



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

June 25, 2013 Government Records Council Meeting

John Coffey
Complainant

Complaint No. 2012-140

v.

New Jersey Department of Health & Senior Services
Custodian of Record

At the June 25, 2013 public meeting, the Government Records Council (“Council”) considered the June 18, 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 Custodian did not bear her burden of proof that she 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. The Custodian has borne her burden of proving that she provided all records not otherwise exempt from access under OPRA and there is no evidence in the record to refute the Custodian’s Statement of Information certification. N.J.S.A. 47:1A-6. Additionally, the Custodian lawfully denied access to those records otherwise exempt from access under N.J.S.A. 47:1A-9(a) and Executive Order No. 26 (Governor McGreevey, 2002).
3. The Custodian’s failure to respond in writing within the statutorily mandated time frame to respond resulted in a “deemed” denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian satisfied her burden of proving that she provided access to all records not otherwise exempt from access under OPRA. N.J.S.A. 47:1A-6. Additionally, the evidence of record does not indicate that the Custodian’s “deemed” denial had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s “deemed” denial 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 25th Day of June, 2013

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

Steven Ritardi, Esq., Acting Chair
Government Records Council

Decision Distribution Date: June 27, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 25, 2013 Council Meeting**

**John Coffey¹
Complainant**

GRC Complaint No. 2012-140

v.

**New Jersey Department of Health & Senior Services²
Custodian of Records**

Records Relevant to Complaint: Copies via U.S. mail of State and Federal deficiency reports for Bayshore Community Hospital, plans of correction and all surveys from January 1, 2007 to May 31, 2011.³

Request Made: May 31, 2011

Response Made: June 10, 2011

GRC Complaint Filed: May 7, 2012⁴

Background⁵

Request and Response:

On May 31, 2011, the Complainant submitted an Open Public Records Act (“OPRA”) request to the New Jersey Department of Health & Senior Services (“DHSS”). On June 10, 2011, the fifth (5th) business day following receipt of said request,⁶ the Custodian verbally responded seeking clarification of the OPRA request. The Complainant clarified his OPRA request at that time to indicate that he was requesting the records now at issue. On June 29, 2011, the Custodian verbally responded advising the Complainant that she would mail a letter advising the Complainant of the applicable copy costs of \$13.35 for 267 pages of records, which she did on this day. The Complainant mailed a check to the Custodian on the same day. On July 5, 2011, the Custodian forwarded the responsive records to the Complainant.

¹ No legal representation listed on record.

² Michelle Maiello, Custodian of Records. The current Custodian is Walter Kowalski; however, he is not a party to the instant complaint. Represented by Deputy Attorney General Michael Kennedy.

³ This is the amended request based on a verbal conversation between the Complainant and Custodian on June 10, 2012, as stated in the Complainant’s Denial of Access Complaint.

⁴ The GRC received the Denial of Access Complaint on said date.

⁵ 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.

⁶ The Custodian certifies in the Statement of Information that she received the Complainant’s OPRA request on June 3, 2011.

Denial of Access Complaint:

On May 7, 2012, the Complainant filed a complaint with the Government Records Council (“GRC”). The Complainant states that he received 267 pages of records from the Custodian that were in a random order and that records were missing or were incomplete. The Complainant contends that the Custodian failed to provide as many as 76 records. The Complainant further argues that it is unreasonable for the Custodian to provide responsive records 32 days after submission of the OPRA request.

The Complainant contends that he submitted four (4) of the responsive complaints regarding various medical treatment issues at Bayshore that were determined to be invalid. The Complainant argues that he never received surveys and received no records revealing information as to the issues addressed in each complaint.

Statement of Information:

On June 22, 2012, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that she received the Complainant’s OPRA request on June 3, 2011. The Custodian certifies that once the Complainant clarified his OPRA request, she compiled 267 pages of responsive records and provided same on July 5, 2011, upon receipt of the appropriate copy costs (\$13.35).

The Custodian certifies that she provided the Complainant with every record not otherwise exempt from access under OPRA. N.J.S.A. 47:1A-9; Executive Order No. 26 (Governor McGreevey, 2002)(“EO 26”)(exempting access to “... information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation ...”). The Custodian certifies that not every survey or inspection generates the same documents. The Custodian certifies that, for example, one inspection may generate an approval letter for a plan of correction while another may not because the approval may have been verbal. The Custodian certifies that a requestor cannot infer that because a document might exist for one survey or inspection, it will exist for every other survey or inspection.

The Custodian notes that the Complainant advised that he did not receive a Post-Certification Revisit Report (Form CMS-2567B) or the Survey Team Composition and Workload Report (Form CMS-670). The Custodian certifies that these records were not forwarded to her by DHSS staff, but that same are being provided to the Complainant via the SOI.

The Custodian’s Counsel submitted a letter brief disputing that the Custodian improperly responded to the Complainant’s OPRA request. Counsel contends that the Complainant sent his OPRA request to the wrong address and placed time limitations on when he could be contacted by telephone. Counsel asserts that the Custodian properly sought clarification of the Complainant’s OPRA request, generated a sizable amount of records, reviewed same for privilege and properly waited for the Complainant to remit the assessed copy cost prior to disclosing records.

Counsel further argues that the Complainant assumed records were missing since he received certain documents in some cases that he did not receive in others. Counsel notes that per the Custodian's certification, not every survey or inspection generates the same documents. Counsel further asserts that the Complainant failed to provide any evidence to contradict the Custodian's legal certification and has thus failed to refute same. Hughes v. Township of Woodbridge (Middlesex), GRC Complaint No. 2011-332 (November 2011); Kirkland v. Township of Irvington (Essex), GRC Complaint No. 2011-373 (January 2012); Cibrian v. NJ Dept. of Banking and Insurance, GRC Complaint No. 2012-78 (April 2012).

Counsel finally notes that the Complainant filed this complaint nearly a year after submission of the OPRA request and response. Counsel notes that at no time prior to filing this complaint did the Complainant contact the Custodian disputing her response.

Analysis⁷

Timeliness

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).⁸ 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 Rivera v. Rutgers, The State University of New Jersey, GRC Complaint No. 2009-311 (Interim Order dated January 31, 2012), the custodian verbally responded within the statutorily mandated time frame; however, the custodian did not respond in writing until after the expiration of said time frame. The Council determined that the custodian's verbal response resulted in a "deemed" denial reasoning that:

The provisions of OPRA specifically provide that a custodian is required to respond in writing within the statutorily mandated seven (7) business day time frame. Here, though the Custodian responded within the statutorily mandated time frame, said verbal response is not in compliance with the provisions of OPRA. (*citing* Dittrich v. City of Hoboken, GRC Complaint No. 2008-04 (March 2009).

Id. at 16.

⁷ There may be other OPRA issues in this matter; however, the Council's analysis is based solely on the claims made in the Complainant's Denial of Access Complaint.

⁸ 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.

Here, the evidence of record indicates that the Custodian verbally responded to the Complainant's OPRA request on the fifth (5th) business day after receipt of same seeking clarification of the Complainant's OPRA request. Notwithstanding the fact that seeking clarification is an acceptable response under OPRA, the Custodian failed to respond in writing until June 29, 2012, well after the expiration of the seven (7) business day time frame. Thus, in accordance with Rivera, *supra*, the Custodian's verbal response is not compliant with OPRA and results in a "deemed" denial.

Therefore, the Custodian did not bear her burden of proof that she 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*.

Moreover, the GRC notes that notwithstanding the Custodian's "deemed" denial, she also failed to provide a lawful basis for denying access to certain records upon disclosure of those records for which access was granted. *See DeAppolonio, Esq. v. Borough of Deal (Monmouth)*, GRC Complaint No. 2008-62 (September 2009)(holding that the custodian's response was insufficient because he failed to provide a specific basis for denying access to records).

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.

OPRA further provides that:

The provisions of [OPRA] shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to P.L.1963, c.73 (C.47:1A-1 et seq.); any other statute; resolution of either or both Houses of the Legislature; *regulation promulgated under the authority of any statute or Executive Order* of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.

N.J.S.A. 47:1A-9(a) (Emphasis added.)

Additionally, EO 26 provides that:

The following records shall not be considered to be government records subject to public access ... Information concerning individuals ... relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation ...

Id. at 4(b)(1).

The first issue raised in this complaint is whether the Custodian provided all responsive records not otherwise exempt from access under EO 26. Here, the Complainant disputed that he was not given access to multiple records sought in connection with complaints filed against Bayshore Community Hospital with DHSS. The Custodian also certified that each complaint does not necessarily produce the exact same documents; thus, a requestor could not determine that because certain records exist for one complaint, they should also exist in connection with every other complaint.

In reviewing the Denial of Access Complaint, a majority of the complaints the Complainant asserted lacked additional records were concluded as unsubstantiated or invalid. The evidence offers support to the Custodian's SOI certification that not every report produces the same documents. Additionally, there is no evidence in the record to refute the Custodian's certification.

The second issue raised herein is whether the Custodian has borne her burden of proving that she lawfully denied access to records under EO 26. Notwithstanding the Custodian's failure to identify the full universe of records for which she denied access, the Complainant's Denial of Access Complaint provides significant facts helpful to making a determination. Specifically, the Complainant noted that he personally filed four (4) of the complaints himself and was only provided with records indicating that the complaints were invalid. The Complainant noted that these complaints centered around medical care, such as "missed respiratory treatments, nursing neglect, pharmacy mistakes, medication dosing mistakes, double-dosing ... and feeding tube ...". A plain reading of OPRA and EO 26 indicates that medical care information is the type of information to which access was meant to be exempt. Thus, the GRC is satisfied that the Custodian lawfully denied access to those records she did not provide to the Complainant.

Thus, the Custodian has borne her burden of proving that she provided all records not otherwise exempt from access under OPRA and there is no evidence in the record to refute the Custodian's SOI certification. N.J.S.A. 47:1A-6. Additionally, the Custodian lawfully denied access to those records otherwise exempt from access under N.J.S.A. 47:1A-9(a) and EO 26.

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 (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's failure to respond in writing within the statutorily mandated time frame to respond resulted in a "deemed" denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian satisfied her burden of proving that she provided access to all records not otherwise exempt from access under OPRA. N.J.S.A. 47:1A-6. Additionally, the evidence of record does not indicate that the Custodian's "deemed" denial had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's "deemed" denial 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 Custodian did not bear her burden of proof that she 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. The Custodian has borne her burden of proving that she provided all records not otherwise exempt from access under OPRA and there is no evidence in the record to refute the Custodian's Statement of Information certification. N.J.S.A. 47:1A-6. Additionally, the Custodian lawfully denied access to those records otherwise exempt

from access under N.J.S.A. 47:1A-9(a) and Executive Order No. 26 (Governor McGreevey, 2002).

3. The Custodian's failure to respond in writing within the statutorily mandated time frame to respond resulted in a "deemed" denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian satisfied her burden of proving that she provided access to all records not otherwise exempt from access under OPRA. N.J.S.A. 47:1A-6. Additionally, the evidence of record does not indicate that the Custodian's "deemed" denial had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's "deemed" denial 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: Brandon D. Minde, Esq.
Acting Executive Director

June 18, 2013