



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

September 29, 2016 Government Records Council Meeting

Nancy A Valentine, Esq.
Complainant
v.
Camden County
Custodian of Record

Complaint No. 2015-242

At the September 29, 2016 public meeting, the Government Records Council (“Council”) considered the September 22, 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 response was insufficient because she failed to state definitively that the records responsive to the Complainant’s OPRA request did not exist. N.J.S.A. 47:1A-5(g); Shanker v. Borough of Cliffside Heights (Bergen), GRC Complaint No. 2007-245 (March 2009). However, the GRC declines to order disclosure of any records because it is clear that the Custodian possesses no responsive records. *See Pusterhofer v. NJ Dep’t of Educ.*, GRC Complaint No. 2005-49 (July 2005); Paff v. City of Hudson City (Hudson), GRC Complaint No. 2012-262 (August 2013).
2. The Custodian’s response was insufficient under N.J.S.A. 47:1A-5(g). However, the GRC declines to order disclosure of records because the evidence herein supports that no responsive records existed. Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). 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 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 29th Day of September, 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: October 4, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 29, 2016 Council Meeting**

**Nancy A. Valentino, Esq.¹
Complainant**

GRC Complaint No. 2015-242

v.

**Camden County²
Custodial Agency**

Records Relevant to Complaint: From 2005 to the present, electronic copies of residency certificates for Captain Karen Taylor of the Camden County Correctional Facility.

Custodian of Record: Maria Efstratiades
Request Received by Custodian: June 15, 2015
Response Made by Custodian: June 24, 2015
GRC Complaint Received: July 28, 2015

Background³

Request and Response:

On June 15, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 24, 2015, the Custodian responded in writing, denying access to the request under the personnel exemption. N.J.S.A. 47:1A-10; Vaughn v. City of Trenton (Mercer), GRC Complaint No. 2009-177 (June 2010); Executive Order No. 11 (Governor Byrne, 1979).

Denial of Access Complaint:

On July 28, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant disputed the denial of access and asserted that she needed the records for a wrongful termination case currently before the Office of Administrative Law.

Statement of Information:

On August 21, 2015, the Custodian filed a Statement of Information (“SOI”). The

¹ No legal representation listed on record.

² Represented by Howard Goldberg, Esq. (Camden, 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.

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Custodian certified that she received the Complainant's OPRA request on June 15, 2015. The Custodian certified that she contacted the warden at Camden County Correctional Facility, who advised that no record existed. Further, the Custodian certified that she also checked with Camden County ("County"), Human Resources Division, who advised that they did not require employees to sign residency certificates. The Custodian certified that she responded in writing on June 24, 2015, denying access to the request under the personnel exemption at N.J.S.A. 47:1A-10. However, the Custodian also certified that no records exist for the reasons above.

Analysis

Sufficiency of Response

OPRA provides that if a "custodian is unable to comply with a request for access, the custodian *shall indicate the specific basis therefor . . .* on the request form and promptly return it to the requestor." N.J.S.A. 47:1A-5(g)(emphasis added). The Council has held that, where applicable, the custodian must definitively state that records did not exist at the time of the initial response in order to comply with OPRA. See Shanker v. Borough of Cliffside Heights (Bergen), GRC Complaint No. 2007-245 (March 2009); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2010-175 (September 2011); Paff v. City of Union City (Hudson), GRC Complaint No. 2012-262 (August 2013); Paff v. Town of Guttenberg (Hudson), GRC Complaint No. 2014-112 (January 2015).

Here, the Custodian initially responded to the Complainant by denying access under the personnel exemption. Subsequent to the filing of the Denial of Access Complaint, the Custodian certified in the SOI that no responsive records existed. The Custodian certified that she reached this conclusion because the warden at Camden County Correctional Facility advised that no records existed and because the County did not require residency certificates.

Therefore, the Custodian's response was insufficient because she failed to state definitively that the records responsive to the Complainant's OPRA request did not exist. N.J.S.A. 47:1A-5(g); Shanker, GRC 2007-245. However, the GRC declines to order disclosure of any records because it is clear that the Custodian possesses no responsive records. See Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005); Paff v. City of Hudson City (Hudson), GRC Complaint No. 2012-262 (August 2013).

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)).

In the current matter, the Custodian's response was insufficient under N.J.S.A. 47:1A-5(g). However, the GRC declines to order disclosure of records because the evidence herein supports that no responsive records existed. Pusterhofer, GRC 2005-49. 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 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 response was insufficient because she failed to state definitively that the records responsive to the Complainant's OPRA request did not exist. N.J.S.A. 47:1A-5(g); Shanker v. Borough of Cliffside Heights (Bergen), GRC Complaint No. 2007-245 (March 2009). However, the GRC declines to order disclosure of any records because it is clear that the Custodian possesses no responsive records. *See* Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005); Paff v. City of Hudson City (Hudson), GRC Complaint No. 2012-262 (August 2013).
2. The Custodian's response was insufficient under N.J.S.A. 47:1A-5(g). However, the GRC declines to order disclosure of records because the evidence herein supports that no responsive records existed. Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). 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 unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

September 22, 2016