of access when a custodian has demonstrated that no records responsive to a complainant’s request exist. In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The Custodian responded stating that there was no record of any telephone calls made to the Complainant. The Custodian subsequently certified that no records responsive to the Complainant’s request existed and the Complainant submitted no evidence to refute said certification. The GRC held the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed.

As in Pusterhofer, the Custodian in the instant matter has certified that there are no records in the County's possession that are responsive to the Complainant's request for phone or computer logs. Accordingly, in the absence of any competent evidence to the contrary, the Custodian has legally discharged his statutory duties under OPRA.

Therefore, because the Custodian has certified that no records responsive to the Complainant's OPRA request for phone and computer logs exist and there is no credible evidence in the record to refute the Custodian's certification, pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Custodian has not unlawfully denied the Complainant access to the requested records. N.J.S.A. 47:1A-6.

Complainant's OPRA Request for Overtime and Comp Records

In e-mails dated August 18, 2011 and August 22, 2011, the Custodian denied access to overtime and comp records for Madelon Michaels and Christian Araujo on the basis that said records do not exist. However, the Custodian granted access to the overtime and comp records for Cielo Gutierrez. In the Custodian's SOI, the Custodian legally certified that the only records responsive to the Complainant's OPRA request were the overtime records for Sheriff's Officer Gurierrez, which the Custodian provided on August 22, 2011. The Complainant has not provided any competent evidence to refute the Custodian's certification.

Therefore, because the Custodian has certified that no records responsive to the Complainant's OPRA request for overtime and comp records for Madelon Michaels and Christian Araujo exist and there is no credible evidence in the record to refute the Custodian's certification, pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Custodian has not unlawfully denied the Complainant access to the requested records. N.J.S.A. 47:1A-6. Further, the Custodian disclosed the responsive overtime records for Cielo Gutierrez on August 22, 2011, thus the Council need not order disclosure here.

Whether the Custodian's actions rise 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 (Felder 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, the Custodian violated N.J.S.A. 47:1A-5.e. by failing to respond immediately to the Complainant’s OPRA request for overtime records. Additionally, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to respond to the remainder of the Complainant’s OPRA request within the statutorily mandated seven (7) business days. However, the Custodian ultimately disclosed the responsive overtime records for Cielo Gutierrez, and the Custodian did not unlawfully deny access to all other records responsive because the Custodian certified that no additional responsive records exist. Therefore, it is concluded that 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 his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian violated N.J.S.A. 47:1A-5.e. by failing to provide immediate access, or provide an immediate response, to the Complainant’s OPRA request for overtime and compensatory time records. Additionally, the Custodian’s failure to respond in writing to the remainder of 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. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Because the Custodian has certified that no records responsive to the Complainant’s OPRA request for phone and computer logs exist and there is no credible evidence in the record to refute the Custodian’s certification,

pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Custodian has not unlawfully denied the Complainant access to the requested records. N.J.S.A. 47:1A-6.

3. Because the Custodian has certified that no records responsive to the Complainant's OPRA request for overtime and comp records for Madelon Michaels and Christian Araujo exist and there is no credible evidence in the record to refute the Custodian's certification, pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Custodian has not unlawfully denied the Complainant access to the requested records. N.J.S.A. 47:1A-6. Further, the Custodian disclosed the responsive overtime records for Cielo Gutierrez on August 22, 2011, thus the Council need not order disclosure here.

4. The Custodian violated N.J.S.A. 47:1A-5.e. by failing to respond immediately to the Complainant's OPRA request for overtime records. Additionally, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to respond to the remainder of the Complainant's OPRA request within the statutorily mandated seven (7) business days. However, the Custodian ultimately disclosed the responsive overtime records for Cielo Gutierrez, and the Custodian did not unlawfully deny access to all other records responsive because the Custodian certified that no additional responsive records exist. Therefore, it is concluded that 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: Dara L. Barry
Communications Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

November 20, 2012⁸

⁸ This complaint was prepared and scheduled for adjudication at the Council's November 27, 2012 meeting; however, said meeting was cancelled due to lack of quorum.