



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

June 24, 2014 Government Records Council Meeting

Lester S. Alford
Complainant

Complaint No. 2013-332

v.

Union County Prosecutor's Office
Custodian of Record

At the June 24, 2014 public meeting, the Government Records Council ("Council") considered the June 17, 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 violated OPRA by initially denying the Complainant access to the documents requested in Item No. 1. N.J.S.A. 47:1A-1. However, the Complainant has borne his burden of proving that he lawfully denied access to Item No. 2, because the request for the trial file is both overly broad and the Custodian certified that he provided all responsive records to the Complainant. *See* N.J.S.A. 47:1A-6; New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007); Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005); MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); McClain v. Essex County Prosecutors Office, GRC Complaint No. 2011-202 (July 2012); Kohn v. Township of Livingston, GRC Complaint No. 2009-203 & 2009-211 (January 2011); Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005). Thus, in light of the Custodian's certification, the Council should decline to order the disclosure of the documents responsive to Item No. 1 because the Custodian already provided same to the Complainant.
2. Although the Custodian violated N.J.S.A. 47:1A-1 by initially failing to release records responsive to the Complainant's request, he disclosed the responsive plea forms shortly after the filing of the instant complaint. Further, 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 an 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**

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

**Lester S. Alford¹
Complainant**

GRC Complaint No. 2013-332

v.

**Union County Prosecutor's Office²
Custodial Agency**

Records Relevant to Complaint:

Item No. 1: Any and all plea recommendations in State v. Lester Alford Ind. No. 94-08-0839.

Item No. 2: Prosecutor's trial file in State v. Lester Alford Ind. No. 94-08-0839.

Custodian of Record: David Hancock

Request Received by Custodian: October 21, 2013

Response Made by Custodian: October 22, 2013; November 22, 2013; December 11, 2013

GRC Complaint Received: November 12, 2013

Background³

Request and Response:

On October 21, 2013, the Custodian received an Open Public Records Act ("OPRA") request from the Complainant seeking the above-mentioned records. On October 22, 2013, one (1) business day later, the Custodian replied by denying Item No. 1 for being exempt criminal investigatory records, and by denying Item No. 2 for being an overly broad and non-specific request. The Custodian noted that the Complainant could clarify Item No. 2 in writing.

On November 22, 2013, subsequent to the filing of the instant complaint, the Custodian responded again to the Complainant by stating that, upon additional review, documents responsive to Item No. 1 could be disclosed, and by attaching said documents.

On November 26, 2013, the Complainant wrote to the Custodian to reiterate that he was seeking "any and all" plea offers relating to his case, and to state that the plea offer provided to

¹ No legal representation listed on record.

² Represented by Robert E. Barry, Esq. (Elizabeth, N.J.).

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.

him did not fulfill his request. On December 11, 2013, the Custodian replied by affirming that he could not locate any other responsive documents aside from those disclosed on November 22, 2013. The Complainant also sent a second copy of the records.

Denial of Access Complaint:

On November 12, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that he requires the requested records to support his petition with the Appellate Division, and that the Custodian is withholding evidence of his unjust conviction.

Statement of Information:

On March 20, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that he received the Complainant’s request on October 21, 2013 and responded on October 22, 2013. Additionally, the Custodian certifies that a search for the requested documents revealed that the only existing responsive documents were the plea recommendations supplied to the Complainant on both November 22, 2013 and December 11, 2013.

Analysis

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), the custodian certified that the record provided to the complainant was the only record responsive to the request. Id. The Council found that there had thus been no unlawful denial of access. Id. See also Kohn v. Twp. of Livingston, GRC Complaint No. 2009-203 & 2009-211 (January 2011) (holding custodian did not unlawfully deny access when he certified that he provided all responsive records to complainant, and there existed no credible evidence in record to refute such certification).

Also, in McClain v. Essex County Prosecutors Office, GRC Complaint No. 2011-202 (July 2012), the Council determined that a request for the “trial file” of a specified case was overly broad and invalid under OPRA. Id. (citing N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166 (App. Div. 2007); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30 (App. Div. 2005); MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005)).

Here, the Custodian first denied access to both requests but, after the Complainant filed his complaint with the GRC, later disclosed documents responsive to Item No. 1. The Custodian then certified that, following repeated searches, the only documents responsive to the complainant's request were the plea forms sent to the Complainant. The record shows that the Custodian sent the responsive records to the Complainant on November 22, 2013 and December 11, 2013.

Therefore, the Custodian violated OPRA by initially denying the Complainant access to the documents requested in Item No. 1. However, the Complainant has borne his burden of proving that he lawfully denied access to Item No. 2, because the request for the trial file is both overly broad and the Custodian certified that he provided all responsive records to the Complainant. *See N.J.S.A. 47:1A-6; N.J. Builders Ass'n*, 390 N.J. Super. at 166; *Bent*, 381 N.J. Super. at 30; *MAG*, 375 N.J. Super. at 53; *McClain*, GRC 2011-202; *Kohn*, GRC 2009-203 & 2009-211; *Burns*, GRC 2005-68. Thus, in light of the Custodian's certification, the Council should decline to order the disclosure of the documents responsive to Item No. 1 because the Custodian already provided same to the Complainant.

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 (*Felder 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-1 by initially failing to release records responsive to the Complainant's request, he disclosed the responsive plea forms shortly after the filing of the instant complaint. Further, 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 an 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 violated OPRA by initially denying the Complainant access to the documents requested in Item No. 1. N.J.S.A. 47:1A-1. However, the Complainant has borne his burden of proving that he lawfully denied access to Item No. 2, because the request for the trial file is both overly broad and the Custodian certified that he provided all responsive records to the Complainant. *See* N.J.S.A. 47:1A-6; New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007); Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005); MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); McClain v. Essex County Prosecutors Office, GRC Complaint No. 2011-202 (July 2012); Kohn v. Township of Livingston, GRC Complaint No. 2009-203 & 2009-211 (January 2011); Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005). Thus, in light of the Custodian's certification, the Council should decline to order the disclosure of the documents responsive to Item No. 1 because the Custodian already provided same to the Complainant.

2. Although the Custodian violated N.J.S.A. 47:1A-1 by initially failing to release records responsive to the Complainant's request, he disclosed the responsive plea forms shortly after the filing of the instant complaint. Further, 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 an unreasonable denial of access under the totality of the circumstances.

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

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

June 17, 2014