



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

March 28, 2017 Government Records Council Meeting

Gavin C. Rozzi
Complainant

Complaint No. 2015-250

v.

Ocean County Prosecutor's Office
Custodian of Record

At the March 28, 2017 public meeting, the Government Records Council ("Council") considered the March 21, 2017 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. Because the Custodian's April 16, 2015 response to the Complainant's OPRA request failed to grant access, deny access, seek clarification, or request an extension of time, the Custodian's response was insufficient pursuant to N.J.S.A. 47:1A-5(g). See Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008). However, the Council 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 all responsive records on December 9, 2015.
2. Although the Custodian violated N.J.S.A. 47:1A-5(g) by providing an insufficient response to the Complainant's OPRA request, the Custodian ultimately produced the responsive records on December 9, 2015. 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 28th Day of March, 2017

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: March 31, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 28, 2017 Council Meeting**

**Gavin C. Rozzi¹
Complainant**

GRC Complaint No. 2015-250

v.

**Ocean County Prosecutor's Office²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of:

1. Arrest report
2. CDR-1 regarding arrest of Andrew Flinchbaugh
3. Narrative/incident reports prepared by the Ocean County Prosecutor's Office ("OCPO")
4. Summons and complaint against Andrew Flinchbaugh (should be same as CDR-1)
5. All audio and video recordings of the incident
6. All narrative reports of the incident

"To the extent that you believe the documents requested by me are confidential because they are part of an ongoing criminal investigation, please provide the documents to the extent that they show the information contained in N.J.S.A. 47:1A-3(b)[.]

Date and Type of Incident: January 8, 2015"

Custodian of Record: O. Nicholas Monaco, Esq.

Request Received by Custodian: April 14, 2015

Response Made by Custodian: April 17, 2015

GRC Complaint Received: August 3, 2015

Background³

Request and Response:

On April 14, 2015, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On April 17, 2015, the Custodian responded in writing, stating that he is in receipt of the Complainant's OPRA request and that

¹ No legal representation listed on record.

² No legal representation listed on record.

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.

upon receipt and review of the requested documents, he would respond to the Complainant's request accordingly. No further correspondence dated prior to the date of the Denial of Access Complaint is contained in the file.

Denial of Access Complaint:

On August 3, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant clarified that all of the records sought pertain to the arrest of Andrew Flinchbaugh on January 8, 2015, in Lacey Township, NJ. The Complainant stated that since receiving the Custodian's initial reply on April 17, 2015, there has been no written response from the Custodian, either granting or denying his OPRA request.

Statement of Information:

On September 8, 2015, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on April 14, 2015. The Custodian then certified that he replied on April 16, 2015, stating that once he receives and reviews the relevant documents, he would fully respond to the Complainant's request.

The Custodian certified that he located an Ocean County Prosecutor's Office ("OCPO") Investigation Report dated March 16, 2015 ("Investigation Report"), an OCPO Supplemental Report dated March 16, 2015 ("Supplemental Report No. 1"), a second Supplemental Report dated March 25, 2015 ("Supplemental Report No. 2"), and a Complaint Summons. Additionally, the Custodian inferred that Item Nos. 2 and 4, and Item Nos. 3 and 6 are redundant.⁴ The Custodian also certified that no responsive records exist for Item Nos. 1 and 5 but noted that information normally contained in an arrest report (Item No. 1) would be found within the records responsive to Item Nos. 2, 3, 4, and 6.

The Custodian argued that there was no denial of access to records and that the lack of a follow-up to his initial response was due to an unintentional oversight. The Custodian contended that, in any event, the requested records are exempt from disclosure as criminal investigatory records under N.J.S.A. 47:1A-1.1 et seq. The Custodian also noted that the underlying matter of the OPRA request, the arrest of Andrew Flinchbaugh, was currently in settlement negotiations amongst the parties. The Custodian argued that N.J.S.A. 47:1A-3(b) allowed the Custodian to withhold records or information that would "jeopardize any investigation in progress or . . . be otherwise inappropriate to release." The Custodian contended that releasing records or information would be inappropriate and inconsistent with the proposed settlement and expungement and thus fall under the §3(b) exemption.

Additional Submissions:

On December 9, 2015, Michael A. Paulhus, Esq. (Mr. Paulhus), of the OCPO e-mailed the GRC, attaching a copy of a letter sent to the Complainant regarding the current matter. Mr. Paulhus stated in the letter that he attached the Complaint Summons regarding the arrest, the Investigation Report and Supplemental Report Nos. 1 and 2. Additionally, Mr. Paulhus asserted

⁴ A "CDR-1" is identified as a "Complaint-Summons" form under R. 3:2-2.

that, although he still argues that the records are not subject to disclosure under OPRA, he released all responsive records based on the specific circumstances of the matter.

Analysis

Insufficient Response

OPRA mandates that a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁵ 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).

In Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), the complainant's counsel asserted that the custodian violated OPRA by failing to respond to each of the complainant's request items individually within seven (7) business days. The GRC examined how the facts in Paff applied to its prior holding in O'Shea v. Township of West Milford, GRC Complaint No. 2004-17 (April 2005) (finding that the custodian's initial response, stating that the complainant's request was a duplicate of a previous request, was legally insufficient because the custodian has a duty to answer each request item individually). The Council reasoned that, "[b]ased on OPRA and the GRC's holding in O'Shea, a custodian is vested with the responsibility to respond to each individually requested item within seven (7) business days after receipt of such request." The GRC ultimately held that:

Although the Custodian responded in writing to the Complainant's August 28, 2007 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5.g." See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-166 (April 2009) and Kulig v. Cumberland County Board of Chosen Freeholders, GRC Complaint No. 2008-263 (November 2009).

Paff, GRC 2007-272.

In the current matter, the Custodian certified that on April 16, 2015, he informed the Complainant in writing to acknowledge receipt of the OPRA request and that he would review and respond accordingly. There is no evidence in the record demonstrating that the Custodian timely responded to the Complainant's ORPA request thereafter, either granting or denying access to the requested records.

⁵ 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.

Therefore, because the Custodian's April 16, 2015 response to the Complainant's OPRA request failed to grant access, deny access, seek clarification, or request an extension of time, the Custodian's response was insufficient pursuant to N.J.S.A. 47:1A-5(g). See Paff, GRC 2007-272. However, the Council 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 all responsive records on December 9, 2015.

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) by providing an insufficient response to the Complainant's OPRA request, the Custodian ultimately produced the responsive records on December 9, 2015. 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. Because the Custodian's April 16, 2015 response to the Complainant's OPRA request

failed to grant access, deny access, seek clarification, or request an extension of time, the Custodian's response was insufficient pursuant to N.J.S.A. 47:1A-5(g). See Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008). However, the Council 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 all responsive records on December 9, 2015.

2. Although the Custodian violated N.J.S.A. 47:1A-5(g) by providing an insufficient response to the Complainant's OPRA request, the Custodian ultimately produced the responsive records on December 9, 2015. 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: Samuel A. Rosado
Staff Attorney

March 21, 2017