



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

July 29, 2014 Government Records Council Meeting

Fareed Ali
Complainant

Complaint No. 2013-367

v.

NJ Department of Corrections
Custodian of Record

At the July 29, 2014 public meeting, the Government Records Council (“Council”) considered the July 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. The Custodian admittedly failed to timely respond to the Complainant’s request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the 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).
2. The Custodian unlawfully denied access to the requested records by failing to respond to the Complainant’s September 19, 2013 OPRA request in a timely manner. N.J.S.A. 47:1A-6. However, it is unnecessary for the Council to order an on-site inspection of the requested records since the Custodian certified that an on-site inspection was conducted on December 17, 2013.
3. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian certified that an on-site inspection of the requested records was conducted on December 17, 2013. 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 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 29th Day of July, 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: July 31, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 29, 2014 Council Meeting**

**Fareed Ali¹
Complainant**

GRC Complaint No. 2013-367

v.

**State of NJ Department of Corrections²
Custodial Agency**

Records Relevant to Complaint: “I am requesting an ‘on site review’ of my complete Classification file.”

Custodian of Record: John Falvey
Request Received by Custodian: September 19, 2013
Response Made by Custodian: December 17, 2013
GRC Complaint Received: December 20, 2013

Background³

Request and Response:

On September 16, 2013,⁴ the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On or around September 19, 2013, the OPRA request was transferred to the OPRA Liaison at New Jersey State Prison (“NJSP”). On December 17, 2013, fifty-nine (59) business days later, the Custodian was informed by the NJSP OPRA Liaison that an on-site inspection of the requested records was completed.

Denial of Access Complaint:

On December 20, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he has not received any response from the Custodian since he submitted his OPRA request. Additionally, the Complainant asserted that on October 22, 2013, he sent a follow-up letter to the Custodian

¹ No legal representation listed on record.

² No legal representation listed on record.

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.

⁴ The Custodian received the OPRA request on September 19, 2013.

seeking an update on his OPRA request. The Complainant claimed he received no response to the follow-up letter either.

Statement of Information:

On January 29, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that upon receiving the Complainant’s OPRA request, he transferred the request to the NJSP OPRA Liaison. The Custodian stated that since the Complainant requested an on-site inspection, and the records were held at NJSP, it was the responsibility of the NJSP OPRA Liaison to fulfill the request.

On October 30, 2013, the Custodian certified that he received the follow-up letter from the Complainant. The Custodian certified that he then sent an email to the NJSP OPRA Liaison, stating that the Complainant’s OPRA request needed to be fulfilled immediately. The Custodian further certified that he sent follow-up emails to the NJSP OPRA Liaison on November 26, 2013, December 9, 2013, and December 13, 2013.

On December 17, 2013, the Custodian certified that he was informed by the NJSP OPRA Liaison that the on-site inspection was completed. Lastly, the Custodian certified that he was informed that the reason for the delay in fulfilling the request was due to various personnel issues at the NJSP office and staff shortages.

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).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 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 Custodian certified that on December 17, 2013, the Complainant completed an on-site inspection of the requested records. The Custodian conceded his failure to respond to the Complainant and the delay in fulfilling the OPRA request without seeking an extension of time to respond.

Therefore, the Custodian admittedly failed to timely respond to the Complainant’s request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the

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.

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, GRC 2007-11.

Unlawful Denial of Access

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

The Custodian conceded that he failed to respond to the Complainant's OPRA request and there was a substantial delay in fulfilling the request due to "various personnel issues" with the NJSP OPRA Liaison. The Custodian certified however, that on December 17, 2013 the on-site inspection of the records was completed. Additionally, there is no evidence in the record to refute the Custodian's certification.

The Custodian unlawfully denied access to the requested records by failing to respond to the Complainant's September 19, 2013 OPRA request in a timely manner. N.J.S.A. 47:1A-6. However, it is unnecessary for the Council to order an on-site inspection of the requested records since the Custodian certified that an on-site inspection was conducted on December 17, 2013.

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 (E.C.E.S. v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian certified that an on-site inspection of the requested records was conducted on December 17, 2013. 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 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 admittedly failed to timely respond to the Complainant's request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the 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).
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3. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian certified that an on-site inspection of the requested records was conducted on December 17, 2013. 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 an unreasonable denial of access under the totality of the circumstances.

Prepared By: Samuel A. Rosado, Esq.
Staff Attorney

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

July 22, 2014