



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

July 23, 2013 Government Records Council Meeting

Clevin A. Pittman
Complainant

Complaint No. 2012-196

v.

Springfield Township Police Department (Union)
Custodian of Record

At the July 23, 2013 public meeting, the Government Records Council (“Council”) considered the July 16, 2013 Supplemental 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 has complied with the Council’s June 25, 2013 Interim Order because she submitted certified confirmation of compliance to the Executive Director within the extended time frame to respond certifying that she provided the Complainant with the records identified in the Statement of Information and that no additional records exist.
2. Although the Custodian unlawfully denied access to records responsive to the Complainant’s OPRA request item No. 3, the Custodian lawfully denied access to OPRA request item Nos. 1 and 2 and further complied with the Council’s June 25, 2013 Interim Order. 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, 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 23rd Day of July 2013

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: July 26, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
July 23, 2013 Council Meeting**

**Clevin A. Pittman¹
Complainant**

GRC Complaint No. 2012-196

v.

**Springfield Township Police Department (Union)²
Custodial Agency**

Records Relevant to Complaint: Hardcopies of:

1. Maintenance records of the 911 recording system between June 1, 2009 and December 30, 2009.
2. Records clarifying when the recording feature of the 911 system was functioning and when it was not functioning between June 1, 2009 and June 1, 2010.
3. Records of repairs and company that performed said work on the 911 recordings system.

Custodian of Record: Linda M. Donnelly
Request Received by Custodian: April 25, 2012
Response Made by Custodian: April 30, 2012
GRC Complaint Received: June 28, 2012

Background

June 25, 2013 Council Meeting:

At its June 25, 2013 public meeting, the 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, found that:

1. Regarding OPRA request item Nos. 1 and 2, since the Custodian initially responded and further certified in the Statement of Information that no records responsive to these OPRA request items exist, and because there is no evidence in the record to refute the Custodian's certifications, the Custodian did not unlawfully deny access to OPRA request item Nos. 1 and 2. *See Pusterhofer v. New Jersey Department of Education*, GRC Complaint No. 2005-49 (July 2005).

¹ No legal representation listed on record.

² Represented by Neil J. Dworkin, Esq. (Irvington, NJ).

2. Since the Custodian attached to the Statement of Information records that may be responsive to OPRA request item No. 3, the Custodian failed to bear her burden of proving a lawful denial of access to those records. N.J.S.A. 47:1A-6. Thus, the Custodian must disclose these records to the Complainant and further disclose any other records that exist, if any. If no additional records exist, the Custodian must certify to this fact.
3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,³ to the Executive Director.⁴**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On June 26, 2013, the Council distributed its Interim Order to all parties. On June 27, 2013, the Custodian's Counsel requested an extension of five (5) business days to respond to the Council's Order. On June 28, 2013, the GRC granted Counsel an extension of time until July 10, 2013.

Compliance:

On July 8, 2013, the Custodian responded to the Council's Interim Order. The Custodian certifies that after receiving the Council's Order, she contacted all municipal department heads to conduct another search of the Township's records and was advised that no additional records exist. The Custodian further certifies that on July 5, 2013, she mailed to the Complainant at his last known address⁵ a copy of her compliance and the records ordered to be provided by the Council.

Analysis

Compliance

On June 25, 2013, the Council ordered the Custodian to disclose to the Complainant records "... responsive to OPRA request item No. 3 ..." and provide a certification if no additional records exist. The Council also ordered the Custodian to provide certified

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁴ Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

⁵ The Complainant was released from incarceration on April 1, 2013, with no forwarding address.

confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On June 26, 2013, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. On July 8, 2013, within the extended time frame to respond, the Custodian provided certified confirmation of compliance to the Executive Director.

Therefore, the Custodian has complied with the Council's June 25, 2013 Interim Order because she submitted certified confirmation of compliance to the Executive Director within the extended time frame to respond certifying that she provided the Complainant with the records identified in the SOI and that no additional records exist.

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 “... [i]f 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 unlawfully denied access to records responsive to the Complainant's OPRA request item No. 3, the Custodian lawfully denied access to OPRA request item Nos. 1 and 2 and further complied with the Council's June 25, 2013 Interim Order. 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, 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 has complied with the Council's June 25, 2013 Interim Order because she submitted certified confirmation of compliance to the Executive Director within the extended time frame to respond certifying that she provided the Complainant with the records identified in the Statement of Information and that no additional records exist.

2. Although the Custodian unlawfully denied access to records responsive to the Complainant's OPRA request item No. 3, the Custodian lawfully denied access to OPRA request item Nos. 1 and 2 and further complied with the Council's June 25, 2013 Interim Order. 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, 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: Frank F. Caruso
Senior Case Manager

Approved By: Brandon D. Minde, Esq.
Executive Director

July 16, 2013