



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

July 26, 2016 Government Records Council Meeting

Aakash Dalal
Complainant

v.

Rutgers University
Custodian of Record

Complaint No. 2015-123

At the July 26, 2016 public meeting, the Government Records Council (“Council”) considered the July 19, 2016 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’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 immediately, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody v. Middletown Twp. Public Schools, GRC Complaint No. 2005-98 (December 2005). See also and Harris v. NJ Dep’t of Corr., GRC Complaint No. 2011-65 (August 2012).
2. Although the Custodian failed to disclose the responsive records immediately upon receipt of the Complainant’s clarification letter on August 11, 2014, she certified that she did send the existing responsive records to the Complainant via U.S. mail on September 9, 2014. The GRC therefore declines to order disclosure in this instance because the evidence of record reflects, and the Complainant did not demonstrate to the contrary, that the Custodian released any responsive records to the Complainant on September 9, 2014.
3. The Custodian violated N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i) by failing to respond immediately to the Complainant’s OPRA request. However, 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. Additionally, the Custodian did disclose existing responsive records. Therefore, the Custodian’s actions do 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 July 26th Day of July, 2016

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 29, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 26, 2016 Council Meeting**

**Aakash Dalal¹
Complainant**

GRC Complaint No. 2015-123

v.

**Rutgers University²
Custodial Agency**

Records Relevant to Complaint:

1. All legal bills and invoices from Bridgewater, New Jersey, law firm Norris, McLaughlin, & Marcus to Rutgers University for legal services or any other purposes between the period from April 1, 2014, to July 22, 2014
2. Documents containing the time records for and time spent by all attorneys, paralegals and secretaries of the law firm Norris, McLaughlin, & Marcus on behalf of Rutgers University between the period from April 1, 2014, to July 22, 2014

Custodian of Record: Susan Glick

Request Received by Custodian: July 30, 2014; August 11, 2014

Response Made by Custodian: July 31, 2014; September 9, 2014

GRC Complaint Received: September 22, 2014

Background³

Request and Response:

On July 22, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 31, 2014, the Custodian wrote to the Complainant, seeking clarification as to the records sought. The Custodian noted that the University retains the above-mentioned firm “on a variety of issues and cases.” She asked the Complainant whether he wished to receive documents pertaining “only to your case involving two RUPD policy[sic] officers” or all legal bills/invoices from the law firm to the University during that timeframe. The Custodian noted that “further clarification” would “significantly facilitate document retrieval and processing.” She further informed the

¹ No legal representation listed on record.

² Represented by Elizabeth Minott, Esq. (New Brunswick, 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 that “invoicing by the law firm typically lags by one or two months” and thus an invoice for services rendered for July would be delivered to the University in late August or early September.

On August 4, 2014, the Complainant wrote to the Custodian, clarifying that he sought the legal bills “regarding any and all issues and cases” and not limited to his own. He further narrowed the timeframe of his request to April 1, 2014 to May 31, 2014. On September 8, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”).

On September 9, 2014, the Custodian replied to the Complainant’s request, attaching nine (9) pages of invoices from April 2014 and seven (7) pages of invoices from May 2014, with attorney-client privileged information redacted.

Denial of Access Complaint:

On September 8, 2014, the Complainant filed a Denial of Access Complaint with the GRC. The Complainant asserted first that his OPRA request was “already clear” prior to the Custodian’s July 31, 2014 clarification request. Additionally, he noted that as of the date of his filed complaint, “Rutgers University has failed to release the requested records to me or provide a response as to why it has been unable to release the records.” He argued that legal bills are “public records that are integral” to the “watchful role” OPRA allows citizens to play in their relationship with the government. See Sussex Commons Associates, LLC v. Rutgers, 210 N.J. 531, 541 (2012), Burnett v. County of Bergen, 198 N.J. 408, 414 (2009).

The Complainant further alleged that the University had violated N.J.S.A. 47:1A-1, N.J.S.A. 47:1A-5(e), and N.J.S.A. 47:1A-5(i) in failing to disclose the requested records.

Statement of Information:

On May 22, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on July 30, 2014. The Custodian averred that she wrote to the Complainant on July 31, 2014, seeking clarification as to the request. She certified that she was in receipt of the Complainant’s clarifying letter on August 11, 2014. The Custodian noted that the Complainant “may only correspond via hard copy letters through the United States Postal Service.” The Custodian certified that she thereafter responded in writing on September 9, 2014, attaching the responsive documents, which consisted of invoices for April 2014 and May 2014. The Custodian noted that the documents were partially redacted, pursuant to N.J.S.A. 47:1A-1.1, which exempts “any record within the attorney-client privilege” and noted that attorney bills may be redacted to remove information protected by attorney-client privilege. She further noted that the work product privilege, defined in R 4:10-2(c), exempts the “mental impressions, conclusions, opinions, or legal theories of an attorney” from public access under OPRA. See also N.J.S.A. 47:1A-9.

Analysis

Timeliness

Unless a shorter time period is otherwise provided, a custodian must 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 accordingly 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).

Likewise, barring extenuating circumstances, a custodian's failure to respond immediately in writing to a complainant's OPRA request for immediate access records, either granting access, denying access, seeking clarification, or requesting an extension of time, also results in a "deemed" denial of the request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i).⁵ See Cody v. Middletown Twp. Public Schools, GRC Complaint No. 2005-98 (December 2005) and Harris v. NJ Dep't of Corr., GRC Complaint No. 2011-65 (August 2012). See also Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007), holding that the custodian was obligated to notify the complainant immediately as to the status of immediate access records.

Here, the Custodian's initial response to the Complainant's July 22, 2014 request, seeking clarification as to the invoices sought, occurred on July 31, 2015, the first business day following receipt of the request. The Custodian additionally advised the Complainant that the law firm's invoicing "typically lags by one or two months." She was in receipt of the Complainant's clarification letter on August 11, 2014, and thereafter disclosed the requested records via U.S. mail on September 9, 2014, the twentieth (20th) business day following receipt. The Custodian's July 31, 2015 response noted the one-two month lag, and in the Complainant's clarification letter, he narrowed the scope of his request to the months of April and May. The immediate access language of N.J.S.A. 47:1A-5(e) suggests that the Custodian was still obligated to notify the Complainant immediately of the existence of responsive records and provide a date or explanation as to when he would receive them.

Therefore, 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 immediately, results in a "deemed" denial of the Complainant's OPRA request pursuant

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.

⁵ OPRA lists immediate access records as "budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information." N.J.S.A. 47:1A-5(e). The Council has also determined that purchase orders and invoices are immediate access records. See Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2012-03 (April 2013).

to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody, GRC 2005-98. See also Harris, GRC 2011-65.

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 the instant matter, although the Custodian failed to disclose the responsive records immediately upon receipt of the Complainant’s clarification letter on August 11, 2014, she certified that she did send the existing responsive records to the Complainant via U.S. mail on September 9, 2014. The GRC therefore declines to order disclosure in this instance because the evidence of record reflects, and the Complainant did not demonstrate to the contrary, that the Custodian released any responsive records to the Complainant on September 9, 2014.

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)).

The Custodian violated N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i) by failing to respond immediately to the Complainant’s OPRA request. However, 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. Additionally, the Custodian did disclose existing responsive records. Therefore, the Custodian's actions do 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. 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 immediately, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody v. Middletown Twp. Public Schools, GRC Complaint No. 2005-98 (December 2005). See also and Harris v. NJ Dep't of Corr., GRC Complaint No. 2011-65 (August 2012).
2. Although the Custodian failed to disclose the responsive records immediately upon receipt of the Complainant's clarification letter on August 11, 2014, she certified that she did send the existing responsive records to the Complainant via U.S. mail on September 9, 2014. The GRC therefore declines to order disclosure in this instance because the evidence of record reflects, and the Complainant did not demonstrate to the contrary, that the Custodian released any responsive records to the Complainant on September 9, 2014.
3. The Custodian violated N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i) by failing to respond immediately to the Complainant's OPRA request. However, 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. Additionally, the Custodian did disclose existing responsive records. Therefore, the Custodian's actions do 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: Husna Kazmir
Staff Attorney

July 19, 2016