



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

January 26, 2021 Government Records Council Meeting

David Weiner
Complainant

Complaint No. 2019-210

v.

County of Essex
Custodian of Record

At the January 26, 2021 public meeting, the Government Records Council (“Council”) considered the January 19, 2021 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 her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the original 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 extended time frame results in a “deemed” denial of said 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). See also Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
2. The Custodian lawfully denied access to the requested employee complaints because they are exempt from access under OPRA as personnel records pursuant to N.J.S.A. 47:1A-10, N.J.S.A. 47:1A-6; Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (Interim Order dated March 11, 2004); Wares v. Twp. of West Milford (Passaic), GRC Complaint No. 2014-274 (May 2015).
3. The Custodian’s failure to timely respond within the extended time frame 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 responsive employee complaints. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10. 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 26th Day of January 2021

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: January 28, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 26, 2021 Council Meeting**

**David Weiner¹
Complainant**

GRC Complaint No. 2019-210

v.

**County of Essex²
Custodial Agency**

Records Relevant to Complaint: Copies of all Food Stamp Office (“Office”) complaint forms submitted by Division of Family Assistance and Benefits (“DFAB”) clients, containing complaints against employees, between January 1, 2018 and September 18, 2019.

Custodian of Record: Olivia Schumann, Esq.
Request Received by Custodian: September 20, 2019
Response Made by Custodian: October 1, 2019
GRC Complaint Received: October 10, 2019

Background³

Request and Response:

On September 19, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 24, 2019, the Custodian responded in writing stating that the Division of Training & Employment (“Division”) advised that they possessed no responsive records. The Custodian thus stated that the Division was “removed from [the Complainant’s] request.” On October 1, 2019, Matthew Dooley responded in writing on behalf of the Custodian extending the time frame to respond through October 8, 2019.

Denial of Access Complaint:

On October 10, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian failed to disclose any responsive records to him.

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.

Statement of Information:⁴

On September 1, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on September 20, 2019. The Custodian certified that her search included contacting Al Fusco, the custodian of record for DFAB, to conduct a search for responsive records. The Custodian certified that she responded in writing on September 24, 2019 stating that the Division possessed no responsive records. The Custodian affirmed that Mr. Dooley responded on her behalf on October 1, 2019 extending time frame for response through October 8, 2019.

The Custodian certified that she was a recent hire of the County engaged in OPRA training under Mr. Dooley at the time Complainant’s OPRA request was filed. See Dooley Cert. ¶ 5, 7. The Custodian certified that Mr. Dooley received an e-mail from Mr. Fusco on October 7, 2019 containing twenty-eight (28) pages of responsive records. Dooley Cert. ¶ 8. The Custodian averred that although Mr. Dooley received that e-mail, he did not inform her of its existence due to the high volume of requests received and her training. Dooley Cert. ¶ 9. The Custodian argued that she was unaware of Mr. Fusco’s e-mail to Mr. Dooley at the time that the Complainant filed this complaint. The Custodian contended that Mr. Dooley’s failure to forward that e-mail to her was an oversight based on the numerous OPRA requests coupled with her ongoing training and did not rise to the level of a knowing and willful violation of OPRA. N.J.S.A. 47:1A-11.

The Custodian further argued that the Council has consistently held that internal grievances and complaints are exempt from access under OPRA. N.J.S.A. 47:1A-10; Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (Interim Order dated March 11, 2004); Truland v. Borough of Madison, GRC Complaint No. 2006-88 (September 2007); Wares v. Twp. of West Milford (Passaic), GRC Complaint No. 2014-274 (May 2015). The Custodian affirmed that the records at issue here were complaints filed by members of the public against specific DFAB employees, that are part of the employees’ respective personnel files. The Custodian argued that it was thus “irrefutable” that the twenty-eight (28) pages of responsive records were exempt from disclosure under OPRA. The Custodian asserted that based on the forgoing, the Council should conclude that no unlawful denial of access occurred here.⁵

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.

⁴ On October 28, 2019, this complaint was referred to mediation. On August 18, 2020, this complaint was referred back to the GRC for adjudication.

⁵ The Custodian included several communications that occurred while these complaints were in mediation. The GRC notes that pursuant to the Uniform Mediation Act, N.J.S.A. 2A:23C-1 *et seq.*, communications that take place during the mediation process are not deemed to be public records subject to disclosure under OPRA. N.J.S.A. 2A:23C-2. All communications that occur during the mediation process are privileged from disclosure and may not be used in any judicial, administrative, or legislative proceeding, or in any arbitration, unless all parties and the mediator waive the privilege. N.J.S.A. 2A:23C-4.

Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁶ 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 Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5th) business day after receipt of the complainant's March 19, 2007 OPRA request seeking an extension of time until April 20, 2007. However, the custodian responded again on April 20, 2007, stating that the requested records would be provided later in the week. Id. The evidence of record showed that no records were provided until May 31, 2007. Id. The GRC held that:

The Custodian properly requested an extension of time to provide the requested records to the Complainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) . . . however . . . [b]ecause the Custodian failed to provide the Complainant access to the requested records by the extension date anticipated by the Custodian, the Custodian violated N.J.S.A. 47:1A-5(i) resulting in a "deemed" denial of access to the records.

[Id.]

Here, the Custodian, through Mr. Dooley, initially responded to the Complainant on the seventh (7th) business day after receipt of the OPRA request obtaining an extension of time through October 8, 2019 to respond to the OPRA request. However, the Custodian did not respond again. Thus, in keeping with Kohn, GRC 2007-124, the Custodian's failure to respond prior to the extension expiration resulted in a "deemed" denial.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the original 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 extended time frame results in a "deemed" denial of said request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. See also Kohn, GRC 2007-124.

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

⁶ 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.

“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 provides that:

Notwithstanding the provisions [OPRA] or any other law to the contrary, the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access . . .

[N.J.S.A. 47:1A-10.]

OPRA begins with a presumption against disclosure and “proceeds with a few narrow exceptions that . . . need to be considered.” Kovalcik v. Somerset Cnty. Prosecutor’s Office, 206 N.J. 581, 594 (2011). These are:

[A]n individual’s name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of any pension received shall be government record;

[P]ersonnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and

[D]ata contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.

[Id.]

The Council has addressed whether personnel records not specifically identified in OPRA were subject to disclosure. For instance, in Guerrero v. Cnty. of Hudson, GRC Complaint No. 2010-216 (December 2011), the complainant sought, among other records, “[a]ny known felony charges.” Id. In the SOI, the custodian argued that he was precluded from acknowledging the existence of felony charges because such information is not included within the excepted personnel information under OPRA. The Council agreed, determining that “. . . even if records of any felony charges were contained within Mr. Spinello’s personnel file, such records are not disclosable under OPRA . . .” Id. at 8. The Council reasoned that “OPRA clearly identifies certain [personnel] information that is subject to disclosure . . . These exceptions do not include any possible felony or criminal charges . . . Thus, OPRA implies that personnel records referencing felony charges are not subject to disclosure . . .” Id.

Further, the Council has determined that records involving employee discipline or investigations into employee misconduct are properly classified as personnel records exempt from disclosure under N.J.S.A. 47:1A-10. In Merino, GRC 2003-110, the Council found that records of complaints or internal reprimands against a municipal police officer were properly classified as personnel records encompassed within the provisions of N.J.S.A. 47:1A-10. For this reason, the Council concluded that “. . . records of complaints filed against [the police officer] and/or reprimands [the officer] received are not subject to public access.” Id.; See also Wares, GRC 2014-274.

In the matter before the Council, the Complainant sought copies of complaints filed against DFAB employees by members of the public. The Custodian argued in the SOI that she lawfully denied access to twenty-eight (28) pages of records under N.J.S.A. 47:1A-10. A plain reading of the subject OPRA request and the Custodian’s SOI description of the records responsive to same support that the records at issue have the “indicia of personnel” records. North Jersey Media Grp. v. Bergen Cnty. Prosecutor’s Office, 405 N.J. Super. 386, 389 (App. Div. 2009). Further, a plain reading of OPRA and the GRC’s prior case law supports that these types of personnel records are not disclosable because they do not fall within the exceptions set forth in N.J.S.A. 47:1A-10. For this reason, the GRC is satisfied that the Custodian lawfully denied access to the responsive records.

Accordingly, the Custodian lawfully denied access to the requested employee complaints because they are exempt from access under OPRA as personnel records pursuant to N.J.S.A. 47:1A-10. N.J.S.A. 47:1A-6; Merino, GRC 2003-110; Wares, GRC 2014-274.

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 within the extended time frame 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 responsive employee complaints. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10. 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 her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the original 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 extended time frame results in a "deemed" denial of said 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). See also Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
2. The Custodian lawfully denied access to the requested employee complaints because they are exempt from access under OPRA as personnel records pursuant to N.J.S.A. 47:1A-10. N.J.S.A. 47:1A-6; Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (Interim Order dated March 11, 2004); Wares v. Twp. of West Milford (Passaic), GRC Complaint No. 2014-274 (May 2015).
3. The Custodian's failure to timely respond within the extended time frame 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 responsive employee complaints. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10. 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
Executive Director

January 19, 2021