



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**

**June 24, 2014 Government Records Council Meeting**

Larry A. Kohn  
Complainant

Complaint No. 2013-308

v.

Township of Livingston (Essex)  
Custodian of Record

At the June 24, 2014 public meeting, the Government Records Council (“Council”) considered the June 17, 2014 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 October 31, 2007).
2. The Custodian has lawfully denied access to the requested appraisal under N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. Specifically, disclosure of the appraisal would have provided an advantage to bidders and competitors vying with the Township for ownership of the subject property. See Murray v. Twp. of Warren, GRC Complaint No. 2006-196 (February 2008)
3. Although the Custodian’s failure to respond in a timely manner resulted in a “deemed” denial of access, he lawfully denied access to the request appraisals. 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, the Custodian’s violation 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 24<sup>th</sup> Day of June, 2014

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 26, 2014**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
June 24, 2014 Council Meeting**

**Larry A. Kohn<sup>1</sup>  
Complainant**

**GRC Complaint No. 2013-308**

v.

**Township of Livingston (Essex)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of appraisals obtained by the Township of Livingston (“Township”) within the last 12 months on property that was the subject of Ordinance No. 24-2013.<sup>3</sup>

**Custodian of Record:** Glenn Turtletaub  
**Request Received by Custodian:** September 3, 2013  
**Response Made by Custodian:** October 2, 2013  
**GRC Complaint Received:** October 21, 2013

**Background<sup>4</sup>**

**Request and Response:**

On September 3, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On October 2, 2013, the Custodian responded in writing denying access to the responsive record based on advice of Counsel that the appraisal is exempt because the property in question is the subject of negotiations.

**Denial of Access Complaint:**

On October 21, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted the requested record is not attorney-client privileged information regarding negotiation strategy. To the contrary, the Complainant asserted that the record is factual in nature and any confidential elements could be redacted.

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Sharon L. Weiner, Esq., of Murphy, McKeon, P.C. (Riverdale, NJ).

<sup>3</sup> The Complainant sought additional records that are not at issue.

<sup>4</sup> 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.

### Statement of Information:

On December 3, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the request on September 3, 2013 and responded on October 2, 2013.

The Custodian certified that the Township obtained the responsive appraisal in connection with ongoing negotiations between itself and the subject property’s owner. The Custodian affirmed that the Township was not the only interested party and the sale price was still subject to discussion at the time of the OPRA request. Further, the Custodian certified that as of this day, negotiations are still ongoing.

The Custodian contended that he lawfully denied access to the appraisal under N.J.S.A. 47:1A-1.1 (exempting disclosure of information which would give an advantage to competitors or bidders). The Custodian asserted that in Murray v. Twp. of Warren, GRC Complaint No. 2006-196 (February 2008), the Council held that:

[T]he requested [appraisal report, photographs and notes of the appraiser] are lawfully exempt from disclosure as information which, if disclosed, would give an advantage to competitors or bidders. N.J.S.A. 47:1A-1.1. At the time of the request, the Township was negotiating the purchase of property belonging to a client of the Complainant. The records responsive to this request represent a part of the negotiation phase that gives a party interested in buying or selling a property a level of bargaining power. The Complainant asserts that disclosure of the records responsive to his August 14, 2006 request would help the negotiation process. The Township of Warren is using the records to substantiate its offer of purchase to the Complainant’s client. Disclosure of the records requested could greatly hinder the Township’s position in the negotiation process by making public the price range at which the Township is willing to obtain the property and could be used to start a bidding war by private companies. Therefore, the requested records are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 regarding information which, if disclosed, would give an advantage to competitors or bidders.

Id. at 7-8.

The Custodian argued that the Council’s decision in Murray, is applicable. The Custodian asserted that disclosure of the appraisal would have weakened its bargaining position.

### Additional Submissions

On December 23, 2013, the Complainant disputed that Murray, GRC 2009-169 was applicable here. Additionally, the Complainant argued that this complaint is not similar to Boggia v. Borough of Oakland, GRC Complaint No. 2005-36 (April 2006), because the Complainant is not the owner of the property. Further, the Complainant noted that in Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2007-323 (Interim Order dated December 22,

2009), the Council determined that records containing purely factual information is not exempt under OPRA. The Complainant contended that nondisclosure of the requested appraisals, which is entirely comprised of factual information, to a member of the general public would be contrary to the very goal of OPRA.

The Complainant further argued that although the ordinance related to the property negotiations was introduced on July 29, 2013, the Township failed to take a final vote at its last meeting of the year thus nullifying the ordinance. The Complainant contended that the property is no longer the focus of negotiations because the Township has shifted that focus to Township-owned property.

The Complainant further argued that the GRC should re-evaluate Murray, because the appraisal is one of many criteria determining whether to purchase a property. Further, the Complainant argued that the disclosure of such appraisals would not chill deliberations and is not reflective of the direction of a negotiation as the GRC concluded in Murray.

Finally, the Complainant noted that the Custodian failed to address the reasons for his untimely response in SOI.

## 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).<sup>5</sup> 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 this matter, the Custodian certified in the SOI that he received the Complainant's OPRA request on September 3, 2013 and did not respond until October 2, 2013, or 21 business days after receipt of the request. The Custodian offered no evidence of a prior response. Thus, the Custodian failed to respond in the statutorily mandated seven (7) business day time frame.

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)

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<sup>5</sup> 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.

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.

### **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 provides that the definition of a government record shall not include “. . . information which, if disclosed, would give an advantage to competitors or bidders . . .” N.J.S.A. 47:1A-1.1 (emphasis added). In Murray, GRC 2006-196, the complainant sought, among other records, “. . . the appraisal report or reports . . . regarding the Facey property . . .” The custodian responded denying access to the record under N.J.S.A. 10:4-12(b)(5) of the Open Public Meetings Act,<sup>6</sup> and argued in the SOI that disclosure of the records would also give an advantage to bidders and competitors. The Council determined that the custodian lawfully denied access to the responsive appraisals under N.J.S.A. 47:1A-1.1, reasoning that:

[A]t the time of the request, the Township was negotiating the purchase of property belonging to a client of the Complainant. The records responsive to this request represent a part of the negotiation phase that gives a party interested in buying or selling a property a level of bargaining power.

Id. at 7-8.

Here, the Custodian denied access to the requested appraisal noting that the appraised property was the subject of negotiations at the time of the request. The Custodian subsequently certified to this fact, noted that negotiations were still ongoing and cited to Murray, in support of his denial of access.

The Complainant disputed that Murray, applied to this complaint and further asserted that the GRC should re-evaluate its decision. The Complainant also argued that the Township was no longer in negotiations for the property because the ordinance allocating funds for the purchase was voided because the Township failed to take a final vote on it at the Township’s final meeting of year. The Complainant also argued that unlike in Boggia, GRC 2005-36, he is not the owner of the property, but a member of the general public. Finally, the Complainant asserted that, similar to Kohn, GRC 2007-323 the record sought is purely factual and should be disclosed.

The facts fall squarely within the facts presented in Murray, and are supported by the Complainant’s argument that an ordinance for funds had been passed prior to the filing of his request. Further, the Council’s decision in Boggia, does not apply here as the GRC did not

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<sup>6</sup> N.J.S.A. 10:4-12(b)(5) states: “[a] public body may exclude the public only from that portion of a meeting at which the public body discusses . . . [a]ny matter involving the purchase, lease or acquisition of real property with public funds . . . where it could adversely affect the public interest if discussions of such matters were disclosed.”

address appraisals there. Also, the Council's decision in Kohn, related to purchase orders and reports the custodian asserted were exempt due to pending litigation. Neither these records or this exemption are at issue in this matter. Thus, the GRC is satisfied that disclosure of the record would greatly hinder the Township's negotiating position if the other bidders were privy to the requested appraisal.

Therefore, the Custodian has lawfully denied access to the requested appraisal under N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. Specifically, disclosure of the appraisal would have provided an advantage to bidders and competitors vying with the Township for ownership of the subject property. See Murray, GRC 2006-196.

### **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 (Law Div. 1993)); 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)).

Although the Custodian's failure to respond in a timely manner resulted in a “deemed” denial of access, he lawfully denied access to the request appraisals. 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, the Custodian's violation 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 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 October 31, 2007).
2. The Custodian has lawfully denied access to the requested appraisal under N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. Specifically, disclosure of the appraisal would have provided an advantage to bidders and competitors vying with the Township for ownership of the subject property. *See* Murray v. Twp. of Warren, GRC Complaint No. 2006-196 (February 2008)
3. Although the Custodian's failure to respond in a timely manner resulted in a "deemed" denial of access, he lawfully denied access to the request appraisals. 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, the Custodian's violation 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: Frank F. Caruso  
Senior Case Manager

Approved By: Dawn R. SanFilippo, Esq.  
Acting Executive Director

June 17, 2014