



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

March 31, 2015 Government Records Council Meeting

Richard G. Holland
Complainant

Complaint Nos. 2014-63 and 2014-64

v.

Rowan University
Custodian of Record

At the March 31, 2015 public meeting, the Government Records Council (“Council”) considered the March 24, 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. The Custodian bore her burden of proof that she timely responded to the Complainant’s December 13, 2013 OPRA request No. 1 by seeking clarification five (5) business days after receipt, and the Complainant failed to respond to her request for clarification. N.J.S.A. 47:1A-6. As such, there was no “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. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s December 13, 2013 OPRA request No. 2. N.J.S.A. 47:1A-6. Although the Custodian timely requested clarification of the Complainant’s request, she failed to respond in writing within seven (7) business days of receiving clarification, resulting in a “deemed” denial 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).
3. The Custodian has borne her burden of proving a lawful denial of access to the Complainant’s December 13, 2013 OPRA request No. 1, because the Custodian timely requested clarification of the request in writing, and the Complainant failed to provide such clarification. N.J.S.A. 47:1A-6. See Schilling v. Twp. of Little Egg Harbor (Ocean), GRC Complaint No. 2013-293 (Interim Order Dated March 22, 2013); Herron v. New Jersey Dep’t of Educ., GRC Complaint No. 2011-363 (December 2012); Moore v. Twp. of Old Bridge, GRC Complaint No. 2005-80 (August 2005).
4. Notwithstanding the Custodian’s “deemed” denial, she did not unlawfully deny access to the responsive records to the Complainant’s December 13, 2013 OPRA request No. 2.



N.J.S.A. 47:1A-6. The Custodian certified that she produced all responsive records to the Complainant, and there is no credible evidence to refute her certification. *See Danis v. Garfield Bd. of Educ. (Bergen)*, GRC Complaint Nos. 2009-156, 2009-157, 2009-158 (Interim Order dated April 28, 2010); *Burns v. Borough of Collingswood*, GRC Complaint No. 2005-68 (September 2005).

5. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to timely respond to the Custodian's December 13, 2013 OPRA request No. 2, the Custodian provided the Complainant with all responsive records on January 30 and 31, 2014. 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 31st Day of March, 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: April 2, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 31, 2015 Council Meeting**

Richard G. Holland¹
Complainant

**GRC Complaint Nos. 2014-63
and 2014-64**

v.

Rowan University²
Custodial Agency

Records Relevant to Complaint:

GRC Complaint No. 2014-63

December 13, 2014 OPRA request No. 1:

“Re: Request for Documents on a Call for Service 12/13/13

Rowan Student Housing
100 Redmond Avenue
Handicap Parking Complaint
1:27 pm

I request all audio from all parties including the Rowan University Police regarding the incident. I also request CFS calls for service and any other reports generated regarding the incident.”

GRC Complaint No. 2014-64

December 13, 2014 OPRA request No. 2:

“Log of Rowan Public Safety “Police” vehicle SG32326 for the date of 12/7/13.”

Custodian of Record: Gina Townsend

Request Received by Custodian: December 16, 2013

Response Made by Custodian: December 20, 2013; January 10, 2014; January 30, 2014;
January 31, 2014

GRC Complaint Received: January 31, 2014

¹ No legal representation listed on record.

² Represented by Christine Brasteter, Esq. (Glassboro, NJ).

Background³

Request and Response:

GRC No. 2014-63

On December 13, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records identified as request No. 1. On December 20, 2013, at 7:25 a.m., the Custodian requested clarification of the request, in writing. On January 10, 2014, thirteen (13) business days later, the Custodian responded in writing, stating that police vehicles do not carry sound recordings. However, the Custodian stated that the Rowan University Police Department possesses archived dispatch recordings, and if the requested portion of the recordings is not part of a criminal investigation, then she would comply with the request. On January 30 and 31, 2014, the Custodian provided the requested records.

GRC No. 2014-64

On December 13, 2013, the Complainant submitted an additional OPRA request to the Custodian seeking the above-mentioned records identified as request No. 2. On December 20, 2013, at 10:25 a.m., the Custodian responded in writing, requesting clarification of the request, specifically the time of day. The Complainant replied on December 26, 2014, stating that the time of day was 11:00 a.m. On January 30 and 31, 2014, the Custodian provided the requested records.

Denial of Access Complaint:

GRC No. 2014-63

On January 28, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian failed to respond to this OPRA request.

GRC No. 2014-64

On January 28, 2014, the Complainant filed another Denial of Access Complaint with the GRC. The Complainant claimed that the Custodian failed to respond subsequently after providing clarification of the request on December 26, 2013.

Statement of Information:

GRC No. 2014-63

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.

On March 19, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she did not receive a response from the Complainant after requesting clarification of the request. The Custodian also certified that the available audio and CAD (“computer-aided dispatch”) reports for request No. 1 were provided on January 30 and 31, 2014.

GRC No. 2014-64

The Custodian provided an additional SOI on March 19, 2014. There, the Custodian certified that the available responsive audio and CAD reports for request No. 2 were also provided to the Complainant on January 30 and 31, 2014.

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).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).

GRC No. 2014-63

The evidence in the record demonstrates that the Custodian responded to the Complainant on December 20, 2013, five (5) business days later. The record also shows that the Complainant failed to respond to the Custodian’s request for clarification.

Therefore, the Custodian bore her burden of proof that she timely responded to the Complainant’s OPRA request by seeking clarification five (5) business days after receipt, and the Complainant failed to respond to her request for clarification. N.J.S.A. 47:1A-6. As such, there was no “deemed” denial of the Complainant’s December 13, 2013 OPRA request No. 1 pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC No. 2007-11.

GRC No. 2014-64

The evidence in the record demonstrates that the Custodian responded to the Complainant on December 20, 2013, five (5) business days later. The record also shows that the Complainant

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.

responded on December 26, 2013, providing clarification of the request. However, the Custodian failed to respond to the Complainant until January 30, 2014, twenty-three (23) business days after receiving clarification of the request.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's December 13, 2013 OPRA request No. 2. N.J.S.A. 47:1A-6. Although the Custodian timely requested clarification of the Complainant's request, she failed to respond in writing within seven (7) business days of receiving clarification, resulting in a "deemed" denial 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.

GRC No. 2014-63

In Schilling v. Twp. of Little Egg Harbor (Ocean), GRC Complaint No. 2013-293 (Interim Order Dated March 22, 2013), the Council determined that the custodian bore her burden of proving a lawful denial of access to the requested records because she sought clarification of the complainant's request and the complainant provided no clarification. *See also* Herron v. New Jersey Dep't of Educ., GRC Complaint No. 2011-363 (December 2012); Moore v. Twp. of Old Bridge, GRC Complaint No. 2005-80 (August 2005).

As previously stated above, the evidence in the record demonstrates that on December 20, 2013, the Custodian requested clarification of request No. 1, via e-mail. There is no evidence in the record showing that the Complainant provided clarification for this request. Nevertheless, the Custodian provided a response to request No. 1 to the Complainant on January 30 and 31, 2014.

The Custodian has borne her burden of proving a lawful denial of access to the Complainant's request No. 1, because the Custodian timely requested clarification of the request in writing, and the Complainant failed to provide such clarification. N.J.S.A. 47:1A-6. *See* Schilling, GRC No. 2013-293; Herron, GRC No. 2011-363; Moore, GRC No. 2005-80.

GRC No. 2014-64

In Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint Nos. 2009-156, 2009-157, 2009-158 (Interim Order dated April 28, 2010), the Council found that the custodian did not unlawfully deny access to the requested records based on the custodian's certification that all such records were provided to the complainant. The Council held that the custodian's certification, in addition to the lack of refuting evidence from the complainant, was sufficient to

meet the custodian's burden of proof. *See also* Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).

In this matter, the Custodian certified that all responsive records to request No. 2 were provided to the Complainant on January 30 and 31, 2014. Furthermore, there is no credible evidence in the record to refute the Custodian's certification.

Notwithstanding the Custodian's "deemed" denial, she did not unlawfully deny access to the responsive records to the Complainant's December 13, 2013 OPRA request No. 2. N.J.S.A. 47:1A-6. The Custodian certified that she produced all responsive records to the Complainant, and there is no credible evidence to refute her certification. *See* Danis, GRC Nos. 2009-156, 2009-157, 2009-158; Burns, GRC No. 2005-68.

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)).

Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to timely respond to the Custodian's December 13, 2014 OPRA request No. 2, the Custodian provided the Complainant with all responsive records on January 30 and 31, 2014. 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 bore her burden of proof that she timely responded to the Complainant's OPRA request by seeking clarification five (5) business days after receipt, and the Complainant failed to respond to her request for clarification. N.J.S.A. 47:1A-6. As such, there was no "deemed" denial of the Complainant's December 13, 2013 OPRA request No. 1 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. The Custodian did not bear her burden of proof that she timely responded to the Complainant's December 13, 2013 OPRA request No. 2. N.J.S.A. 47:1A-6. Although the Custodian timely requested clarification of the Complainant's request, she failed to respond in writing within seven (7) business days of receiving clarification, resulting in a "deemed" denial 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).
3. The Custodian has borne her burden of proving a lawful denial of access to the Complainant's request No. 1, because the Custodian timely requested clarification of the request in writing, and the Complainant failed to provide such clarification. N.J.S.A. 47:1A-6. See Schilling v. Twp. of Little Egg Harbor (Ocean), GRC Complaint No. 2013-293 (Interim Order Dated March 22, 2013); Herron v. New Jersey Dep't of Educ., GRC Complaint No. 2011-363 (December 2012); Moore v. Twp. of Old Bridge, GRC Complaint No. 2005-80 (August 2005).
4. Notwithstanding the Custodian's "deemed" denial, she did not unlawfully deny access to the responsive records to the Complainant's December 13, 2013 OPRA request No. 2. N.J.S.A. 47:1A-6. The Custodian certified that she produced all responsive records to the Complainant, and there is no credible evidence to refute her certification. See Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint Nos. 2009-156, 2009-157, 2009-158 (Interim Order dated April 28, 2010); Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).
5. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to respond timely to the Custodian's December 13, 2014 OPRA request No. 2, the Custodian provided the Complainant with all responsive records on January 30 and 31, 2014. 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

Approved By: Dawn R. SanFilippo
Deputy Executive Director

March 24, 2015