



State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

June 30, 2015 Government Records Council Meeting

Michael Taylor
Complainant

Complaint No. 2014-271

v.

County of Bergen
Custodian of Record

At the June 30, 2015 public meeting, the Government Records Council (“Council”) considered the June 23, 2015 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. Although the Custodian attempted to respond to the Complainant within the statutorily mandated time frame, the Custodian failed to conform to the rules regarding inmate correspondence under N.J.A.C. 10A:18-2.6(c) and failed to correct the error. 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 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 dated October 31, 2007).
2. Notwithstanding the Custodian’s “deemed denial,” the Custodian has borne her burden of proof that she lawfully denied access to the requested video recording of the Complainant’s trial proceedings. N.J.S.A. 47:1A-6. The Custodian certified that Bergen County does not possess or maintain video recordings of trial proceedings. *See* N.J.S.A. 47:1A-1.1; Bent v. Twp. of Stafford Police Dep’t, 381 N.J. Super. 30, 39 (App. Div. 2005); Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. Although the Custodian violated N.J.S.A. 47:1A-5(i) and provided an insufficient response to the Complainant’s request pursuant to N.J.S.A. 47:1A-5(g), the Custodian certified that Bergen County does not possess or maintain the requested record. 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 June, 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: July 2, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Michael Taylor¹
Complainant**

GRC Complaint No. 2014-271

v.

**County of Bergen²
Custodial Agency**

Records Relevant to Complaint: “Copy of the videotape of my trial court proceedings (Indictment No. 03-02-208-I).”

Custodian of Records: Christina A. D’Aloia, Esq.

Request Received by Custodian: July 7, 2014

Response Made by Custodian: July 7, 2014

GRC Complaint Received: July 28, 2014

Background³

Request and Response:

On July 2, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request seeking the above-mentioned records. On July 7, 2014, the date of receipt, the Custodian attempted to respond in writing, stating that Bergen County does not possess the responsive records. The Custodian further stated that the Complainant should direct his request to either the Administrative Office of the Court for Bergen County or Courtroom Transcript Services.

On July 16, 2014, the Custodian’s response was returned as undelivered, with the recipient, South Woods State Prison (“SWSP”), claiming that there was no inmate number provided to process.

Denial of Access Complaint:

On July 28, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that his initial contact with the Custodian was in November 2012, when the Custodian asserted that any OPRA requests to

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.

Bergen County should be directed to her. With respect to the instant matter, the Complainant claimed that he did not receive a response from the Custodian within seven (7) business days. He also contended that he is entitled to inspect and copy audiovisual records of the courts pursuant to Hammock by Hammock v. Hoffman La Roche, Inc., 142 N.J. 356, 379 (1995).

Statement of Information:

On August 1, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that her agency received the Complainant’s request on July 7, 2014. She further certified that they mailed a reply to the Complainant that same day, stating Bergen County does not possess audiovisual recordings of court proceedings and adding that the Complainant should make a request with Bergen County Court or Courtroom Transcript Services. The Custodian then certified that she mailed her response to the Custodian, which was later returned as undeliverable.

Analysis

Timeliness/Insufficient Response

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).⁴ 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 dated October 31, 2007).

The rules regarding incoming correspondence for inmates are found under N.J.A.C. 10A:18-2.6. In relevant part, the rule states that “[t]he inmate’s name and number shall appear on the outside of the incoming correspondence. Correspondence without either the inmate’s name or number shall be returned to the sender.”

The evidence in the record demonstrates that the Custodian failed to include the Complainant’s inmate number on the outside of her OPRA response. The SWSP therefore refused the Custodian’s response and returned it as undeliverable pursuant to N.J.A.C. 10A:18-2.6(c). Additionally, there is no evidence indicating that the Custodian made any additional attempts to deliver her response to the Complainant and include his inmate number on the outside of her response.

Therefore, although the Custodian attempted to respond to the Complainant within the

⁴ 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.

statutorily mandated time frame to respond, the Custodian failed to conform to the rules regarding inmate correspondence under N.J.A.C. 10A:18-2.6(c) and failed to correct the error. 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 request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC No. 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.

Custodians are under no obligation to search for documents that are beyond what a particular agency makes, maintains, or keeps on file. N.J.S.A. 47:1A-1.1; *see Bent v. Twp. of Stafford Police Dep't*, 381 N.J. Super. 30, 39 (App. Div. 2005). Additionally, the Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. *See Pusterhofer v. N.J. Dep't of Educ.*, GRC Complaint No. 2005-49 (July 2005).

Here, the Custodian certified that Bergen County does not possess video recordings of trial proceedings and directed the Complainant to submit a request with either the Administrative Office of the Courts for Bergen County⁵ or Courtroom Transcript Services. Additionally, the Complainant failed to provide any evidence to rebut the Custodian's certification.

Notwithstanding the Custodian's "deemed denial," the Custodian has borne her burden of proof that she lawfully denied access to the requested video recording of the Complainant's trial proceedings. N.J.S.A. 47:1A-6. The Custodian certified that Bergen County does not possess or maintain video recordings of trial proceedings. *See N.J.S.A.* 47:1A-1.1; Bent, 381 N.J. Super. at 39; Pusterhofer, GRC No. 2005-49.

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

⁵ Video recordings of trial proceedings are "court records" as defined by R. 1:38-2(a)(3), are thus governed by the rules of the New Jersey Judiciary branch.

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(i) and provided an insufficient response to the Complainant’s request pursuant to N.J.S.A. 47:1A-5(g), the Custodian certified that Bergen County does not possess or maintain the requested record. 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. Although the Custodian attempted to respond to the Complainant within the statutorily mandated time frame, the Custodian failed to conform to the rules regarding inmate correspondence under N.J.A.C. 10A:18-2.6(c) and failed to correct the error. 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 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 dated October 31, 2007).
2. Notwithstanding the Custodian’s “deemed denial,” the Custodian has borne her burden of proof that she lawfully denied access to the requested video recording of the Complainant’s trial proceedings. N.J.S.A. 47:1A-6. The Custodian certified that Bergen County does not possess or maintain video recordings of trial proceedings. *See* N.J.S.A. 47:1A-1.1; Bent v. Twp. of Stafford Police Dep’t, 381 N.J. Super. 30, 39 (App. Div. 2005); Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

3. Although the Custodian violated N.J.S.A. 47:1A-5(i) and provided an insufficient response to the Complainant's request pursuant to N.J.S.A. 47:1A-5(g), the Custodian certified that Bergen County does not possess or maintain the requested record. 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
Staff Attorney

Reviewed By: Joseph D. Glover
Executive Director

June 23, 2015