



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

FINAL DECISION

September 30, 2014 Government Records Council Meeting

Juan L. Cabral
Complainant

Complaint No. 2014-298

v.

Morris County Park Police
Custodian of Record

At the September 30, 2014 public meeting, the Government Records Council (“Council”) considered the September 23, 2014 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. Although the Custodian responded in writing to the Complainant’s OPRA request in a timely manner, the response was insufficient because the Custodian failed to identify the request item, or grant access, deny access, seek clarification or request an extension of time. *See* N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008)
2. The Custodian failed to bear his burden of proving that denial of access to the Complainant’s September 27, 1995 arrest record was lawful. N.J.S.A. 47:1A-6. However, the Council declines to order disclosure because following the filing of the Denial of Access Complaint, the Custodian did disclose the responsive record to the Complainant.
3. Although the Custodian failed to bear his burden of proving that the denial of access to the Complainant’s September 27, 1995 arrest record was authorized by law, he did disclose said record to the Complainant. Additionally, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian’s actions did 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 30th Day of September, 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: October 3, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 30, 2014 Council Meeting**

**Juan L. Cabral¹
Complainant**

GRC Complaint No. 2014-298

v.

**Morris County Park Police²
Custodial Agency**

Records Relevant to Complaint: A mailed certified copy of the Complainant's arrest report.

Custodian of Record: Chief David Doyle
Request Received by Custodian: June 17, 2014
Response Made by Custodian: June 17, 2014
GRC Complaint Received: August 21, 2014

Background³

Request and Response:

On June 17, 2014, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On June 17, 2014, the same date the request was received, the Custodian responded in writing by stating "Got it. thank (sic) you." On July 1, 2014, the Complainant e-mailed the Custodian to ask if the record had been mailed to him. On July 10, 2014, the Custodian replied to the Complainant's July 1, 2014 e-mail by informing him that that the Custodian was awaiting a superior officer's signature.

Denial of Access Complaint:

On August 21, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserts that on June 17, 2014, the Custodian e-mailed him an OPRA request form along with instructions for completion of the form. The Complainant states that he e-mailed the completed form to the Custodian that same date and the Custodian then e-mailed him a response which stated "thanks I got it." The Complainant states that on July 1, 2014, he e-mailed the Custodian to ask if the record had been mailed to him. On July 10, 2014, the Complainant states the Custodian replied to the

¹ No legal representation listed on record.

² "Represented by John Suminski, Esq., of McElroy, Deutsch, Mulvaney and Carpenter, LLP (Morristown, 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 July 1, 2014 e-mail by informing him that that the Custodian was awaiting a superior officer's signature. The Complainant states that he recently attempted to follow-up on the status of the OPRA request but that the Custodian is ignoring his inquiries.

Statement of Information:

On September 4, 2014, the Custodian filed a Statement of Information ("SOI"). The Custodian certifies that he received the Complainant's OPRA request on June 17, 2014 and responded to the request on the same date.

The Custodian certifies that the record responsive to the Complainant's request was an arrest record dated September 27, 1995. The Custodian further certifies that 1995 arrest records had been archived and locating the record responsive to the request necessitated a physical search of the archives. The Custodian certifies that after the record was found, the Custodian checked to see if the complaint had been expunged, which process further delayed disclosure of the record. The Custodian certifies that the requested record was disclosed to the Complainant on August 22, 2014.

Additional Submissions:

On September 15, 2014, the Complainant telephoned the GRC to say that he received the arrest report he requested but that it was not certified as a true copy. The Complainant was informed that there is nothing in OPRA which requires a custodian to disclose a certified true copy of a record. The Complainant was further advised to contact the Custodian and explain the reason why he needs a certified copy because the agency may offer that as an optional service.

Analysis

Sufficiency of Response

In Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008), the complainant's counsel asserted that the custodian violated OPRA by failing to respond to each of the complainant's request items individually within seven (7) business days. The Council reasoned that, "a custodian is vested with the responsibility to respond to each individual request item within seven (7) business days after receipt of such request." Paff, GRC 2007-272 (citing O'Shea v. Twp. of W. Milford, GRC Complaint No. 2004-17 (April 2005)) The GRC ultimately held that:

Although the Custodian responded in writing to the Complainant's August 28, 2007 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5(i), the Custodian's response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5(g).

Id. (citing Verry v. Borough of S. Bound Brook (Somerset), GRC Complaint No. 2008-166 (April 2009); Kulig v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2008-263 (November 2009)).

Here, the Custodian responded in writing to the Complainant's June 17, 2014 OPRA request in a timely manner by responding on the same date it was received; however, the Custodian's response merely stated "Got it. thank (sic) you." The Custodian did not identify the request item, or grant access, deny access, seek clarification or request an extension of time. Thus, the Custodian's response was insufficient.

Therefore, although the Custodian responded in writing to the Complainant's OPRA request in a timely manner, the response was insufficient because the Custodian failed to identify the request item, or grant access, deny access, seek clarification or request an extension of time. See N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Paff, GRC 2007-272.

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.

On the date the Complainant's OPRA request was received by the Custodian, the Custodian acknowledged receipt of the request and thereafter the evidence of record reveals he did nothing. The Complainant stated he contacted the Custodian two (2) weeks after the Custodian's response to check on the status of the request and that the Custodian informed him that the request was pending a superior officer's signature.

The Custodian certified in the Statement of Information that the record responsive to the request was dated September 27, 1995 and had been archived; therefore, locating the requested record would require a physical search. The Custodian also certified that, once found, the Custodian checked to see if the complaint had been expunged, which further delayed disclosure of the record. There is nothing in the evidence of record to indicate that any of the reasons for delaying disclosure of the requested record were made clear to the Complainant. To the contrary, the evidence of record reveals the reason the record was withheld from disclosure was that such disclosure lacked administrative approval. On August 22, 2014, following the August 21, 2014 filing of the Denial of Access Complaint, the Custodian disclosed to the Complainant the record responsive to the request which formed the basis for the complaint.

Therefore, the Custodian failed to bear his burden of proving that denial of access to the Complainant's September 27, 1995 arrest record was lawful. N.J.S.A. 47:1A-6. However, the Council declines to order disclosure because following the filing of the Denial of Access Complaint, the Custodian did disclose the responsive record 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 (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 (Berg); 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, although the Custodian failed to bear his burden of proving that the denial of access to the Complainant’s September 27, 1995 arrest record was authorized by law, he did disclose said record to the Complainant. Additionally, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian’s actions did 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. Although the Custodian responded in writing to the Complainant’s OPRA request in a timely manner, the response was insufficient because the Custodian failed to identify the request item, or grant access, deny access, seek clarification or request an extension of time. *See* N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008)
2. The Custodian failed to bear his burden of proving that denial of access to the Complainant’s September 27, 1995 arrest record was lawful. N.J.S.A. 47:1A-6. However, the Council declines to order disclosure because following the filing of the

Denial of Access Complaint, the Custodian did disclose the responsive record to the Complainant.

3. Although the Custodian failed to bear his burden of proving that the denial of access to the Complainant's September 27, 1995 arrest record was authorized by law, he did disclose said record to the Complainant. Additionally, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions did 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: John E. Stewart, Esq.

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

September 23, 2014