



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

August 28, 2012 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2011-277

v.

Borough of Rutherford Police Department (Bergen)
Custodian of Record

At the August 28, 2012 public meeting, the Government Records Council (“Council”) considered the August 21, 2012 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 because the Complainant filed his Denial of Access Complaint before the agreed-upon time period provided for the Custodian to respond had expired, the complaint is materially defective and must be dismissed.

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 August, 2012

Robin Berg Tabakin, Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: September 5, 2012



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 28, 2012 Council Meeting**

**Richard Rivera¹
Complainant**

GRC Complaint No. 2011-277

v.

**Borough of Rutherford Police Department (Bergen)²
Custodian of Records**

Records Relevant to Complaint:

Copies of:

1. Computer-aided dispatching (“CAD”) summary log or similar police report for activities on December 1, 2010 from 9:00 p.m. to 10:00 p.m.
2. CAD abstract reports or similar police report for activities on December 1, 2010 from 9:00 p.m. to 10:00 p.m.
3. CAD abstract reports or similar police reports and narratives for activities for 178 Highland Cross for the years 2009, 2010 and from January 1, 2011 until June 15, 2011.
4. All arrest reports and CAD entries where Gerald Eulo is a named suspect and/or participant.
5. Police daily duty log for December 1, 2010 from 9:00 p.m. to 10:00 p.m. that includes all police officers, supervisors and civilians working during that time and what their assignments were.
6. All police radio recordings for December 1, 2010 from 9:00 p.m. to 10:00 p.m. for all police frequencies and channels.
7. All police telephone recordings for December 1, 2010 from 9:00 p.m. to 10:00 p.m. for all recorded telephone extensions.
8. Police Department Internal Affairs Annual Summary Reports for 2006 through 2010.
9. Police use of force incident reports for all incidents from 2008 through 2010.
10. Police use of force annual summary reports for 2005 through 2010.
11. Police vehicle pursuit annual summaries for 2005 through 2010.
12. Police vehicle pursuit reports for each pursuit incident for 2008 through 2010.

Request Made: June 15, 2011

Response Made: June 22, 2011

Custodian: Mary P. Kriston

GRC Complaint Filed: August 22, 2011³

¹ No legal representation listed on record.

² Represented by Justin D. Santagata, Esq., Kaufman, Semeraro, Bern, Deutsch & Leibman, L.L.P., (Fort Lee, NJ).

³ The Complainant signed the Denial of Access Complaint on said date.

Background

June 15, 2011

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in a letter referencing OPRA. The Complainant indicates that the preferred method of delivery is via e-mail.

June 22, 2011

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the fourth (4th) business day following receipt of such request.⁴ The Custodian informs the Complainant that the Police Department is searching their files for the records responsive to the Complainant's request and the Custodian asks the Complainant for an extension of time for an additional seven (7) business days until July 5, 2011 to reply to the Complainant's request.⁵

June 22, 2011

E-mail from the Complainant to the Custodian. The Complainant informs the Custodian that he agrees to the extension of time. The Complainant also informs the Custodian to advise him if she needs additional time beyond the extended date.

June 22, 2012

E-mail from the Custodian to the Complainant. The Custodian acknowledges the Complainant's offer of additional time and tells the Complainant she will keep him apprised as she obtains information.⁶

June 27, 2011

Letter from the Custodian's Counsel to the Complainant. Counsel states that the Complainant's request is under review by the Custodian's Counsel. Counsel states that due to the nature the Complainant's request the Custodian will need additional time to respond. Counsel informs the Complainant that the Custodian will respond to the Complainant's request by July 15, 2011.

July 15, 2011

Letter from the Custodian's Counsel to the Complainant. Counsel states that he has enclosed the records responsive to request item numbers 1 through 3 with certain information redacted. Counsel states that request item numbers 5 and 8 are not government records subject to disclosure. Counsel further states that request item numbers 6 and 7 are overly broad, and the Custodian needs more specific information in order to respond to the Complainant's request for these items. Counsel states that the Custodian needs additional time to search for and examine request item number 4 and request items numbered 9 through 12. Counsel states that the Custodian will reply to the

⁴ The Custodian certifies in the SOI that she received the Complainant's OPRA request on June 16, 2011.

⁵ An additional seven (7) business days beyond the initial seven (7) business days from the date the Custodian certified the OPRA request was received would mean the response would be due on July 7, 2011, not July 5, 2011.

⁶ The Complainant stated "I agree to extension. Please check back with status if you need more time in addition to that agreed." The Custodian replied "Ok, I'll keep you posted as I get information."

Complainant regarding request item number 4 and request items numbered 9 through 12 by July 29, 2011.

July 29, 2011

Letter from the Custodian's Counsel to the Complainant. Counsel states that the Custodian is still searching the files for those records that may be responsive to the portion of the Complainant's request which remains outstanding since the Custodian last communicated to the Complainant on July 15, 2011. Counsel states that the Custodian will respond to the Complainant by August 12, 2011.

August 12, 2011

Letter from the Custodian's Counsel to the Complainant. Counsel states that the Custodian continues to search the files for any records that may be responsive to request item number 4 and request items numbered 9 through 12. Counsel further states that the Custodian will respond to the Complainant by August 26, 2011, and anticipates that the Custodian will be able to either fulfill or deny the remaining items of the Complainant's request at that time.

August 22, 2011

Denial of Access Complaint filed with the GRC with the following attachments:

- Complainant's OPRA request dated June 15, 2011
- Custodian's response to the OPRA request dated June 22, 2011
- E-mail from the Complainant to the Custodian dated June 22, 2011
- Letter from the Custodian's Counsel to the Complainant dated June 27, 2011
- Letter from the Custodian's Counsel to the Complainant dated July 15, 2011
- Letter from the Custodian's Counsel to the Complainant dated July 29, 2011
- Letter from the Custodian's Counsel to the Complainant dated August 12, 2011
- Letter from the Complainant to the Custodian's Counsel dated August 22, 2012
- Letter from the Custodian's Counsel to the Complainant dated August 22, 2012
- Letter from the Custodian's Counsel to the Complainant dated August 22, 2012

The Complainant states that on June 15, 2011, he submitted his OPRA request to the Custodian. The Complainant also states that on June 22, 2011 the Custodian e-mailed him to request an additional seven (7) business day extension of time to which the Complainant states that he agreed. The Complainant states that he received a letter from the Custodian's Counsel stating that it would take more than seven (7) business days to respond to the Complainant's request; however, the Complainant states that Counsel did not request an extension of time.

The Complainant states that he received a letter from the Custodian's Counsel dated July 15, 2011 that itemized and responded to the requested records. The Complainant states that the Custodian disclosed the records responsive to request item number 1 and 2 but the records had some redactions and the Custodian failed to provide the Complainant with a reason for the redactions. The Complainant states that the records responsive to request item number 3 were denied. The Complainant states that the Custodian's Counsel requested more information in order to specifically identify

request items number 6 and number 7 and the Complainant states that he e-mailed the Custodian the requested information just prior to filing his Denial of Access Complaint. The Complainant states that the Custodian denied him access to request items number 4, 5, 8, 9, 10, 11 and 12.

The Complainant states that he received a letter from the Custodian's Counsel dated July 29, 2011, wherein Counsel stated that the Custodian was still searching for records and needed additional time to do so. The Complainant further states that he received another letter from the Custodian's Counsel dated August 12, 2011, in which Counsel stated that the Custodian was still searching for certain records and needed additional time to do so. As such, the Complainant states that the Custodian is intentionally delaying disclosure of certain records and therefore willfully denying the Complainant access to those records.

The Complainant does not agree to mediate this complaint.

August 22, 2011

Letter from the Custodian's Counsel to the Complainant. Counsel states that the Complainant knows that his law firm represents the Borough of Rutherford; however, Counsel states that the Complainant e-mailed all members of the Borough Council regarding the filing of his Denial of Access Complaint. Counsel advises the Complainant that because he has decided to litigate his June 15, 2011 OPRA request, he is not to communicate directly with Borough of Rutherford officials. Counsel informs the Complainant to direct all communications to the Custodian's Counsel.

August 22, 2011

Letter from the Complainant to the Custodian's Counsel. The Complainant states that he is replying to Counsel's request for additional information to specifically identify request item numbers 6 and 7. The Complainant states that he is seeking any and all incoming and outgoing recordings related to incident number 2010-012963 including transmissions and calls to and from other police agencies. The Complainant also states that he agreed to an initial extension of time for seven (7) business days. The Complainant further states that he has filed a Denial of Access Complaint.

August 22, 2011

Letter from the Custodian's Counsel to the Complainant. Counsel states that he is in receipt of the Complainant's letter dated August 22, 2011. Counsel states that the Complainant has failed to narrow his request sufficiently for request items number 6 and 7 because the Custodian does not know what "related to" means; however, Counsel states that to the extent the incident number is sufficient to identify the recordings, the Custodian will search for the requested records. Counsel states that the Complainant has not objected to any of the Custodian's requests for an extension of time to respond to the Complainant's outstanding request items.

Counsel also informs the Complainant that Counsel has received the Complainant's Denial of Access Complaint. Counsel states that the Custodian still intends to respond to the Complainant regarding the status of the remainder of his request by August 26, 2011.

August 23, 2011

E-mail from the Complainant to the Custodian's Counsel. The Complainant informs Counsel that he filed a Denial of Access Complaint as his objection to the Custodian's extensions of time to respond to his request. The Complainant also informs Counsel that he does not know whose interests Counsel represents and therefore he does not know to whom he should communicate.

August 25, 2011

Request for the Statement of Information ("SOI") sent to the Custodian.

August 26, 2011

E-mail from the Custodian's Counsel to the Complainant. Counsel informs the Complainant that the Custodian promised to respond to him regarding the remaining records requested in his OPRA request by August 26, 2011; however, the Custodian is unable to do so because the Police Department has been preoccupied with the recent hurricane. Counsel states that the Custodian anticipates sending out the records to the Complainant on August 31, 2011 but asks for additional time until September 2, 2011 in case it is needed. Counsel apologizes for taking longer than expected to gather the balance of the requested records and states that the Custodian will complete her response to the request notwithstanding the filing of a Denial of Access Complaint.

August 31, 2011

Letter from the Custodian's Counsel to the Complainant. Counsel states that the Custodian has enclosed records responsive to request item number 4 and request items numbered 9 through 12 of the Complainant's June 15, 2011 OPRA request. Counsel also tells the Complainant that although the Custodian did receive a clarification from the Complainant with regard to request item numbers 6 and 7, the records cannot be disclosed because the Custodian has been advised by the Bergen County Prosecutor's Office ("BCPO") that the records are part of an ongoing investigation pursuant to N.J.S.A. 47:1A-3. The Custodian's Counsel informs the Complainant that the BCPO investigation was a cause of delay in disclosing some of the requested records and has resulted in parts of the disclosed records being redacted.

September 8, 2011

E-mail from the GRC to the Custodian. The GRC confirms an earlier telephone conversation wherein the Custodian requested, and the GRC granted, an extension of time for the Custodian to complete and submit the SOI until September 13, 2011.

September 13, 2011

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated June 15, 2011
- Custodian's response to the OPRA request dated June 22, 2011
- E-mail from the Complainant to the Custodian dated June 22, 2011
- Letter from the Custodian's Counsel to the Complainant dated June 27, 2011
- Letter from the Custodian's Counsel to the Complainant dated July 15, 2011
- Letter from the Custodian's Counsel to the Complainant dated July 29, 2011

- Letter from the Custodian's Counsel to the Complainant dated August 12, 2011
- Letter from the Complainant to the Custodian's Counsel dated August 22, 2012
- Letter from the Custodian's Counsel to the Complainant dated August 22, 2012
- Letter from the Custodian's Counsel to the Complainant dated August 22, 2012
- E-mail from the Custodian's Counsel to the Complainant dated August 26, 2011
- Letter from the Custodian's Counsel to the Complainant dated August 31, 2012

The Custodian certifies that her search for the requested records involved having the Rutherford Police Department assemble and review the records responsive to the Complainant's request. The Custodian also certifies that all requested records must be retained for five (5) years except for police radio and telephone recordings which must be retained for seventy-five (75) years if there is an arrest; seven (7) years if there is not an arrest, use of force and vehicle pursuit reports which must be retained for seven (7) years, and arrest reports which must be retained until disposition of the case in accordance with the Records Destruction Schedule established and approved by Records Management Services. The Custodian certifies that there is no records retention schedule for use of force annual summary reports.

The Custodian certifies that she received the Complainant's OPRA request on June 16, 2011. The Custodian further certifies that she responded to the Complainant's request via correspondence from the Custodian's Counsel to the Complainant dated June 27, 2011, July 15, 2011, July 29, 2011, August 12, 2011, August 22, 2012, August 26, 2011, and August 31, 2012.

The Custodian certifies that request item numbers 1 through 4 were disclosed to the Complainant with redactions of addresses, telephone numbers and domestic violence information. The Custodian further certifies that request item number 5 was denied because it is a police duty log which is exempt from disclosure pursuant to Rivera v. City of Plainfield, GRC Complaint No. 2009-317 (May 2011) and N.J.S.A. 47:1A-1. The Custodian certifies that request item numbers 6 and 7 were initially denied because they were overly broad; however, after the Complainant clarified his request the Custodian certifies that she was able to locate records responsive to request items numbered 6 and 7 but the records were determined to be exempt from disclosure because they are records in an ongoing BCPO investigation and also constitute criminal investigatory records exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. The Custodian certifies that request items numbered 8 through 12 were disclosed to the Complainant.

Analysis

Whether the Complainant's Denial of Access Complaint is actionable?

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 also provides that:

“...[i]f the government record requested is temporarily unavailable because it is in use or in storage, the custodian shall so advise the requestor and shall make arrangements to promptly make available a copy of the record...” (Emphasis added.) N.J.S.A. 47:1A-5.g.

OPRA further provides that:

“...[A] custodian of a government record shall grant access to a government record or deny access to a government record as soon as possible, but not later than seven business days after receiving the request....” N.J.S.A. 47:1A-5.i.

OPRA states that:

“A person who is denied access to a government record by the custodian of the record...may institute a proceeding to challenge the custodian’s decision by filing...a complaint with the Government Records Council...” N.J.S.A. 47:1A-6.

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.

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 Custodian certified that she received the Complainant’s June 15, 2011 OPRA request on June 16, 2011. The Complainant’s request was complex, encompassing twelve (12) separate items, many of which sought several years’ worth of records. The Custodian responded via e-mail to the Complainant’s request four (4) business days later on June 22, 2011 and informed the

Complainant that the Police Department was searching their files for the records responsive to the Complainant's request. The Custodian requested from the Complainant an additional seven (7) business day extension of time in order to reply to the Complainant's request. On that same date, June 22, 2011, the Complainant agreed to the Custodian's request for an additional extension of time, which would extend the due date for granting or denying the requested records until July 7, 2011. Moreover, the Complainant told the Custodian "[p]lease check back with status if you need more time in addition to that agreed." The Custodian replied back one (1) minute later by stating "[o]k, I'll keep you posted as I get information."

Thereafter, prior to the July 7, 2011 response date the Custodian's Counsel sent a letter dated June 27, 2011 to the Complainant, providing the Complainant with the status of the request and extending the response date to July 15, 2011.

On July 15, 2011, Counsel again wrote to the Complainant. Counsel stated that the Custodian disclosed request items numbered 1 through 3 in redacted form, determined that request items number 5 and 8 were not government records subject to disclosure, stated that request items number 6 and 7 were overly broad and requested more specific information in order to respond to the Complainant's request for those items, and stated that the Custodian needed additional time to compile request item number 4 and request items numbered 9 through 12. Counsel informed the Complainant that the Custodian would respond back to him by July 29, 2011, regarding the status of the request items.

On July 29, 2011, the Custodian's Counsel provided the Complainant with a status report regarding the remaining items of his request and informed the Complainant that the Custodian would respond back to him by August 12, 2011.

On August 12, 2011, the Custodian's Counsel informed the Complainant that the Custodian was still checking for any records responsive to request item number 4 and request items numbered 9 through 12. Counsel further informed the Complainant that the Custodian should be able to grant or deny access to the remaining items by August 26, 2011.

Throughout the series of correspondence from the Custodian to the Complainant, the Complainant did not object to the length of time necessary for disclosure of the remaining outstanding records responsive to his request until August 22, 2011. On August 22, 2011, the Complainant sent a letter to the Custodian's Counsel wherein he described with more specificity request items number 6 and number 7. The Complainant also told Counsel that he had filed a Denial of Access Complaint. The next day, in an e-mail from the Complainant to the Custodian's Counsel dated August 23, 2011, the Complainant informed Counsel that he filed the Denial of Access Complaint as his objection to the Custodian's extensions of time to respond to his request.

OPRA places time constraints upon a custodian's response to an OPRA request. 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. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). In New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180-181 (App. Div. 2007), the court examined the reasonableness of OPRA's seven (7) business day period for the Custodian to grant or deny access to a government record. In that case the court said "...[i]f [a record] is in storage or archived, the custodian must advise the requestor within seven business days and give the requestor a date on which the record will be provided. *N.J.S.A. 47:1A-5(i)*. The date selected by the custodian then becomes the deadline for compliance. A custodian's failure to meet the promised deadline is then deemed a denial."

Although a custodian is usually bound to such constraints, here the parties agreed otherwise. The Complainant offered the Custodian the flexibility to obtain additional extensions of time as long as she provided him with the status of the response. The Custodian accepted the Complainant's offer and told him she would keep him posted as she got information. The Custodian, through Counsel, continued to do what she agreed to do, which was to keep the Complainant posted as she needed additional time to fulfill the Complainant's request. In each communication that the Custodian's Counsel sent to the Complainant, Counsel provided the Complainant with a firm suspense date. And before any given suspense date lapsed, another similar status report was sent to the Complainant. The fact that the Complainant did not question, or otherwise object to this arrangement, only served to underscore the parties' understanding that the time for consummating a final response was being extended by mutual agreement. Revealingly, on the same date he filed his complaint, the Complainant continued to clarify his OPRA request by providing to the Custodian more specificity with respect to request items number 6 and number 7.

Accordingly, because the Complainant filed his Denial of Access Complaint before the agreed-upon time period provided for the Custodian to respond had expired, the complaint is materially defective and must be dismissed.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Complainant filed his Denial of Access Complaint before the agreed-upon time period provided for the Custodian to respond had expired, the complaint is materially defective and must be dismissed.

Prepared By: John E. Stewart, Esq.

Approved By: Karyn Gordon, Esq.
Acting Executive Director

August 21, 2012