



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

Jose R. Gonzalez
Complainant

Complaint No. 2013-370

v.

Hudson County Sheriff's Office
Custodian of Record

At the June 24, 2014 public meeting, the Government Records Council ("Council") considered the May 20, 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. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Because the Custodian certified that the requested report contains a detailed analysis of the court buildings' security systems, to include surveillance capability, and that disclosure of the report could jeopardize the safety of those working in the building as well as visitors to the buildings, the Custodian lawfully denied access to the requested report as "...security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein." N.J.S.A. 47:1A-1.1. See also Kohn v. Township of Livingston (Essex), GRC Complaint No. 2007-319 (July 2008).
3. Although the Custodian failed to bear his burden of proof that he timely responded to the Complainant's OPRA request resulting in a "deemed" denial, he did lawfully deny access to the requested record pursuant to N.J.S.A. 47:1A-1.1. Additionally, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the



Custodian's actions did 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 24th 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**

**Jose R. Gonzalez¹
Complainant**

GRC Complaint No. 2013-370

v.

**Hudson County Sheriff's Office²
Custodial Agency**

Record Relevant to Complaint: Copy of a report generated by an outside agency regarding a safety analysis or security assessment of the court house³

Custodian of Record: Robert Taino

Request Received by Custodian: November 19, 2013

Response Made by Custodian: December 6, 2013

GRC Complaint Received: December 26, 2013

Background⁴

Request and Response:

On November 19, 2013, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On December 6, 2013, the twelfth (12th) business day following receipt of said request, the Custodian responded in writing informing the Complainant that the request was denied because it "...falls within a privileged or protected category of OPRA, specifically, the information may contain emergency or security information or procedures, also security measures and surveillance techniques, it may contain electronic surveillance material. Release of this material would be inimical to the public interest and contain otherwise inappropriate material."

Denial of Access Complaint:

On December 26, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserts that on November 19, 2013, he requested a copy of the record relevant to the complaint and on December 6, 2013, the Custodian

¹ No legal representation listed on record.

² Represented by Neil J. Carroll, Esq. (Jersey City, NJ).

³ There were other records requested that are not relevant to this complaint.

⁴ 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.

denied the request asserting that the record was exempt under OPRA because it "...may contain emergency or security information or procedures, also security measures and surveillance techniques, it may contain electronic surveillance material. Release of this material would be inimical to the public interest and contain otherwise inappropriate material."

The Complainant further stated that he disagrees with the Custodian's denial because the report "MAY contain this or MAY contain that." (Emphasis in original.) The Complainant states that the Hudson County Administration Building is an antiquated and functionally obsolete public building and the report generated by the outside agency contains information that is a matter of public concern because it involves the public safety. The Complainant also made a common law argument for disclosure of the records.

Statement of Information:

On January 13, 2014, the Custodian filed a Statement of Information ("SOI"). The Custodian certifies that he received the Complainant's request on November 19, 2013 and responded to the request on December 6, 2013.

The Custodian identified the record responsive to the Complainant's request as a detailed analysis of the Hudson County Courts located at 593 and 595 Newark Avenue in Jersey City. The Custodian certifies that the report analyzes and comments upon the security of both buildings and provides recommendations to further secure the judiciary and the administrative staff that occupy the buildings. The Custodian certifies that the report includes suggestions for improvement of security as well as weaknesses in the security of the court buildings which can affect the judges, court staff, sheriff's officers and civilians that may enter the buildings. The Custodian further certifies that the report also contains a detailed analysis of the security systems to include surveillance capability.

The Custodian certifies that the report was denied because OPRA exempts from disclosure documents regarding security or surveillance. The Custodian further certifies that disclosure of the record to the Complainant would compromise the purpose of the report and place in jeopardy the judiciary, court staff, sheriff's officers and others who visit the court house.

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).⁵ 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

⁵ 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.

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).

Here, there is no dispute between the parties that the Complainant submitted the request to the Custodian on November 19, 2013, and the Custodian responded in writing on December 6, 2013, the twelfth (12th) business day following receipt of said request.

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) 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 “[a] government record shall not include the following information which is deemed to be confidential for the purposes of [OPRA] ... emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein.” N.J.S.A. 47:1A-1.1.

In Kohn v. Township of Livingston (Essex), GRC Complaint No. 2007-319 (July 2008), the complainant requested site and floor plans for a new municipal complex. The Council, in denying the request, stated:

[t]he Complainant is requesting plans for a new facility that will contain the Township’s government and police services, among others. These floor plans provide information that jeopardize the security of the building. As such, the requested floor plans are exempt from disclosure for containing security information or procedures for any building facility which, if disclosed, would jeopardize security of the building or facility or persons therein pursuant to N.J.S.A. 47:1A-1.1.

Here, the Custodian certified that because the requested report contains a detailed analysis of the court buildings’ security systems, to include surveillance capability, disclosure of the report could jeopardize the safety of those working in the building as well as visitors to the buildings. For this reason the Custodian denied access to the report citing N.J.S.A. 47:1A-1.

Accordingly, because the Custodian certified that the requested report contains a detailed analysis of the court buildings' security systems, to include surveillance capability, and that disclosure of the report could jeopardize the safety of those working in the building as well as visitors to the buildings, the Custodian lawfully denied access to the requested report as "...security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein." N.J.S.A. 47:1A-1.1. See also Kohn, GRC 2007-319.

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 (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)).

Here, although the Custodian failed to bear his burden of proof that he timely responded to the Complainant's OPRA request resulting in a "deemed" denial, he did lawfully deny access to the requested record pursuant to N.J.S.A. 47:1A-1.1. Additionally, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions did 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. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Because the Custodian certified that the requested report contains a detailed analysis of the court buildings' security systems, to include surveillance capability, and that disclosure of the report could jeopardize the safety of those working in the building as well as visitors to the buildings, the Custodian lawfully denied access to the requested report as "...security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein." N.J.S.A. 47:1A-1.1. See also Kohn v. Township of Livingston (Essex), GRC Complaint No. 2007-319 (July 2008).
3. Although the Custodian failed to bear his burden of proof that he timely responded to the Complainant's OPRA request resulting in a "deemed" denial, he did lawfully deny access to the requested record pursuant to N.J.S.A. 47:1A-1.1. Additionally, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions did 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: John E. Stewart, Esq.

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

May 20, 2014⁶

⁶ This matter was not heard at the May 27, 2014 Council meeting because the meeting was canceled due to lack of a quorum.