



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

April 25, 2017 Government Records Council Meeting

Vaughn Simmons
Complainant

Complaint No. 2015-343

v.

City of Newark (Essex)
Custodian of Record

At the April 25, 2017 public meeting, the Government Records Council (“Council”) considered the April 18, 2017 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear his burden of proof that he timely responded 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 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).
2. The Custodian has borne his burden of proof that he lawfully denied access to the requested audio CD recording and transcripts/testimony, as described in the Complainant’s September 3, 2015 OPRA request. He certified that his office does not maintain any existing records responsive to the request, and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. N.J.S.A. 47:1A-6; Pusterhofer v. NJ Dep’t. of Educ., GRC 2005-49 (July 2005).
3. Although the Custodian unlawfully denied access to the requested records by failing to respond directly to the Complainant after receipt of the OPRA request, thereby resulting in a deemed denial, he ultimately certified that his office does not maintain any existing records responsive to the request. 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 25th Day of April, 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: April 27, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 25, 2017 Council Meeting**

**Vaughn Simmons¹
Complainant**

GRC Complaint No. 2015-343

v.

**City of Newark (Essex)²
Custodial Agency**

Records Relevant to Complaint: “The audio C.D. recording of the probable cause testimony/transcript or the equivalent communicated to Asst. Pros. Jim Guezinski and Justice Anthony Higgins on December 16, 2009, pertaining to an arrest warrant for [the Complainant].”

Custodian of Record: Kenneth Louis

Request Received by Custodian: October 13, 2015; December 1, 2015

Response Made by Custodian: None

GRC Complaint Received: November 4, 2015

Background³

Request and Response:

On September 3, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 30, 2015, the Complainant wrote to the Custodian, seeking a status update as to his request. The Custodian did not respond to the Complainant’s request in writing.

Denial of Access Complaint:

On November 4, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that as of the time he filed his complaint, he had not received a response to his OPRA request.

Statement of Information:

On December 23, 2015, the Custodian filed a Statement of Information (“SOI”). The

¹ No legal representation listed on record.

² Represented by Guenther Waldow, Jr., Esq. (Newark, 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.

Custodian certified that, due to “an administrative oversight,” his office was “unaware” of the Complainant’s OPRA request until receiving a communication, dated December 1, 2015, from the GRC, which referenced the request. He certified that his office then reviewed the request and determined that the records requested, to the extent they might exist, are not maintained by his office. He averred that the requested records, to the extent that they exist, might possibly be maintained by the City of Newark (“City”) Municipal Court; the Superior Court of New Jersey, Essex County Vicinage; and/or the Essex County Prosecutor’s Office. The Custodian advised that those are “separate governmental entities” and not controlled by the City. He certified that his office does not maintain or have control of any existing records responsive to the Complainant’s OPRA request.

Additional Submissions:

On January 28, 2016, the Complainant responded to the Custodian’s SOI. The Complainant argued that the U.S. Constitution and NJ Constitution guaranteed his right to the requested records.

On February 1, 2017, the GRC sent a request for additional information to the Custodian, seeking clarification as to the date the Custodian received the Complainant’s OPRA request. The GRC further sought clarification as to whether the Custodian responded directly to the Complainant, apart from the submission of the SOI in this matter, to advise that his office maintains no existing responsive records. On February 2, 2017, the Custodian’s Counsel requested an extension of time to respond until February 20, 2017. The GRC granted the request on February 6, 2017.

The Custodian’s Counsel submitted his response on February 16, 2017. Therein, the Custodian certified that his office’s OPRA Division received the Complainant’s OPRA request on October 13, 2015. The Custodian certified that he did not respond directly to the Complainant regarding his OPRA request, apart from the submission of the SOI in this matter. He included a separate certification from former OPRA Division Supervisor Cheryl Coxson, who certified that the office mistakenly believed it to be a duplicate of a prior request and therefore did not become aware of the request until the GRC’s December 1, 2015 communication regarding the Complainant’s Denial of Access Complaint. She further certified that there was no direct communication with the Complainant regarding his request.

Analysis

Timeliness

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).

In the instant matter, the Custodian certified that his office was unaware of the Complainant's OPRA request until receiving a GRC communication, dated December 1, 2015, referencing the request. He did not respond directly to the Complainant, instead certifying in his SOI and the February 16, 2017 response to the GRC's request for additional information that his office does not maintain or have control of any existing records responsive to the Complainant's OPRA request.

Therefore, the Custodian did not bear his burden of proof that he timely responded 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 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, GRC 2007-11.

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.

The Council has previously found that, in light of a custodian's certification that no records responsive to the request exist, and where no evidence exists in the record to refute the custodian's certification, no unlawful denial of access occurred. *See Pusterhofer v. NJ Dep't. of Educ.*, GRC 2005-49 (July 2005). Here, the Custodian certified in his SOI that upon being made aware of the Complainant's OPRA request, his office reviewed and determined that the records requested, to the extent that they exist, are not maintained by his office. He averred that any existing records may be in possession of the City of Newark Municipal Court; the Superior Court of New Jersey, Essex County Vicinage; and/or the Essex County Prosecutor's Office. He certified that his office does not maintain or have control of any existing records responsive to the Complainant's OPRA request.

Therefore, the Custodian has borne his burden of proof that he lawfully denied access to the requested audio CD recording and transcripts/testimony, as described in the subject OPRA request. He certified that his office does not maintain any existing records responsive to 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.

request, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. N.J.S.A. 47:1A-6; Pusterhofer, GRC 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 “[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 unlawfully denied access to the requested records by failing to respond directly to the Complainant after receipt of the OPRA request, thereby resulting in a deemed denial, he ultimately certified that his office does not maintain any existing records responsive to the request. 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 did not bear his burden of proof that he timely responded 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 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).

2. The Custodian has borne his burden of proof that he lawfully denied access to the requested audio CD recording and transcripts/testimony, as described in the Complainant’s September 3, 2015 OPRA request. He certified that his office does not maintain any existing records responsive to the request, and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. N.J.S.A. 47:1A-6; Pusterhofer v. NJ Dep’t. of Educ., GRC 2005-49 (July 2005).
3. Although the Custodian unlawfully denied access to the requested records by failing to respond directly to the Complainant after receipt of the OPRA request, thereby resulting in a deemed denial, he ultimately certified that his office does not maintain any existing records responsive to the request. 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

April 18, 2017