



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

March 22, 2013 Government Records Council Meeting

Victor Lopez-Rodriguez
Complainant

Complaint No. 2011-325

v.

Passaic County Prosecutor's Office
Custodian of Record

At the March 22, 2013 public meeting, the Government Records Council ("Council") considered the March 15, 2013 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 original Custodian unlawfully denied access to the responsive records. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of same because the current Custodian provided the records to the Complainant on November 8, 2012.
2. The original Custodian unlawfully denied access to the responsive records pursuant to N.J.S.A. 47:1A-6; however, the current Custodian disclosed same to the Complainant on November 8, 2012. Additionally, the evidence of record does not indicate that the original Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the original 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 22nd Day of March, 2013



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

Robin Berg Tabakin, Esq., Chair
Government Records Council

Decision Distribution Date: April 1, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 22, 2013 Council Meeting**

**Victor Lopez-Rodriguez¹
Complainant**

GRC Complaint No. 2011-325

v.

**Passaic County Prosecutor's Office²
Custodian of Records**

Records Relevant to Complaint: Copies of the Complainant's initial "arrest warrant/CDR-2/green sheet."

Request Made: January 4, 2008

Response Made: January 15, 2008

GRC Complaint Filed: October 21, 2011³

Background⁴

The Complainant filed his OPRA request with the Passaic County Prosecutor's Office ("PCPO") on January 4, 2008 seeking the records listed above. The Complainant responded in writing on January 15, 2008, the seventh (7th) business day after receipt of same, stating that the responsive records are exempt from disclosure as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1.

The Complainant filed his Denial of Access Complaint with the Government Records Council ("GRC") on October 21, 2011. The Complainant argues that the records are not criminal investigatory records and are commonly released to newspapers for a "police blotter" section.

The Custodian filed her Statement of Information ("SOI") on February 21, 2013.⁵ The Custodian certifies that because she was not the custodian at the time of the OPRA request, she cannot certify to the search undertaken at that time. The Custodian certifies that after receiving a copy of this complaint in October 2012, she retrieved the Complainant's file from storage and

¹ No legal representation listed on record.

² Mary Kate Ryan, Esq., Custodian of Records. The original Custodian of Record was Steven E. Braun, Esq. No legal representation listed on record.

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

⁴ 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.

⁵ After being advised of a custodian change on October 26, 2012, the GRC reoffered mediation to the PCPO. This complaint was referred to mediation on November 15 2012. This complaint was referred back from mediation on January 8, 2013. The Complainant did not submit an amendment to the Denial of Access Complaint.

obtained the records referenced in the complaint. The Custodian further certifies that to the best of her knowledge, no records were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services.

The Custodian certifies that the PCPO received the Complainant's OPRA request on January 10, 2008. The Custodian certifies that the original Custodian responded on January 15, 2008 denying access to the responsive records pursuant to N.J.S.A. 47:1A-1.1. The Custodian notes that the OPRA request at issue is five (5) years old and the original custodian retired in 2008. The Custodian notes that for these reasons, she could not locate the original OPRA request and was unable to properly complete the SOI. The Custodian certifies that notwithstanding the foregoing, she relied on "Records Denied List" portion of the Complainant's Denial of Access Complaint to provide the Complainant with the arrest warrant and green sheet on November 8, 2012.

Analysis

Unlawful Denial of Access

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.

Additionally, OPRA provides for certain exemptions that include "criminal investigatory records ..." N.J.S.A. 47:1A-1.1. Here, the original Custodian denied access to the Complainant's OPRA request stating that the responsive records were exempt from disclosure as criminal investigatory records. However, the current Custodian located and provided the responsive records on November 8, 2012.

Regarding the original Custodian's denial of access to the "warrant//CDR-2/green sheet," the evidence of record herein suffers from an erosion of time and a written argument from the original Custodian as to why he believed the responsive records were criminal investigatory in nature. This is because the request at issue is now five (5) years old and the current Custodian certified in the SOI that the original Custodian retired in 2008. Thus, the current Custodian was unable to provide a viable defense for why the original Custodian denied access to the records.

Additionally, the GRC has previously decided on complaints where warrants were at issue. In those instances, the GRC never determined that the warrants were exempt from disclosure as criminal investigatory records. *See Paff v. Cumberland County Sheriff's Office*, GRC Complaint No. 2005-159 (January 2006); *Rosenberg v. Bergen County Sheriff's Office*, GRC Complaint No. 2008-96 (April 2009); *Harris v. NJ Dept. of Corrections*, GRC Complaint No. 2010-233 (February 2012). Thus, there is no evidence supporting the original Custodian's claim that the responsive records were exempt from disclosure.

Therefore, the original Custodian unlawfully denied access to the responsive records. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of same because the current Custodian provided the records to the Complainant on November 8, 2012.

Knowing & Willful

OPRA states that:

“[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ...” N.J.S.A. 47:1A-11(a).

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

“... 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)).

The original Custodian unlawfully denied access to the responsive records pursuant to N.J.S.A. 47:1A-6; however, the current Custodian disclosed same to the Complainant on November 8, 2012. Additionally, the evidence of record does not indicate that the original Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the original 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. The original Custodian unlawfully denied access to the responsive records. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of same because the current Custodian provided the records to the Complainant on November 8, 2012.
2. The original Custodian unlawfully denied access to the responsive records pursuant to N.J.S.A. 47:1A-6; however, the current Custodian disclosed same to the Complainant on November 8, 2012. Additionally, the evidence of record does not indicate that the original Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the original 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: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

March 15, 2013