



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

October 27, 2015 Government Records Council Meeting

Joseph Post
Complainant

Complaint No. 2015-51

v.

NJ Office of the Attorney General
Custodian of Record

At the October 27, 2015 public meeting, the Government Records Council (“Council”) considered the October 20, 2015 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 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 did not unlawfully deny access to the Complainant’s OPRA request because he initially responded, albeit in an untimely manner, stating that no records exist and subsequently certified to same in the Statement of Information. Additionally, there is no evidence in the record to refute the Custodian’s certification. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The Custodian’s failure to respond in writing until the thirty-eighth (38th) business day resulted in a “deemed” denial of the Complainant’s OPRA request. However, the Custodian did not unlawfully deny access because he certified that no responsive records exist, and there is no evidence to refute the certification. 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 27th Day of October, 2015

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 29, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 27, 2015 Council Meeting**

**Joseph Post¹
Complainant**

GRC Complaint No. 2015-51

v.

**NJ Office of the Attorney General²
Custodial Agency**

Records Relevant to Complaint: Hard copies via U.S. mail of all documents pertaining to the investigation of a former State Parole Board member in 2002.

Custodian of Record: Bruce J. Solomon, Esq.

Request Received by Custodian: February 2, 2015

Response Made by Custodian: March 27, 2015

GRC Complaint Received: March 4, 2015

Background³

Request and Response:

On January 16, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.

Denial of Access Complaint:

On March 4, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian failed to respond to his OPRA request.

Supplemental Submissions:

On March 27, 2015, the thirty-eighth (38th) business day after receipt of the OPRA request, the Custodian responded in writing, advising the Complainant that the Office of the Attorney General (“OAG”) did not maintain any responsive records. Additionally, the Custodian advised the Complainant that the Division of Criminal Justice (“DCJ”) conducts criminal

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.

investigations. The Custodian thus advised the Complainant that he could submit a request directly to DCJ; however, the Complainant should know that OPRA exempts access to criminal investigatory records. N.J.S.A. 47:1A-1.1.

Statement of Information:

On March 27, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on February 2, 2015. The Custodian certified that he made inquiries to Legal Affairs and Employee Relations and members of the OAG executive staff. The Custodian noted that he also contacted DCJ. The Custodian certified that he responded in writing on March 27, 2015, advising the Complainant that no responsive records exist.

The Custodian affirmed that no records responsive to the Complainant’s OPRA request exist. The Custodian certified that he advised the Complainant of this fact and referred the Complainant to DCJ, as all divisions within the New Jersey of Law & Public Safety designate their own custodians. N.J.A.C. 13:1E-2. Also, the Custodian asserted that the Complainant failed to submit any evidence to contradict the instant denial of access. The Custodian asserted that this complaint should be dismissed in accordance with precedential GRC case law. *See Pusterhofer v. N.J. Dep’t of Educ.*, GRC Complaint No. 2005-49 (July 2005); *Kehoe v. NJ Dep’t of Env’tl. Prot., Div. of Fish & Wildlife*, GRC Complaint No. 2010-300 (July 2012); *Tormasi v. NJ Dep’t of Corr.*, GRC Complaint No. 2012-203 *et seq.* (June 2013).

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).

Here, the evidence of record indicates that the Custodian failed to respond timely, as he instead waited until the thirty-eighth (38th) business day after receipt of the OPRA request. The statutorily mandated time frame for response expired on February 11, 2015. In his SOI, the Custodian certified that he was not at work from February 12 until February 23, 2015, during which time he had to address a personal issue. However, there is no evidence in the record that the Custodian had properly requested an extension of time.

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.

Therefore, the Custodian did not bear his burden of proving 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.

In Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005), the custodian certified that no records responsive to the complainant's request for billing records existed, and the complainant submitted no evidence to refute the custodian's certification regarding said records. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian's certification, there was no unlawful denial of access to the requested records.

In the instant matter, the Custodian responded in writing, albeit untimely, to the Complainant's OPRA request by advising that no records responsive exist. The Custodian further certified to this fact in the SOI.

Accordingly, the Custodian did not unlawfully deny access to the Complainant's OPRA request because he initially responded, albeit in an untimely manner, stating that no records exist and subsequently certified to same in the SOI. Additionally, there is no evidence in the record to refute the Custodian's certification. *See* 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)).

The Custodian’s failure to respond in writing until the thirty-eighth (38th) business day resulted in a “deemed” denial of the Complainant’s OPRA request. However, there was no unlawful denial of access because the Custodian certified that no responsive records exist, and there is no evidence to refute said certification. 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 did not unlawfully deny access to the Complainant’s OPRA request because he initially responded, albeit in an untimely manner, stating that no records exist and subsequently certified to same in the Statement of Information. Additionally, there is no evidence in the record to refute the Custodian’s certification. *See* Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The Custodian’s failure to respond in writing until the thirty-eighth (38th) business day resulted in a “deemed” denial of the Complainant’s OPRA request. However, the Custodian did not unlawfully deny access because he certified that no responsive records exist, and there is no evidence to refute the certification. 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

Reviewed By: Joseph D. Glover
Executive Director

October 20, 2015