



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

January 29, 2013 Government Records Council Meeting

Maria Melton
Complainant

Complaint No. 2011-233

v.

City of Camden (Camden)
Custodian of Record

At the January 29, 2013 public meeting, the Government Records Council (“Council”) considered the January 22, 2013 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 her burden of proof that she timely responded to either of the Complainant’s OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s first (1st) and second (2nd) OPRA requests 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. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian has lawfully denied access to the requested photographs and has borne his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6. Specifically the Complainant is not entitled to the requested photographs because they are specifically exempt pursuant to N.J.S.A. 47:1A-9(a) and Executive Order No. 69 (Gov. Whitman, 1999).
3. The Custodian violated N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), by failing to timely respond to the Complainant’s first (1st) and second (2nd) OPRA requests. However, the Complainant requested photographs of individuals arrested are specifically exempted from disclosure pursuant to N.J.S.A. 47:1A-9(a) and Executive Order No. 69 (Gov. Whitman, 1999). 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, it is concluded that 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 29th Day of January, 2013

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: February 6, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 29, 2013 Council Meeting**

**Maria Melton¹
Complainant**

GRC Complaint No. 2011-233

v.

**City of Camden (Camden)²
Custodian of Records**

Records Relevant to Complaint:

May 5, 2011: photographs of those arrested by the City of Camden (“City”) Police Department (“Police Department”) from April 25, 2011 through May 4, 2011.

May 16, 2011: photographs of those arrested by the City Police Department from May 8, 2011 through May 14, 2011.

May 24, 2011: photographs of those arrested by the City Police Department from May 15, 2011 through May 21, 2011.

Request Made: May 5, 2011, May 16, 2011 and May 24, 2011³

Response Made: May 25, 2011

Custodian: Louis Pastoriza

GRC Complaint Filed: July 8, 2011⁴

Background

July 8, 2011

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the following attachments:

- E-mail from the Ms. Yenise Valdez (“Ms. Valdez”), Data Clerk to the Complainant dated May 25, 2011
- E-mail from Custodian’s Counsel to the Complainant dated May 25, 2011

¹ No legal representation listed on record.

² Represented by Jason Asuncion, Esq. (Camden, NJ).

³ The Complainant asserts in her Denial of Access Complaint that she submitted an OPRA request seeking photographs of those arrested by the City Police Department from May 5, 2011 through May 7, 2011. However, the Complainant failed to provide any evidence that she submitted an OPRA request, nor provided a date when she submitted the OPRA request. Further, the Custodian did not address this OPRA request in his Statement of Information. Therefore, the GRC will only consider the three (3) OPRA requests dated May 5, 2011, May 16, 2011 and May 24, 2011.

⁴ The GRC received the Denial of Access Complaint on said date.

The Complainant states that she submitted OPRA requests to the Custodian from April 25, 2011 through May 24, 2011.⁵ The Complainant also states that the Custodian responded to her request on May 24, 2011. The Complainant states that she requested the photographs of those who were arrested during specific weekly periods. The Complainant also states that the Custodian did not provide her with copies of the requested photographs. The Complainant further states that her newspaper will show that those arrested are innocent until proven guilty.

The Complainant agrees to mediate this complaint.⁶

January 25, 2012

Custodian's Statement of Information ("SOI") attaching the Complainant's OPRA request dated May 5, 2011.

The Custodian certifies that his search for the requested records and the last date upon which records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services is not applicable in the instant complaint.

The Custodian certifies that Custodian's Counsel responded to the Complainant's OPRA requests on May 25, 2011. The Custodian also certified that the City determined and informed the Complainant that the photographs responsive to the request were not disclosable pursuant to N.J.S.A.47:1A-3(b).

Custodian's Counsel argues that N.J.S.A.47:1A-3(b) does not expressly describe police photographs as information concerning a criminal investigation that is to be provided to the public on an expedited basis. Counsel also argues that the photographs responsive are not public records pursuant to Executive Order No. 69 (Gov. Whitman, 1999) ("EO 69") and Executive Order No. 21 (Gov. McGreevey, 2002) ("EO 21"). Counsel states that the New Jersey Supreme Court's decision in Burnette v. County of Bergen, 198 N.J. 408 (2009) an agency "has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy." Counsel argues that photographs of criminal defendants, particularly when their matters have not yet been fully prosecuted are a privacy interest the City is obligated to protect under N.J.S.A. 47:1A1-1.1. and Burnette, *supra*.

Counsel argues that the photographs of criminal defendants carry a clear implication of criminal activity. Counsel also argues that these individuals likely have a substantial privacy interest in their criminal histories. Counsel further argues that a booking photograph is a unique and powerful type of photograph that raises personal privacy interests distinct from normal photographs. Counsel additionally argues that these photographs are a vivid symbol of criminal accusation, which is often associated with guilt. Counsel argues that these photographs capture an individual in an vulnerable

⁵ The Complainant failed to submit any evidence that she filed an OPRA request with the City of Camden on April 25, 2011.

⁶ This Denial of Access Complaint was referred to mediation on July 22, 2011. However, this complaint was referred back to the GRC for adjudication on January 12, 2012.

and embarrassing moments immediately after being accused, taken into custody and deprived of most liberties.

Counsel argues that the Burnette, *supra*, decision required the City to balance the interests of access to government records while safeguarding a citizen's reasonable expectation of privacy. Counsel also argues that criminal defendants have a substantial personal privacy interest in preventing public dissemination of their booking photographs. Counsel further argues that the public does not have any discernible interest from accessing these photographs of those defendants whose matters have not yet been fully prosecuted.

Analysis

Whether the Custodian timely responded to the Complainant's first (1st) and second (2nd) OPRA requests?

OPRA provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5(g).

Further, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (Emphasis added.) N.J.S.A. 47:1A-5(i).

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). As also prescribed under 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. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁷ 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),

⁷ It is the GRC's position that 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), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

The Complainant filed her first (1st) OPRA request on May 5, 2011. The Complainant filed her second (2nd) OPRA request on May 16, 2011. The Custodian certified in the SOI that he responded to the Complainant's OPRA requests in writing, via letter on May 25, 2011, the fourteenth (14th) and eighth (8th) business day, respectively, following receipt of said requests. Therefore the Custodian failed to timely respond to both of the Complainant's OPRA requests.

Therefore, the Custodian did not bear her burden of proof that she timely responded to either of the Complainant's OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's first (1st) and second (2nd) OPRA requests 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, supra.

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions*..." (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file* ... or *that has been received* in the course of his or its official business ..." (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

"...[t]he public agency shall have the burden of proving that the denial of access is authorized by law..." N.J.S.A. 47:1A-6.

Additionally, OPRA states that "[t]he provisions of this act...shall not abrogate any exemption of a public record or government record from public access... made pursuant to Executive Order of the Governor." N.J.S.A. 47:1A-9(a).

Executive Order No. 69 ("Gov. Whitman") states that:

“[t]he following records shall not be deemed to be public records subject to inspection and examination and available for copying pursuant to the provisions of [OPRA], as amended: fingerprint cards, plates and *photographs* and similar criminal investigation records that are required to be made, maintained or kept by any State or local governmental agency.” (Emphasis added.)

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.

In the instant complaint, the Complainant filed three (3) separate OPRA requests for photographs of individuals arrested by the City Police Department over a specific timer period. The Custodian responded to the Complainant’s requests in writing stating that the photographs responsive were not disclosable pursuant to N.J.S.A. 47:1A-3(b). Further, the Custodian argued in the SOI that the photographs responsive to the request are not public records pursuant to EO 69.

OPRA at N.J.S.A. 47:1A-9(a) mandates that OPRA’s provisions do not supersede any exemption contained in an Executive Order of the Governor, or any regulation promulgated pursuant to an Executive Order of the Governor. The Custodian in this matter alleged that EO 69 exempts the requested photographs from public access.

Therefore, the Custodian has lawfully denied access to the requested photographs and has borne his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6. Specifically the Complainant is not entitled to the requested photographs because they are specifically exempt pursuant to N.J.S.A. 47:1A-9(a) and Executive Order No. 69 (Gov. Whitman, 1999).

Whether the Custodian’s delayed response to the Complainant’s first (1st) and second (2nd) OPRA requests rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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:

“... If 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 (Felder 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 (Berg); 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)).

The Custodian violated N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), by failing to timely respond to the Complainant’s first (1st) and second (2nd) OPRA requests. However, the Complainant requested photographs of individuals arrested are specifically exempted from disclosure pursuant to N.J.S.A. 47:1A-9(a) and EO 69. 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, it is concluded that 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. The Custodian did not bear her burden of proof that she timely responded to either of the Complainant’s OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s first (1st) and second (2nd) OPRA requests 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. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian has lawfully denied access to the requested photographs and has borne his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6. Specifically the Complainant is not entitled to the requested

photographs because they are specifically exempt pursuant to N.J.S.A. 47:1A-9(a) and Executive Order No. 69 (Gov. Whitman, 1999).

3. The Custodian violated N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), by failing to timely respond to the Complainant's first (1st) and second (2nd) OPRA requests. However, the Complainant requested photographs of individuals arrested are specifically exempted from disclosure pursuant to N.J.S.A. 47:1A-9(a) and Executive Order No. 69 (Gov. Whitman, 1999). 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, it is concluded that 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: Harlynn A. Lack, Esq.
Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

January 22, 2013