



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

June 28, 2022 Government Records Council Meeting

Lynn Petrovich
Complainant

Complaint No. 2020-223

v.

NJ Department of Health,
Office of Population Health
Custodian of Record

At the June 28, 2022 public meeting, the Government Records Council (“Council”) considered the June 21, 2022 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 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 dated October 31, 2007); Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). However, the Council need not order disclosure of the requested record because the Custodian disclosed responsive records to the Complainant on November 25, 2020.
2. The Custodian failed to timely respond to the Complainant’s OPRA request prior to the last day of the seventh (7th) extension, thus resulting 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 ultimately provided responsive records on November 25, 2020. Further, 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 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 June 2022

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: June 30, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 28, 2022 Council Meeting**

**Lynn Petrovich¹
Complainant**

GRC Complaint No. 2020-223

v.

**New Jersey Department of Health,²
Office of Population Health
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of “[r]eference to W162600 which requested the cause of death to date for the year 2020 only. Response received contained a link [URL omitted]. This website contains a pdf GRAPH of all 2020 deaths. I specifically request the numbers – causes of death for 2020 – used to prepare the graph.”

Custodian of Record: Darrin D. Goldman

Request Received by Custodian: August 28, 2020

Response Made by Custodian: September 9, 2020; September 16, 2020; September 23, 2020; September 30, 2020; October 7, 2020; October 14, 2020; October 21, 2020; November 5, 2020

GRC Complaint Received: November 5, 2020

Background³

Request and Response:

On August 28, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 9, 2020, the Custodian responded in writing stating that another week was needed to prepare a response. The Custodian stated that the new response date would be September 16, 2020. Thereafter, the Custodian extended the time to respond on September 16, 2020, September 23, 2020, September 30, October 7, 2020, and October 14, 2020.

On October 14, 2020, the Custodian e-mailed the Complainant stating that another extension was needed until October 21, 2020 to response to the request. On October 17, 2020, the Complainant responded to the Custodian, stating that the refusal to provide the requested numbers

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Francis X. Baker.

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.

Lynn Petrovich v. New Jersey Department of Health, Office of Population Health, 2020-223 – Findings and Recommendations of the Executive Director

of deaths in New Jersey by cause was evidence of fraud. On October 21, 2020, the Custodian again requested an extension of time to respond until November 4, 2020.

On November 5, 2020, the day after the latest extension's deadline, Marisol Meyer e-mailed the Complainant on the Custodian's behalf, stating that the Office of Public Health needed additional time to respond to the request, providing a date of November 18, 2020.

Denial of Access Complaint:

On November 5, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that on August 20, 2020, she submitted an OPRA request seeking the causes of death to date for New Jersey in 2020. The Complainant asserted that she received a response from the Department of Health ("DOH") on August 26, 2020, being provided a .pdf containing a graph.

The Complainant asserted that he then requested the records at issue on August 28, 2020. The Complainant asserted that DOH had eight (8) weeks to provide the numbers used to create the graph she received in response to the previous request. The Complainant asserted that DOH had no intention of providing the state request, and the repeated delays evidenced a denial of access.

Supplemental Response:

On November 25, 2020, Counsel for the Custodian e-mailed the Complainant notifying her that DOH had launched an online resource which allowed users to search mortality statistics in New Jersey. Counsel stated that users could access the number of deaths reported in New Jersey organized by cause of death. Counsel also stated that a copy of search results for the number of deaths in each county was attached to the e-mail. Counsel noted that the attached results broke down the deaths in each county by cause of death, as requested by the Complainant. Counsel thus requested that the Complainant withdraw her complaint with the GRC.

Statement of Information:

On December 7, 2020, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on August 28, 2020. The Custodian certified that he responded in writing on September 9, 2020 stating that an extension of time was needed to process the request. The Custodian certified that additional extensions were sent on September 9, 2020, September 16, 2020, September 23, 2020, September 30, 2020, October 7, 2020, October 14, 2020, October 21, 2020, and November 5, 2020.

The Custodian asserted that during the pendency of the Complainant's OPRA request, DOH launched an online resource allowing users to search through mortality data in New Jersey, including the cause of death. The Custodian asserted on November 25, 2020, Counsel e-mailed the Complainant notifying same that the resource was available and provided the requested information as an attached document.

The Custodian contended that because the records were disclosed to the Complainant, the complaint was now moot and should be dismissed. See Stop & Shop Supermarket Co., LLC v. Cty. of Bergen, 450 N.J. Super. 286, 291-92 (App. Div. 2017); Mason v. City of Hoboken, Docket No. A-0508-06T5, 2008 N.J. Super. Unpub. LEXIS 1660, *7 (App. Div. Jan. 29, 2008) (affirming dismissal of OPRA complaint as moot after Hoboken provided response to OPRA request). The Custodian asserted that the Complainant was provided a document containing the requested information on November 25, 2020, but the resource used to generate the document was not available at the time of the request. The Custodian nevertheless argued that since the Complainant has been provided with responsive records, the matter should be dismissed as moot.

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 dated 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.]

In the matter before the Council, the Complainant requested the "numbers" of deaths and

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.

Lynn Petrovich v. New Jersey Department of Health, Office of Population Health, 2020-223 – Findings and Recommendations of the Executive Director

cause thereof in New Jersey for a certain period.⁵ The Custodian sought several extensions of time to respond to the Complainant's OPRA request, with the latest deadline identified as November 4, 2020. However, the Custodian did not respond again until November 5, 2020, seeking another extension. In the SOI, the Custodian certified to these facts. Based on the forgoing and the Council's decision in Kohn, GRC 2007-124, the Custodian's failure to respond prior to the expiration of the extended time frame resulted in a "deemed" denial.

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 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; Kohn, GRC 2007-124. However, the Council need not order disclosure of the requested record because the Custodian disclosed responsive records to the Complainant on November 25, 2020.

Finally, the GRC notes it does not address whether the extensions in their totality were reasonable and substantiated because the Complainant's OPRA request was "deemed" denied as of the filing of this complaint.

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); the Custodian's actions must have been intentional and deliberate, with knowledge

⁵ The GRC notes that the Complainant's OPRA request is invalid on its face because it seeks information and fails to identify any specific records. MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012).

Lynn Petrovich v. New Jersey Department of Health, Office of Population Health, 2020-223 – Findings and Recommendations of the Executive Director

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 failed to timely respond to the Complainant's OPRA request prior to the last day of the seventh (7th) extension, thus resulting 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 ultimately provided responsive records on November 25, 2020. Further, 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 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 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 dated October 31, 2007); Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). However, the Council need not order disclosure of the requested record because the Custodian disclosed responsive records to the Complainant on November 25, 2020.
2. The Custodian failed to timely respond to the Complainant's OPRA request prior to the last day of the seventh (7th) extension, thus resulting 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 ultimately provided responsive records on November 25, 2020. Further, 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 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

June 21, 2020