



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**

**February 21, 2017 Government Records Council Meeting**

Carl Culley  
Complainant

v.

Mercer County Community College  
Custodian of Record

Complaint No. 2015-315

At the February 21, 2017 public meeting, the Government Records Council (“Council”) considered the February 14, 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) The original Custodian’s initial September 4, 2015 response, although timely issued, did not comply with OPRA, because he incorrectly advised the Complainant of the status of the requested record at that time and did not provide the correct basis for denial, pursuant to N.J.S.A. 47:1A-5(g). The GRC declines to adjudicate the disclosability of the requested report because the Custodian’s Counsel certified on November 12, 2015, that the report was subsequently disclosed to the Complainant, and the Complainant did not advance evidence to the contrary.
- 2) The original Custodian’s initial September 4, 2015 response did not comply with OPRA, because he incorrectly advised the Complainant of the status of the requested record at that time and did not provide the correct basis for denying access to the record, pursuant to N.J.S.A. 47:1A-5(g). However, the Custodian’s Counsel disclosed to the Complainant the requested report in unredacted form on November 12, 2015, and there is nothing in the evidence of record disputing the sufficiency of said disclosure. Additionally, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian’s actions did 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 21<sup>st</sup> Day of February, 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: February 23, 2017**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
February 21, 2017 Council Meeting**

**Carl Culley<sup>1</sup>  
Complainant**

**GRC Complaint No. 2015-315**

v.

**Mercer County Community College<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copy of report prepared by Hodulik & Morrison, P.A. for Mercer County Community College in July/August 2015.

**Custodian of Record:** José A. Fernandez<sup>3</sup>

**Request Received by Custodian:** September 2, 2015

**Response Made by Custodian:** September 3, 2015; September 4, 2015; September 15, 2015

**GRC Complaint Received:** October 13, 2015

**Background<sup>4</sup>**

**Request and Response:**

On September 1, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 4, 2015, the Custodian responded in writing, indicating that no responsive records were located. Subsequently, the Custodian responded in writing on September 15, 2015, denying the request based on the inter-agency or intra-agency advisory, consultative, or deliberative (“ACD”) material exemption under N.J.S.A. 47:1A-1.1.

**Denial of Access Complaint:**

On October 13, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian’s reliance on the exemption in N.J.S.A. 47:1A-1.1 was misplaced, because the requested document was not “pre-decisional” and therefore not exempt. He also argued that the document he sought contained factual and statistical information, as opposed to the “opinions, recommendations, or advice

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Rocky L. Peterson, Esq. (Princeton, NJ).

<sup>3</sup> The current Custodian of Records is Dr. Mark Harris.

<sup>4</sup> 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.

about agency policies” covered by the privilege. He contended that the record he sought was an independent auditor’s report, containing professional and expert review of specific policies and procedures.

He distinguished the instant case from Ciesla v. NJ Dep’t of Health & Senior Serv. et. al., 429 N.J. Super. 127 (App. Div. 2012), where the Court affirmed the GRC’s decision that a staff recommendation report consisted of ACD material because it was a draft document. The Complainant stated that the requested record at issue is not a draft document but rather a final document and not entitled to deliberative process protection. He asked that the GRC reverse the Custodian’s denial and order that the record be released.

#### Statement of Information:

On November 4, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on September 2, 2015. The Custodian certified that he responded in writing on September 3, 2015, acknowledging receipt of the request. The Custodian then responded in writing on September 4, 2015, advising that MCCC did not possess the requested report but anticipated “delivery within the next 3 to 4 weeks,” at which time the Custodian could provide the document. The Custodian certified that he spoke to the President of MCCC regarding the request, who was the “only individual at the College to receive a copy of the draft document.” On September 15, 2015, the Custodian responded in writing, denying the request, pursuant to N.J.S.A. 47:1A-1.1. He averred that the request was denied because it was a draft report that is specifically exempt as ACD material.

#### Additional Submissions:

On October 19, 2015, the Custodian’s Counsel wrote to the GRC, seeking to clarify certain assertions the Complainant made in the Denial of Access Complaint. The Custodian’s Counsel wrote that the requested report was prepared by Hodulik & Morrison, P.A., an accounting firm. He advised that Mercer County Community College (“MCCC”) requested the firm to evaluate internal processes and provide recommendations grounded in best practices. He advised that the Complainant’s assertion that the report was a “final report” was incorrect, because at the time of the request, the report was a draft document. He advised that the Report’s “draft and undistributed status was central” to the Custodian’s decision to deny the Complainant’s OPRA request as privileged from disclosure pursuant to N.J.S.A. 47:1A-1.1. He additionally stated that MCCC intended to make the final report publically available “when complete.”

On October 25, 2015, the Complainant responded to the Custodian’s Counsel’s October 19, 2015 letter. He reiterated that the requested report “was always . . . a policy document, not an exempt document.”

On November 12, 2015, the Custodian’s Counsel wrote to the GRC, advising that the requested report was now complete and publically available. The Custodian’s Counsel advised that the report was provided to the Complainant on that same day, via correspondence.

On February 1, 2017, the GRC sent a request for additional information to the Custodian's Counsel, seeking clarification as to the status of the report on September 3, 2015, the date when the Custodian first responded to the Complainant's OPRA request.

On February 7, 2017, Dr. Mark Harris, the Vice President for Finance and Administration and the current Custodian, submitted a certification in response to the GRC's request. Dr. Harris certified that MCCC possessed a draft copy of the requested report on September 3, 2015, although there was no final copy of the report at that time. He certified that the basis for denying the report at the time of the request was due to it being a draft report and therefore exempt from production as inter-agency or intra-agency advisory, consultative, or deliberative material under N.J.S.A. 47:1A-1.1. He reiterated that the finalized report was disclosed to the Complainant on November 12, 2015.

## Analysis

### Sufficiency of Response

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.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. OPRA also provides that:

"[i]f the 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. The custodian shall sign and date the form and provide the requestor with a copy thereof ..." N.J.S.A. 47:1A-5(g).

The Council's decisions have repeatedly supported the above statutory mandate by holding that custodians must provide a legally valid reason for any denial of access to records. *See* Seabrook v. Cherry Hill Police Dep't, GRC Complaint No. 2004-40 (April 2004), Rosenblum v. Borough of Closter, GRC Complaint No. 2005-16 (October 2005) and Paff v. Twp. of Plainsboro, GRC Complaint No. 2005-29 (October 2005). The Council also held that for a denial of access to be in compliance with OPRA, it must be specific and must be sufficient to prove that a custodian's denial is authorized by OPRA. *See* Morris v. Trenton Police Dep't, GRC Complaint No. 2007-160 (May 2008).

Here, the Custodian's initial response to the Complainant's request, on September 4, 2015, advised that MCCC did not possess the requested report but noted an anticipated delivery within the next 3 or 4 weeks. However, days later on September 15, 2015, the Custodian responded a second time and denied the request, pursuant to N.J.S.A. 47:1A-1.1. Following a certification by the current Custodian, the evidence of record indicates that MCCC possessed a draft version of the requested report on September 4, 2015.

Therefore, the original Custodian's initial September 4, 2015 response, although timely issued, did not comply with OPRA, because he incorrectly advised the Complainant of the status of the requested record at that time and did not provide an accurate, specific basis for denial, pursuant to N.J.S.A. 47:1A-5(g). The GRC declines to adjudicate the disclosability of the requested report because the Custodian's Counsel certified on November 12, 2015, that the report was subsequently provided to the Complainant, and the Complainant did not advance evidence to the contrary.

### **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 (Berg); 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)).

Here, the original Custodian's initial September 4, 2015 response did not comply with OPRA because he incorrectly advised the Complainant of the status of the requested record at that time and did not provide the correct basis for denying access to the record, pursuant to N.J.S.A. 47:1A-5(g). However, the Custodian's Counsel disclosed to the Complainant the requested report in unredacted form on November 12, 2015, and there is nothing in the evidence of record disputing the sufficiency of said disclosure. Additionally, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions did 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:

- 1) The original Custodian's initial September 4, 2015 response, although timely issued, did not comply with OPRA, because he incorrectly advised the Complainant of the status of the requested record at that time and did not provide the correct basis for denial, pursuant to N.J.S.A. 47:1A-5(g). The GRC declines to adjudicate the disclosability of the requested report because the Custodian's Counsel certified on November 12, 2015, that the report was subsequently disclosed to the Complainant, and the Complainant did not advance evidence to the contrary.
  
- 2) The original Custodian's initial September 4, 2015 response did not comply with OPRA, because he incorrectly advised the Complainant of the status of the requested record at that time and did not provide the correct basis for denying access to the record, pursuant to N.J.S.A. 47:1A-5(g). However, the Custodian's Counsel disclosed to the Complainant the requested report in unredacted form on November 12, 2015, and there is nothing in the evidence of record disputing the sufficiency of said disclosure. Additionally, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions did 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

February 14, 2017