



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

February 28, 2023 Government Records Council Meeting

Stephen Grogan
Complainant

Complaint No. 2021-19

v.

Sussex County Prosecutor's Office
Custodian of Record

At the February 28, 2023 public meeting, the Government Records Council ("Council") considered the February 21, 2023 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 October 31, 2007); Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
2. Notwithstanding the Custodian's "deemed" denial, the Custodian has borne his burden of proving that he lawfully denied access to the requested records because said records are not government records subject to disclosure pursuant to Executive Order No. 26 (McGreevey, 2002), applicable to OPRA by operation of N.J.S.A. 47:1A-9(a). See also Vaughn v. City of Trenton (Mercer), GRC Complaint No. 2009-177 (June 2010), Little v. N.J. Dep't of Corr., GRC Complaint No. 2012-70 (April 2013) and Nevin v. N.J. Dep't of Health and Senior Servs., GRC Complaint No. 2013-18 (October 2013). Because said records are exempt from access under Executive Order No. 26 (McGreevey, 2002), it is unnecessary for the GRC to examine additional reasons asserted by the Custodian for denying access.
3. The Custodian failed to timely respond to the Complainant's OPRA request by the extended response date of November 30, 2020, 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 did respond lawfully denying access to the requested records. 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 February 2023

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: March 6, 2023

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 28, 2023 Council Meeting**

**Stephen Grogan¹
Complainant**

GRC Complaint No. 2021-19

v.

**Sussex County Prosecutor's Office²
Custodial Agency**

Records Relevant to Complaint: Copies via e-mail of “[r]edacted records (applications) for Sussex County Veterans Diversion Program from 2017 till (sic) [November 16, 2020].”

Custodian of Record: Francis A. Koch, Esq.

Request Received by Custodian: November 16, 2020

Response Made by Custodian: November 19, 2020

GRC Complaint Received: January 19, 2021

Background³

Request and Responses:

On November 16, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 19, 2020 at 9:18 a.m., the third (3rd) business day following receipt of said request, OPRA Designee Rachelle Jones, on behalf of the Custodian, responded in writing via e-mail asking the Complainant to clarify his request. Ms. Jones asked the Complainant whether he was seeking a blank copy of the Veterans Diversion Program (“VDP”) application or statistics regarding the number of individuals who applied to the VDP. On that same date, the following e-mails were exchanged:

- At 9:45 a.m., the Complainant e-mailed Ms. Jones and stated that he was seeking both a blank application and statistics. The Complainant stated that he knew under OPRA he could only seek records, not statistics, so he was seeking VDP applications redacted such that they would only reveal the total number of applicants and the number of applicants accepted into the program.

¹ No legal representation listed on record.

² Represented by James F. Moscagiuri, Esq., of Lavery, Selvaggi, Abromitis & Cohen, P.C. (Hackettstown, NJ).

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.

- At 10:07 a.m., Ms. Jones e-mailed the Complainant and stated that she understood that the Complainant wanted a blank application; however, she stated that she was still confused regarding the statistics he was seeking. Ms. Jones stated that if the Complainant was seeking the number of applicants accepted into the VDP he could obtain the data “from the AG’s website.” Ms. Jones informed the Complainant that if he was seeking completed applications there would be issues of confidentiality and she would have to redact the entire application(s).
- At 10:28 a.m., the Complainant e-mailed Ms. Jones and stated that the Attorney General’s website does not post the information he is seeking. The Complaint stated, “the application . . . should include approved or denied.”
- At 12:09 p.m., Ms. Jones e-mailed the Complainant, informing him that she understood his request. Ms. Jones further informed the Complainant that she required an extension of time until November 30, 2020, at which time she would be back in the office and able to respond to the request.

On December 11, 2020, the Complainant e-mailed Ms. Jones to inform her that it had been more than seven (7) business days since November 30, 2020, and his OPRA request had not been fulfilled. The Complainant stated that the Custodian’s failure to timely respond to his request will be deemed a denial of the request per N.J.S.A. 47:1A-5(i).

On December 14, 2020, the tenth (10th) business day following the extended response date of November 30, 2020, Rachele Jones, on behalf of the Custodian, e-mailed the Complainant. Ms. Jones apologized for the delay and informed the Complainant that she had attached a blank VDP application. Ms. Jones further informed the Complainant his request for VDP applications was denied because Executive Order 26 precludes disclosure of information concerning an individual that relates to medical, psychiatric or psychological history, diagnosis, treatment or evaluation. Ms. Jones also informed the Complainant that the requested records constitute their office’s work product which is not subject to disclosure.

Denial of Access Complaint:

On January 19, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he filed his OPRA request on November 16, 2020, and Rachele Jones contacted him for clarification of the request. The Complainant stated that he was only seeking VDP applications, not doctor or attorney reports. The Complainant stated that Ms. Jones informed him she understood but would not be back in the office to process his request until November 30, 2020.

The Complainant stated that on December 11, 2020, he contacted Ms. Jones and informed her that since she did not respond to the request in a timely manner, it was an automatic denial. The Complainant stated that on December 14, 2020, he received an e-mail from Ms. Jones denying his request because VDP applications are internal office documents that cannot be disclosed.

Supplemental Submissions:

On February 19, 2021, the Custodian's Counsel e-mailed the GRC to report that he provided the Complainant with a spreadsheet containing the number of VDP applications filed since 2017, the filing date of each application, and whether the application was accepted, rejected, transferred or withdrawn. As such, Counsel stated that the parties reached an amicable resolution of the complaint.

On February 24, 2021, the GRC e-mailed the Complainant to inform him that the Custodian's Counsel notified the GRC that the parties resolved the complaint. The GRC further informed the Complainant that the GRC would need a written notification that he was voluntarily withdrawing the complaint. The GRC also informed the Complainant that when the GRC received the written withdrawal it would place the complaint on the Council's March agenda for dismissal.

On February 26, 2021, the Complainant e-mailed the GRC stating that he is not completely satisfied with the spreadsheet provided by the Custodian's Counsel. The Complainant stated that he will not withdraw the complaint.

Statement of Information:

On March 5, 2021, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on November 16, 2020. The Custodian certified that OPRA designee Rachelle Jones responded in writing on November 19, 2020. The Custodian certified that thereafter, there was an e-mail string between Ms. Jones and the Complainant "regarding extensions and clarifications" culminating in a final response on December 14, 2020.

The Custodian certified that the Sussex County Prosecutor's Office maintains a VDP. The Custodian certified that the VDP is a program by which military service members who are charged with non-violent crimes of the third and fourth degree, and who suffer from mental health conditions, may be eligible for diversion to mental health treatment programs, rather than traditional prosecution. The Custodian certified that the disclosure of any aspect of the VDP application discloses the applicant's medical, psychiatric or physiological history, diagnosis, treatment or evaluation.

The Custodian certified that five (5) completed VDP applications and one (1) blank VDP application are the records responsive to the request.⁴ The Custodian certified that the blank VDP application was disclosed to the Complainant; however, the completed VDP applications were denied for several reasons, including the following:

1. Executive Order 26 (McGreevey) provides that records which contain information concerning an individual's "medical, psychiatric or physiological history, diagnosis, treatment or evaluation" are not government records subject to disclosure under OPRA.

⁴ Although the Custodian did disclose a copy of a blank VDP application form, the form was not a record responsive to the Complainant's November 16, 2020 OPRA request.

2. OPRA's privacy clause requires a custodian to maintain the confidentiality of "a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy." The Custodian cited N.J.S.A. 47:1A-1, Paff v. Ocean Cnty. Prosecutor's Office, 235 N.J. 1, 26 (2018), and Burnett v. Cnty. of Bergen, 198 N.J. 408, 427 (2009).
3. The Sussex County Prosecutor's Office retains sole discretion over who is admitted into VDP, the specific terms of admission, and the duration that the individual is in the VDP. As such, production of the applications is prohibited as inter-agency or intra-agency advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1.
4. Disclosure would implicate the Sussex County Prosecutor's Office attorney work product privilege with respect to impressions of a specific applicant and decisions related to admission into the program.
5. Often, a public defender represents a veteran seeking admission into VDP. In such cases, the public defender's records, including the requested records, would be exempt from disclosure pursuant to N.J.S.A. 47:1A-5(k).

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 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

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.

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 instant complaint, the Custodian responded to the Complainant’s OPRA request on the third (3rd) business day following receipt of the request informing the Complainant that an extension of time until November 30, 2020 was required. However, the Custodian did not respond again until December 14, 2020. Therefore, 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.

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.

OPRA also provides that its provisions:

[S]hall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.

[N.J.S.A. 47:1A-9(a)]

Executive Order No. 26 (McGreevey, 2002) (“EO 26”) states in part that, “[i]nformation relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation” are not government records subject to access under OPRA.

The Council has long held that records which contain information that relates to medical, psychiatric or psychological history, diagnosis, treatment or evaluation are not government records as per EO 26. In Vaughn v. City of Trenton (Mercer), GRC Complaint No. 2009-177 (June 2010),

the complainant sought access to psychological test and medical reports for a Trenton Police Department detective. The Council held that such records were exempt from access as “[i]nformation relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation” under EO 26. Subsequently, in Little v. N.J. Dep’t of Corr., GRC Complaint No. 2012-70 (April 2013), the Council found that the custodian lawfully denied access to requested medical and psychological records because they were “specifically exempt from public access pursuant to [EO 26].” More recently, in Nevin v. N.J. Dep’t of Health and Senior Servs., GRC Complaint No. 2013-18 (October 2013), the Council held that the custodian lawfully denied access to medical records under EO 26 because the complainant failed to submit evidence to refute the custodian’s certification that certain requested records contained medical information.

Here, the Custodian certified that the VDP is a program by which veterans charged with non-violent third and fourth degree crimes, and *who suffer from mental health conditions*, may be eligible for diversion to mental health treatment programs, instead of criminal prosecution. It is axiomatic therefore that VDP program applications must contain medical and/or physiological information. Moreover, the Custodian certified that disclosing any aspect of the VDP application would disclose the applicant’s medical, psychiatric or physiological history, diagnosis, treatment or evaluation. And the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification.

Therefore, notwithstanding the Custodian’s “deemed” denial, the Custodian has borne his burden of proving that he lawfully denied access to the requested records because said records are not government records subject to disclosure pursuant to EO 26, applicable to OPRA by operation of N.J.S.A. 47:1A-9(a). See also Vaughn, GRC 2009-177, Little, GRC 2012-70 and Nevin, GRC 2013-18. Because said records are exempt from access under EO 26, it is unnecessary for the GRC to examine additional reasons asserted by the Custodian for denying access.

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 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 by the extended response date of November 30, 2020, 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 did respond lawfully denying access to the requested records. 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 October 31, 2007); Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
2. Notwithstanding the Custodian's "deemed" denial, the Custodian has borne his burden of proving that he lawfully denied access to the requested records because said records are not government records subject to disclosure pursuant to Executive Order No. 26 (McGreevey, 2002), applicable to OPRA by operation of N.J.S.A. 47:1A-9(a). See also Vaughn v. City of Trenton (Mercer), GRC Complaint No. 2009-177 (June 2010), Little v. N.J. Dep't of Corr., GRC Complaint No. 2012-70 (April 2013) and Nevin v. N.J. Dep't of Health and Senior Servs., GRC Complaint No. 2013-18 (October 2013). Because said records are exempt from access under Executive Order No. 26 (McGreevey, 2002), it is unnecessary for the GRC to examine additional reasons asserted by the Custodian for denying access.
3. The Custodian failed to timely respond to the Complainant's OPRA request by the extended response date of November 30, 2020, 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 did respond lawfully denying access to the requested records. 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: John E. Stewart

February 21, 2023