



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

January 28, 2014 Government Records Council Meeting

Wanda R. Stevenson
Complainant

Complaint No. 2013-151

v.

City of Newark (Essex)
Custodian of Record

At the January 28, 2014 public meeting, the Government Records Council (“Council”) considered the January 21, 2014 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian partially failed to comply with the Council’s November 19, 2013 Interim Order because he did not respond within in the prescribed extended time frame, but he did provide the requested records and simultaneously certified confirmation of compliance to the Executive Director.
2. Although the Custodian violated N.J.S.A. 47:1A-5(i), and was one (1) day late responding to the Council’s Interim Order, he provided the Complainant with the records she sought to obtain through her request. 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 28th Day of January, 2014

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: January 30, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
January 21, 2014 Council Meeting**

**Wanda R. Stevenson¹
Complainant**

GRC Complaint No. 2013-151

v.

**City of Newark (Essex)²
Custodial Agency**

Records Relevant to Complaint: A “[p]rintout of People Soft records that reflect City employee Amos Crudup’s current title and salary.”

Custodian of Record: Robert P. Marasco

Request Received by Custodian: April 12, 2013

Response Made by Custodian: April 24, 2013

GRC Complaint Received: May 22, 2013

Background

November 19, 2013 Council Meeting:

At its November 19, 2013 public meeting, the Council considered the November 12, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted by a majority to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not bear his burden of proof that he 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 granting access, denying access, seeking clarification or requesting an extension of time either immediately or within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s request. *See* N.J.S.A. 47:1A-5(e); N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007); Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007); Hardwick v. New Jersey Department of Transportation, GRC Complaint No. 2007-164 (February 2008).
2. The Custodian unlawfully denied access to the record responsive to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Accordingly, the Custodian shall

¹ No legal representation listed on record.

² The Custodian is represented by Guenther Waldow, Esq. (Newark, NJ).

disclose any responsive record. See N.J.S.A. 47:1A-10; Valdes v. Union City Board of Education (Hudson), GRC Complaint No. 2011-64 (August 2012); Morgano v. New Jersey Department of Treasury, Division of Pensions and Benefits, GRC Complaint No. 2011-145. If a “People Soft” printout listing the requested salary information does not exist, the Custodian must certify as such, retrieve the most comprehensive record containing the information that is subject to disclosure, and redact such record as required. See Morgano v. Essex County. Prosecutor’s Office, GRC Complaint No. 2007-156 (February 2008).

3. **The Custodian shall comply with item number two (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 November 20, 2013, the Council distributed its Interim Order to all parties. On November 26, 2013, the Custodian requested, and the GRC granted, a request for an extension of time to respond until December 3, 2013. On December 3, 2013, the Custodian provided his initial response to the Council’s Interim Order. Later on December 3, 2013, the GRC contacted the Custodian to confirm that a response to the instant complaint’s Interim Order was forthcoming, as the documents provided appeared to only be responsive to two (2) Interim Orders corresponding to separate requests made by the complainant. On December 4, 2013, the Custodian provided a revised response to the Council’s Interim Order. The Custodian certifies that he provided true copies of the documents responsive to the Complainant’s request.

Analysis

Compliance

At its November 19, 2013 meeting, the Council ordered the Custodian to disclose the records responsive to the Complainant’s request and, if a “People Soft” printout listing the requested salary information did not exist, to certify as such, retrieve the most comprehensive record containing the information that is subject to disclosure, and redact such record as required.

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 record(s) 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.

On November 20, 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. Thus, the Custodian's response was due by the close of business on November 27, 2013.

On November 26, 2013, the fourth (4th) business day after receipt of the Council's Order, the Custodian requested an extension of time to respond until December 3, 2013. The GRC granted that extension. On December 4, 2013, the Custodian provided certified confirmation of compliance that he was disclosing true copies of a "People Soft printout for Amos Crudup" to the Complainant.

Therefore, the Custodian partially failed to comply with the Council's November 19, 2013 Interim Order because he did not respond within in the prescribed extended time frame, but he did provide the requested records and simultaneously certified confirmation of compliance to the Executive Director.

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 that "[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 the Council to determine that a custodian "knowingly and willfully" violated OPRA: the custodian's actions must have been much more than negligent conduct; the custodian must have had some knowledge that his actions were wrongful; the custodian's actions must have had a positive element of conscious wrongdoing; the custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden; and the custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. *See Alston v. City of Camden*, 168 N.J. 170, 185 (2001); *Fielder v. Stonack*, 141 N.J. 101, 124 (1995); *Berg v. Reaction Motors Div.*, 37 N.J. 396, 414 (1962); *ECES v. Salmon*, 295 N.J. Super. 86, 107 (App. Div. 1996).

Although the Custodian violated N.J.S.A. 47:1A-5(i), and was one (1) day late responding to the Council's Interim Order, he provided the Complainant with the records she sought. 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 partially failed to comply with the Council's November 19, 2013 Interim Order because he did not respond within in the prescribed extended time frame, but he did provide the requested records and simultaneously certified confirmation of compliance to the Executive Director.
2. Although the Custodian violated N.J.S.A. 47:1A-5(i), and was one (1) day late responding to the Council's Interim Order, he provided the Complainant with the records she sought to obtain through her request. 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: Robert T. Sharkey, Esq.
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.
Senior Counsel

January 21, 2014



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

November 19, 2013 Government Records Council Meeting

Wanda R. Stevenson
Complainant

Complaint No. 2013-151

v.

City of Newark (Essex)
Custodian of Record

At the November 19, 2013 public meeting, the Government Records Council (“Council”) considered the November 12, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear his burden of proof that he 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 granting access, denying access, seeking clarification or requesting an extension of time either immediately or within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s request. *See* N.J.S.A. 47:1A-5(e); N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007); Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007); Hardwick v. New Jersey Department of Transportation, GRC Complaint No. 2007-164 (February 2008).
2. The Custodian unlawfully denied access to the record responsive to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Accordingly, the Custodian shall disclose any responsive record. *See* N.J.S.A. 47:1A-10; Valdes v. Union City Board of Education (Hudson), GRC Complaint No. 2011-64 (August 2012); Morgano v. New Jersey Department of Treasury, Division of Pensions and Benefits, GRC Complaint No. 2011-145. If a “People Soft” printout listing the requested salary information does not exist, the Custodian must certify as such, retrieve the most comprehensive record containing the information that is subject to disclosure, and redact such record as required. *See* Morgano v. Essex County. Prosecutor’s Office, GRC Complaint No. 2007-156 (February 2008).
3. **The Custodian shall comply with item number two (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 1:4-4,¹ to the Executive Director.²

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.

Interim Order Rendered by the
Government Records Council
On The 19th Day of November, 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: November 20, 2013

¹ "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."

² Satisfactory compliance requires that the Custodian deliver the record(s) 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.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 19, 2013 Council Meeting**

**Wanda R. Stevenson¹
Complainant**

GRC Complaint No. 2013-151

v.

**City of Newark (Essex)²
Custodial Agency**

Records Relevant to Complaint: A “[p]rintout of People Soft records that reflect City employee Amos Crudup’s current title and salary.”

Custodian of Record: Robert P. Marasco

Request Received by Custodian: April 12, 2013

Response Made by Custodian: April 24, 2013

GRC Complaint Received: May 22, 2013

Background³

Request and Response:

On April 12, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 24, 2013, eight (8) business days later, the Custodian responded in writing stating that the Division of Personnel had begun a search of City of Newark (“City”) records and that responsive documents could not be provided within the timeframe required by N.J.S.A. 47:1A-5(i). The Custodian requested an extension of time to “locate and compile the documents,” noting that “[w]e anticipate a response on or before May 1, 2013.” On April 26, 2013, the Custodian wrote to the Complainant disclosing a printout he stated was responsive to the request.

Denial of Access Complaint:

On May 22, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that the document she received with the Custodian’s April 26, 2013 letter did not satisfy her request. The Complainant states that she requested both the title and salary of a City employee in the form of a “People Soft printout,”

¹ No legal representation listed on record.

² The Custodian is represented by Guenther Waldow, Esq. (Newark, NJ).

³ 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.

but that the disclosed printout did not list the employee's salary. The Complainant states that she did not have any conversations with, or receive any information from, the Custodian regarding this OPRA request after April 26, 2013.

Statement of Information:

On May 23, 2013, the GRC requested that the Custodian submit a completed Statement of Information ("SOI") form. The GRC did not receive a response from the Custodian.

Analysis⁴

Timeliness

OPRA mandates that a custodian either grant or deny access to requested records as soon as possible, but no later than seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian that does not comply with a request must indicate on the request form a specific basis for not doing so and promptly return a signed and dated copy of said form. N.J.S.A. 47:1A-5(g). 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 time period results in a "deemed" denial of the complainant's OPRA request pursuant. *See* N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

OPRA provides that immediate access shall be granted to "contracts, including collective negotiations agreements and individual employment contracts, and public employee salary . . . information." N.J.S.A. 47:1A-5(e). When "immediate access" records are requested, a custodian must respond immediately either granting or denying access, seeking additional time, or asking for clarification. *See* Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007).

Here, the salary information requested by the Complainant is specifically classified as an immediate access record under OPRA. *See* N.J.S.A. 47:1A-5(e). Although the Custodian responded in writing to the Complainant seeking an extension of time until May 1, 2013, he did so eight (8) business days after receiving the OPRA request. *See* N.J.S.A. 47:1A-5(i). Thus, the Custodian failed to respond immediately to the Complainant's request for salary information, and his request for an extension of time is invalid because he failed to respond in writing within the statutorily mandated time frame. *See* N.J.S.A. 47:1A-5(e); Hardwick v. N.J. Dep't of Transp., GRC Complaint No. 2007-164 (February 2008).

⁴ 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.

⁵ 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 bear his burden of proof that he 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 granting access, denying access, seeking clarification or requesting an extension of time either immediately or within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's request. *See* N.J.S.A. 47:1A-5(e); N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Herron, GRC 2006-178; Kelley, GRC 2007-11; Hardwick, GRC 2007-164.

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. For example, personnel records in the possession of a government agency are exempt from disclosure, but "an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefore . . ." are open to public access. N.J.S.A. 47:1A-10. 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 sought a "[p]rintout of People Soft records that reflect City employee Amos Crudup's current title and salary." The Custodian provided a printout listing the City employee's title, supervisor, department, and other information. The printout did not list the employee's salary. Disclosure of such information is expressly required by N.J.S.A. 47:1A-10. *See also* Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2011-64 (August 2012); Morgano v. N.J. Dept. of Treasury, Div. of Pensions & Benefits, GRC Complaint No. 2011-145. As such, the Custodian should have disclosed this information to the Complainant; however, there is no evidence in the record to support that disclosure occurred.

The absence of an SOI submitted by the Custodian leaves the record unclear as to whether employee printouts from the "People Soft" program ordinarily contain salary information. In Morgano v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2007-156 (February 2008), the GRC determined that if information must be disclosed under OPRA, but there is no record which contains such information exclusively, then a custodian can redact a more comprehensive record to fulfill a complainant's request. The GRC found that when "specific . . . information must be disclosed, the [c]ustodian is under no duty to extract and synthesize such information from government records in order to comply with the provisions of OPRA." *Id.* Rather, the Council directed the custodian to retrieve the most comprehensive record containing the information that was subject to disclosure and to redact such record so that only the information required to be disclosed was revealed.

Therefore, the Custodian unlawfully denied access to the record responsive to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Accordingly, the Custodian shall disclose any responsive record. *See* N.J.S.A. 47:1A-10; Valdes, GRC 2011-64; Morgano, GRC 2011-145. If a "People Soft" printout listing the requested salary information does not exist, the Custodian must certify as such, retrieve the most comprehensive record containing the information that is subject to disclosure, and redact such record as required. *See* Morgano, GRC 2007-156.

Knowing & Willful

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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he 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 granting access, denying access, seeking clarification or requesting an extension of time either immediately or within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's request. *See* N.J.S.A. 47:1A-5(e); N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007); Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007); Hardwick v. New Jersey Department of Transportation, GRC Complaint No. 2007-164 (February 2008).
2. The Custodian unlawfully denied access to the record responsive to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Accordingly, the Custodian shall disclose any responsive record. *See* N.J.S.A. 47:1A-10; Valdes v. Union City Board of Education (Hudson), GRC Complaint No. 2011-64 (August 2012); Morgano v. New Jersey Department of Treasury, Division of Pensions and Benefits, GRC Complaint No. 2011-145. If a "People Soft" printout listing the requested salary information does not exist, the Custodian must certify as such, retrieve the most comprehensive record containing the information that is subject to disclosure, and redact such record as required. *See* Morgano v. Essex County, Prosecutor's Office, GRC Complaint No. 2007-156 (February 2008).
3. **The Custodian shall comply with item number two (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 1:4-4,⁶ to the Executive Director.⁷**

⁶ "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."

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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.

Prepared By: Robert T. Sharkey, Esq.
Staff Attorney

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

November 12, 2013