



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 26, 2012 Government Records Council Meeting**

Robert A. Norcia  
Complainant

Complaint No. 2011-133

v.

Borough of North Arlington (Bergen)  
Custodian of Record

At the June 26, 2012 public meeting, the Government Records Council (“Council”) considered the June 19, 2012 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. Because the Custodian failed 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, the Custodian’s violation of OPRA 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. The requested police report is exempt from disclosure as it pertains to an ongoing investigation conducted by the Borough of North Arlington Police Department, and disclosure of such records would be inimical to the public interest because such disclosure would jeopardize the state agency’s ability to conduct such investigation and the safety of the victim involved. Accordingly, the Custodian lawfully denied access to such records pursuant to N.J.S.A. 47:1A-3.a.; N.J.S.A. 47:1A-6.; *See also Henderson v. New Jersey Department of Law and Public Safety, Division of Alcoholic Beverage Control*, 2010-139 (April 2011).
3. Although the Custodian failed to provide a written response to the Complainant’s OPRA request, the Custodian lawfully denied the Complainant access to the requested police report as the report was exempt from disclosure because it pertains to an ongoing investigation and the disclosure of such report is inimical to the public interest. 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, 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.

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 26<sup>th</sup> Day of June, 2012

Steven F. Ritardi, Esq., Acting Chair  
Government Records Council

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

Denise Parkinson Vetti, Secretary  
Government Records Council

**Decision Distribution Date: June 27, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
June 26, 2012 Council Meeting**

**Robert A. Norcia<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-133**

v.

**Borough of North Arlington (Bergen)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copy of:  
Police report (#10-007786).

**Request Made:** November 16, 2010

**Response Made:** November 16, 2010

**Custodian:** Terence M. Wall

**GRC Complaint Filed:** April 18, 2011<sup>3</sup>

**Background**

**November 16, 2010**

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.

**November 16, 2010**

Custodian's response to the OPRA request. The Custodian responds verbally to the Complainant's OPRA request on the same business day as the request is received. The Custodian states that the access to the requested record is denied because the police report is a part of an ongoing criminal investigation and is therefore exempt from disclosure under OPRA.

**April 18, 2011**

Denial of Access Complaint filed with the Government Records Council ("GRC"). The Complainant's OPRA request dated November 16, 2011 is attached.

The Complainant states that he was refused access to the police reports by Louis M. Ghione, Chief of the Borough of North Arlington Police Department ("Chief"). The

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

<sup>2</sup> Represented by Randy Pearce, Esq. of Pearce Law LLC (Hackensack, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

Complainant states that he believes that the Chief of police is illegally denying him access to the police report. The Complainant agrees to mediate this complaint.

**April 25, 2011**

Letter from Chief Ghione to the GRC. The Chief certifies that he is vested with the authority of overseeing the records for the North Arlington Police Department. The Chief further certifies that police report sought by the Complainant is a part of an ongoing police investigation in which the Complainant is the target. The Chief also certifies that the victim of the criminal act documented in the police report has informed the police department that she fears for her safety and does not want the report to be released to the Complainant.

The Chief further certifies that the Complainant has contacted the Attorney General's Office, the Bergen County Prosecutor's Office, and the ACLU in an attempt to secure the requested police report.

**May 9, 2011**

Offer of Mediation sent to the Custodian.<sup>4</sup>

**May 29, 2011**

Request for the Statement of Information ("SOI") sent to the Custodian.

**August 10, 2011**

Letter from GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for an SOI on May 29, 2011 and to date has not received a response.

**September 13, 2011**

Custodian's SOI with an attached copy of the Complainant's OPRA request dated November 16, 2011.

The Custodian certifies that he coordinated with the Borough's Police Department to search for the requested record and further certifies that the requested record was not destroyed. The Custodian certifies that the Borough Police Department advised him that the requested police report is exempt from disclosure under OPRA because the report applies to an ongoing criminal investigation.

**Analysis**

**Whether the Custodian timely responded to the Complainant's OPRA request?**

OPRA also provides that:

“[i]f the 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. The custodian shall sign and date the

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<sup>4</sup> The Custodian did not respond to the Offer of Mediation.

form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g.

Further, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

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. As also prescribed under 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. 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. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

In the instant matter, the Complainant filed an OPRA request on November 16, 2011. The Custodian failed to bear his burden of proof under N.J.S.A. 47:1A-6 that he provided a written response to the Complainant’s request. Accordingly, the Custodian’s failure to respond in writing to the Complainant’s request is in violation of the duties placed upon Custodian’s in OPRA.

Therefore, because the Custodian failed 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, the Custodian’s violation of OPRA 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).

### **Whether the Custodian unlawfully denied access to the requested records?**

OPRA provides that:

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<sup>5</sup> It is the GRC’s position that 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.

“...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 ... or that has been received* in the course of his or its official business ...” *Criminal investigatory record*” means a record *which is not required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding.*” (Emphasis added.) N.J.S.A. 47:1A1.1.

OPRA also provides in pertinent part that:

“where it shall appear that the record or records which are sought to be inspected, copied, or examined shall pertain to an investigation in progress by any public agency, the right of access provided for in [OPRA] may be denied if the inspection, copying or examination of such record or records shall be inimical to the public interest[.]” N.J.S.A. 47:1A-3.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. 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 evidence of record indicates that the Complainant filed an OPRA request for a police report on November 16, 2010. In response, the Custodian informed the Complainant that the requested police report is part of an ongoing police investigation and is therefore exempt from disclosure under OPRA. In the SOI, the Custodian certified that the requested police report is part of an ongoing police investigation at the time of the Complainant’s request. In addition, the Chief of the Borough’s Police Department provided a letter dated April 25, 2011 to the GRC in which he asserted that the Complainant in this matter is the target of the investigation relating to the requested police report and the victim identified in said police report has informed the Borough that

she fears for her safety and does not want the police report disclosed to the Complainant. The Complainant has not submitted any evidence to refute this contention.

Accordingly, it appears from Custodian's certification in the SOI that the requested police report is part of an ongoing police investigation and the Borough Police Chief's assertion that the victim identified in said police report fears for her safety that the record sought to be copied in the instant matter pertains to an investigation in progress by the Borough Police Department and that disclosure of such record is inimical to the public interest. Therefore, the Custodian did not unlawfully deny the Complainant access to the requested record pursuant to N.J.S.A. 47:1A-3.a.

Therefore, the requested police report is exempt from disclosure as it pertains to an ongoing investigation conducted by the Borough of North Arlington Police Department, and disclosure of such records would be inimical to the public interest because such disclosure would jeopardize the state agency's ability to conduct such investigation and the safety of the victim involved. Accordingly, the Custodian lawfully denied access to such records pursuant to N.J.S.A. 47:1A-3.a; N.J.S.A. 47:1A-6; *See also Henderson v. New Jersey Department of Law and Public Safety, Division of Alcoholic Beverage Control*, 2010-139 (April 2011).

**Whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

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:

"... If 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)).

Therefore, although the Custodian failed to provide a written response to the Complainant's OPRA request, the Custodian lawfully denied the Complainant access to the requested police report as the report was exempt from disclosure because it pertains to an ongoing investigation and the disclosure of such report is inimical to the public interest. 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, 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.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find:

1. Because the Custodian failed 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, the Custodian's violation of OPRA 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. The requested police report is exempt from disclosure as it pertains to an ongoing investigation conducted by the Borough of North Arlington Police Department, and disclosure of such records would be inimical to the public interest because such disclosure would jeopardize the state agency's ability to conduct such investigation and the safety of the victim involved. Accordingly, the Custodian lawfully denied access to such records pursuant to N.J.S.A. 47:1A-3.a.; N.J.S.A. 47:1A-6.; *See also Henderson v. New Jersey Department of Law and Public Safety, Division of Alcoholic Beverage Control*, 2010-139 (April 2011).
3. Although the Custodian failed to provide a written response to the Complainant's OPRA request, the Custodian lawfully denied the Complainant access to the requested police report as the report was exempt from disclosure because it pertains to an ongoing investigation and the disclosure of such report is inimical to the public interest. 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, 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.

Prepared By: Darryl C. Rhone  
Case Manager

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

June 19, 2012