



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

January 28, 2014 Government Records Council Meeting

Harry B. Scheeler, Jr.
Complainant

Complaint No. 2013-207

v.

N.J. Motor Vehicle Commission
Custodian of Record

At the January 28, 2014 public meeting, the Government Records Council (“Council”) considered the January 21, 2014 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’s failure to respond immediately to the Complainant’s OPRA request for a current MVC contract either granting or denying access, requesting additional time to respond, or requesting clarification of the request results in a violation of OPRA’s immediate access provision. N.J.S.A. 47:1A-5(e); Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007).
2. Although the Custodian violated OPRA’s immediate access provision at N.J.S.A. 47:1A-5(e), he provided the Complainant with all records responsive to the request even though the MVC does not maintain the requested contracts. 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**

**Findings and Recommendations of the Executive Director
January 28, 2014 Council Meeting**

**Harry B. Scheeler, Jr.¹
Complainant**

GRC Complaint No. 2013-207

v.

**N.J. Motor Vehicle Commission²
Custodial Agency**

Records Relevant to Complaint: An emailed copy of the “[c]ontract for security guard services currently in effect.”

Custodian of Record: Joseph F. Bruno
Request Received by Custodian: July 11, 2013
Response Made by Custodian: July 15, 2013
GRC Complaint Received: July 16, 2013

Background³

Request and Response:

On July 11, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 12, 2013, the Custodian emailed the Complainant acknowledging receipt of the request and stating that the Complainant’s request was being reviewed. Later on July 12, 2013, the Complainant emailed the Custodian asserting that the requested contract was subject to immediate access under OPRA. On July 15, 2013, three (3) business days after receipt of the request, the Custodian responded to the Complainant by providing a link to access the contract online.

Denial of Access Complaint:

On July 16, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that the records are subject to immediate access and, as such, a custodian must state in writing why any records cannot be provided and request an extension of time to comply. *Citing N.J.S.A. 47:1A-5(e)*. The Complainant states that the Custodian did not do so. Further, the Complainant argues that a

¹ No representation listed in record.

² The Custodian is represented by Deputy Attorney General Valentina M. DiPippo.

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.

Harry B. Scheeler, Jr. v. N.J. Motor Vehicle Comm’n, GRC Complaint No. 2013-207 – Findings and Recommendations of the Executive Director

custodian cannot direct a requestor to a website instead of providing copies. *Citing Langford v. City of Perth Amboy*, GRC Complaint No. 2005-181 (May 2007). The Complainant states that he was unable to open the link to the contract provided by the Custodian.

Statement of Information:

On July 31, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that he received the Complainant’s OPRA request on July 11, 2013, and responded on July 12 and 15, 2013.

Counsel for the Custodian (“Counsel”) states that the Custodian provided a link to access the requested records three (3) business days after he received the Complainant’s request. Counsel states that the requested contract is not maintained by the Motor Vehicle Commission (“MVC”) and that any delay in the Custodian’s response is attributable to his efforts to locate the responsive records despite this. Counsel argues that this response complies with OPRA’s requirement that immediate access be provided to contracts. *Citing N.J.S.A. 47:1A-5(e)*.

Counsel also contends that the Complainant’s assertion that Langford supports the contention that a custodian cannot provide a link to responsive records, rather than copies of the records themselves, is improper. Counsel asserts that while the custodian in Langford merely informed the requestor that certain unidentified records could be reviewed on site, the Custodian here provided the Complainant with a link to the website where he could directly access the contracts. *See Langford*, GRC 2005-181.

Counsel additionally states that if the Complainant had contacted the Custodian regarding his inability to utilize the provided link, the Custodian would have provided him with copies of the responsive records. The Custodian certifies that he disclosed copies of the responsive documents to the Complainant with the SOI.

Additional Submissions:

On August 19, 2013, the Complainant provided a response to the SOI. The Complainant stated that because he did not contact the Custodian about his inability to access the provided internet link, he is withdrawing his arguments regarding the appropriateness of disclosing records to requestors in that manner. The Complainant also states, however, that the Custodian still violated OPRA by failing to provide him immediate access to the requested contracts.

Analysis

Timeliness

OPRA mandates that a custodian normally must respond to a records request within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). However, OPRA contains a separate response timeline for certain records. Specifically, OPRA states that immediate access ordinarily shall be granted to contracts, among other types of records. N.J.S.A. 47:1A-5(e). When immediate access records are requested, a custodian must respond to the

request for those records immediately, granting or denying access, requesting additional time to respond, or requesting clarification of the request. Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007).

Here, the Complainant's OPRA request sought the "[c]ontract for security guard services currently in effect." Although the Complainant requested a type of immediate access records listed in N.J.S.A. 47:1A-5(e), the Custodian did not first respond until the third (3rd) business day following receipt of the request.

Accordingly, the Custodian's failure to respond immediately to the Complainant's OPRA request for a current MVC contract either granting or denying access, requesting additional time to respond, or requesting clarification of the request results in a violation of OPRA's immediate access provision. N.J.S.A. 47:1A-5(e); Herron, GRC 2006-178.

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 (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); 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(e), he provided the Complainant with all records responsive to the request even though the MVC does not maintain the requested contracts. 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's failure to respond immediately to the Complainant's OPRA request for a current MVC contract either granting or denying access, requesting additional time to respond, or requesting clarification of the request results in a violation of OPRA's immediate access provision. N.J.S.A. 47:1A-5(e); Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007).

2. Although the Custodian violated OPRA's immediate access provision at N.J.S.A. 47:1A-5(e), he provided the Complainant with all records responsive to the request even though the MVC does not maintain the requested contracts. 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