



VINCENT P. MALTESE, Chairman
ACTING COMMISSIONER JOSEPH V. DORIA, JR.
COMMISSIONER LUCILLE DAVY
ROBIN BERG TABAKIN
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

Toll Free: 866-850-0511
Fax: 609-633-6337
E-mail: grc@dca.state.nj.us
Web Address:
www.nj.gov/grc

FINAL DECISION

November 28, 2007 Government Records Council Meeting

D.B.

Complaint No. 2007-144

Complainant

v.

Somerset County Prosecutor's Office

Custodian of Record

At the November 28, 2007 public meeting, the Government Records Council ("Council") considered the November 21, 2007 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 evidence of record shows that the Complainant requested juvenile police reports, including the interview/statement, for his daughter who was a victim in an incident that took place in Montgomery Township. Pursuant to N.J.S.A. 47:1A-9.a., OPRA does not abrogate any exemption of a public record or government record from public access made pursuant to any other statute. N.J.S.A. 2A:4A-60(a) (3) specifically permits the release of records of the court and law enforcement agencies to the parents of the juvenile. Therefore, there are no exemptions for access to the requested records under OPRA or any other law that the Custodian cited.
2. Even though the Custodian eventually made the requested records available to the Complainant after receiving further clarification, the Custodian has violated OPRA by denying the Complainant access to the requested records. Therefore, the Custodian unlawfully denied access to the requested records and has failed to bear his burden of proof that the denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6.
3. Because the Custodian made the requested records available to the Complainant after receiving further clarification, it is concluded that the Custodian's actions 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. However, the Custodian's unlawful denial of access appears



negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

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 November, 2007

Vincent P. Maltese, Chairman
Government Records Council

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

Government Records Council

Decision Distribution Date: November 29, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 28, 2007 Council Meeting**

**D.B.¹
Complainant**

GRC Complaint No. 2007-144

v.

**Somerset County Prosecutor's Office²
Custodian of Records**

Records Relevant to Complaint:

Juvenile police report (JV-02-06-0159) for the Complainant's daughter who was a victim in an incident taking place in Montgomery Township. The reports should include the victim's interview/statement and any other relevant documents.

Request Made: April 23, 2007

Response Made: May 1, 2007

Custodian: Daniel J. Livak

GRC Complaint Filed: June 11, 2007

Background

April 23, 2007

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

May 1, 2007

Custodian's Response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the sixth (6th) business day following receipt of such request. The Custodian states that pursuant to N.J.S.A. 47:1A-1 all government records shall be subject to public access unless exempt from such access by...any other statute. The Custodian also states that since the requested records refer to a juvenile case, N.J.S.A. 2A:4A-60 precludes access to the information; therefore, the requested records will not be released.

June 11, 2007

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- Complainant's OPRA request dated April 23, 2007
- Letter from the Custodian to the Complainant dated May 1, 2007

¹ No legal representation listed on record.

² Represented by Robert J. Hawkes, Esq. (Somerville, NJ).

- Copy of N.J.S.A. 2A:4A-60

The Complainant states that his request was denied pursuant to N.J.S.A. 2A:4A-60. The Complainant asserts that N.J.S.A. 2A:4A-60 (10) indicates that the records shall be made available to any potential party in a subsequent civil action for damages related to an act of delinquency committed by a juvenile...provided, however, that records available under this paragraph shall be limited to police or investigative reports concerning acts of delinquency.

The Complainant states that he is a parent requesting the records and is a potential party to a civil action for damages resulting from the acts of the juvenile in question, his child. The Complainant also states that the requested records are police reports. The Complainant asserts that the respective police reports should be made available to them and any questions concerning the civil action should be addressed to his attorneys.

June 22, 2007

Offer of Mediation sent to both parties. Neither party agreed to mediate this complaint.

July 6, 2007

Request for the Statement of Information sent to the Custodian.

July 17, 2007

Custodian's Statement of Information ("SOI") with the following attachments:

- Complainant's OPRA request dated April 23, 2007
- Letter from the Custodian to the Complainant dated May 1, 2007
- Letter from the Custodian to the Complainant dated July 17, 2007

The Custodian contends that the Complainant submitted his OPRA request on April 23, 2007 and was provided a response on May 1, 2007, which stated that the Complainant's OPRA request was denied pursuant to N.J.S.A. 2A:4A-60. The Custodian also contends that after further clarification, sixteen (16) pages of the records responsive to the request were provided on July 17, 2007.

July 17, 2007

Letter from the Custodian to the Complainant. The Custodian states that pursuant to the Complainant's OPRA request of April 23, 2007, enclosed is a total of sixteen (16) pages of responsive records. The Custodian also asks the Complainant to make his check for copying charges in the amount of \$10.50 payable to the Somerset County Prosecutor's Office, Attention Mary Ann Tracchio.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

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 ...*” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also states that:

“[t]he provisions of [OPRA] shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA] any other *statute*; resolution of either or both Houses *of the Legislature*; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.” (Emphasis added). N.J.S.A. 47:1A-9.a.

N.J.S.A. 2A:4A-60(a) states in pertinent part that:

“Social, medical, psychological, legal and other records of the court and probation division, and records of law enforcement agencies, pertaining to juveniles charged as a delinquent or found to be part of a juvenile-family crisis, shall be strictly safeguarded from public inspection. Such records shall be made available only to:

...

The parents or guardian and to the attorney of the juvenile....” N.J.S.A. 2A:4A-60(a).

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. 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. A

custodian must also release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1.

The evidence of record shows that the Complainant requested juvenile police reports, including the interview/statement, for his daughter who was a victim in an incident that took place in Montgomery Township. Pursuant to N.J.S.A. 47:1A-9.a., OPRA does not abrogate any exemption of a public record or government record from public access made pursuant to any other statute. N.J.S.A. 2A:4A-60(a) (3) specifically permits the release of records of the court and law enforcement agencies to the parents of the juvenile. Therefore, there are no exemptions for access to the requested records under OPRA or any other law that the Custodian cited. Even though the Custodian eventually made the requested records available to the Complainant after receiving further clarification, the Custodian has violated OPRA by denying the Complainant access to the requested records. Therefore, the Custodian unlawfully denied access to the requested records and has failed to bear his burden of proof that the denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6.

Whether the delay in access to the requested records rises to the level of a knowing and willful violation of OPRA?

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 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 at 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 (App. Div. 1996) at 107).

Because the Custodian made the requested records available to the Complainant after receiving further clarification, it is concluded that the Custodian's actions 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. However, the Custodian's unlawful denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The evidence of record shows that the Complainant requested juvenile police reports, including the interview/statement, for his daughter who was a victim in an incident that took place in Montgomery Township. Pursuant to N.J.S.A. 47:1A-9.a., OPRA does not abrogate any exemption of a public record or government record from public access made pursuant to any other statute. N.J.S.A. 2A:4A-60(a) (3) specifically permits the release of records of the court and law enforcement agencies to the parents of the juvenile. Therefore, there are no exemptions for access to the requested records under OPRA or any other law that the Custodian cited.
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Prepared By:

Tiffany L. Mayers
Case Manager

Approved By:

Catherine Starghill, Esq.

Executive Director

November 21, 2007