



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

April 28, 2020 Government Records Council Meeting

Ahmad I. Ali
Complainant

Complaint No. 2018-139

v.

Hudson County Community College
Custodian of Record

At the April 28, 2020 public meeting, the Government Records Council (“Council”) considered the April 3, 2020 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 dated October 31, 2007).
2. Notwithstanding the Custodian’s “deemed” denial, he borne his burden of proof that he lawfully denied access to the Complainant’s June 13, 2018 OPRA request because the Custodian certified, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. New Jersey Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The Custodian’s failure to timely respond to the Complainant’s June 13, 2018 OPRA request resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian lawfully denied access to the request because no responsive records exist. Pusterhofer v. New Jersey Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). Additionally, the evidence of record does not indicate that Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original 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 28th Day of April 2020

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 30, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 28, 2020 Council Meeting**

**Ahmad I. Ali¹
Complainant**

GRC Complaint No. 2018-139

v.

**Hudson County Community College²
Custodial Agency**

Records Relevant to Complaint: Copies of video footage recorded by two (2) surveillance cameras attached to the back of Hudson County Community College (“HCCC”) campus’s conjoined buildings C & D, located at 162-168 Sip Avenue, Jersey City, NJ 07306. Time period between 10:30 PM on May 25, 2018 to 3:30 PM on May 26, 2018.

Custodian of Record: Nicholas A. Chiaravolloti
Request Received by Custodian: June 13, 2018
Response Made by Custodian: June 27, 2018
GRC Complaint Received: July 17, 2018

Background³

Request and Response:

On June 11, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Neil Carroll, the Custodian of Record for Hudson County, seeking the above-mentioned records. On June 13, 2018, Mr. Carroll forwarded the request to the Custodian via e-mail. On June 27, 2018, the eleventh (11th) business day after receipt of the OPRA request, the Custodian responded in writing stating that no responsive records exist.

Denial of Access Complaint:

On July 17, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he sought video footage of an incident involving a missing family member occurring between the stated period.

¹ No legal representation listed on record.

² Represented by Ivan Tukhtin, of Scarinci & Hollenbeck, LLC (Lyndhurst, NJ). Previously represented by John G. Geppert, Esq.

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.

The Complainant stated that on June 8, 2018, a detective at Jersey City's Missing Persons Unit informed him via telephone that the head of HCCC's Safety and Security Department was cooperating with processing the request and create a copy of the requested footage.

The Complainant asserted that on June 12, 2018, he spoke with Mr. Carroll via telephone to inform him that he submitted his request. The Complainant then asserted that he contacted the Hudson County Law Department on June 20, 2018 and June 21, 2018, inquiring on the status of his request. The Complainant then stated that he did not receive a response until June 27, 2018. The Complainant asserted that accompanying his OPRA request was video footage of his family member's condition when he was located, as well the location of the cameras identified in the request.

Statement of Information:⁴

On October 19, 2018, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that Mr. Carroll forwarded the Complainant's OPRA request to him on June 13, 2018. The Custodian then certified that he reviewed the request on June 26, 2018. The Custodian certified that he contacted Rafael O. Nivar, HCCC's Safety and Security Director, to conduct a search for responsive records. The Custodian certified that Mr. Nivar informed him that HCCC did not have surveillance footage from the area requested. The Custodian then certified that he responded in writing on June 27, 2018, stating that no responsive records exist.

The Custodian's SOI included certifications from Mr. Nivar and Gregory Burns, HCCC's Safety and Security Manager. Mr. Burns certified that on June 12, 2018, he and another HCCC employee reviewed surveillance footage of the subject area and time period for response to an unrelated OPRA request. Mr. Burns certified that the security cameras were operating as expected during the relevant time period but did not record any footage.

Mr. Nivar certified that the security cameras were expected to record video only when motion was detected. Mr. Nivar also certified that video recordings are typically retained for approximately fourteen (14) to twenty-eight (28) days. Mr. Nivar also certified that the cameras were operating as expected during the relevant time period. Mr. Nivar certified that on or about June 26, 2018, he confirmed to Mr. Burns that no responsive records exist.

Custodian's Counsel argued that because the Custodian certified that no responsive records were found or destroyed, the GRC should dismiss complaint as the Complainant did not provide evidence to contradict the Custodian's certification. Pusterhofer v. New Jersey Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records

⁴ On August 3, 2018, this complaint was referred to mediation. On October 1, 2018, this complaint was referred back to the GRC for adjudication.

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).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 the instant matter, the Complainant maintained that he did not receive a response to his OPRA request until June 27, 2018. The Custodian certified that he received the request on June 13, 2018 when it was forwarded to him by Mr. Carroll. The Custodian also certified that he did not review the request until June 26, 2018, and thereafter responded on June 27, 2018.

Upon review, the GRC is satisfied that the Custodian failed to timely respond to the Complainant's OPRA request. Specifically, the Custodian certified that he received the request on June 13, 2018 and provided a copy of the e-mail. Thereafter, the Custodian did not begin to address the subject OPRA request until June 26, 2018, ten (10) business days later. Thus, by the time the Custodian responded to the Complainant, the statutorily mandated period to respond had already lapsed.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's June 13, 2018 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, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer, GRC 2005-49. Here, the Complainant's OPRA request sought surveillance footage from two (2) specific security cameras located on the HCCC campus. The Custodian responded that no responsive records exist and certified to same in his SOI. The Custodian also provided certifications from Mr. Burns, HCCC's Safety and Security Manager, and Mr. Nivar, HCCC's Safety and Security Director. Mr. Nivar certified that the security cameras recorded footage based on motion activation. Mr. Burns certified

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.

that he and another HCCC employee conducted a search and found that the security cameras did not capture any footage during the subject date and time. Additionally, both Mr. Burns and Mr. Nivar certified that the cameras were in good working order during the subject date and time.

Therefore, notwithstanding the Custodian's "deemed" denial, he borne his burden of proof that he lawfully denied access to the Complainant's June 13, 2018 OPRA request because the Custodian certified, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; 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)).

In the matter before the Council, the Custodian's failure to timely respond to the Complainant's June 13, 2018 OPRA request resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian lawfully denied access to the request because no responsive records exist. Pusterhofer, GRC 2005-49. Additionally, the evidence of record does not indicate that Custodian's violation of OPRA had a positive element of conscious wrongdoing or was 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 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 dated October 31, 2007).
2. Notwithstanding the Custodian's "deemed" denial, he borne his burden of proof that he lawfully denied access to the Complainant's June 13, 2018 OPRA request because the Custodian certified, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. New Jersey Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The Custodian's failure to timely respond to the Complainant's June 13, 2018 OPRA request resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian lawfully denied access to the request because no responsive records exist. Pusterhofer v. New Jersey Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). Additionally, the evidence of record does not indicate that Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original 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: Samuel A. Rosado
Staff Attorney

April 3, 2020