



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

June 24, 2014 Government Records Council Meeting

Raymond A. Delbury
Complainant

Complaint No. 2013-240

v.

Greystone Park Psychiatric Hospital (Morris)
Custodian of Record

At the June 24, 2014 public meeting, the Government Records Council (“Council”) considered the June 17, 2014 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. Mr. Nielsen complied with the Council’s April 29, 2014 Interim Order because he responded in the prescribed time frame providing the fourth (4th) report based on an inspection conducted prior to the submission of the OPRA request (via the Complainant’s preferred method of delivery) and simultaneously provided certified confirmation of compliance to the GRC.
2. The GRC first notes that the evidence of record indicates that Mr. Stern did not violate OPRA and thus his actions will not be analyzed here. Mr. Nielsen’s initial response was insufficient because he failed to address the Complainant’s preferred method of delivery and he unlawfully denied access to the fourth (4th) report based on an inspection conducted prior to the submission of the OPRA request. However, Mr. Nielsen properly requested two (2) extensions of time, did not unlawfully deny access to an overwhelming majority of the Complainant’s OPRA request and timely complied with the Council’s Interim Order. Additionally, the evidence of record does not indicate that Mr. Nielsen’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Mr. Nielsen’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 24th Day of June, 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: June 26, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
June 24, 2014 Council Meeting**

**Raymond A. Delbury¹
Complainant**

GRC Complaint No. 2013-240

v.

**Greystone Park Psychiatric Hospital (Morris)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies on a compact disc (“CD”) or a USB drive of:

1. Greystone Psychiatric Hospital (“Greystone”) Department of Staff Development and Training policies and procedures, and any and all updates to date.
2. Any other protocol and/or procedure manuals that may guide hospital personnel.
3. AFSCME, CWA and IFPTC Union rules.
4. Last four (4) Greystone and (on-premises) affiliates Health Department Inspection Reports in their entirety.

Custodian of Record: Steven Stern and Jeffrey Nielson³

Request Received by Custodian: August 7, 2013

Response Made by Custodian: August 8, 2013

GRC Complaint Received: August 26, 2013

Background

April 29, 2014 Council Meeting:

At its April 29, 2014 public meeting, the Council considered the April 22, 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, found that:

1. Because Mr. Nielsen responded timely seeking an extension of time, responded prior to the expiration of the extended time frame, sought a second extension and responded prior to the expiration of same, the Custodians bore their burden of proof

¹ No legal representation listed on record.

² Represented by Deputy Attorney General John F. Regina.

³ Mr. Stern is the Custodian of Record for Greystone and Mr. Nielson is the Custodian of Record for the New Jersey Department of Human Services, Division of Mental Health and Addiction Services. Both custodians worked on the response to the Complainant’s OPRA request.

that they timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, there was no "deemed" denial of OPRA. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i).

2. Mr. Nielsen's August 21, and August 22, 2013 responses were insufficient, because he failed to address the Complainant's preferred method of delivery (electronic on a CD or a USB drive). N.J.S.A. 47:1A-5(g); O'Shea v. Twp of Fredon (Sussex), GRC Complaint Number 2007-251 (February 2008), Paff v. Borough of Sussex (Sussex), GRC Complaint Number 2008-38 (July 2008). However, the Council should decline to order disclosure of the records provided on these dates in the requested method of delivery because same were already provided to the Complainant.
3. The Custodians did not unlawfully deny access to the record responsive to item No. 1 because they timely responded within the extended time frame providing access to a record that reasonably fulfilled the request item. N.J.S.A. 47:1A-6.
4. The Custodians have borne their burden of proving that they did not unreasonably deny access to Greystone's protocols and procedures "that may guide hospital personnel." N.J.S.A. 47:1A-6. Specifically, Mr. Nielsen provided the Complainant with a copy of the web pages listing said protocol/procedures that included the Internet address where the responsive record resided. See Rodriguez v. Kean Univ., GRC Complaint No. 2013-69 (March 2014).
5. Because Mr. Nielsen initially responded to the Complainant and both Custodians subsequently certified in the Statement of Information that no records responsive to the Complainant's OPRA request item No. 3 exist, and because there is no evidence on record to refute the Custodians' certifications, the Custodians did not unlawfully deny access to the requested records. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
6. Mr. Nielsen may have unlawfully denied access to the fourth (4th) report. N.J.S.A. 47:1A-6. Specifically, Mr. Nielsen identified in his response a fourth (4th) inspection that was conducted subsequent to submission of the OPRA request and for which no report was created at the time of Mr. Nielsen's August 22, 2013 response. Paff v. City of Union City (Hudson), GRC Complaint No. 2012-262 (August 2013); Paff v. Neptune Twp. Hous. Auth. (Monmouth), GRC Complaint No. 2010-307 (Interim Order dated April 25, 2012). Thus, Mr. Nielsen must either disclose a fourth (4th) completed report based on an inspection conducted prior to the submission of the OPRA request or certify if no other inspection reports (besides the three (3) provided) exist.
7. **The Custodians shall comply with item No. 6 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 1:4-4,⁴ to the Executive Director.⁵

8. The Council defers analysis of whether the Custodians knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending compliance with the Council's Interim Order.

Procedural History:

On May 1, 2014, the Council distributed its Interim Order to all parties. On May 9, 2014, Mr. Nielsen responded to the Council's Interim Order. Mr. Nielsen certified that he received the Interim Order on May 5, 2014. Mr. Nielsen further certified that he contacted Greystone for the inspection report ordered to be provided and received same on May 7, 2014. In addition, Mr. Nielsen certified that under cover of letter on May 7, 2014, he provided to the Complainant a copy of the report as a .pdf file on compact disc and hard copy.

Analysis

Compliance

At its April 29, 2014 meeting, the Council ordered Mr. Nielsen to disclose the report based on an inspection conducted prior to the submission of the OPRA request or certify if no other inspection reports exist. Further, Mr. Nielsen was ordered to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On May 1, 2014, the Council distributed its Interim Order to all parties, providing Mr. Nielsen five (5) business days to comply with the terms of said Order, which he received on May 5, 2014. Thus, Mr. Nielsen's response was due by close of business on May 12, 2014.

On May 8, 2014, the third (3rd) business day after receipt of the Council's Order, Mr. Nielsen disclosed the record ordered to be provided. On May 9, 2014, Mr. Nielsen submitted certified confirmation of compliance to the Executive Director.

Therefore, Mr. Nielsen complied with the Council's April 29, 2014 Interim Order because he responded in the prescribed time frame providing the fourth (4th) report based on an inspection conducted prior to the submission of the OPRA request (via the Complainant's preferred method of delivery) and simultaneously provided certified confirmation of compliance to the Executive Director.

⁴ "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."

⁵ Satisfactory compliance requires that the Custodian deliver the record 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.

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)).

The GRC first notes that the evidence of record indicates that Mr. Stern did not violate OPRA and thus his actions will not be analyzed here. Mr. Nielsen’s initial response was insufficient because he failed to address the Complainant’s preferred method of delivery and he unlawfully denied access to the fourth (4th) report based on an inspection conducted prior to the submission of the OPRA request. However, Mr. Nielsen properly requested two (2) extensions of time, did not unlawfully deny access to an overwhelming majority of the Complainant’s OPRA request and timely complied with the Council’s Interim Order. Additionally, the evidence of record does not indicate that Mr. Nielsen’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Mr. Nielsen’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. Mr. Nielsen complied with the Council’s April 29, 2014 Interim Order because he responded in the prescribed time frame providing the fourth (4th) report based on an inspection conducted prior to the submission of the OPRA request (via the

Complainant's preferred method of delivery)and simultaneously provided certified confirmation of compliance to the GRC.

2. The GRC first notes that the evidence of record indicates that Mr. Stern did not violate OPRA and thus his actions will not be analyzed here. Mr. Nielsen's initial response was insufficient because he failed to address the Complainant's preferred method of delivery and he unlawfully denied access to the fourth (4th) report based on an inspection conducted prior to the submission of the OPRA request. However, Mr. Nielsen properly requested two (2) extensions of time, did not unlawfully deny access to an overwhelming majority of the Complainant's OPRA request and timely complied with the Council's Interim Order. Additionally, the evidence of record does not indicate that Mr. Nielsen's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Mr. Nielsen'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: Dawn R. SanFilippo, Esq.
Acting Executive Director

June 17, 2014



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

INTERIM ORDER

April 29, 2014 Government Records Council Meeting

Raymond A. Delbury
Complainant

Complaint No. 2013-240

v.

Greystone Park Psychiatric Hospital (Morris)
Custodian of Record

At the April 29, 2014 public meeting, the Government Records Council (“Council”) considered the April 22, 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. Because Mr. Nielsen responded timely seeking an extension of time, responded prior to the expiration of the extended time frame, sought a second extension and responded prior to the expiration of same, the Custodians bore their burden of proof that they timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, there was no “deemed” denial of OPRA. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i).
2. Mr. Nielsen’s August 21, and August 22, 2013 responses were insufficient, because he failed to address the Complainant’s preferred method of delivery (electronic on a CD or a USB drive). N.J.S.A. 47:1A-5(g); O’Shea v. Twp of Fredon (Sussex), GRC Complaint Number 2007-251 (February 2008), Paff v. Borough of Sussex (Sussex), GRC Complaint Number 2008-38 (July 2008). However, the Council should decline to order disclosure of the records provided on these dates in the requested method of delivery because same were already provided to the Complainant.
3. The Custodians did not unlawfully deny access to the record responsive to item No. 1 because they timely responded within the extended time frame providing access to a record that reasonably fulfilled the request item. N.J.S.A. 47:1A-6.
4. The Custodians have borne their burden of proving that they did not unreasonably deny access to Greystone’s protocols and procedures “that may guide hospital personnel.” N.J.S.A. 47:1A-6. Specifically, Mr. Nielsen provided the Complainant with a copy of the web pages listing said protocol/procedures that included the Internet address where the responsive record resided. See Rodriguez v. Kean Univ., GRC Complaint No. 2013-69 (March 2014).
5. Because Mr. Nielsen initially responded to the Complainant and both Custodians subsequently certified in the Statement of Information that no records responsive to the Complainant’s OPRA request item No. 3 exist, and because there is no evidence on



record to refute the Custodians' certifications, the Custodians did not unlawfully deny access to the requested records. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

6. Mr. Nielsen may have unlawfully denied access to the fourth (4th) report. N.J.S.A. 47:1A-6. Specifically, Mr. Nielsen identified in his response a fourth (4th) inspection that was conducted subsequent to submission of the OPRA request and for which no report was created at the time of Mr. Nielsen's August 22, 2013 response. Paff v. City of Union City (Hudson), GRC Complaint No. 2012-262 (August 2013); Paff v. Neptune Twp. Hous. Auth. (Monmouth), GRC Complaint No. 2010-307 (Interim Order dated April 25, 2012). Thus, Mr. Nielsen must either disclose a fourth (4th) completed report based on an inspection conducted prior to the submission of the OPRA request or certify if no other inspection reports (besides the three (3) provided) exist.
7. **The Custodians shall comply with item No. 6 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**
8. The Council defers analysis of whether the Custodians knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 29th Day of April, 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: May 1, 2014

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 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
April 29, 2014 Council Meeting**

**Raymond A. Delbury¹
Complainant**

GRC Complaint No. 2013-240

v.

**Greystone Park Psychiatric Hospital (Morris)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies on a compact disc (“CD”) or a USB drive of:

1. Greystone Psychiatric Hospital (“Greystone”) Department of Staff Development and Training policies and procedures, and any and all updates to date.
2. Any other protocol and/or procedure manuals that may guide hospital personnel.
3. AFSCME, CWA and IFPTC Union rules.
4. Last four (4) Greystone and (on-premises) affiliates Health Department Inspection Reports in their entirety.

Custodian of Record: Steven Stern and Jeffrey Nielson³

Request Received by Custodian: August 7, 2013

Response Made by Custodian: August 8, 2013

GRC Complaint Received: August 26, 2013

Background⁴

Request and Response:

On July 26, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 8, 2013, the first (1st) business day after receipt of the request, Mr. Nielsen responded in writing advising that an extension until August 21, 2013 was necessary to search for and review responsive records. On August 21, 2013, Mr. Nielsen responded stating the following:

¹ No legal representation listed on record.

² Represented by Deputy Attorney General John F. Regina.

³ Mr. Stern is the Custodian of Record for Greystone and Mr. Nielson is the Custodian of Record for the New Jersey Department of Human Services, Division of Mental Health and Addiction Services. Both custodians worked on the response to the Complainant’s OPRA 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.

Raymond A. Delbury v. Greystone Park Psychiatric Hospital (Morris), 2013-240 – Findings and Recommendations of the Executive Director

1. Section AD-HR-0905 (5 pages).
2. Screenshot of <http://mhs-gph-web2/policy/>: Summary of thousands of pages of policy that may guide personnel (4 pages). The full policies can be accessed from Greystone's website.
3. Access is denied because the responsive records are likely made, maintained, received or kept on file at the individual labor union offices referenced.
4. Additional time until August 27, 2013 is required to determine whether Health Department inspection reports related to Greystone exist.

On August 22, 2013, Mr. Nielsen again responded provided three (3) of the most recent inspection reports and advising that a fourth (4th) report exists but is not available at that time.

Denial of Access Complaint:

On August 26, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that he received no response to his OPRA request. The Complainant contended that he has a right to obtain the requested records and will pay the "actual cost" of the CD.

Statement of Information:⁵

On October 18, 2013, Mr. Nielsen and Mr. Stern filed a collective Statement of Information ("SOI"). Custodians certified that they received the Complainant's OPRA request on August 7, 2013 and provided responses on August 8, 2013, August 21, 2013 and August 22, 2013. Custodians argued that the Complainant's assertion that Greystone failed to respond is contrary to the evidence of record, which supports that they responded on three (3) different dates.

Item Nos. 1 and 2:

Mr. Nielsen certified that he asked Mr. Stern to provide him with records responsive to the Complainant's request items. Mr. Stern certified that he provided Mr. Nielsen with records for Item Nos. 1 and 2 on August 13, 2013. Mr. Stern further affirmed that he advised Mr. Nielsen that Item No. 2 appeared overly broad and that thousands of responsive pages of procedure manuals may exist.

Custodians argued that although Item No. 2 was overly broad because it failed to reasonably identify the records sought, they disclosed a complete list of procedures and protocols accessible on Greystone's website. Custodians contended that the item would have forced them to review thousands of pages of hospital policies and analyze, collate or compile data. Custodians argued that precedential case law supports that no such review of "wholesale requests" is required. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Gannett v. Cnty. of Middlesex, 379 N.J. Super. 205, 211-12 (App. Div. 2005).

⁵ On November 18, 2013, the Custodian's Counsel advised the GRC that the Complainant's copy of the SOI was returned as unclaimed.

Item No. 3:

Custodians certified that a reasonable search revealed that no records responsive to Item No. 3 existed.

Item No. 4:

Mr. Nielsen certified that on August 21, 2013, he requested the inspection reports responsive to Item No. 4 from Greystone and was provided with three (3) of four (4) responsive reports. Mr. Nielsen certified that Raymond Gray, Associate Hospital Administrator advised that the fourth (4th) report was not available because the inspection had only just been completed on August 19, 2013.

Analysis

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).⁶ 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

The Complainant filed this complaint contending that he never received a response to his OPRA request. However, the Custodians attached three (3) responses to the SOI. Those responses were: 1) August 8, 2013, or the first (1st) business day after receipt of the request (seeking an extension until August 21, 2013); 2) August 21, 2013 (providing responses to Item Nos. 1, 2 and 3 and seeking an extension until August 27, 2013 for Item No. 4); and 3) August 22, 2013 (providing records responsive to Item No. 4). All responses fell within either the statutorily mandated or the extended time frames. Thus, the evidence supports that the Custodians (via Mr. Nielsen) responded in accordance with OPRA.

Therefore, because Mr. Nielsen responded timely seeking an extension of time, responded prior to the expiration of the extended time frame, sought a second extension and responded prior to the expiration of same, the Custodians bore their burden of proof that they timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, there was no "deemed" denial of OPRA. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i).

⁶ 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.

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Sufficiency of Response

The GRC previously adjudicated complaints in which a custodian did not address the preferred method of delivery. In O’Shea v. Twp of Fredon (Sussex), GRC Complaint Number 2007-251 (February 2008), the complainant contended that the custodian’s response to his OPRA request was insufficient because it did not address his preference for e-mailed records over paper copies via regular mail. The Council held that “[a]ccording to [the] language of N.J.S.A. 47:1A-5(g), the Custodian was given two ways to comply and should have, therefore, responded acknowledging the Complainant’s preferences with a sufficient response for each.” The Council further held that “the Custodian’s response is insufficient because she failed to specifically address the Complainant’s preference for receipt of records.” *See also* Paff v. Borough of Sussex (Sussex), GRC Complaint Number 2008-38 (July 2008)(holding that although the custodian timely responded granting access to the requested record, the custodian’s response was insufficient because she failed to address the preferred method of delivery).

Here, Mr. Nielsen failed to address the Complainant’s preferred method of delivery (electronically on a CD or a USB drive) in his August 21, 2013 and August 22, 2013 and instead provided paper copies of responsive records.

Thus, Mr. Nielsen’s August 21, and August 22, 2013 responses were insufficient, because he failed to address the Complainant’s preferred method of delivery (electronic on a CD or a USB drive). N.J.S.A. 47:1A-5(g); O’Shea, GRC 2007-251; Paff, GRC 2008-38. However, the Council should decline to order disclosure of the records provided on these dates in the requested method of delivery because same were already provided to the Complainant.

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.

Item Nos. 1: Greystone policies, procedures for training

In the instant matter, the Custodians disclosed to the Complainant a section of the Greystone’s Policy and Procedure Manual regarding employee competency. A review of this record shows that a vast majority of it pertains to employee training to include responsibilities of department heads and the Department of Staff Development and Training, mandates for employee trainings and training guidelines. The GRC is satisfied that this record is responsive to the Complainant’s OPRA request item No. 1.

Therefore, the Custodians did not unlawfully deny access to the record responsive to item No. 1 because they timely responded within the extended time frame providing access to a record that reasonably fulfilled the request item. N.J.S.A. 47:1A-6.

Item No. 2: Procedure manuals

In Windish v. Mount Arlington Pub. Sch., GRC Complaint No. 2005-216 (August 2006), the complainant sought a breakdown of the actual costs of paper copies. The custodian responded advising the complainant that a breakdown of copying costs was included on the OPRA request form that the complainant used to submit his request. The Council determined that the custodian violated OPRA by informing the complainant of where to find the requested information instead of providing the complainant with a “copy of the Board of Education’s OPRA request form . . .” Id. (citing N.J.S.A. 47:1A-1). The Council’s decision in Windish was based on the custodian’s failure to provide any record at all. *See also* Langford v. City of Perth Amboy, GRC Complaint No. 2005-181 (May 2007)(holding that custodian’s response that “rules in order to obtain a loan” were available for review at the Director of Human Services’ office resulted in violation of N.J.S.A. 47:1A-1).

The Council later applied this reasoning to instances where custodians referred requestors to the Internet. Specifically, in Kaplan v. Winslow Twp. Bd. of Educ. (Camden), Complaint No. 2009-148 (Interim Order dated June 29, 2010), the custodian responded to the complainant’s OPRA request by advising that the responsive records could be found on the Board of Education’s website. The Council, applying its previous holdings in Windish and Langford, without further explanation, determined that informing the complainant that the records could be found on the Internet instead of physically providing the records resulted in a violation of N.J.S.A. 47:1A-1. *See also* Wolosky v. Twp. of Denville (Morris), GRC Complaint No. 2010-191 (Interim Order dated January 31, 2012)(finding custodian’s response directing complainant to township’s website to be impermissible). Thereafter, the Council similarly applied this holding to complaints in which a custodian referred a requestor to a website.

Most recently, in Rodriguez v. Kean Univ., GRC Complaint No. 2013-69 (March 2014), the Council noted that

[A]vailability of Internet, as well as technological capability in general, has greatly increased. Many New Jerseyans turn to the Internet to conduct business with government, including electronically filing taxes, renewing motor vehicle registrations, paying penalties for motor vehicle violations, and making OPRA requests. Indeed, the Legislature signified its awareness of this fact by passing a statute requiring “[a]ny State authority, board, or commission, regional authority, or environmental authority, board, or commission [to] develop and maintain either an Internet website or a webpage on the State's, municipality's, or county's Internet website . . . to provide increased public access to . . . operations and activities” N.J.S.A. 40:56A-4.1.

A reversal of the Council’s past holdings that found referring requestors to records readily available on the Internet to be a violation of OPRA will not infringe on the statute’s purpose of “maximiz[ing] public knowledge about public affairs in order to ensure an informed citizenry . . .” Mason v. City of Hoboken, 196 N.J. 51, 64 (2008) (citing Asbury Park Press v. Ocean Cnty. Prosecutor’s Office, 374 N.J. Super. 312, 329 (Law. Div. 2004)). Directing a requestor to the

specific location of a government record on the Internet will save government, and thus taxpayers, time and money, while also providing an efficient and expedient way for a requestor to easily obtain and examine the responsive record as required under OPRA. N.J.S.A. 47:1A-1.

Id. at 3.

The Council further noted that “[t]he Legislature incorporated the notion of “reasonableness” into several sections of OPRA.” Id. at 4 (citing N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-5(c)-(d); N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-6, 7(f)). The Council thus set a reasonable policy by which a custodian may direct a requestor to records on the Internet:

[A] custodian shall direct a requestor, with reasonable clarity, to the specific location on the Internet where the responsive records reside. This shall include, if necessary, directions for accessing the responsive document that would be comprehensible to a reasonable person, including but not limited to providing a link to the exact location of the requested document. However, a custodian’s ability to direct a requestor to the specific location of a government record on the Internet is contingent upon on the requestor’s ability to electronically access the records. Thus, a custodian is not absolved from providing the record in hardcopy if the requestor is unable to obtain the information from the Internet and makes it known to the custodian within seven (7) business days after receipt of the custodian’s response, in which case the custodian will have seven (7) business days from the date of such notice to disclose the record(s) in hardcopy.⁷

Id. at 4.

In the instant matter, the Complainant requested Greystone’s “. . . protocol and/or procedure manuals that may guide hospital personnel” electronically on a CD or a USB drive. The Custodian provided a timely response, via email, indicating that the responsive records could be found at <http://mhs-gph-web2/policy/>, comprising thousands of pages of policies “that may guide hospital personnel.” The Custodians subsequently certified in the SOI that although the Complainant’s OPRA request item would have forced them to research thousands of pages to determine what records existed, they provided the Complainant the direct ability to access and review every protocol and procedure. This response is consistent with the GRC’s new policy because the Complainant sought the records electronically and was provided with an exact location to access same. Further, the Complainant has not disputed that he could not access these records at any point thereafter.

Therefore, the Custodians have borne their burden of proving that they did not unreasonably deny access to Greystone’s protocols and procedures “that may guide hospital personnel.” N.J.S.A. 47:1A-6. Specifically, Mr. Nielsen provided the Complainant with a copy of the web pages listing said protocol/procedures that included the Internet address where the responsive record resided. *See Rodriguez*, GRC 2013-69.

⁷ If the request was submitted electronically or the records were requested to be disclosed electronically, there will be a presumption that the complainant has access to the Internet.

Item No. 3: Union rules

In Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005), the complainant sought a copy of a telephone bill from the custodian in an effort to obtain proof that a phone call was made to him by an official from the Department of Education. The custodian provided a certification in his submission to the GRC that certified that the requested record was nonexistent and the complainant submitted no evidence to refute the custodian's certification. The Council subsequently determined that "[t]he Custodian has certified that the requested record does not exist. Therefore, the requested record cannot (sic) be released and there was no unlawful denial of access."

In the instant complaint, the Complainant's request item No. 3 sought records that on their face are not likely to be maintained by a public agency. Notwithstanding this fact, Mr. Nielsen initially responded denying access to same advising the Complainant that no responsive records existed and were likely maintained with the individual union offices. The Custodians subsequently certified that a reasonable search yielded no responsive records.

Therefore, because Mr. Nielsen initially responded to the Complainant and both Custodians subsequently certified in the SOI that no records responsive to the Complainant's OPRA request item No. 3 exist, and because there is no evidence on record to refute the Custodians' certifications, the Custodians did not unlawfully deny access to the requested records. *See Pusterhofer*, GRC 2005-49.

Item No. 4: Inspection reports

The Council has previously determined that a custodian is not required to provide records that came into existence after the submission of an OPRA request. Paff v. City of Union City (Hudson), GRC Complaint No. 2012-262 (August 2013). Further, OPRA does not contemplate on-going requests for records. Paff v. Neptune Twp. Hous. Auth. (Monmouth), GRC Complaint No. 2010-307 (Interim Order dated April 25, 2012)(*citing Blau v. Union Cnty.*, GRC Complaint No. 2003-75 (January 2005)).

Here, on August 22, 2013, Mr. Nielsen disclosed to the Complainant three (3) inspection reports and advised that the fourth (4th) report was unavailable because an inspection recently occurred on August 19, 2013 and no report was completed. However, not only did a record not exist at the time of the request, but also this inspection was completed after the submission of same. Just as OPRA does not require a custodian to provide records that did not exist at the time of a request nor allow for on-going requests, the fourth (4th) report cited as responsive could not have possibly been responsive to this OPRA request. Thus, Mr. Nielsen should have disclosed the last four (4) completed reports. Although he disclosed three (3) reports already, he failed to disclose a fourth (4th) completed report to the Complainant. The GRC notes that the evidence of record is unclear as to whether any additional inspections were conducted prior to the three (3) disclosed to the Complainant.

Therefore, Mr. Nielsen may have unlawfully denied access to the fourth (4th) report. N.J.S.A. 47:1A-6. Specifically, Mr. Nielsen identified in his response a fourth (4th) inspection

that was conducted subsequent to submission of the OPRA request and for which no report was created at the time of Mr. Nielsen's August 22, 2013 response. Paff, GRC 2012-262; Paff, GRC 2010-307. Thus, Mr. Nielsen must either disclose a fourth (4th) completed report based on an inspection conducted prior to the submission of the OPRA request or certify if no other inspection reports (besides the three (3) provided) exist.

Knowing & Willful

The Council defers analysis of whether the Custodians knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because Mr. Nielsen responded timely seeking an extension of time, responded prior to the expiration of the extended time frame, sought a second extension and responded prior to the expiration of same, the Custodians bore their burden of proof that they timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, there was no "deemed" denial of OPRA. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i).
2. Mr. Nielsen's August 21, and August 22, 2013 responses were insufficient, because he failed to address the Complainant's preferred method of delivery (electronic on a CD or a USB drive). N.J.S.A. 47:1A-5(g); O'Shea v. Twp of Fredon (Sussex), GRC Complaint Number 2007-251 (February 2008), Paff v. Borough of Sussex (Sussex), GRC Complaint Number 2008-38 (July 2008). However, the Council should decline to order disclosure of the records provided on these dates in the requested method of delivery because same were already provided to the Complainant.
3. The Custodians did not unlawfully deny access to the record responsive to item No. 1 because they timely responded within the extended time frame providing access to a record that reasonably fulfilled the request item. N.J.S.A. 47:1A-6.
4. The Custodians have borne their burden of proving that they did not unreasonably deny access to Greystone's protocols and procedures "that may guide hospital personnel." N.J.S.A. 47:1A-6. Specifically, Mr. Nielsen provided the Complainant with a copy of the web pages listing said protocol/procedures that included the Internet address where the responsive record resided. *See* Rodriguez v. Kean Univ., GRC Complaint No. 2013-69 (March 2014).
5. Because Mr. Nielsen initially responded to the Complainant and both Custodians subsequently certified in the Statement of Information that no records responsive to the Complainant's OPRA request item No. 3 exist, and because there is no evidence on record to refute the Custodians' certifications, the Custodians did not unlawfully

deny access to the requested records. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

6. Mr. Nielsen may have unlawfully denied access to the fourth (4th) report. N.J.S.A. 47:1A-6. Specifically, Mr. Nielsen identified in his response a fourth (4th) inspection that was conducted subsequent to submission of the OPRA request and for which no report was created at the time of Mr. Nielsen's August 22, 2013 response. Paff v. City of Union City (Hudson), GRC Complaint No. 2012-262 (August 2013); Paff v. Neptune Twp. Hous. Auth. (Monmouth), GRC Complaint No. 2010-307 (Interim Order dated April 25, 2012). Thus, Mr. Nielsen must either disclose a fourth (4th) completed report based on an inspection conducted prior to the submission of the OPRA request or certify if no other inspection reports (besides the three (3) provided) exist.
7. **The Custodians shall comply with item No. 6 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 1:4-4,⁸ to the Executive Director.⁹**
8. The Council defers analysis of whether the Custodians knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending compliance with the Council's Interim Order.

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Senior Counsel

April 22, 2014

⁸ "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."

⁹ Satisfactory compliance requires that the Custodian deliver the record 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.

Raymond A. Delbury v. Greystone Park Psychiatric Hospital (Morris), 2013-240 – Findings and Recommendations of the Executive Director