



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

April 27, 2021 Government Records Council Meeting

Kevin Lawrence Conley
Complainant

Complaint No. 2020-113

v.

NJ Office of the Public Defender
Custodian of Record

At the April 27, 2021 public meeting, the Government Records Council (“Council”) considered the April 20, 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. Since there is no evidence identifying the Office of the Public Defender employee who received the Complainant’s March 27, 2020 OPRA, the Council is unable to determine who violated N.J.S.A. 47:1A-5(h) and N.J.S.A. 47:1A-5(i). See Kovacs v. Union Cnty. Dep’t of Corr., GRC Complaint No. 2014-353 (September 2015).
2. The Custodian’s failure to locate additional responsive records until after she conducted a more reasonable search, following receipt of the Denial of Access Complaint, resulted in an insufficient search. Thus, the Custodian unlawfully denied access to the additional reports responsive to Complainant’s OPRA requests located in connection with the second search. N.J.S.A. 47:1A-6; Schneble v. N.J. Dep’t of Env’tl. Protection, GRC Complaint No. 2007-220 (April 2008); Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 2013). However, the GRC declines to order disclosure of those records because the Custodian disclosed same to the Complainant on August 24, 2020.
3. The Custodian unlawfully denied access to records provided on August 24, 2020 because she failed to perform a sufficient search. Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 2013). 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 April 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: April 29, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 27, 2021 Council Meeting**

**Kevin Lawrence Conley¹
Complainant**

GRC Complaint No. 2020-113

v.

**New Jersey Office of the Public Defender²
Custodial Agency**

Records Relevant to Complaint: Hard copies via U.S. mail of the “most recent [New Jersey Office of the Public Defender (“OPD”)] annual report prepared pursuant to [N.J.S.A. 2A:158A-22].”

Custodian of Record: Alison Perrone

Request Received by Custodian: April 7, 2020; May 8, 2020

Response Made by Custodian: May 14, 2020

GRC Complaint Received: June 8, 2020

Background³

Request and Response:

On March 27, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On May 5, 2020, the Complainant submitted an OPRA request to the Custodian seeking the same records.

On May 14, 2020, the twenty-sixth (26th) business day after receipt of the first OPRA request, and the fourth (4th) business day after receipt of the second OPRA request, the Custodian responded in writing providing six (6) pages of records entitled, “[OPD’s] Reports on Key Performance Indicators” for January through September 2019. The Custodian stated that the Complainant’s first request was received by OPD on April 7, 2020 but was not timely forwarded to her remote location. The Custodian also stated that she was not aware of the first request until after receiving the second request on May 8, 2020. The Custodian also noted that N.J.S.A. 47:1A-5(i)(2) relaxes OPRA’s deadlines during a declared state of emergency or public health emergency.

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.

Denial of Access Complaint:

On June 8, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that as of May 22, 2020, he has not received a response to either request in violation of OPRA. The Complainant also asserted that N.J.S.A. 2A:158A-22 required OPD to create an annual report pertaining to its costs of operation, and said report was a “government record” under OPRA.

Statement of Information:

On July 16, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that OPD received the Complainant’s March 27, 2020 OPRA request on April 7, 2020 but was not forwarded to the Custodian by mistake. The Custodian certified that at the time, OPD had transitioned to working remotely due to the public health crisis and never received the request.

The Custodian certified that she received the Complainant’s May 5, 2020 OPRA request on May 8, 2020, and it was at that time she realized the Complainant submitted the same request previously. The Custodian certified that she responded to both requests in writing on May 14, 2020, providing the requested record.

Additional Submissions:

On July 29, 2020, the Complainant submitted a letter to the GRC. Therein, the Complainant asserted that he did not receive the Custodian’s May 14, 2020 response to his OPRA requests until it arrived alongside the SOI on July 20, 2020.

The Complainant also contended that the records provided were not responsive to his request. The Complainant asserted that the requested “annual report” was supposed to contain the “data on the operations of the office, the costs, projected needs, and to the extent experience may indicate, recommendations for statutory changes, including changes in criminal law or changes in court rules, all as may appropriate to the improvement of the system of criminal justice, the control of crime, the rehabilitation of offenders, and other related objectives.” N.J.S.A. 2A:158A-22. The Complainant argued that the documents he received contained none of the above information.

The Complainant asserted that even if there is no annual report containing information described under N.J.S.A. 2A:158A-22, the Custodian has not certified that no such document exists. Further, the Complainant argued that any certification to same required additional evidence. Lastly, the Complainant argued that even if the provided records were the only ones responsive to his request, the Custodian only provided nine (9) months of data, rather than the full 2019 year.

On August 24, 2020, the Custodian e-mailed the GRC in response to the Complainant’s correspondence. Therein, the Custodian attached correspondence being sent to the Complainant that same day, along with additional records. In the attached cover letter, the Custodian stated that she confirmed with OPD management who confirmed that OPD has not produced an “annual report” contemplated by N.J.S.A. 2A:158A-22 since OPD came within the Department of the Treasury twenty-six (26) years ago. The Custodian stated that the previously provided documents

contained data that would have been in an annual report. Additionally, the Custodian stated that, as per the Complainant's requests, she attached an additional document covering the last three (3) months of 2019. The Custodian also stated that she included excerpts from the Governor's Budget Message for Fiscal Year 2021, believing that the information contained therein would also be included in an annual report created under N.J.S.A. 2A:158A-22.

Analysis

Failure to Forward/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 dated October 31, 2007).

OPRA also provides that, "[a]ny officer or employee of a public agency who receives a request for access to a government record shall forward the request to the custodian of the record or direct the requestor to the custodian of the record." N.J.S.A. 47:1A-5(h) (emphasis added).

In the instant matter, the Custodian conceded that OPD received the Complainant's March 27, 2020 OPRA request on April 7, 2020 and was not timely forwarded to her. The Custodian also certified that it was not until she received the Complainant's May 5, 2020 OPRA request that she realized that he had sent a previous OPRA request seeking the same records. The Custodian certified that she responded to both requests on May 14, 2020, twenty-six (26) business days after OPD received the Complainant's March 27, 2020 OPRA request.

However, the evidence in the record does not identify the OPD employee who received the Complainant's March 27, 2020 OPRA request as received. In Kovacs v. Union Cnty. Dep't of Corr., GRC Complaint No. 2014-353 (September 2015), the custodian was unable to identify the employee who responded to the complainant's OPRA request. Therefore, the Council was unable to identify the individual who violated N.J.S.A. 47:1A-5(h).

Therefore, since there is no evidence identifying the OPD employee who received the Complainant's March 27, 2020 OPRA, the Council is unable to determine who violated N.J.S.A. 47:1A-5(h) and N.J.S.A. 47:1A-5(i). See Kovacs, GRC 2014-353.

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.

Sufficiency of Search

It is the custodian's responsibility to perform a complete search for the requested records before responding to an OPRA request, as doing so will help ensure that the custodian's response is accurate and has an appropriate basis in law. In Schneble v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008), the custodian initially stated that no records responsive to the complainant's OPRA request existed. The custodian certified that after receipt of the complainant's denial of access complaint, which contained e-mails responsive to the complainant's request, the custodian conducted a second search and found records responsive to the complainant's request. The GRC held that the custodian had performed an inadequate search and thus unlawfully denied access to the responsive records. See also Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (January 2011).

Moreover, in Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 2013), the custodian initially responded to the complainant's request, producing four (4) responsive records and stating that no other records existed. However, after receiving the denial of access complaint, the custodian performed another search and discovered several other records. Id. In accordance with Schneble, the Council held that the custodian failed to perform an adequate initial search and unlawfully denied access to those additional records. Weiner, GRC 2013-52.

Here, the Custodian certified in the SOI that she responded to both OPRA requests on May 14, 2020, providing six (6) pages of documents entitled, "[OPD's] Reports on Key Performance Indicators" covering January 2019 through September 2019. In a supplemental correspondence, the Complainant asserted that the records were not responsive to his requests, as he sought OPD's "annual report" for 2019 pursuant to N.J.S.A. 2A:158A-22. The Complainant added that even if the records he received were the only ones most responsive to his requests, the Custodian only provided data for nine (9) months rather than the entire 2019 year.

In response to the Complainant's letter, the Custodian responded on August 24, 2020 by providing additional records. The Custodian stated that the records comprised the "[OPD's] Reports on Key Performance Indicators" for the last three (3) months of 2019 and summary data for 2020. The Custodian also provided excerpts from the Governor's budget for FY2021. The Custodian stated that OPD has not submitted an "annual report" described under N.J.S.A. 2A:158A-22 since the agency was reorganized underneath the Department of the Treasury. The Custodian added that she provided the additional records because the Complainant requested the annual report for 2019, and that the excerpt from the budget likely contained data that would have been in the annual report had OPD submitted one. Thus, based upon the Custodian's submissions, the records provided on August 24, 2020 were responsive to the Complainant's request, but were not provided until after the filing of the instant complaint. Therefore, the Custodian's initial search was insufficient and resulted in an unlawful denial of access, consistent with Weiner, GRC 2013-52.

Accordingly, the Custodian's failure to locate additional responsive records until after she conducted a more reasonable search, following receipt of the Denial of Access Complaint, resulted in an insufficient search. Thus, the Custodian unlawfully denied access to the additional reports responsive to Complainant's OPRA requests located in connection with the second search.

N.J.S.A. 47:1A-6; Schneble, GRC 2007-220; Weiner, GRC 2013-52. However, the GRC declines to order disclosure of those records because the Custodian disclosed same to the Complainant on August 24, 2020.

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)).

Here, the Custodian unlawfully denied access to records provided on August 24, 2020 because she failed to perform a sufficient search. Wiener, GRC 2013-52. 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. Since there is no evidence identifying the Office of the Public Defender employee who received the Complainant’s March 27, 2020 OPRA, the Council is unable to determine who violated N.J.S.A. 47:1A-5(h) and N.J.S.A. 47:1A-5(i). See Kovacs v. Union Cnty. Dep’t of Corr., GRC Complaint No. 2014-353 (September 2015).
2. The Custodian’s failure to locate additional responsive records until after she conducted a more reasonable search, following receipt of the Denial of Access Complaint, resulted

in an insufficient search. Thus, the Custodian unlawfully denied access to the additional reports responsive to Complainant's OPRA requests located in connection with the second search. N.J.S.A. 47:1A-6; Schneble v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008); Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 2013). However, the GRC declines to order disclosure of those records because the Custodian disclosed same to the Complainant on August 24, 2020.

3. The Custodian unlawfully denied access to records provided on August 24, 2020 because she failed to perform a sufficient search. Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 2013). 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: Samuel A. Rosado
Staff Attorney

April 20, 2021