



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

David Goff
Complainant

Complaint No. 2012-301

v.

New Jersey Department of Labor,
State Board of Mediation
Custodian of Record

At the July 23, 2013 public meeting, the Government Records Council (“Council”) considered the July 16, 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 Complainant’s letter dated June 21, 2010, is a valid form of request because it clearly invoked OPRA and made clear the nature of the request. *See Carter v. Franklin Fire District No. 1 (Somerset)*, GRC Complaint No. 2011-73 (Interim Order July 30, 2012).
2. 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).
3. Notwithstanding the Custodian’s “deemed” denial, she did not unlawfully deny access to the record responsive to the request because the Custodian certified that the record is nonexistent and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. *See Pusterhofer v. New Jersey Department of Education*, GRC Complaint No. 2005-49 (July 2005).
4. Although the Custodian violated *N.J.S.A. 47:1A-5(g)* and *N.J.S.A. 47:1A-5(i)*, 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**

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

**David Goff¹
Complainant**

GRC Complaint No. 2012-301

v.

**New Jersey Department of Labor,
State Board of Mediation²
Custodial Agency**

Records Relevant to Complaint: “Please give me the status of the Letter/Request attached”³

Custodian of Records: Tina Carpenter
Request Received by Custodian: July 9, 2010
Response Made by Custodian: August 2, 2010
GRC Complaint Received: November 16, 2012

Background⁴

Request and Response:

On June 21, 2010, the Complainant submitted an Open Public Records Act (“OPRA”) request seeking the above-listed information. On August 2, 2010, the sixteenth (16th) business day following receipt of said request, the Custodian responded in writing denying the request because the Custodian does not have a record responsive to the request on file.

Denial of Access Complaint:

On November 16, 2012, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant states that his request was provided to the Custodian on June 28, 2010, and that the Custodian responded to his request on August 2, 2010, informing the Complainant “the document you continue to request is not in our files.”

Statement of Information:

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Donald Palombi; however, there are no submissions from the Custodian’s Counsel to the GRC on file.

³ Numerous letters were attached to the request.

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.

On November 26, 2012, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that she did not receive an OPRA request from the Complainant dated June 28, 2010; however, she certifies she did receive a letter dated June 21, 2010, on July 9, 2010. The Custodian certifies that a response was sent to the Complainant in reply to his June 21, 2010 letter on August 2, 2010.

The Custodian certifies that the Complainant’s June 21, 2010 letter is captioned “...Mr. Mitrani’s decision...File No. 90-859...in the matter of David Goff, Grievant.” The Custodian further certifies that, while not conceding that the June 21, 2010 letter was an OPRA request, she would respond to the letter as follows:

“...there is no record which is responsive to complainant’s government records request in that the complainant’s request seeks a ‘Decision’...in the matter of his grievance arbitration and there is no such document in existence.”

Analysis⁵

Validity of the Form of Complainant’s Request

“A request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian.”

N.J.S.A. 47:1A- 5(g).

The threshold issue is whether the form of complainant’s letter was a valid OPRA request. The Complainant stated that he provided his request to the Custodian on June 28, 2010, and the evidence of record reflects he did attach a letter dated June 28, 2010, to his complaint. Conversely, the Custodian denies receiving a request dated June 28, 2010; however, she certified that she received a letter dated June 21, 2010, from the Complainant but it was not an OPRA request.⁶

Although the parties disagree as to the date of the Complainant’s request, there is no dispute between the parties with respect to the date of the response to the request. Both the Complainant and the Custodian agree that the response is dated August 2, 2010. Moreover, both the Complainant and the Custodian attached a copy of the same response to their submissions. The August 2, 2010 response states in the lead paragraph that it was prompted by the Complainant’s June 21, 2010 letter and the Complainant references said response several times throughout the complaint. It is clear, therefore, that the Complainant intended the June 21, 2010 letter to form the basis of the complaint.

⁵ 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.

⁶ Both the June 21, 2010 letter and the June 28, 2010 letter seek the status of a letter/request associated with arbitration file no. 90-859.

In Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009) the court held that although requestors shall continue to use public agencies' OPRA request forms when making requests, no custodian shall withhold records if the written request for such records, not presented on the official form, contains the requisite information prescribed in the section of OPRA requiring custodians to adopt a form. The GRC subsequently stated that when a complainant's letter request clearly invoked OPRA and made clear the nature of the request, the custodian's demand that the complainant complete an official OPRA request form is an impermissible limitation on access pursuant to Renna. See Carter v. Franklin Fire District No. 1 (Somerset), GRC Complaint No. 2011-73 (Interim Order July 30, 2012).

Here, the Complainant wrote under the caption of his June 21, 2010 letter request, "New Jersey Right to Know Law/Authority N.J.S.A. 47:1A et seq." Although the statute cited by the Complainant codified the Right to Know Law, it was amended in 2001 to the Open Public Records Act. As such, the complainant in his letter request did invoke OPRA. Further, the Complainant made clear his request by setting it forth in a separate sentence within the letter.

Accordingly, the Complainant's letter dated June 21, 2010, is a valid form of request because it clearly invoked OPRA and made clear the nature of the request. See Carter, *supra*.⁷

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). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. *Id.* 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).

The Custodian certified that she received the Complainant's June 21, 2010 letter request on July 9, 2010. The Custodian also certified that a response to the request was sent to the Complainant on August 2, 2010, which was the sixteenth (16th) business day following the Custodian's receipt of the request. Accordingly, the Custodian failed to respond to the Complainant's request within the statutorily mandated seven (7) business day period.

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)

⁷ The GRC makes no finding as to whether the request itself is valid.

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.

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.

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.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the custodian certified that no records responsive to the complainant’s request for billing records existed and the complainant submitted no evidence to refute the custodian’s certification regarding said records. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian’s certification, there was no unlawful denial of access to the requested records.

Here, the Custodian certified that she determined the record responsive to the Complainant’s request was a copy of a decision in the matter of his grievance arbitration. The Complainant further certified that said record does not exist.

Therefore, notwithstanding the Custodian’s “deemed” denial, she did not unlawfully deny access to the record responsive to the request because the Custodian certified that the record is nonexistent and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. *See Pusterhofer, supra*.

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 violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), 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 Complainant's letter dated June 21, 2010, is a valid form of request because it clearly invoked OPRA and made clear the nature of the request. *See* Carter v. Franklin Fire District No. 1 (Somerset), GRC Complaint No. 2011-73 (Interim Order July 30, 2012).
2. 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).
3. Notwithstanding the Custodian's "deemed" denial, she did not unlawfully deny access to the record responsive to the request because the Custodian certified that the record is nonexistent and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. *See* Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), 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: John E. Stewart, Esq.

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

July 16, 2013