



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**

**March 22, 2013 Government Records Council Meeting**

Judith Papiez  
Complainant

Complaint No. 2012-59

v.

County of Mercer, Office of County Counsel  
Custodian of Record

At the March 22, 2013 public meeting, the Government Records Council (“Council”) considered the March 15, 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. Although the Custodian responded in writing to the Complainant’s OPRA request within statutorily mandated time frame to respond, the Custodian’s written response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), because the Custodian failed to provide a date certain upon which she would respond to the Complainant providing any responsive records. *See also* Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011).
2. Notwithstanding the Custodian’s insufficient response, the Custodian has borne her burden of proving that she provided all responsive records in her possession. N.J.S.A. 47:1A-6.
3. Because the language of N.J.S.A. 47:1A-5(e) is clear and unambiguous as to which specific records are classified as “immediate access” records, the GRC declines to determine that “Public Employee Occupational Safety & Health Act reports” are “immediate access” records because said records are not specifically identified under OPRA as such.
4. The Custodian’s response was insufficient pursuant to N.J.S.A. 47:1A-5(i) because she failed to provide a date certain on which she would respond; however, the Custodian borne her burden of proving she provided access to all responsive records in her possession. N.J.S.A. 47:1A-6. 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 insufficient response 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 22<sup>nd</sup> Day of March, 2013

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

Robin Berg Tabakin, Esq., Chair  
Government Records Council

**Decision Distribution Date: March 26, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
March 22, 2013 Council Meeting**

**Judith Papiez<sup>1</sup>  
Complainant**

**GRC Complaint No. 2012-59**

**v.**

**County of Mercer, Office of County Counsel<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Electronic copy (via e-mail) of all Public Employee Occupational Safety & Health Act (“PEOSHA”) reports filed by or involving Mercer County Department of Transportation (“DOT”) and Public Works from 2006 to February 14, 2012 to include copies of the OSHA 300 log.

**Request Made:** February 14, 2012

**Response Made:** February 15, 2012

**GRC Complaint Filed:** March 7, 2012<sup>3</sup>

**Background<sup>4</sup>**

The Complainant hand-delivered an OPRA request to the County on February 14, 2012. The Custodian responded in writing on February 15, 2012, the first (1<sup>st</sup>) business day after receipt of the subject request, stating that additional time would be necessary to retrieve the responsive records. The Complainant e-mailed the County on March 2, 2012 seeking a status update. The Custodian responded on March 19, 2012 providing paper copies of records for a total of 44 pages.

The Complainant filed her Denial of Access Complaint with the Government Records Council (“GRC”) on March 7, 2012. In said complaint, the Complainant argues that the Custodian violated N.J.S.A. 47:1A-5(i) by failing to provide a date certain on which she would respond to the Complainant.

The Complainant submitted a letter to the GRC on April 23, 2012. In said letter, the Complainant asserts that the Custodian partially complied with her OPRA request. The Complainant states that her preferred method of delivery was e-mail; however, the Custodian

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Sarah G. Crowley, Esq., Custodian of Records.

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

<sup>4</sup> 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.

advised that six (6) e-mails were not available via e-mail and the Complainant was charged accordingly. The Complainant requests that the Custodian send those e-mails (with attachments) to her electronically pursuant to her preferred method of delivery.

The Complainant contends that not included were investigation details and steps taken to prevent further incidents as required under OSHA (citation omitted), an investigation report and employee statement for the 2011 incident at Hamilton Avenue and time-stamped employee reports from a 2011 incident at Hamilton Avenue and Woodside Road. The Complainant finally contends that the Custodian failed to provide her with PEOSHA reports for eight (8) incidents within the requested time frame. The Complainant contends that the Custodian violated N.J.S.A. 47:1A-5(e) by failing to grant immediate access to all responsive records.

The Custodian filed her Statement of Information (“SOI”) on May 25, 2012. In the SOI, the Custodian certifies she received the Complainant’s OPRA request on February 14, 2012. The Custodian certifies she responded on February 15, 2012 stating that she needed an extension of time. The Custodian certifies that she responded again on March 19, 2012 providing the Complainant with copies of all records in her possession. The Custodian certifies that included in those records were e-mails pertaining to certain reports that were provided by those individuals in paper copies and not electronically, thus, same were provided to the Complainant in paper.

The Custodian contends that the Complainant believes the County is not performing its duties required under other statutes; however, the GRC is not the proper venue for such a complaint.

### Analysis<sup>5</sup>

#### Sufficiency of the Custodian’s Response

OPRA provides that a custodian may have an extension of time to respond to a complainant’s OPRA request, but the custodian must provide a date certain. N.J.S.A. 47:1A-5(i). OPRA further provides that should the custodian fail to provide a response on that specific date, “access shall be deemed denied.” N.J.S.A. 47:1A-5(i).

In Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), the custodian provided the complainant with a written response to the complainant’s OPRA request on the seventh (7<sup>th</sup>) business day following receipt of said request. In the response, the custodian requested an extension of time to respond to said request but failed to provide a date certain upon which the requested records would be provided. The Council held that the custodian’s request for an extension of time was inadequate under OPRA pursuant to N.J.S.A. 47:1A-5(i).

Here, the Custodian responded in writing to the Complainant’s OPRA request on the first (1<sup>st</sup>) business day after receipt of same stating that additional time would be necessary to retrieve

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<sup>5</sup> 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.

the responsive records. However, the Custodian failed to provide a date certain on which she would respond to the Complainant providing access to any responsive records.

Therefore, although the Custodian responded in writing to the Complainant's OPRA request within statutorily mandated time frame to respond, the Custodian's written response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Hardwick, supra, because the Custodian failed to provide a date certain upon which she would respond to the Complainant providing any responsive records. *See also* Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011).

### **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.

The Complainant's OPRA request herein sought "PEOSHA reports" for a (six) year period to include OSHA 300 log. The Custodian responded on March 19, 2012 providing the Complainant access to six (6) reports for a total of 44 pages.

The Complainant submitted a letter to the GRC on April 23, 2012 arguing that not included were investigation details and steps taken to prevent further incidents as required under OSHA (citation omitted), an investigation report and employee statement for the 2011 incident at Hamilton Avenue and time-stamped employee reports from a 2011 incident at Hamilton Avenue and Woodside Road. The Complainant further contended that the Custodian failed to provide her with PEOSHA reports for eight (8) incidents within the requested time frame. The Complainant also argued that she wished to receive six (6) e-mails provided by the Custodian electronically and not in paper copies.

In the SOI, the Custodian certified that she provided all responsive records in her possession. The Custodian further certifies that she maintained the six (6) e-mails in paper copies only and thus provided same accordingly. The Custodian also argued that the GRC does not have the authority to adjudicate whether the County is following a statute.

The crux of this complaint is whether the Complainant's assertion that additional records relating to other supposed OSHA incidents outweighs the Custodian's SOI certified statements that she provided all responsive records. The Complainant's uncertified statement that other incidents occurred is not supported by any evidence proving that these other incidents spawned OSHA reports; thus, the mere statement that these incidents occurred does not amount to competent, credible evidence sufficient to refute the Custodian's SOI certification. Thus, GRC is satisfied that the preponderance of the competent, credible evidence establishes that the Custodian provided all responsive records in her possession.

Therefore, notwithstanding the Custodian's insufficient response, the Custodian has borne her burden of proving that she provided all responsive records in her possession. N.J.S.A. 47:1A-6.

Regarding the Complainant's request to have e-mails sent to her e-mail account, the Custodian certified in the SOI that the e-mails were only in paper copies. The evidence further shows that the Custodian advised the Complainant that electronic copies of the records were unavailable.

Regarding the Complainant's argument that OSHA requires certain actions from the County that should beget records, the GRC does not have the authority to adjudicate whether the County is adhering to other statutes. N.J.S.A. 47:1A-7(b) and Barile v. Stillwater Township (Sussex), GRC Complaint No. 2007-92 (Interim Order dated February 25, 2009).

Finally, OPRA provides that "immediate access ordinarily shall be granted ..." to certain specific types of government records. N.J.S.A. 47:1A-5(e). Here, the Complainant contended that the Custodian violated N.J.S.A. 47:1A-5(e) by failing to grant immediate access to PEOSHA reports. A review of N.J.S.A. 47:1A-5(e) reveals that "PEOSHA reports" are not specifically identified "immediate access" records. Thus, the GRC must adhere to the clear and unambiguous language of N.J.S.A. 47:1A-5(e) and recognize only those specific records identified as immediate access records.

Therefore, because the language of N.J.S.A. 47:1A-5(e) is clear and unambiguous as to which specific records are classified as "immediate access" records, the GRC declines to determine that "PEOSHA reports" are "immediate access" records because said records are not specifically identified under OPRA as such.

### **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 response was insufficient pursuant to N.J.S.A. 47:1A-5(i) because she failed to provide a date certain on which she would respond; however, the Custodian borne her burden of proving she provided access to all responsive records in her possession. N.J.S.A. 47:1A-6. 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 insufficient response 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. Although the Custodian responded in writing to the Complainant’s OPRA request within statutorily mandated time frame to respond, the Custodian’s written response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), because the Custodian failed to provide a date certain upon which she would respond to the Complainant providing any responsive records. *See also* Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011).
2. Notwithstanding the Custodian’s insufficient response, the Custodian has borne her burden of proving that she provided all responsive records in her possession. N.J.S.A. 47:1A-6.
3. Because the language of N.J.S.A. 47:1A-5(e) is clear and unambiguous as to which specific records are classified as “immediate access” records, the GRC declines to determine that “Public Employee Occupational Safety & Health Act reports” are “immediate access” records because said records are not specifically identified under OPRA as such.
4. The Custodian’s response was insufficient pursuant to N.J.S.A. 47:1A-5(i) because she failed to provide a date certain on which she would respond; however, the Custodian borne her burden of proving she provided access to all responsive records in her possession. N.J.S.A. 47:1A-6. 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 insufficient response 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: Karyn Gordon, Esq.  
Acting Executive Director

March 15, 2013