



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

FINAL DECISION

December 18, 2012 Government Records Council Meeting

Meir Diskind  
Complainant

Complaint No. 2011-279

v.

NJ Department of Community Affairs,  
Division of Housing & Community Resources  
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. 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’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. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Because the only responsive record to the Complainant’s request was an application for federal housing assistance that qualifies as confidential information under the federal Privacy Act of 1974, N.J.S.A. 47:1A-9.a. dictates that such information is not disclosable under OPRA in the absence of the fulfillment of the release requirements mandated by the Housing Choice Voucher Administrative Plan and 5 U.S.C. 522a(b). Thus, the Custodian bore his burden of proof that the denial of access to the records requested herein was lawful. N.J.S.A. 47:1A-6.
3. In the matter before the Council, the Custodian did not bear his burden of proving that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Custodian’s failure to respond in writing to the Complainant’s request within the statutorily mandated seven (7) business days resulted in a deemed denial and a violation of N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. However, the Custodian lawfully denied the Complainant access to the responsive application for federal housing assistance because the release of such a record is prohibited by the Privacy

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Act of 1974 absent the execution of a signed release as required by the Housing Choice Voucher Administrative Plan and 5 U.S.C. 522a(b). Accordingly, 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, 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 18<sup>th</sup> 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**

**Meir Diskind<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-279**

v.

**New Jersey Department of Community Affairs,  
Division of Housing and Community Resources<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

Copies of the entire file including but not limited to:

- All paperwork and documentation pertaining to my application for Section 8 rental assistance
- The original application
- All ensuing paperwork filled out after I was contacted for possible eligibility
- All documentation relating to the denial of services
- All e-mails between parties relating to this file – individuals and/or agencies
- All notes of telephone calls between parties related to this file
- All copies of faxes related to this file
- All notes of telephone conversations between me and agency representatives or employees
- All conversations, notes, e-mails, faxes, and any other copies or documentation following receipt of paperwork for eligibility
- All of the above relating to reasons and/or basis for denial of services

**Request Made:** August 3, 2011

**Response Made:** August 25, 2011

**Custodian:** Robert Wright

**GRC Complaint Filed:** August 22, 2011<sup>3</sup>

**Background**

**August 3, 2011**

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> No legal representation listed on record.

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

**August 22, 2011**

Denial of Access Complaint filed with the Government Records Council (“GRC”) with an attached copy of the Complainant’s OPRA request dated August 3, 2011.<sup>4</sup>

The Complainant states that he did not get a response to the OPRA request that he sent via facsimile on August 3, 2011. The Complainant does not agree to mediate this complaint.

**August 25, 2011**

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

**September 9, 2011**

Custodian’s SOI with no attachments.

The Custodian certifies that a search for the requested records yielded an application for federal housing assistance (Section 8) that was dated December 8, 2008 that included authorization forms, handwritten notes, handwritten statements, a route slip, a certificate of marriage, and a denial of application letter. The Custodian further certifies that there is no application retention schedule and that no records were destroyed.

The Custodian certifies that the Complainant’s request was denied because the Department of Community Affairs (“DCA”) has a duty to safeguard from public access a citizen’s personal information with which it has been entrusted and cites Burnett v. City of Bergen, 198 N.J. 408, 427 (2009) and Executive Order 21, section 3 (Gov. McGreevey, 2002) in support of this proposition. The Custodian maintains that the Division of Housing was not sure that the requesting party was indeed the Complainant and did not want to disclose the application file as it contains bank account numbers, social security numbers, and address information. The Custodian certifies that he requested that the Complainant supply the Division of Housing with a notarized copy of a release if he wished the documents to be released in unredacted form. The Custodian states that the Complainant has refused to execute such a release. The Custodian certifies that all of the correspondence he received was via e-mail or facsimile, and therefore, there was no way in which to verify the identity of the requestor of this sensitive information.

The Custodian argues that without an executed release, Executive Order 26, section 4(b)(3) (Gov. McGreevey, 2002) prohibits the disclosure of records containing information “describing a natural person’s finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness,” as such documents will not be considered government records subject to OPRA.

In addition, the Custodian certifies that the DCA’s Housing Choice Voucher Administrative Plan (“HCVP”) for the Section 8 Program specifically requires that each

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<sup>4</sup> The Complainant attached additional documentation that is not relevant to the adjudication of this complaint.

Division of Housing program sign a Statement of Confidentiality and apply the necessary federal discretionary policies adopted by the DCA in its administration of the HCVP.

### Analysis

#### **Whether the Custodian timely responded to the Complainant's OPRA request?**

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.

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 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.<sup>5</sup> 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).

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<sup>5</sup> 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.

In the instant matter, the Complainant filed an OPRA request on August 3, 2011. While the Custodian certified in his SOI that a response to the Complainant's request was provided on August 25, 2011, the Custodian did not provide any competent evidence that a response was actually provided because he failed to submit to the GRC a copy of such response.

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'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, supra.

### **Whether the Custodian unlawfully denied the Complainant access to the requested records?**

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.

In addition, 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.

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.

Moreover, OPRA provides that:

"[t]he provisions of [OPRA] shall not abrogate any exemption of a public record...from public access made pursuant to [OPRA]...regulation promulgated under the authority of any statute..." N.J.S.A. 47:1A-9.a.

Federal agencies and agencies that oversee and collect information in furtherance of federal programs must abide by the Privacy Act of 1974, which in part states that:

“No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains.” 5 U.S.C. 522a(b).

Privacy concerns are further expressed in OPRA, as it provides that:

“[A] public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy; and nothing contained in P.L. 1963, c. 73 (C. 47:1A-1 et seq.), as amended and supplemented, shall be construed as affecting in any way the common law right of access to any record, including but not limited to criminal investigatory records of a law enforcement agency.” N.J.S.A. 47:1A-1.

In the instant matter, the Complainant made a broad request seeking copies of his “entire file.” On its face, such a request is an overly broad, blanket request. See MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005). However, although the Custodian failed to respond to the Complainant’s request, the Custodian’s Statement of Information to the GRC certifies that he was able to locate an application file for federal assistance that may be responsive to the Complainant’s request. Accordingly, a discussion of the disclosability of the application file is required.

In arguing the legality of the denial of access to the application file, the Custodian certified that the records he located are a part of the application process required by the Department of Community Affairs’ Housing Choice Voucher Administrative Plan (“HCVP”) for the federal government’s Section 8 Program.<sup>6</sup> The Custodian certified that as a federal program, the information collected is protected by the Privacy Act of 1974 (“Privacy Act”) and requires that written consent be given by the owner of such information before it is released.

The Custodian further certified that he requested that the Complainant supply the Division of Housing with a notarized copy of a release form if he wished the documents to be released in unredacted form, but the Complainant refused to sign such a release. Accordingly, the Custodian certified that he is prohibited from releasing the information contained in the application file and that the requirements of the Privacy Act prohibit him from doing so.

As stated, the access granted to government records under OPRA does not abrogate existing exemptions to public access pursuant to N.J.S.A. 47:1A-9.a. The evidence of record indicates that the application file the Complainant has requested was created as part of the application process required by the HCVP, a federal program.

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<sup>6</sup> The housing choice voucher program is the federal government's major program for assisting very low-income families, the elderly, and the disabled to afford decent, safe, and sanitary housing in the private market.  
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Accordingly, the Privacy Act requires that the owner of the information contained in the application sign a release before it is disclosed. Absent such action, the information contained within cannot be released.

Therefore, because the only responsive record to the Complainant's request was an application for federal housing assistance that qualifies as confidential information under the federal Privacy Act of 1974, N.J.S.A. 47:1A-9.a. dictates that such information is not disclosable under OPRA in the absence of the fulfillment of the release requirements mandated by the Housing Choice Voucher Administrative Plan and 5 U.S.C. 522a(b). Thus, the Custodian bore his burden of proof that the denial of access to the records requested herein was lawful. N.J.S.A. 47:1A-6.

**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 (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 (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)).

In the matter before the Council, the Custodian did not bear his burden of proving that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6.



Custodian's failure to respond in writing to the Complainant's request within the statutorily mandated seven (7) business days resulted in a deemed denial and a violation of N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. However, the Custodian lawfully denied the Complainant access to the responsive application for federal housing assistance because the release of such a record is prohibited by the Privacy Act of 1974 absent the execution of a signed release as required by the Housing Choice Voucher Administrative Plan and 5 U.S.C. 522a(b). Accordingly, 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, 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. 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'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. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Because the only responsive record to the Complainant's request was an application for federal housing assistance that qualifies as confidential information under the federal Privacy Act of 1974, N.J.S.A. 47:1A-9.a. dictates that such information is not disclosable under OPRA in the absence of the fulfillment of the release requirements mandated by the Housing Choice Voucher Administrative Plan and 5 U.S.C. 522a(b). Thus, the Custodian bore his burden of proof that the denial of access to the records requested herein was lawful. N.J.S.A. 47:1A-6.
3. In the matter before the Council, the Custodian did not bear his burden of proving that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Custodian's failure to respond in writing to the Complainant's request within the statutorily mandated seven (7) business days resulted in a deemed denial and a violation of N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. However, the Custodian lawfully denied the Complainant access to the responsive application for federal housing assistance because the release of such a record is prohibited by the Privacy Act of 1974 absent the execution of a signed release as required by the Housing Choice Voucher Administrative Plan and 5 U.S.C. 522a(b). Accordingly, 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, 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: Darryl C. Rhone  
Case Manager

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

November 20, 2012<sup>7</sup>

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<sup>7</sup> 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.  
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