



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**

**September 29, 2015 Government Records Council Meeting**

Robert Kovacs  
Complainant

Complaint No. 2014-353

v.

Union County Department of Corrections  
Custodian of Record

At the September 29, 2015 public meeting, the Government Records Council (“Council”) considered the September 22, 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. In the absence of any evidence identifying the Union County Department of Corrections employee who responded to the Complainant’s August 4, 2014, OPRA request, the GRC is unable to determine who violated N.J.S.A. 47:1A-5(h) and N.J.S.A. 47:1A-5(i). *See Reed v. Camden Cnty. Police Dep’t*, GRC Complaint No. 2014-158 (January 2015).
2. Notwithstanding the Union County Department of Correction’s “deemed denial” of access, the Custodian has borne his burden of proof that he lawfully denied access to the requested jail file described in the Complainant’s August 4, 2014, OPRA request because he certified, and the record reflects, that no responsive records exist beyond the seventeen (17) pages of records already produced. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The Union County Department of Corrections violated N.J.S.A. 47:1A-5(h) and N.J.S.A. 47:1A-5(i) by failing to forward the Complainant’s OPRA request timely to the Custodian or direct the Complainant to the Custodian. However, the Custodian did not unlawfully deny access to the record because he certified that the original request did not exist. Moreover, the evidence in the record demonstrates the Custodian’s good faith attempts to locate records related to the Complainant’s original request and subsequently produce seventeen (17) pages of responsive records. 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.

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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 29<sup>th</sup> Day of September, 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: October 5, 2015**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
September 29, 2015 Council Meeting**

**Robert Kovacs<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-353**

v.

**Union County Department of Corrections<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Union County Department of Corrections jail file.

**Custodian of Records:** James Pellettiere  
**Request Received by Custodian:** N/A  
**Response Made by Custodian:** September 23, 2014  
**GRC Complaint Received:** October 21, 2014

**Background<sup>3</sup>**

**Request and Response:**

On August 4, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request seeking the above-mentioned records. On September 23, 2014, thirty-one (31) business days later, an anonymous employee with the Union County Department of Corrections (“UCDC”) responded in writing, stating that the requested record can only be obtained via subpoena or court order.

**Denial of Access Complaint:**

On October 21, 2014, the Complainant filed a Denial of Access Complaint (“Complaint”) with the Government Records Council (“GRC”). The Complainant argued that the response he received was unprofessional and believed the fact that the response’s author remained anonymous was evidence that the author knew he was unlawfully denying access to the requested records. The Complainant contended that the Custodian’s failure to respond timely is evidence of discrimination based on his incarceration.

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Brian P. Trelease, Esq. (Elizabeth, NJ).

<sup>3</sup> 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.

### Statement of Information:

On January 29, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he was unaware of the Complainant’s OPRA request until receipt of the Complaint. Regardless, the Custodian certified that since the Complainant was last incarcerated in May 2008, New Jersey Division of Archives and Records Management (“DARM”) guidelines subjected most of the records contained in the Complainant’s jail file to destruction. The Custodian further certified that the only remaining records would be the Complainant’s medical records and his history file. The Custodian certified he provided the latter to the Complainant without redactions.

The Custodian’s Counsel (“Counsel”) submitted a brief in support of the Custodian’s SOI. Counsel stated that the Custodian did not condone the actions of the anonymous respondent and conducted a search for responsive records upon receipt of the Complaint. After an initial search, Counsel stated that the originally requested record, the Complainant’s jail file, could not be located. At Counsel’s request, the UCDC conducted a search for any records related to the Complainant’s jail file. Counsel asserted that the UCDC located seventeen (17) pages of responsive records, which were forwarded to the Complainant without redactions on or around December 17, 2014.

Counsel maintained that despite being unable to locate the jail file responsive to the Complainant’s OPRA request, the Custodian made several good faith attempts to locate any responsive records related to jail file. Counsel also contended that subsequent to filing the Complaint, the Complainant expanded his request to include records beyond the scope of his original request. Nonetheless, the UCDC conducted a third (3<sup>rd</sup>) search, which failed to locate any additional records. Counsel maintained that the seventeen (17) pages of responsive records already provided comprised all responsive records that would be contained in the Complainant’s jail file.

Counsel concluded that the good faith efforts to locate records responsive to the Complainant’s OPRA request counter the Complainant’s allegations of discrimination and unlawful denial of access under OPRA.

### Analysis

#### Failure to Forward/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).<sup>4</sup> 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

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<sup>4</sup> 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.

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).

OPRA further provides that “Any 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 the instant matter, the Complainant submitted his OPRA request via U.S. mail on August 4, 2014, and did not receive a response until September 30, 2014, from an anonymous UCDC employee. The Custodian certified in his SOI that he had no knowledge of the Complainant’s OPRA request until receiving the denial of access complaint. Thus, the unknown employee violated N.J.S.A. 47:1A-5(h) and N.J.S.A. 47:1A-5(i) for failing to forward the Complainant’s request in a timely manner.

However, the evidence in the record does not identify the UCDC employee responsible for handling the Complainant’s request. In Reed v. Camden Cnty. Police Dep’t, GRC Complaint No. 2014-158 (January 2015), the agency was unable to identify the staff member who responded to the complainant’s OPRA request. Thus, the Council was unable to identify the individual who violated N.J.S.A. 47:1A-5(h).

Therefore, in the absence of any evidence identifying the UCDC employee who responded to the Complainant’s August 4, 2014 OPRA request, the GRC is unable to determine who violated N.J.S.A. 47:1A-5(h) and N.J.S.A. 47:1A-5(i). See Reed, GRC No. 2014-158.

### **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 Council has previously found that, in light of a custodian’s certification that no records responsive to the request 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 subsequent to receiving the Complaint, an initial search failed to locate the originally requested jail file. A second (2<sup>nd</sup>) search for records related to the original address located seventeen (17) pages of responsive documents. After a third (3<sup>rd</sup>) search, the Custodian certified that no additional records exist. Additionally, the Complainant failed to provide any evidence in the record to rebut the Custodian’s certification.

Notwithstanding the UCDC’s “deemed” denial, the Custodian has borne his burden of proof that he lawfully denied access to the requested jail file described in the Complainant’s

August 4, 2014, OPRA request because he certified, and the record reflects, that no responsive records exist beyond the seventeen (17) pages of records already produced. N.J.S.A. 47:1A-6; 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 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, the UCDC violated N.J.S.A. 47:1A-5(h) and N.J.S.A. 47:1A-5(i) by failing to forward the Complainant’s OPRA request timely to the Custodian or direct the Complainant to the Custodian. However, the Custodian did not unlawfully deny access to the record because he certified that the original request did not exist. Moreover, the evidence in the record demonstrates the Custodian’s good faith attempts to locate records related to the Complainant’s original request and subsequently produce seventeen (17) pages of responsive records. 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 identifying the Union County Department of Corrections employee who responded to the Complainant's August 4, 2014, OPRA request, the GRC is unable to determine who violated N.J.S.A. 47:1A-5(h) and N.J.S.A. 47:1A-5(i). *See Reed v. Camden Cnty. Police Dep't*, GRC Complaint No. 2014-158 (January 2015).
2. Notwithstanding the Union County Department of Correction's "deemed denial" of access, the Custodian has borne his burden of proof that he lawfully denied access to the requested jail file described in the Complainant's August 4, 2014, OPRA request because he certified, and the record reflects, that no responsive records exist beyond the seventeen (17) pages of records already produced. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The Union County Department of Corrections violated N.J.S.A. 47:1A-5(h) and N.J.S.A. 47:1A-5(i) by failing to forward the Complainant's OPRA request timely to the Custodian or direct the Complainant to the Custodian. However, the Custodian did not unlawfully deny access to the record because he certified that the original request did not exist. Moreover, the evidence in the record demonstrates the Custodian's good faith attempts to locate records related to the Complainant's original request and subsequently produce seventeen (17) pages of responsive records. 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

September 22, 2015