



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

Leigh Lesniak
Complainant

Complaint No. 2020-245

v.

NJ Department of Labor & Workforce Development,
Division of Unemployment Insurance
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 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). However, the Council need not order disclosure of the requested information because the Custodian responded to the Complainant’s OPRA request on December 30, 2020.
2. The Custodian failed to timely respond to the Complainant’s OPRA request or timely seek an extension of time, 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 a response on December 30, 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**

**Leigh Lesniak¹
Complainant**

GRC Complaint No. 2020-245

v.

**New Jersey Department of Labor & Workforce Development,
Division of Unemployment Insurance²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of “the following information for every N.J. Department of Labor & Workforce Development [(“DOL”)] employee. Please include the employee’s first name, last name, hire date, salary, position, email address, the county the employee lives in, the employee’s race and gender.”

Custodian of Record: David Fish
Request Received by Custodian: October 15, 2020
Response Made by Custodian: N/A
GRC Complaint Received: December 29, 2020

Background³

Request:

On October 15, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.

Denial of Access Complaint:

On December 29, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that to date the Custodian has failed to respond to his OPRA request.

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Rimma Razhba. Previously represented by Deputy Attorney General Sean Havern.

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.

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Response:

On December 30, 2020, the Custodian responded to the Complainant's request in writing, stating that the requested information of a DOL employee's name, salary, position, and department could be located on the website "YourMoney.NJ.gov". The Custodian then stated that the balance of the request was denied as improper as it did not identify specific government records.

Statement of Information:

On January 22, 2021, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on October 15, 2020. The Custodian certified that on October 27, 2020, and November 19, 2020, the Custodian of Record for DOL's Division of Unemployment Insurance, Christopher Aspinwall, sought extensions from the Complainant to respond to the request.⁴ The Custodian also certified that no search for records was undertaken since the first name, last name, salary, and position for every DOL employee was available online. The Custodian certified that he responded in writing on December 30, 2020, providing the Complainant with a link to the website.

The Custodian argued that the remainder of the request did not seek specific government records. See MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Twp. Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass'n v. New Jersey Council on Affordable Hous., 390 N.J. Super. 166 (App. Div. 2007); and Spectraserv, Inc. v. Middlesex Cty. Utilities Auth., 416 N.J. Super. 565, 576 (App. Div. 2010). The Custodian asserted that the Complainant's request for "the county the employee lives in and the employee's race and gender" was not information contained in a document that could be produced to the Complainant. See Lagerkvist v. Office of the Governor, 443 N.J. Super. 230, 236-37 (App. Div. 2015).

The Custodian also asserted that some of the requested information was not possessed by DOL at the time, stating that questions concerning an employee's race and gender on an application was optional and oftentimes not completed by employees. The Custodian therefore argued that such information did not exist and DOL was not obligated to produce information it did not have. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

Lastly, the Custodian argued that even if the request identified specific records, same must be denied under OPRA's personnel records exemption. See N.J.S.A. 47:1A-10. The Custodian asserted that under N.J.S.A. 47:1A-10, the exception to the personnel records exemption comprising information pertaining to an public employee's "name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received." See Kovalcik v. Somerset Cnty. Prosecutor's Office, 206 N.J. 581, 594 (2011). The Custodian asserted that to the extent that the "county the employee lives in" and the employee's "race and gender" could be located, it would be contained within the personnel records of each employee. The Custodian thus argued that such information would not be subject to disclosure under OPRA.

⁴ The Custodian did not attach copies of Mr. Aspinwall's correspondence in support of this statement. Leigh Lesniak v. New Jersey Dep't of Labor & Workforce Development, Division of Unemployment Insurance, 2020-245 – Findings and Recommendations of the Executive Director

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).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 contended in his Denial of Access Complaint that he did not receive a response to his request dated October 15, 2020. In the SOI, the Custodian certified that on October 27, 2020 and November 19, 2020, Mr. Aspinwall responded to the Complainant seeking extensions of time to respond. On December 29, 2020, the Complainant filed the instant complaint, and on December 30, 2020, the Custodian responded to the Complainant's request.

Upon review, the evidence supports that a deemed denial of access occurred. The Custodian failed to provide documentation evidencing Mr. Aspinwall's requests for extensions, or provide a certification from Mr. Aspinwall attesting to same. Furthermore, the Custodian failed to indicate that Mr. Aspinwall provided a date certain in those responses. Nevertheless, Mr. Aspinwall's alleged October 27, 2020 response comes on the eighth (8th) business day after receiving the Complainant's OPRA request, or one (1) day past the statutory seven (7) business-day response period.

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 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. However, the Council need not order disclosure of the requested information because the Custodian responded to the Complainant's OPRA request on December 30, 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

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.

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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 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 or timely seek an extension of time, 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 a response on December 30, 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 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). However, the Council need not order disclosure of the requested information because the Custodian responded to the Complainant’s OPRA request on December 30, 2020.
2. The Custodian failed to timely respond to the Complainant’s OPRA request or timely seek an extension of time, 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 a response on December 30, 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, 2022