



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

August 28, 2012 Government Records Council Meeting

Jose R. Gonzalez
Complainant

Complaint No. 2011-212

v.

County of Hudson
Custodian of Record

At the August 28, 2012 public meeting, the Government Records Council (“Council”) considered the August 21, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian did not respond in writing to the Complainant’s OPRA request until the twelfth (12th) business day following receipt thereof, 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 constitutes a violation of OPRA and 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 Complainant has requested a record generated on behalf of a public employer in connection with a grievance filed against an employee, the requested investigative report is exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-10. Thus, the Custodian has borne her burden of proving a lawful denial of access to the responsive report pursuant to N.J.S.A. 47:1A-6. See Parreott v. Asbury Park Police Department (Monmouth), 2011-78 (May 2012 Reconsideration). See also Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (Interim Order dated March 2004) and Vaughn v. City of Trenton (Mercer), GRC Complaint No. 2009-177 (June 2010).
3. Although the Custodian failed to timely respond to the Complainant’s request and therefore violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Custodian met his burden of proving that his denial of access to the requested records was lawful. N.J.S.A. 47:1A-6. Specifically, the Custodian lawfully denied access to the requested investigative report because it is exempt from access pursuant to N.J.S.A. 47:1A-10, because the report was generated on behalf of a public employer in connection with a grievance filed against an employee. Accordingly, 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 28th Day of August, 2012

Robin Berg Tabakin, 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: August 30, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 28, 2012 Council Meeting**

Jose R. Gonzalez¹
Complainant

GRC Complaint No. 2011-212

v.

County of Hudson²
Custodian of Records

Records Relevant to Complaint:

A copy of the complete investigative report generated by the outside law firm, LeClair Ryan.

Request Made: April 28, 2011

Response Made: May 16, 2011

Custodian: Neil J. Carroll, Jr., Esq.

GRC Complaint Filed: June 14, 2011³

Background

April 28, 2011

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in a letter referencing OPRA. The Complainant states that the requested investigative report is being generated pursuant to a complaint filed by the Complainant against Sheriff Frank Schillari and members of his administration.

May 16, 2011

Custodian's response to the OPRA request. The Custodian responds in writing via letter to the Complainant's OPRA request on the twelfth (12th) business day following receipt of such request. The Custodian states that access to the requested record is denied because OPRA precludes access to any information that is generated by or on behalf of public employers or public employees in connection with any grievance filed by or against an employee.

June 14, 2011

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

- Complainant's OPRA request dated April 28, 2011

¹ No legal representation listed on record.

² Mr. Carroll is also representing the County of Hudson as attorney in this matter.

³ The GRC received the Denial of Access Complaint on said date.

- Letter from the Custodian to the Complainant dated May 16, 2011

The Complainant states that he does not agree with the Custodian's denial of access to the requested record. The Complainant asserts that the Custodian's denial of access is in violation of the Complainant's common law right of access.⁴

The Complainant does not agree to mediate this complaint.

June 14, 2011

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

June 20, 2011

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated April 28, 2011
- Letter from the Custodian to the Complainant dated May 16, 2011

The Custodian certifies that a search for the requested investigative report yielded a 58-page report. The Custodian certifies that no records were destroyed and that there is no applicable record retention schedule.

The Custodian maintains that access to the requested report was denied because the record is exempt from disclosure under OPRA because it was generated on behalf of a public employer in connection with a grievance filed against an employee. The Custodian contends that this exemption applies to interested and non-interested parties alike.

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 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*

⁴ The Complainant makes additional arguments based upon an asserted common law right of access. Jose R. Gonzalez v. County of Hudson, 2011-212 – Findings and Recommendations of the Executive Director

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.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 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, the Custodian did not respond to the Complainant’s April 28, 2011 OPRA request until May 16, 2011, the twelfth (12th) business day following the receipt of the Complainant’s request. While the Custodian’s response was in writing, it occurred five (5) days after the statutorily mandated seven (7) business days elapsed.

Therefore, because the Custodian did not respond in writing to the Complainant’s OPRA request until the twelfth (12th) business day following receipt thereof, the Custodian did not timely respond to the Complainant’s OPRA request. Accordingly, the Custodian 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 constitutes a violation of OPRA and 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:

“...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*

⁵ 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.

kept on file ... or that has been received in the course of his or its official business ... [a] government record shall not include the following information which is deemed to be confidential ... information generated by or on behalf of public employers or public employees in connection ... with any grievance filed by or against an individual ” (Emphasis added.) N.J.S.A. 47:1A-1.1.

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 further provides that:

“... the personnel or pension records of any individual in the possession of a public agency, *including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record* and shall not be made available for public access... N.J.S.A. 47:1A-10. [Emphasis added].

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.

In this case, the Complainant asserted that he was unlawfully denied access to the requested “complete investigative report” generated by Hudson County’s outside law firm, LeClair Ryan, in connection with a complaint he filed against Sheriff Frank Schillari and members of his administration. The Custodian denied access to the requested record, asserting that such report was exempt from disclosure under OPRA as information generated by or on behalf of public employers or public employees in connection with any grievance filed by or against an employee.⁶ The Custodian certified in the SOI that the requested report was generated by the County in connection with a grievance filed against an employee, and therefore argued that the requested report is exempt from disclosure under OPRA pursuant to the personnel exemption prescribed in N.J.S.A. 47:1A-10.

The Council has previously adjudicated complaints in which the records requested under OPRA were related to grievances filed against public employees. In Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (Interim Order dated March 2004) the Council held that:

“[t]he Complainant’s request to review the records of complaints filed against Officer Tuttle were properly denied by the Custodian. N.J.S.A.

⁶ As provided by N.J.S.A. 47:1A-10.

47:1A-10 provides in pertinent that “the personnel or pension records of any individual in the possession of a public agency, *including but not limited to* records relating to *any grievance filed by or against an individual*, shall not be considered a public record and shall not be made available for public access” [emphasis added]. As a result, records of complaints filed against Officer Tuttle and/or reprimands he has received are not subject to public access.”

Further, in Vaughn v. City of Trenton (Mercer), GRC Complaint No. 2009-177 (June 2010) the Council held that:

“[a]lthough the Custodian violated OPRA at N.J.S.A. 47:1A-5.g. by failing to provide a response to the Complainant’s request for the disciplinary history for Trenton Police Department Detective, Robert Sheehan (retired), said record is exempt from disclosure as a personnel record pursuant to N.J.S.A. 47:1A-10 and Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004).”

In the matter before the Council, the Custodian certified in the SOI that the requested report was generated by the County in connection with a grievance filed against an employee, and therefore the requested report is exempt from disclosure under OPRA pursuant to the personnel exemption prescribed in N.J.S.A. 47:1A-10. The Complainant has submitted no evidence to refute the Custodian’s certification in this regard. To the contrary, the Complainant’s OPRA request stated that the requested investigative report was being generated pursuant to a complaint filed by the Complainant against Sheriff Frank Schillari and members of his administration.

Therefore, because the Complainant has requested a record generated on behalf of a public employer in connection with a grievance filed against an employee, the requested investigative report is exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-10. Thus, the Custodian has borne her burden of proving a lawful denial of access to the responsive report pursuant to N.J.S.A. 47:1A-6. See Parreott v. Asbury Park Police Department (Monmouth), 2011-78 (May 2012 Reconsideration). See also Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (Interim Order dated March 2004) and Vaughn v. City of Trenton (Mercer), GRC Complaint No. 2009-177 (June 2010).

The Complainant also argued in the Denial of Access Complaint that he has a common law right of access to the complete investigative report.

The Council notes that it is not empowered to adjudicate disputes concerning the scope of common law rights. The Government Records Council is an agency "within the Department of Community Affairs charged with adjudicating OPRA disputes" in the event the person seeking the record chooses not to file an action in Superior Court. Rosenblum v. Borough of Closter, 2006 N.J. Super. Unpub. LEXIS 1444, 4-5 (App.Div. 2006), *citing* Bent v. Twp. of Stafford Police Dep't., 381 N.J. Super. 30, 38 (App. Div. 2005); N.J.S.A. 47:1A-6.

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 (Felder 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)).

In the matter before the Council, although the Custodian failed to timely respond to the Complainant’s request and therefore violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Custodian met his burden of proving that his denial of access to the requested records was lawful. N.J.S.A. 47:1A-6. Specifically, the Custodian lawfully denied access to the requested investigative report because it is exempt from access pursuant to N.J.S.A. 47:1A-10, because the report was generated on behalf of a public employer in connection with a grievance filed against an employee. Accordingly, 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 that:

1. Because the Custodian did not respond in writing to the Complainant's OPRA request until the twelfth (12th) business day following receipt thereof, 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 constitutes a violation of OPRA and 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 Complainant has requested a record generated on behalf of a public employer in connection with a grievance filed against an employee, the requested investigative report is exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-10. Thus, the Custodian has borne her burden of proving a lawful denial of access to the responsive report pursuant to N.J.S.A. 47:1A-6. *See Parreott v. Asbury Park Police Department (Monmouth)*, 2011-78 (May 2012 Reconsideration). *See also Merino v. Borough of Ho-Ho-Kus*, GRC Complaint No. 2003-110 (Interim Order dated March 2004) and Vaughn v. City of Trenton (Mercer), GRC Complaint No. 2009-177 (June 2010).
3. Although the Custodian failed to timely respond to the Complainant's request and therefore violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Custodian met his burden of proving that his denial of access to the requested records was lawful. N.J.S.A. 47:1A-6. Specifically, the Custodian lawfully denied access to the requested investigative report because it is exempt from access pursuant to N.J.S.A. 47:1A-10, because the report was generated on behalf of a public employer in connection with a grievance filed against an employee. Accordingly, 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

August 21, 2012