



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

August 28, 2012 Government Records Council Meeting

Harry James
Complainant

Complaint No. 2011-36

v.

New Jersey Department of Law & Public Safety,
Division of Consumer Affairs
Custodian of Record

At the August 28, 2012 public meeting, the Government Records Council (“Council”) considered the August 21, 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’s response was timely and in writing, such response failed to grant access, deny access, seeking clarification or request an extension of time. Therefore, the Custodian’s response to the Complainant’s OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. See Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. Because the Custodian certified in the Statement of Information that health care profiles for nurses do not exist and there is no evidence in the record to refute the Custodian’s certification, the Custodian has not unlawfully denied the Complainant access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.
3. The Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., *i.e.*, by providing an insufficient response to the Complainant’s OPRA request by requesting the Complainant to provide him with information pertaining to any of the Complainant’s indictable convictions. However, the Custodian certified that there are no health care profiles responsive to the Complainant’s OPRA request, and there is no evidence to refute the Custodian’s certification. 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 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 28th Day of August, 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: August 30, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 28, 2012 Council Meeting**

**Harry James¹
Complainant**

GRC Complaint No. 2011-36

v.

**New Jersey Department of Law & Public Safety
Division of Consumer Affairs²
Custodian of Records**

Records Relevant to Complaint: Health care profiles concerning the nurses, Cynthia Kaszian, Elzona Livingston, Jennifer Rap, Kimberly Priest, Julie Gbogi, Carol Milroy, Bernice Anene, Regina Jones, Yenken Kamara and Barbara Brown.

Request Made: October 3, 2010

Response Made: October 28, 2010

Custodian: Robert J. Campanelli

GRC Complaint Filed: February 4, 2011³

Background

October 3, 2010

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.

October 28, 2010

Custodian's response to the OPRA request. The Custodian responds in writing via letter to the Complainant's OPRA request on the same business day following receipt of such request.⁴ The Custodian states that before he can consider the Complainant's request, he is required to review information pertaining to any indictable offense for which the Complainant was convicted. The Custodian requests the Complainant to provide him with the following information: 1) the nature of the offense and conviction; 2) the name of the case; 3) the date of the conviction; 4) the jurisdiction; 5) the names of victims (if applicable); and 6) the docket number. The Custodian further states that the New Jersey State Board of Nursing does not maintain a healthcare profile for nurses. The Custodian requests the Complainant to identify the specific records he is seeking.

¹ No legal representation listed on record.

² Represented by DAG Steven Flanzman, Esq., 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 Statement of Information that he received the Complainant's OPRA request on October 28, 2010.

November 9, 2010

Letter from the Complainant to the Custodian. The Complainant states that the Custodian's requirement to review information pertaining to any indictable offense is antithetical and repugnant under OPRA. The Complainant further states that the Custodian placed a burden on the Complainant by requiring him to provide personal information, which would be the Custodian's obligation to obtain if he was seeking victim records. The Complainant additionally states that such a burden was not contemplated by the Legislature. Lastly, the Complainant states that the Custodian's actions violate the separation of powers doctrine and the doctrine of unconstitutional conditions.

January 6, 2011

Government records request receipt from the Custodian to the Complainant. The Custodian states that the Complainant has not yet responded to the Custodian's request on October 28, 2010 for any indictable information. The Custodian denies the Complainant's request as overly broad and unclear pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Gannett N.J. Partners, L.P. v. County of Middlesex, 379 N.J. Super. 205, 212 (App. Div. 2005). The Custodian further states that OPRA is for requesting records and not information. The Custodian additionally states that a request must identify with reasonable clarity those records that are desired and a party cannot satisfy this requirement by simply requesting all of an agency's records.

February 4, 2011

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

- Complainant's OPRA request dated October 3, 2010
- Letter from the Custodian to the Complainant dated October 28, 2010
- Letter from the Complainant to the Custodian dated November 9, 2010⁵

The Complainant does not indicate whether he wants to participate in the mediation process.

February 17, 2011

Offer of Mediation sent to both parties.

February 25, 2011

The Custodian agrees to mediate this complaint.

March 8, 2011

The Complainant agrees to mediate this complaint.

⁵ The Complainant also includes additional material not relevant to the adjudication of the Complainant's Denial of Access Complaint.
Harry James v. New Jersey Department of Law & Public Safety, Division of Consumer Affairs, 2011-36 – Findings and Recommendations of the Executive Director 2

March 8, 2011

The Denial of Access Complaint is referred to mediation.

May 11, 2011

The Complainant's Denial of Access Complaint is referred back to the GRC for adjudication.

May 12, 2011

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

May 24, 2011

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 May 12, 2011 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.

May 24, 2011

Telephone call from the Custodian to the GRC. The Custodian requests a five (5) business day extension to complete the SOI because Custodian's Counsel will be unavailable until May 26, 2011. The GRC grants the Custodian the five (5) business day extension to complete the SOI no later than June 6, 2011.

May 24, 2011

E-mail from the GRC to the Custodian. The GRC confirms a telephone conversation granting a five (5) business day extension to complete the SOI. The GRC states the Custodian must provide the SOI no later than June 6, 2011.

June 6, 2011⁶

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated October 3, 2010
- Letter from the Custodian to the Complainant dated October 28, 2010
- Letter from the Complainant to the Custodian dated November 9, 2010
- Government Records Request Receipt dated January 6, 2011

The Custodian certifies that he received the Complainant's OPRA request on October 28, 2010 for "health care profiles concerning the nurses, Cynthia Kaszian, Elzona Livingston, Jennifer Rap, Kimberly Priest, Julie Gbogi, Carol Milroy, Bernice Anene, Regina Jones, Yenken Kamara and Barbara Brown." The Custodian also certifies that the Complainant failed to complete the certification on the OPRA request form detailing whether he had or had not been convicted of an indictable offense. The Custodian further certifies that the Complainant's return address was a prison address and

⁶ The Custodian did not certify to the search undertaken to locate the records responsive or whether any records responsive to the Complainant's OPRA request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).

that the Custodian deduced that the Complainant was incarcerated. The Custodian additionally certifies that he responded to the Complainant's request on October 28, 2010 via letter advising the Complainant that before he could consider the OPRA request, the Custodian needed to review information pertaining to any indictable offense for which the Complainant was convicted. The Custodian certifies that he also informed the Complainant on October 28, 2010 via letter that the NJ State Board of Nursing does not maintain health care profiles for nurses and thus requested the Complainant to specify what records he was seeking.

The Custodian certifies he received a letter from the Complainant on November 1, 2010 where the Complainant objected to the Custodian's request for additional information pertaining to any indictable offense.⁷ The Custodian also certifies that the Complainant refused to supply the requested information and failed to provide any additional information specifying what records he sought. The Custodian further certifies that on January 6, 2011 he forwarded the Complainant, a formal receipt denying the Complainant's request.

The Custodian certifies that the NJ State Board of Nursing does not maintain individual profiles for licensed nurses. The Custodian further certifies that there is no statutory requirement that profiles be maintained for nurses and no such profiles are maintained. Lastly, the Custodian certifies that independent of the Complainant's failure to provide information concerning whether he was convicted of any indictable offense, it is factually the case that the Division of Consumer Affairs does not maintain the records that the Complainant sought in his OPRA request.

Analysis

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

OPRA states that:

“where it shall appear that a person who is convicted of any indictable offense under the laws of this State, any other state or the United States is seeking government records containing personal information pertaining to the person's victim or the victim's family, including but not limited to a victim's home address, home telephone number, work or school address, work telephone number, social security account number, medical history or any other identifying information, the right of access provided for in [OPRA] shall be denied...a custodian shall not comply with an anonymous request for a government record which is protected under the provisions of this section.” N.J.S.A. 47:1A-2.2.

OPRA provides that:

⁷ The Custodian certifies that he received the Complainant's letter dated November 1, 2011, however the Complainant's letter is dated November 9, 2010.
Harry James v. New Jersey Department of Law & Public Safety, Division of Consumer Affairs, 2011-36 – Findings and Recommendations of the Executive Director 4

“[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 in writing to the Complainant’s OPRA request on the same business day as receipt of such request. The Custodian stated in his response that before he could consider the Complainant’s OPRA request, he must review information pertaining to any indictable offense for which the Complainant was convicted. The Custodian requested the Complainant to provide him with the following information: 1) the nature of the offense and conviction; 2) the name of the case; 3) the date of the conviction; 4) the jurisdiction; 5) the names of victims (if applicable); and 6) the docket number. The Custodian also informed the Complainant that the NJ State Board of Nursing does not maintain healthcare profiles for nurses. The Complainant responded via letter on November 9, 2010 stating that the Custodian placed a burden on the Complainant by requiring him to provide personal information that could be the Custodian’s obligation to obtain if he was seeking victims records.

Although the Custodian’s response was timely and in writing, such response failed to grant access, deny access, seeking clarification or request an extension of time. Therefore, the Custodian’s response to the Complainant’s OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. See Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).

Moreover, N.J.S.A. 47:1A-2.2 prohibits a Custodian’s compliance with an anonymous request for a government record and further provides that a request for victim’s records from an individual convicted of an indictable offense should be denied. However, in the matter before the Council, the Complainant’s request was clearly not anonymous nor did it seek victim’s records. Thus, the Custodian’s requirement that the Complainant provide details pertaining to the nature of his offense was an improper limitation on the Complainant’s right to access pursuant to N.J.S.A. 47:1A-2.2.

Whether copies of the “health care profiles” responsive to the Complainant’s OPRA request exist?

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 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.

The Complainant’s OPRA request sought copies of “health care profiles concerning the nurses, Cynthia Kaszian, Elzona Livingston, Jennifer Rap, Kimberly Priest, Julie Gbogi, Carol Milroy, Bernice Anene, Regina Jones, Yenken Kamara and Barbara Brown.” The Custodian informed the Complainant in writing that the New Jersey State Board of Nursing does not maintain health care profiles for nurses and subsequently certified to such fact in the SOI. The Custodian also certified in the SOI that there is no statutory requirement that profiles be maintained for nurses and no such profiles are maintained. The Complainant did not submit any evidence to refute the Custodian’s certification.

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. The complainant failed to submit any evidence to refute the custodian’s certification. The GRC held that the custodian did not unlawfully deny access to the requested records because the custodian certified that no records responsive to the request existed.

Therefore, because the Custodian certified in the Statement of Information that health care profiles for nurses do not exist, and there is no evidence in the record to refute

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

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, 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 and N.J.S.A. 47:1A-5.i by providing an insufficient response to the Complainant's OPRA request, *i.e.*, by requesting the Complainant to provide information pertaining to any of the Complainant's indictable convictions. However, the Custodian certified that there are no health care profiles responsive to the Complainant's OPRA request, and there is no evidence to refute the Custodian's certification. 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 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. Although the Custodian's response was timely and in writing, such response failed to grant access, deny access, seeking clarification or request an extension of time. Therefore, the Custodian's response to the Complainant's OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. See Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. Because the Custodian certified in the Statement of Information that health care profiles for nurses do not exist and there is no evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied the Complainant access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.
3. The Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., *i.e.*, by providing an insufficient response to the Complainant's OPRA request by requesting the Complainant to provide him with information pertaining to any of the Complainant's indictable convictions. However, the Custodian certified that there are no health care profiles responsive to the Complainant's OPRA request, and there is no evidence to refute the Custodian's certification. 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 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: Harlynn A. Lack, Esq.
Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

August 21, 2012