



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

January 30, 2015 Government Records Council Meeting

Keith A. Werner
Complainant

Complaint No. 2014-116

v.

Newark Police Department (Essex)
Custodian of Record

At the January 30, 2015 public meeting, the Government Records Council (“Council”) considered the January 20, 2015 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. In the absence of any evidence indicating the Newark Police Department staff member who responded to the Complainant’s OPRA request, the GRC is unable to determine the identity of the staff member of the Newark Police Department that violated N.J.S.A. 47:1A-5(h).
2. The Custodian has borne his burden of proof that he did not unlawfully deny access to the requested records. N.J.S.A. 47:1A-6. The evidence of record demonstrates that the Custodian provided all responsive records in his possession and directed the Complainant to where he could retrieve the remaining records. Moreover, the Complainant has failed to provide any evidence to contradict the Custodian’s certification.
3. A member of the Newark Police Department violated N.J.S.A. 47:1A-5(h) by failing to forward the Complainant’s OPRA request to the Custodian or direct the Complainant to the Custodian. However, the Custodian did not unlawfully deny access to the records because he certified that he provided the Complainant with all responsive records in his possession and directed the Complainant to where he can obtain the remainder. 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 30th Day of January, 2015

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: February 4, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 30, 2015 Council Meeting**

**Keith A. Werner¹
Complainant**

GRC Complaint No. 2014-116

v.

**Newark Police Department (Essex)²
Custodial Agency**

Records Relevant to Complaint: Hard copies of:

“The criminal complaints and statements/confessions (made by the accused) of the below listed individuals:

1. Patrice Philson (DOB [omitted])
2. Stafford Hughes (DOB [omitted]) (SBI# 576297C)
3. Bomaro Kubueza (SBI# 207249C)
4. Darryl V. Conquest (SBI# 130874A)
5. John Pritchett (SBI# 979250B)
6. Julius Wilson (DOB [omitted]) (SBI# 476388C)
7. Eugene Belton (SBI# 149120C)
8. Jonathan Williams (SBI# 476388C)”

Custodian of Record: Robert P. Marasco

Request Received by Custodian: March 20, 2014

Response Made by Custodian: March 31, 2014; May 7, 2014; June 10, 2014; July 15, 2014; July 28, 2014

GRC Complaint Received: March 14, 2014

Background³

Request and Response:

On January 30, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request, addressed to Captain Caroline Clark (“Capt. Clark”) at the Newark Police Department (“NPD”) seeking the above-mentioned records. As of March 7, 2014, the date of the

¹ No legal representation listed on record.

² 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.

Complainant's signature on his Denial of Access Complaint, there had been no response from the Custodian.

Denial of Access Complaint:

On March 17, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that the Custodian has not responded to his OPRA request.

Statement of Information:

On April 21, 2014, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that Capt. Clark was not and had never been the records custodian with the NPD, causing the delay in receiving the Complainant's OPRA request. The Custodian certified that he did not receive the request until March 20, 2014. On March 31, 2014, seven (7) business days later, the Custodian responded to the Complainant. The Custodian stated that they do not possess criminal complaints, and that the Complainant would have to request those records from the court. Regarding the statements and/or confessions, the Custodian requested clarification from the Complainant, seeking a range of dates in which he could conduct a manual search of their records.

On April 9, 2014, the Custodian sent a letter the Complainant correcting a typographical error made in the March 31, 2014 response.

Additional Submissions:

On May 7, 2014, the Custodian sent a letter to the Complainant stating that he has not received a response to his request for clarification of the Complainant's OPRA request.

On May 20, 2014, the Complainant submitted a letter to the Custodian, providing arrest dates of September 17 and 19, 2002 for Julius Wilson, the sixth (6th) individual listed in his OPRA request. The Complainant further stated that he would provide specific dates for the other individuals in a separate OPRA request. The Complainant also provided an arrest date for a "Farad Wynn," who was not originally identified in the Complainant's OPRA request.

The Custodian responded to the Complainant by mail on June 10, 2014, stating that a search revealed two (2) arrests for Julius Wilson on the dates provided by the Complainant. However, the Custodian was unable to locate any criminal complaints or statements of Julius Wilson sought by the Complainant. The Custodian advised the Complainant to reach out to the Municipal or County Prosecutor's Office, or the Court to obtain those records. The Custodian also stated that if the Complainant wanted records pertaining to Farad Wynn, he would have to file a separate OPRA request.

Upon receiving a letter from the Complainant indicating he had not received the Custodian's June 10, 2014 letter, the Custodian sent a letter on July 15, 2014 attaching the prior correspondence. On July 28, 2014, the Custodian sent another letter informing the Complainant

that they had sent the July 15, 2014 and June 10, 2014 correspondence to the incorrect mailing address, which caused the Complainant to miss the previous correspondence.

Analysis

Failure to Forward

OPRA provides that “[a]ny officer or *employee* of a *public agency* who receives a request for access to a government record *shall forward* the request to the *custodian of the record* or *direct the requestor* to the *custodian of the record*.” N.J.S.A. 47:1A-5(h) (emphasis added).

In Barkley v. NJ Dep’t of Treasury, GRC Complaint No. 2009-128 (May 2010), the agency was unable to identify the staff member who responded to the complainant’s letter request. As such, the Council was unable to identify the individual who violated N.J.S.A. 47:1A-5(h).

In the instant matter, the Custodian certified that the Complainant addressed his OPRA request to Capt. Clark of the NPD, using the City of Newark’s OPRA request form. The Custodian certified that Capt. Clark had never been the custodian of records for the City of Newark, nor for the NPD. Similar to the facts in Barkley, there is no evidence in the record to identify who initially received the Complainant’s request, nor who forwarded it to the Custodian. GRC No. 2009-128.

Therefore, in the absence of any evidence indicating the NPD staff member who responded to the Complainant’s OPRA request, the GRC is unable to determine the identity of the staff member of the NPD that violated N.J.S.A. 47:1A-5(h).

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 certified that all records responsive to the Complainant’s OPRA request were provided to the Complainant upon receipt of clarification from the Complainant. The Custodian further certified that NPD does not possess criminal complaints and statements, and advised the Complainant to seek such records from the Municipal or County Prosecutor’s Office or the Court. Additionally, the Complainant has failed to provide any evidence to contradict the Custodian’s certification.

The Custodian has borne his burden of proof that he did not unlawfully deny access to the requested records. N.J.S.A. 47:1A-6. The evidence of record demonstrates that the Custodian provided all responsive records in his possession, and directed the Complainant to where he

could retrieve the remaining records. Moreover, the Complainant has failed to provide any evidence to contradict the Custodian's certification.

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)).

Here, a member of the NPD violated N.J.S.A. 47:1A-5(h) by failing to forward the Complainant's OPRA request to the Custodian or direct the Complainant to the Custodian. However, the Custodian did not unlawfully deny access to the records because he certified that he provided the Complainant with all responsive records in his possession and directed the Complainant to where he can obtain the remainder. 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. In the absence of any evidence indicating the Newark Police Department staff member who responded to the Complainant's OPRA request, the GRC is unable to

determine the identity of the staff member of the Newark Police Department that violated N.J.S.A. 47:1A-5(h).

2. The Custodian has borne his burden of proof that he did not unlawfully deny access to the requested records. N.J.S.A. 47:1A-6. The evidence of record demonstrates that the Custodian provided all responsive records in his possession and directed the Complainant to where he could retrieve the remaining records. Moreover, the Complainant has failed to provide any evidence to contradict the Custodian's certification.
3. A member of the Newark Police Department violated N.J.S.A. 47:1A-5(h) by failing to forward the Complainant's OPRA request to the Custodian or direct the Complainant to the Custodian. However, the Custodian did not unlawfully deny access to the records because he certified that he provided the Complainant with all responsive records in his possession and directed the Complainant to where he can obtain the remainder. 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.
Deputy Executive Director

January 20, 2015