



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

July 29, 2014 Government Records Council Meeting

Anthony B. Frye
Complainant

Complaint No. 2013-326

v.

Kenilworth Police Department (Union)
Custodian of Record

At the July 29, 2014 public meeting, the Government Records Council (“Council”) considered the July 22, 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. Although the Complainant responded within the statutorily mandated seven (7) business days in accordance with N.J.S.A. 47:1A-5(i), he failed to provide a specific lawful basis for denying access to the requested record. N.J.S.A. 47:1A-5(g); Roarty v. Secaucus Bd. of Education (Hudson), GRC Complaint No. 2009-221 (January 2011); Morris v. Trenton Police Dep’t (Mercer), GRC Complaint No. 2007-160 (May 2008). As such, the Custodian failed to bear his burden of proving he lawfully denied access to the record. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure because the Complainant acknowledged that he received the record from the Custodian.
2. The Custodian failed to provide a specific lawful basis for denying access to the Complainant’s October 29, 2013 OPRA request in violation of N.J.S.A. 47:1A-5(g), and failed to bear his burden of proving a lawful denial of access to same pursuant to N.J.S.A. 47:1A-6. However, the Custodian provided the requested record to the Complainant’s satisfaction. 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 actions do not rise to the level of a knowing and willful violation of OPRA and an 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 July, 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: July 31, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 29, 2014 Council Meeting**

**Anthony B. Frye¹
Complainant**

GRC Complaint No. 2013-326

v.

**Kenilworth Police Department (Union)²
Custodial Agency**

Records Relevant to Complaint: “Dashboard cam [sic] from Officer E. Pastor from my traffic violation on the night of 10/21/2013.”

Custodian of Record: Lt. Timothy Dowd

Request Received by Custodian: October 29, 2013

Response Made by Custodian: October 31, 2013

GRC Complaint Received: November 12, 2013

Background³

Request and Response:

On October 29, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On October 31, 2013, two (2) business days later, the Custodian responded, in writing, denying the requested record as part of a “departmental review.”

Denial of Access Complaint:

On November 12, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he was not given a proper explanation for the denial of his OPRA request.

Statement of Information:

On November 21, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he informed the Complainant that the video would be released when the

¹ No legal representation listed on record.

² Represented by Harvey Fruchter, Esq. (Kenilworth, 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.

Kenilworth Police Department (“KPD”) finished its internal review of the incident. The Custodian did not cite to any legal authority in denying access to the report pending review. Lastly, the Custodian certified, by virtue of his SOI, that he was informing the Complainant that the requested record would be available on November 25, 2013.

Additional Submissions:

On December 13, 2013, the GRC emailed the Complainant and asked whether he received the requested record. The Complainant responded, confirming that the Custodian had provided the record.

Analysis

Sufficiency of the Custodian’s Response

OPRA provides that if a “. . . 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.” N.J.S.A. 47:1A-5(g) (emphasis added). The Council has held that for a denial of access to be in compliance with OPRA, it must be specific and sufficient to prove that a custodian’s denial is authorized by OPRA. *See* Morris v. Trenton Police Dep’t (Mercer), GRC Complaint No. 2007-160 (May 2008). 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 Roarty v. Secaucus Bd. of Education (Hudson), GRC Complaint No. 2009-221 (January 2011), the complainant requested accumulated sick time for certain employees. The custodian timely responded in writing, stating that accumulated sick time is not a government record subject to disclosure. *Id.* The Council found that “although the Custodian responded within the statutorily mandated seven (7) business days in accordance with N.J.S.A. 47:1A-5(i), he ultimately failed to provide a specific lawful basis for denying access to the requested sick time.” *Id.*

In the instant matter, the Custodian timely responded, in writing, to the Complainant’s request. The Custodian denied access to the requested video footage, stating that the recorded incident was “under departmental review.” The Custodian, however, gave no further explanation, nor cited any statute or case law in support of his denial. A record that is “under departmental review,” without additional justification, is insufficient to prove that the Custodian’s denial is authorized under OPRA. *See* Roarty, GRC No. 2009-221; Morris, GRC No. 2007-160.

Therefore, although the Complainant responded within the statutorily mandated seven (7) business days in accordance with N.J.S.A. 47:1A-5(i), he failed to provide a specific lawful basis for denying access to the requested record. N.J.S.A. 47:1A-5(g); Roarty, GRC No. 2009-221; Morris, GRC No. 2007-160. As such, the Custodian failed to bear his burden of proving he lawfully denied access to the record. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure because the Complainant acknowledged that he received the record from the Custodian.

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)).

The Custodian failed to provide a specific lawful basis for denying access to the Complainant’s October 29, 2013 OPRA request in violation of N.J.S.A. 47:1A-5(g), and failed to bear his burden of proving a lawful denial of access to same pursuant to N.J.S.A. 47:1A-6. However, the Custodian provided the requested record to the Complainant’s satisfaction. 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 actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Complainant responded within the statutorily mandated seven (7) business days in accordance with N.J.S.A. 47:1A-5(i), he failed to provide a specific lawful basis for denying access to the requested record. N.J.S.A. 47:1A-5(g); Roarty v. Secaucus Bd. of Education (Hudson), GRC Complaint No. 2009-221 (January 2011); Morris v. Trenton Police Dep’t (Mercer), GRC Complaint No. 2007-160 (May

2008). As such, the Custodian failed to bear his burden of proving he lawfully denied access to the record. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure because the Complainant acknowledged that he received the record from the Custodian.

2. The Custodian failed to provide a specific lawful basis for denying access to the Complainant's October 29, 2013 OPRA request in violation of N.J.S.A. 47:1A-5(g), and failed to bear his burden of proving a lawful denial of access to same pursuant to N.J.S.A. 47:1A-6. However, the Custodian provided the requested record to the Complainant's satisfaction. 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 actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

Prepared By: Samuel A. Rosado, Esq.
Staff Attorney

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

July 22, 2014