



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

January 31, 2017 Government Records Council Meeting

Annette L. Steinhardt
Complainant

Complaint No. 2015-291

v.

Bernardsville Police Department (Somerset)
Custodian of Record

At the January 31, 2017 public meeting, the Government Records Council (“Council”) considered the January 24, 2017 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. Because the requested law enforcement reports records constitute criminal investigatory files, the Custodian has borne his burden of proof that the denial of access was lawful pursuant to N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; and Janeczko (June 2004). Additionally, because the Custodian responded to the request and was able to identify records, the Council declines to address the Custodian’s point that the request, on its face, was overly broad.
3. Although the Custodian failed to respond to the Complainant’s request for access records within the statutorily mandated seven (7) business days, which resulted in in a “deemed” denial of said request, the Custodian did ultimately respond and lawfully withheld the responsive records as being exempt as criminal investigatory records. Additionally, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were 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 31st Day of January, 2017

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 3, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 31, 2017 Council Meeting**

**Annette L. Steinhardt¹
Complainant**

GRC Complaint No. 2015-291

v.

**Bernardsville Police Department (Somerset)²
Custodial Agency**

Records Relevant to Complaint:

Copy of “contract or any supporting document/evidence that was submitted by contractor. Think name is Huite Construction, first name Robert but goes under other name. Court date was July 20, 2015.”

Custodian of Record: Kevin J. Valentine

Request Received by Custodian: July 29, 2015; August 24, 2015

Response Made by Custodian: September 1, 2015;

GRC Complaint Received: September 10, 2015

Background³

Request and Response:

On July 29, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 24, 2015, the Complainant wrote to the Custodian, seeking an update as to the status of her July 29, 2015 OPRA request.

On September 1, 2015, the Custodian responded in writing and denied the request for two reasons. The Custodian first argued that the request sought the production of documents that were classified as criminal investigatory records, which are “not considered government records” pursuant to N.J.S.A. 47:1A-1.1. He noted that the criminal investigatory records exemption applied to both open and closed cases and included, but were not limited to, police incident reports, criminal investigation reports, Internal Affairs reports, statements or transcripts of statements, and other such documents used to substantiate or authenticate criminal activity,

¹ No legal representation listed on record.

² Represented by John R. Pidgeon, Esq. (Princeton, 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.

which are obtained during the course of an investigation. See Janeczko v. New Jersey Dep't of Law and Pub. Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 & 2002-80 (June 2004); Johnson/Press of Atlantic City v. New Jersey Div. of State Police, GRC Complaint No. 2004-46 (June 2004); Brewer v. NJ Dep't of Law and Pub. Safety, Division of State Police, GRC Complaint No. 2006-204 (October 2007); West Solloway v. Bergen County Prosec. Office, GRC Complaint No. 2011-39 (January 2013).

The Custodian additionally denied the request for being overly broad and generalized. *See MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534 (App. Div. 2005).*

Denial of Access Complaint:

On September 10, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that an unlawful denial of access had occurred but made no additional legal arguments.

Statement of Information:

On September 25, 2015, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on July 29, 2015, and her follow-up e-mail seeking a status update on August 24, 2015. The Custodian certified that he responded in writing on September 1, 2015, acknowledging that he did not respond until seven business days after her follow-up August 24, 2015 e-mail. He stated that while the Bernardsville Police Department is "meticulous" about responding to OPRA request, "for some reason this request was misplaced and not responded to in a timely manner."

The Custodian certified that responsive records consisted of the following:

- Initial Police Investigation report (2 pages)
- Supplementary report (1 page, with attached proposal from Huite Construction)
- Supplementary report (1 page with attached e-mails and photos, also two recorded interviews with Complainant)

The Custodian also noted that the case is still an active investigation. He made no additional legal arguments, other than reasserting the arguments found in the initial response.

Additional Submissions:

On September 30, 2015, the Complainant wrote to the GRC, reiterating her request for "a contract . . . with my name on it" that she "[has] never seen or signed." In an e-mail later that day, she alleged that the Custodian's Counsel was "l[ying]." That same day, the Custodian's Counsel wrote to the Complainant, copying the GRC, denying that he had lied or submitted untruthful information to the GRC.

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).⁴ 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).

Although the Custodian certified that his office was in receipt of the Complainant's OPRA request on July 29, 2015, he acknowledged that he did not reply until seven (7) business days after her August 24, 2015 e-mail seeking a status update, on September 1, 2015, ultimately twenty-four (24) business days after her initial request. The Custodian certified that the original July 29, 2015 OPRA request "was misplaced" and that this fact accounted for the untimely response.

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.

The status of records purported to fall under the criminal investigatory records exemption, pursuant to N.J.S.A. 47:1A-1.1, was examined by the GRC in Janeczko v. NJ Dep't of Law and Pub. Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004). There, the complainant sought access to copies of records related to alleged criminal actions committed by her son, who was allegedly killed by police officers. The Council found that under OPRA, "criminal investigatory records include records involving all manner of crimes, resolved or unresolved, and includes information that is part and parcel of an

⁴ 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.

investigation, confirmed and unconfirmed” and are not accessible under N.J.S.A. 47:1A-1.1. Consequently, the complainant’s request was denied, and the Council found no violation by the Custodian, stating: “[the criminal investigatory records exemption] does not permit access to investigatory records once the investigation is complete . . . and the Council does not have a basis to withhold from access only currently active investigations and release those where the matter is resolved or closed.”

Further, in Hwang v. Bergen Cnty. Prosecutor’s Office, GRC Complaint No. 2011-348 (January 2013), the complainant requested reports made for case number BCP0-1002349 regarding the September 20, 2010 arrest of Hwang and a codefendant. The complainant also requested all police logs for September 20, 2010. The custodian agreed to disclose the requested arrest report because it merely recorded the basic factual data for the arrest, which required only a 35 cents copy fee; however, he refused to disclose the “narrative” police logs as they pertained to an open and ongoing criminal investigation. The complainant disagreed with the proposition that police reports constitute exempt criminal investigatory records. The complainant asserted that the case resulted in his arrest and had since been closed.

Relying on the holding in Janeczko, the GRC stated that:

[I]n the instant matter the Custodian has certified that Item No. 1 of the Complainant’s request constitutes criminal investigatory files. The Complainant has not provided any competent evidence to refute this certification. Therefore, because the requested law enforcement reports . . . constitute criminal investigatory files, the Custodian has borne his burden of proof that the denial of access was lawful pursuant to N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. [citations omitted].

Id.

In the instant matter, the Custodian certified in his SOI that responsive records to the request consisted of an initial police investigation report and two supplementary reports with attached e-mails, photos, and interviews. The Custodian also noted that, as of the time of the SOI, the case is still an active investigation. He made no additional legal arguments, other than reasserting the arguments found in the initial response. Additionally, the Complainant has not provided any competent evidence to refute the certification.

Therefore, because the requested law enforcement reports records constitute criminal investigatory files, the Custodian has borne his burden of proof that the denial of access was lawful pursuant to N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; and Janeczko (June 2004). Additionally, because the Custodian responded to the request and was able to identify records, the Council declines to address the Custodian’s point that the request, on its face, was overly broad.

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 respond to the Complainant’s request for access records within the statutorily mandated seven (7) business days, which resulted in a “deemed” denial of said request, the Custodian did ultimately respond and lawfully withheld the responsive records as being exempt as criminal investigatory records. Additionally, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

2. Because the requested law enforcement reports records constitute criminal investigatory files, the Custodian has borne his burden of proof that the denial of access was lawful pursuant to N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; and Janeczko (June 2004). Additionally, because the Custodian responded to the request and was able to identify records, the Council declines to address the Custodian's point that the request, on its face, was overly broad.

3. Although the Custodian failed to respond to the Complainant's request for access records within the statutorily mandated seven (7) business days, which resulted in a "deemed" denial of said request, the Custodian did ultimately respond and lawfully withheld the responsive records as being exempt as criminal investigatory records. Additionally, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were 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: Husna Kazmir
Staff Attorney

January 24, 2017