



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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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

John Ciszewski
Complainant

Complaint No. 2014-68

v.

Newton Police Department (Sussex)
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 voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear her burden of proof that she provided a timely or sufficient response to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s March 20, 2013 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 October 31, 2007). *See O’Shea v. Twp. of West Milford*, GRC Complaint No. 2004-17 (April 2005); Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. Irrespective of the Custodian’s “deemed” denial, she did not unlawfully deny access to the Complainant’s March 20, 2013 OPRA request because the Custodian certified that no responsive records exist, and the Complainant failed to provide any competent, credible evidence to rebut the Custodian certification. N.J.S.A. 47:1A-6; *see 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 did not unlawfully deny access to the requested records as she certified that no responsive records existed. 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 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**

**John Ciszewski¹
Complainant**

GRC Complaint No. 2014-68

v.

**Newton Police Department (Sussex)²
Custodial Agency**

Records Relevant to Complaint: “In accordance with my OPRA request (see below) please provide the correspondence that was contained in “**my letter to the Mayor Elvidge dated May 31, 2010, Certified No. 7008 1830 0004 9935 7013,**” that resulted in your correspondence to me dated June 7, 2010. Also, “**Please include all records generated by this letter and all correspondence between and among the the [sic] Newton Police Department, Darlene V. Cooper, , [sic] Newtown PD OPRA Officer, Debra [sic] Carter HR Coordinator Lt. Robert Osborn, Newton PD, myself, and all other persons.**”

(Emphasis in original).

Custodian of Record: Lorraine A. Read
Request Received by Custodian: March 20, 2013
Response Made by Custodian: N/A
GRC Complaint Received: February 4, 2014

Background³

Request and Response:

On March 7, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the following records:

Pursuant to the NJ state open records act, I request copies of all records concerning my letter to the Mayor Elvidge dated May 31, 2010, Certified No. 7008 1830 0004 9935 7013. Please include all records generated by this letter and all correspondence between and among the Newton Police Department, Darlene

¹ No legal representation listed on record.

² Represented by Laddey Clerk & Ryan, LLP (Sparta, 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.

V. Cooper, Newton PD OPRA Officer, Debra Carter HR Coordinator Lt. Robert Osborn, Newton PD, myself and all other persons.

On March 18, 2013, the Custodian attempted to respond to the Complainant via telephone, but was unable to reach him. On March 19, 2013, eight (8) business days later, the Custodian responded, in writing, stating that no responsive records existed that directly relate to the May 31, 2010 letter to Mayor Elvidge. Further, the Custodian stated that Mayor Elvidge did not recall receiving a certified letter from the Complainant. However, the Custodian stated that she possessed records relevant to a May 31, 2010 OPRA request the Complainant previously submitted, and could deliver them upon request.

On March 19, 2013, the Complainant responded to the Custodian via email, requesting those records related to his May 31, 2010 OPRA request. On March 20, 2013 at 1:23 PM, the Custodian emailed said records to the Complainant. That same day, the Complainant submitted an OPRA request seeking the records at issue in this matter. To date, the Custodian has not responded to the Complainant.

Denial of Access Complaint:

On February 4, 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 March 20, 2013 OPRA request.

Statement of Information:

On February 28, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she assumed that the Complainant delivered his March 20, 2013 request in error. The Custodian argued that because she previously responded to the Complainant’s March 7, 2013 request on March 19, 2013, the March 20, 2013 request seeking the same records did not require a response.

Additional Submissions:

On March 8, 2014, the Complainant emailed the GRC with copies of alleged correspondence between the Custodian and the Complainant dated March 7, 19, 20, and 25, 2013; February 1, 2014; and March 8, 2014.

Analysis

Timeliness and Sufficiency of 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 October 31, 2007).

Further, in O'Shea v. Twp. of West Milford, GRC Complaint No. 2004-17 (April 2005), a custodian failed to respond to a complainant's January 29, 2004 request because he considered the complainant's January 26, 2004 request, and his response, to be sufficiently similar to satisfy the requirements of OPRA. The Council found that the custodian unlawfully denied access because he failed to provide a *specific response* to the January 29, 2004 request as required by N.J.S.A. 47:1A-5(i). *Id.* (emphasis added). *See also* Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008) (finding custodian's response legally insufficient pursuant to N.J.S.A. 47:1A-5(i) and N.J.S.A. 47:1A-5(g) for failing to respond to each request item individually).

Here, the Custodian admittedly failed to respond to the Complainant's March 20, 2013 OPRA request. The Custodian believed that the Complainant's March 20, 2013 request was made in error, since the request sought the same records as the Complainant's March 7, 2013 OPRA request. Similar to O'Shea, the Custodian appeared to presume that her response to the Complainant's March 7, 2013 request was sufficient to satisfy the March 20, 2013 request.

Therefore, the Custodian did not bear her burden of proof that she provided a timely or sufficient response to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's March 20, 2013 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 2007-11. *See* O'Shea, GRC No. 2004-17; Paff, GRC No. 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.

In Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005), the custodian certified that no responsive records to the complainant's request for billing records existed, and the complainant submitted no evidence to refute the custodian's certification regarding said records. The GRC determined that, based on the custodian's certification and 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.

lack of evidence in the record to refute same, there was no unlawful denial of access to the requested records.

In the instant matter, the Custodian failed to respond to the Complainant's March 20, 2013 OPRA request. The Custodian believed the request was made in error, as she certified that on March 19, 2013, she responded to the Complainant's March 7, 2013 OPRA request seeking the same records. Within her response and subsequent SOI certification, the Custodian stated that no responsive records exist, and that Mayor Elvidge does not recall receiving the Complainant's May 31, 2010 certified letter. Further, the Complainant failed to provide any competent, credible evidence to rebut the Custodian's certification.

Irrespective of the Custodian's "deemed" denial, she did not unlawfully deny access to the Complainant's March 20, 2013 OPRA request because the Custodian certified that no responsive records exist, and the Complainant failed to provide any competent, credible evidence to rebut the Custodian certification. N.J.S.A. 47:1A-6; *see 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 that "[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(i) and provided an insufficient response to the Complainant's request pursuant to N.J.S.A. 47:1A-5(g), the Custodian did not unlawfully deny access to the requested records as she certified that no responsive records existed. 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 did not bear her burden of proof that she provided a timely or sufficient response to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's March 20, 2013 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 October 31, 2007). *See O'Shea v. Twp. of West Milford*, GRC Complaint No. 2004-17 (April 2005); Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. Irrespective of the Custodian's "deemed" denial, she did not unlawfully deny access to the Complainant's March 20, 2013 OPRA request because the Custodian certified that no responsive records exist, and the Complainant failed to provide any competent, credible evidence to rebut the Custodian certification. N.J.S.A. 47:1A-6; *see 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 did not unlawfully deny access to the requested records as she certified that no responsive records existed. 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.
Acting Executive Director

September 23, 2014