



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
Acting Commissioner

FINAL DECISION

May 29, 2012 Government Records Council Meeting

Keith A. Werner
Complainant

Complaint No. 2011-96

v.

New Jersey Department of Corrections
Custodian of Record

At the May 29, 2012 public meeting, the Government Records Council (“Council”) considered the May 22, 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. The Custodian did not timely respond to the Complainant’s OPRA request. 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 Custodian certified in the Statement of Information that no records responsive to the Complainant’s OPRA request 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. Although the Custodian failed to provide the Complainant with a written response within the statutorily mandated seven (7) business days and therefore violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Custodian did not unlawfully deny the Complainant access to the requested records because she certified in the SOI that there are no records within the NJDOC that are responsive to the Complainant’s request and the Complainant provided 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 29th Day of May, 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: June 4, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 29, 2012 Council Meeting**

**Keith A. Werner¹
Complainant**

GRC Complaint No. 2011-96

v.

**New Jersey Department of Corrections²
Custodian of Records**

Records Relevant to Complaint: Copies of:

The most recent audit of all law library books, treatises, magazines, periodicals, reference materials and computer generated materials available to Management Control Unit prisoners.

Request Made: January 4, 2011

Response Made: February 8, 2011

Custodian: Dierdre Fedkenheuer

GRC Complaint Filed: March 29, 2011³

Background

January 4, 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. The Complainant requests that the Custodian specify each corresponding volume number, year of publication, CD-ROM, and Lexis dates listing each of the responsive records.

February 8, 2011

Custodian's response to the OPRA request. On behalf of the Custodian, New Jersey State Prison Assistant Superintendent and OPRA Liaison, Jimmy Barnes ("Liaison"), responds in writing via letter to the Complainant's OPRA request on the tenth (10th) business day following receipt of such request.⁴ The Liaison states that he needs additional information clarifying the Complainant's request before the request can be fulfilled.

March 29, 2011

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

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 Custodian certifies in the SOI that he received the Complainant's OPRA request on January 25, 2011.

- Complainant's OPRA request dated January 4, 2011
- Letter from the Custodian to the Complainant dated February 8, 2011

The Complainant argues that the Custodian's response was not timely and that despite the February 8, 2011 date on the Custodian's response, he did not receive the Custodian's response until February 23, 2011. The Complainant maintains that the Custodian's response is merely a delay tactic and the New Jersey Department of Corrections ("NJDOC") is attempting to suppress his attempt to obtain information to which he is lawfully entitled. The Complainant requests that the GRC order the Custodian to disclose the requested records and subject her to any applicable disciplinary action.

The Complainant does not agree to mediate this complaint.

March 29, 2011

Letter from the Liaison to the Complainant. The Liaison states that his office needs additional information from the Complainant clarifying his request in order to complete the OPRA request. The Liaison asserts that if a response is not received by his office within thirty (30) days from the date of this letter, this request will be closed and no further action will be taken.

April 8, 2011

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

April 14, 2011

Letter from the Liaison to the Complainant. The Liaison states that the Complainant did not provide the additional information requested in the Liaison's March 29, 2011 letter to the Complainant. The Liaison asserts that there were no records found that correspond to the Complainant's OPRA request. The Liaison maintains that the requested records do not exist.

April 19, 2011

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated January 4, 2011
- Letter from the Custodian to the Complainant dated February 8, 2011
- Letter from the Liaison to the Complainant dated March 29, 2011
- Letter from the Liaison to the Complainant dated April 14, 2011

The Custodian certifies that a search for the records did not yield any responsive records and, accordingly, no records were destroyed and there are no applicable record retention schedules. The Custodian further certifies that her office received the Complainant's OPRA request on January 25, 2011 and upon its receipt, said request was immediately assigned a case number. The Custodian certifies that although the Complainant never provided the NJDOC with the requested information that would clarify his request, the NJDOC still made a good faith effort to locate any records that could potentially be responsive to his request. The Custodian certifies that the

Complainant was notified that there were no records responsive to his request on April 14, 2011.

Analysis

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

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 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.⁵ 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).

In the instant matter, the Complainant filed his OPRA request on January 4, 2011. While the Custodian certified in her SOI that she did not receive the Complainant's OPRA request until January 25, 2011, the Custodian did not provide the Complainant with a response to his OPRA request until February 8, 2011, the tenth (10th) business day following the Custodian's receipt of the Complainant's request.

⁵ 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.

Therefore, the Custodian did not timely respond to the Complainant's OPRA request. 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).

Whether the Custodian unlawfully denied access to the requested records?

Further, 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 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.

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.

In this case, the Complainant's OPRA request sought "the most recent audit of all law library books, treatises, magazines, periodicals, reference materials and computer

generated materials available to Management Control Unit prisoners.” In response to the Complainant’s January 4, 2011 request, the Custodian, on February 8, 2011, requested that the Complainant provide further clarification as to the records sought. The Custodian certified in the SOI that the Complainant never gave the Custodian additional clarification regarding the request. The Complainant provided no evidence to refute the Custodian’s certification. Regardless, the Custodian certifies in her SOI that she made a good faith effort to locate responsive records but that her search did not yield any responsive records.

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 certified in the SOI that the NJDOC does not possess any records that are responsive to the Complainant’s request. The Complainant has not submitted any evidence to refute the Custodian’s certification in this regard.

Therefore, because the Custodian has certified that no records responsive to the Complainant’s OPRA request 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.

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).

Although the Custodian failed to provide the Complainant with a written response within the statutorily mandated seven (7) business days and therefore violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Custodian did not unlawfully deny the Complainant access to the requested records because she certified in the SOI that there are no records within the NJDOC that are responsive to the Complainant’s request and the Complainant provided 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. The Custodian did not timely respond to the Complainant’s OPRA request. 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 Custodian certified in the Statement of Information that no records responsive to the Complainant’s OPRA request 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. Although the Custodian failed to provide the Complainant with a written response within the statutorily mandated seven (7) business days and therefore violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Custodian did not unlawfully deny the Complainant access to the requested records because she certified in the SOI that there are no records within the NJDOC that are responsive to the Complainant's request and the Complainant provided 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: Darryl C. Rhone
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

May 22, 2012