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This opinion shall not "constitute precedent or be binding upon any court."  
Although it is posted on the internet, this opinion is binding only on the  
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-5573-14T1

JEFF CARTER,

Appellant,

v.

FRANKLIN FIRE DISTRICT  
NO. 1 (Somerset),

Respondent.

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Argued October 5, 2017 — Decided November 20, 2017

Before Judges Simonelli, Rothstadt and Gooden  
Brown.

On appeal from Government Records Council,  
Complaint No. 2011-76.

Jeff Carter, appellant, argued the cause pro  
se.

Dominic P. DiYanni argued the cause for  
respondent Franklin Fire District No. 1 (Eric  
M. Bernstein & Associates, LLC, attorneys; Mr.  
DiYanni, of counsel and on the brief).

Raymond R. Chance, III, Assistant Attorney  
General, argued the cause for respondent  
Government Records Council (Christopher S.  
Porrino, Attorney General, attorney; Mr.

Chance, of counsel; Debra A. Allen, Deputy Attorney General, on the brief).

PER CURIAM

Complainant, Jeff Carter, appeals from the Government Records Council's (GRC) final decision adopting an Administrative Law Judge's (ALJ) finding that respondent, Franklin Fire District No. 1 (District), did not knowingly and willfully fail to disclose records that Carter requested under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, even though it had violated the act. Carter's primary claim on appeal is that the GRC's decision was not supported by the evidence. He also argues the GRC failed to properly advise him of its rejection of a supplemental certification he filed in support of his claim and that it should have imposed a civil penalty on the District's legal counsel who responded to his OPRA request. We disagree and affirm.

The facts gleaned from the record are undisputed and are summarized as follows. On January 21, 2011, Carter submitted an OPRA request to the District for all annual financial disclosure statements (FDS) filed by its commissioners from 2000 to 2011. The District, through its attorney, William T. Cooper, denied the request on February 10, 2011, explaining that the FDS Carter sought were not maintained by its office and were instead available to Carter through the Franklin Township Municipal Clerk's office.

Carter filed an OPRA request with the town clerk and received all of the documents he requested from the District. He also submitted a second OPRA request to the District requesting different documents. Among the documents he received in response to that request, Carter found a January 25, 2011 email from the District's administrative assistant, Debi Nelson, who is Carter's sister, to Melissa Kosensky, the commissioner who served as the District's custodian of records. The email included some of the 2007 FDS that were on file with Nelson's office, which were the documents Cooper stated were not in the District's possession.

Carter filed a complaint with the GRC, challenging the District's denial of his first OPRA request and access to the requested records. The District filed a Statement of Information (SOI) with the GRC, explaining the reasons it was delayed in responding to Carter's first OPRA request. The SOI stated the delay was the result of receiving about eighteen OPRA requests in ten days from Carter, its custodian being away for training during part of this time period, and the custodian referring the request to its counsel for advice on how to respond. The District denied that the custodian's "actions r[ose] to the level of a knowing and willful violation of [OPRA]." The SOI did not reveal that the District had copies of the 2007 FDS it included in its response to Carter's second OPRA request. In response to the SOI, Carter

filed a certification with the GRC that attached the January 25, 2011 email with the 2007 FDS that proved the District had in its possession some of the requested documents that it failed to disclose.

On June 26, 2012, the GRC reviewed Carter's complaint and found that the custodian violated OPRA by not timely responding to Carter's OPRA request within seven business days, and by denying access to the FDS as evidenced by the January 25, 2011 email. It issued an interim order requiring the custodian to disclose the responsive 2007 FDS to Carter, in addition to any other responsive statements it had on file from 2000 to the date the OPRA request was made. It also ordered that if no other FDS existed, the custodian was to submit a certification attesting to that fact. On July 2, 2012, the District provided Carter with documents in response to the GRC's order.

In anticipation of the GRC's scheduled review of the matter, Carter prepared a certification in which he included a copy of a January 27, 2011 email from Kosensky to Cooper transmitting the 2007 FDS that she received from Nelson two days earlier. In that email, Kosensky stated "[i]t looks like we only have copies from 2007. I am assuming that [Carter] can get the rest from the township." Carter argued in the certification that the document established that when Cooper responded to Carter's OPRA request,

he and Kosensky knew the District was in possession of at least some responsive documents.

Carter's counsel transmitted the certification by email to the GRC on August 24, 2012. The GRC responded the same day by informing Carter's counsel that the "submission will not be reviewed [by the GRC]" because, (1) the matter was already scheduled before the council for its review of the executive director's "Findings and Recommendations"; and, (2) its regulations did "not include a provision for submissions in advance of the Council's meeting" where there is no hearing being held and the GRC made no request for additional information. According to Carter, his attorney never informed him of the GRC's rejection of his submission.

At its August 28, 2012 meeting, the GRC determined the custodian complied with the June 26 interim order. It again relied on the January 25, 2011 email and found that the District violated OPRA because it did not release documents it obviously had in its possession. It also found that Carter was a prevailing party entitled to an award of counsel fees and directed that the matter be transmitted to the Office of Administrative Law (OAL) for a hearing to determine the amount of the award and whether the District's denial of Carter's initial request was a knowing and willful OPRA violation.

The OAL scheduled a hearing before an ALJ. At the hearing, Carter and Nelson testified on behalf of Carter.<sup>1</sup> Kosensky testified for the District. Carter testified about the January 25 and January 27 emails, and explained they proved that two weeks before Cooper responded to his initial request and explained the District did not maintain the FDS, Nelson and Kosensky had exchanged an email that contained some of the requested FDS and Kosensky provided it to Cooper. He argued that because the District possessed some responsive documents, it was required to disclose whatever it possessed, regardless of the town clerk serving as the repository for the FDS. Carter admitted he promptly made an OPRA request for the same documents from the town clerk, who complied and forwarded to him the FDS that he sought.

Nelson testified that after receiving her brother's OPRA request, she spoke with Cooper and explained she had copies of the 2007 FDS in the District's file and she assumed they were released to Carter. Only later, upon receiving the GRC complaint, did she learn that the 2007 FDS were not disclosed.

Kosensky testified she was the District's records custodian from 2010 to 2011. She received some responsive documents to the OPRA request from Nelson and forwarded them to Cooper. She

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<sup>1</sup> By that time, Nelson no longer worked for the District.

admitted that she thought the 2007 FDS were responsive to Carter's request, but agreed with Cooper's response to Carter that advised him to direct his request to the Municipal Clerk's office, and did not feel that Cooper's response was an attempt to intentionally withhold documents. It was her opinion, however, that Carter should have been given a copy of the 2007 FDS that the District had on file. Finally, she stated that she received no training about OPRA when she was appointed to the year-long interim position.

On April 23, 2015, the ALJ issued an Initial Decision. The judge's comprehensive nineteen-page written decision specifically found that Nelson sent the January 25, 2011 email to Kosensky, who then sent the January 27, 2011 email to Cooper. Despite those emails, the ALJ concluded that the District's custodian did not knowingly and willfully violate OPRA and that her mistake in denying the OPRA request was negligent. Relying on the commissioner's demeanor during the hearing, the ALJ stated that the commissioner "did not impress [the ALJ] as anything other than a worker who was doing her job to the best of her ability without an ulterior motive of denying Carter to access to records he requested." The ALJ recommended against assessing any civil penalties under OPRA. The ALJ then determined the amount of the

counsel fees and costs to be awarded to Carter as directed by the GRC.

On June 30, 2015, the GRC issued its final decision, adopting its Executive Director's supplemental findings and recommendations that were based upon the ALJ's Initial Decision. Addressing exceptions made by Carter to the ALJ's decision, the GRC explained again its reason for rejecting Carter's August 12, 2012 certification. This appeal followed.

We begin our review of the GRC's decision by acknowledging that it "is governed by the same standards as review of a decision by any other state agency," Fisher v. Div. of Law, 400 N.J. Super. 61, 70 (App. Div. 2008), and is therefore limited. In re Stallworth, 208 N.J. 182, 194 (2011). We "will not overturn an agency's decision unless it violates express or implied legislative policies, is based on factual findings that are not supported by substantial credible evidence, or is arbitrary, capricious or unreasonable." Fisher, supra, 400 N.J. Super. at 70.

"Our standard of review is plenary with respect to" the GRC's interpretation of OPRA. Asbury Park Press v. Cty. of Monmouth, 406 N.J. Super. 1, 6 (App. Div. 2009), aff'd, 201 N.J. 5 (2010); see also O'Shea v. Twp. of W. Milford, 410 N.J. Super. 371, 379 (App Div. 2009). "[D]eterminations about the applicability of



OPRA and its exemptions are legal conclusions . . . and are therefore subject to de novo review." Carter v. Doe, 230 N.J. 258, 273-274 (2017). However, "under our deferential standard of review, we give weight to the GRC's interpretation of OPRA." McGee v. Twp. of E. Amwell, 416 N.J. Super. 602, 616 (App. Div. 2010). "We do not, however, simply rubber stamp the agency's decision." Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609, 618 (App. Div. 2008) (citations omitted), certif. denied, 198 N.J. 316 (2009).

In our review, we are mindful of the public policy in these matters. "Any analysis of OPRA must begin with the recognition that the Legislature created OPRA intending to make government records 'readily accessible' to the state's citizens 'with certain exceptions[] for the protection of the public interest.'" Gilleran v. Bloomfield, 227 N.J. 159, 170 (2016) (alteration in original) (quoting N.J.S.A. 47:1A-1). OPRA expresses New Jersey's public policy favoring transparency in government and disclosure of government documents. See N.J.S.A. 47:1A-1. It endeavors to "maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process." Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005) (citation omitted).

"[A]ny limitations on the right of access . . . shall be construed in favor of the public's right of access[.]" N.J.S.A. 47:1A-1.

We turn first to Carter's primary contention that the GRC should have imposed penalties on Kosensky and Cooper because the District's withholding of the 2007 FDS was knowing and willful. OPRA requires that a custodian or any other public official or employee "who knowingly and 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). To determine whether a custodian knowingly and willfully violated OPRA, "the custodian must have . . . actual knowledge that his actions were wrongful, and . . . there [must] be a positive element of conscious wrongdoing." Bart, supra, 403 N.J. Super. at 619; see also Fielder v. Stonack, 141 N.J. 101 (1995); Berg v. Reaction Motors Div., Thiokol Chem. Corp., 37 N.J. 396 (1962).

If there is a knowing and willful OPRA violation by a public body or custodian of records, "and [they are] found to have unreasonably denied access under the totality of the circumstances, the [GRC] may impose the penalties provided for in [OPRA]." N.J.S.A. 47:1A-7(e).

N.J.S.A. 47:1A-11 provides a valuable means to compel compliance with OPRA by public officials, officers, employees and records

custodians who might otherwise flout OPRA's requirements and willfully and knowingly deprive the public of access to government records. The civil penalties permitted under N.J.S.A. 47:1A-11 help ensure that records at all levels of government, including the highest levels of our State government, are not willfully and knowingly withheld in an effort to shroud possible wrongdoing from the public's view or deny access to government records to which every citizen is entitled. It is inconsistent with the plain language of N.J.S.A. 47:1A-11 and OPRA's purpose to shield the recalcitrance and obfuscation of public officials, officers, custodians and employees from the imposition of a civil penalty. . . .

[N. Jersey Media Grp., Inc. v. State Office of the Governor, 451 N.J. Super. 282, 309 (App. Div. 2017) (emphasis added).]

We conclude the GRC's determination that the District did not knowingly and willfully fail to disclose documents to Carter was supported by substantial evidence in the record of the hearing before the ALJ. R. 2:11-3(e)(1)(D). That evidence included proof that the custodian's decision to forward documents to its counsel to formulate a response to Carter lacked any indication that she intended to deprive Carter of responsive documents, and therefore did not warrant the imposition of civil penalties. See Bart, supra, 403 N.J. Super. at 619 (finding no knowing and willful violation of OPRA where a parking authority "consulted with its counsel . . . to formulate a proper response"). In addition, it was undisputed that Carter was never deprived of the requested

documents because he received them from the municipal clerk as Cooper directed. While Cooper's response on behalf of Kosensky clearly violated OPRA, there was no demonstration that it was a knowing and willful attempt to "shroud possible wrongdoing from the public's view or deny access to government records to which every citizen is entitled." N. Jersey Media Grp., Inc., supra, 451 N.J. Super. at 309.

We find Carter's remaining arguments regarding Cooper's liability for civil penalties, and the GRC's failure to consider his supplemental certification before it agreed with him that the District violated OPRA and referred the matter to the OAL, to be without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We only observe that Cooper acted at all times as counsel, not as the custodian, and was never named as a party to this action, see N. Jersey Media Grp., Inc., supra, 451 N.J. Super. at 288 n.1. And, the certification the GRC refused to consider when it ruled in Carter's favor was admitted into evidence and testified to by Carter before the ALJ in support of his claim that the District's actions were knowing and willful.

Affirmed.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.

  
CLERK OF THE APPELLATE DIVISION