



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

July 29, 2014 Government Records Council Meeting

Carl W. Hittinger
Complainant

Complaint No. 2013-324

v.

NJ Transit
Custodian of Record

At the July 29, 2014 public meeting, the Government Records Council (“Council”) considered the July 22, 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Because NJ Transit’s contract with Titan provides that the entity accept full responsibility for procuring advertising, the Custodian was not obligated to obtain records responsive to OPRA request Item Nos. 2-6 and 8-14 from Titan in order to fulfill the Complainant’s OPRA request. N.J.S.A. 47:1A-1.1. The Custodian has thus not unlawfully denied access to any records. N.J.S.A. 47:1A-6.
3. Although the Custodian’s failure to respond in writing in a timely manner resulted in a “deemed” denial, the Custodian did not unlawfully deny access to records responsive to request Item Nos. 2-6 and 8-14. Additionally, 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, 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 29th Day of July, 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: July 31, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 29, 2014 Council Meeting**

**Carl W. Hittinger¹
Complainant**

GRC Complaint No. 2013-324

v.

**New Jersey Transit²
Custodial Agency**

Records Relevant to Complaint: See Exhibit A.

Custodian of Record: Rocio Munoz
Request Received by Custodian: August 30, 2013
Response Made by Custodian: September 25, 2013
GRC Complaint Received: November 6, 2013

Background³

Request and Response:

On August 29, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 25, 2013, seventeen (17) business days after receipt of the request, Kimberley Dickerson responded in writing on behalf of the Custodian seeking an extension until October 3, 2013 to respond. On October 2, 2013, the Custodian stated that records responsive to the Complainant’s OPRA request will be provided upon payment of \$18.30 for copying costs.

On October 4, 2013, the Custodian responded acknowledging receipt of \$18.30 from the Complainant and advised that he was providing records responsive to item Nos. 1 and 7. The Custodian noted that he redacted certain e-mail addresses and proprietary or financial information. N.J.S.A. 47:1A-1; Burnett v. Cnty. of Bergen, 198 N.J. 408 (2009); N.J.S.A. 47:1A-1.1. The Custodian also noted that information outside the scope of the Complainant’s OPRA request on the New Jersey Transit (“NJ Transit”) detail documents was also redacted. Finally, the Custodian stated NJ Transit conducted a thorough search for records responsive to item Nos. 2-6 and 8-14 and no records responsive exist.

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Jason Frankiewicz.

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.

On October 8, 2013, Mr. Robert Connelly, on behalf of the Complainant, responded advising the Custodian that certain records in the possession of Titan Outdoor, LLC (“Titan”) generated, produced or maintained on behalf of, or received as, an agent of NJ Transit were not provided. Mr. Connelly requested that the Custodian advise whether NJ Transit has obtained these records from Titan for production or if NJ Transit does not believe they are required to obtain same and the reasons therefor. Mr. Connelly noted that the Complainant is particularly interested in records reflecting contracts, agreements and communications that Titan entered into with Lundy Law on behalf of NJ Transit.

On October 16, 2013, the Custodian responded advising that NJ Transit did not request records from Titan and that NJ Transit had no obligation to do so; to wit, records in the possession of Titan are not government records under OPRA. On the same day, Mr. Connelly disputed the Custodian’s response noting that his research indicated that Titan’s records are subject to OPRA. Specifically, according to Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010), records in possession of a third party contractor executed on behalf of an agency are subject to access. *See also* Gannett v. Borough of Raritan, 2011 N.J. Super. Unpub. LEXIS 308 (App. Div. 2011). Mr. Connelly thus requested a conference call on this issue.

Denial of Access Complaint:

On November 6, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that NJ Transit is a “public agency” functioning to provide public transportation. The Complainant noted that part of NJ Transit’s functions include generating revenue to support services. The Complainant asserted that one way of raising revenue is by selling advertising space on buses and trains, which it contracted out to Titan on September 14, 2012. The Complainant stated that the contract includes multiple clauses requiring Titan to perform its advertising duties in accordance with how NJ Transit would perform same if they maintained the function in-house. The Complainant further stated that although Titan is a private company, the contract specifically provides that documents “of every nature” prepared pursuant to the contract become the property of NJ Transit and must be made available to NJ Transit upon request. NJ Transit Contract No. 11-051, ¶16 at 15.

The Complainant disputed the Custodian’s denial of access to records maintained by Titan because Titan’s contract with NJ Transit specifically states that all records generated on behalf of the contract are the property of NJ Transit and are thus government records under OPRA. The Complainant argued that NJ Transit did not deny that responsive records may exist, but that they had no obligation to obtain same from Titan. The Complainant countered that the location of a government record in the possession of a third-party contractor does not shield said records from access. *See* Times of Trenton, Pub. Corp. v. Lafayette Yard Cmty. Dev., 183 N.J. 519 (2005); Burnett, 415 N.J. Super. at 517; Gannett, 2011 N.J. Super. Unpub. LEXIS 308.

The Complainant argued that here, NJ Transit delegated advertising to Titan by contract but did not alleviate its burden of obtaining government records from Titan. The Complainant further argued that this case is of significant public interest and that disclosure meets OPRA’s intent “. . . to maximize the public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.” Asbury Park Press v. Ocean

Cnty. Prosecutor's Office, 374 N.J. Super. 312, 329 (September 28, 2004). The Complainant contended that the fact that NJ Transit delegated its advertising function to Titan may actually increase the need for disclosure to minimize such evils.

Statement of Information:

On December 4, 2013, the Custodian filed a Statement of Information ("SOI").⁴ The Custodian certified that he received the Complainant's OPRA request on August 30, 2013. The Custodian certified that the request was forwarded to the Division of Real Estate & Economic Development ("Real Estate"), who conducted a search and located Contract No. 11-051 "Advertising Revenue" with attachments. The Custodian certified that Real Estate staff was unable to locate any records responsive to item Nos. 2-6 and 8-14. The Custodian affirmed that NJ Transit initially responded in writing on September 25, 2013.

The Custodian stated that in OPRA request item Nos. 2-6 and 8-14, the Complainant sought contracts, memorandums of understanding ("MOU"), term sheets, communications, etc. between Titan and Lundy Law or between Titan and other vendors that do business with Titan.

The Custodian contended that the records sought are not government records and that NJ Transit is under no obligation to obtain same from Titan. The Custodian asserted that the Complainant misunderstands the contractual relationship between NJ Transit and Titan. The Custodian certified that NJ Transit contracted with Titan, but that it is Titan's sole responsibility to seek, develop, enter into contracts and manage said contracts with vendors. Further, the Custodian affirmed that Titan suffers any losses from those contracts if the vendor does not perform. The Custodian certified that NJ Transit does not recruit vendors for Titan and does not approve or disapprove contracts or agreements between Titan and its vendors. Simply put, NJ Transit contracted with Titan only and is not privy to contracts Titan entered into with vendors. The Custodian certified that Titan pays a minimum guaranteed amount to NJ Transit without NJ Transit's concern on how Titan generates that revenue.

The Custodian argued that Burnett, 415 N.J. Super. 506, is inapposite to this complaint because NJ Transit does not review, approve, or disapprove a single contract that Titan enters into with any vendor. The Custodian contended that NJ Transit is not bound by Titan's contracts nor are same executed on behalf of NJ Transit. The Custodian further argued that Lafayette Yard, 183 N.J. 519, does not apply here because Titan is not an extension of any instrumentality of the State, nor is it a subsidiary or creation of NJ Transit. Titan is a private company with multiple clients in multiple markets across the United States and none of its records are subject to access under OPRA.

The Custodian finally disputed Complainant's assertion that because the NJ Transit reserved the right to audit Titan's records, all relevant records are government records under OPRA. The Custodian contended that because NJ Transit has retained the right to inspect Titan's records does not make them NJ Transit's records subject to disclosure under OPRA.

⁴ The Custodian's initial filing was incomplete; however, the Custodian cured all deficiencies on December 9, 2013.

Additional Submissions:

On December 4, 2014, the Complainant disputed the Custodian's SOI arguments. The Complainant noted that NJ Transit's contract with Titan explicitly states that "[d]ocuments of every nature prepared pursuant to this contract shall be available to and become the property of [NJ Transit] . . ." Contract No. 11-051 ¶16 at 15. The Complainant asserted that Titan was acting on behalf of NJ Transit in raising revenue and is bound by numerous contractual clauses to perform these duties as if Titan were NJ Transit.

The Complainant further argued that NJ Transit has delegated governmental function of generating revenue by soliciting advertising to Titan. The Complainant asserted that although NJ Transit argued in the SOI that Titan generates its own revenue without NJ Transit oversight, several clauses in the contract give NJ Transit minute control over how Titan raises said revenues. Contract No. 11-051, ¶5 at 7; ¶7 at 9; ¶8 at 9; ¶16 at 15; ¶25 at 21; ¶27 at 22 ¶ 28 at 23.

The Complainant finally asserted that visiting NJ Transit's website further proves that Titan is performing NJ Transit's duties on their behalf. The Complainant stated that the webpage "Doing Business" contains the statement "NJ Transit invites you to do business with *us* by viewing the appropriate links above"⁵ (emphasis added). The Complainant noted that clicking the link "Advertise on NJ Transit" directs the user to Titan's website. The Complainant argued that it is disingenuous to tell the public they are doing business with NJ Transit by advertising with Titan and, at the same time, disavow their relationship here to withhold responsive records. The Complainant asserted that this highlights the issues decided on by the Court in Lafayette Yard, in that Titan is performing a government function under the control of NJ Transit as if it were performing the function itself.⁶

On December 9, 2014, the Custodian's Counsel argued that contrary to the Complainant's assertions, the only issue here is whether the records sought in OPRA request item Nos. 2-6 and 8-14 are government records. Counsel maintained that they are not government records. Counsel asserted that NJ Transit's contract with Titan gives them full rights to develop, place and maintain advertising on NJ Transit's equipment and property in exchange for a revenue commitment. Contract No. 11-051 ¶1 at 1. Counsel further asserted that NJ Transit's only contractual relationship is with Titan and not the vendors. Counsel thus contended that its responses to the items are as follows:

- OPRA request item No. 2: NJ Transit is not a party to any agreement between Lundy and Titan; thus, it does not make maintain or keep agreements nor does it receive them in the normal course of business.
- OPRA request item No. 3: NJ Transit has no contractual relationship with any legal services provider. Its only contract is with Titan.

⁵ http://www.njtransit.com/tm/tm_servlet.srv?hdnPageAction=DoingBusinessTo (accessed July 15, 2014).

⁶ The Complainant noted that a daughter of L. Leonard Lundy is an account executive at Titan and that records provided by SEPTA as part of a similar records request in Pennsylvania have revealed an inappropriate relationship between Lundy Law and Titan that has adversely affected competitors, including sharing competitive information and arranging secret exclusive contracts in perpetuity.

- OPRA request item No. 4: NJ Transit is not a party to any agreement between Titan and Lundy Law; thus, it would not be part of any negotiations between those parties.
- OPRA request item No. 5: NJ Transit is not a party to any agreement between Titan and Lundy Law.
- OPRA request item No. 6: NJ Transit is not a party to any agreement between Titan and Lundy Law and would not be part of any negotiations between those parties.
- OPRA request item No. 8: NJ Transit is not privy to documented communications between Titan, Sara Lundy and Lundy Law.
- OPRA request item No. 9: NJ Transit is not privy to documented communications between Titan and legal services providers.
- OPRA request item No. 10: NJ Transit is not a party to any agreement between Titan and Lundy Law, and is thus not privy to any documented communications between the parties.
- OPRA request item No. 11: NJ Transit is not privy to documented communications between Titan and legal services providers.
- OPRA request item No. 12: NJ Transit is not privy to documented communications between Titan and any legal services providers that do business with Titan.
- OPRA request item No. 13: No such communications exist; however, NJ Transit acknowledges that they may be subject to disclosure if they did exist.
- OPRA request item No. 14: No such communications or records exist; however, NJ Transit acknowledges that they may be subject to disclosure if they did exist.

Counsel noted that the Complainant labeled multiple clauses in the contract as “controlling provisions” to evidence NJ Transit’s control over Titan. Counsel stated that NJ Transit certainly bargained for terms and conditions that would govern its legal relationship with Titan, but the terms merely protect NJ Transit’s legal and contractual rights. Counsel stated that the clauses do not constitute minute control over Titan’s activities, nor do they render Titan’s work product the property of NJ Transit.⁷

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).⁸ 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

⁷ Counsel further noted that any comparison to SEPTA’s response to a records request for similar records is of no moment here because NJ Transit is not privy to SEPTA’s relationship with Titan and whether the terms of that relationship are comparable to the contractual relationship NJ Transit has with Titan.

⁸ 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.

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).

The Custodian here did not respond to the Complainant until the seventeenth (17th) business day after receipt of the request, or ten (10) business days beyond the statutorily mandated time frame. Thus, the Custodian clearly violated OPRA by failing to respond in writing in a timely manner.

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 threshold issue present here is whether NJ Transit was required to obtain from Titan records responsive to the Complainant's OPRA request item Nos. 2-6 and 8-14.

The Complainant argued that aspects of the contract between NJ Transit and Titan necessarily created a relationship in which NJ Transit outsourced its function of selling advertising. Based on language contained in the contract, the Complainant contended that NJ Transit exercised enough control over Titan to be obligated to obtain responsive records from Titan. The Complainant cited to Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010) and Times of Trenton, Pub. Corp. v. Lafayette Yard Cmty. Dev., 183 N.J. 519 (2005) to support his argument

Conversely, the Custodian argued that Titan operates as a private entity and that NJ Transit has no participation and control over Titan's business. The Custodian further asserted that NJ Transit would obviously craft a contract with language suitable to its legal relationship; however, this does not change that Titan is solely responsible for all advertising enterprises in which it engages. The Custodian further noted that Lafayette Yard, did not apply here because Titan is in no way an instrumentality of the State nor a subsidiary or creation of NJ Transit.

First, the GRC agrees that the Complainant's application of Lafayette Yard, in this complaint is incorrect. Titan is a private agency with offices nationwide that contract with public agencies to provide advertising services. <http://www.titan360.com/usa-company/about-us.html> (accessed July 15, 2014). Further, the NJ Transit contract clearly states that Titan is an independent firm and "[Titan], its officers, partners, employees . . . are not employees . . . of NJ

Transit.” Contract No. 11-051 ¶9 at 10. Contrary to Lafayette Yard, Titan was not created by the State of New Jersey or NJ Transit, and the argument that it is performing a government function on behalf of NJ Transit has not been aptly supported here. To hold that Titan essentially performs a government function is not in conformance with the Court’s holding in Lafayette Yard. See also Paff v. Cmty. Educ. Ctr., 2013 N.J. Super. Unpub. LEXIS 2813 (App. Div. 2013).

The GRC now turns to how the facts here relate to Burnett, 415 N.J. Super. 506. There, the Appellate Division determined that defendant was required to obtain settlement agreements from its insurance broker. The Court’s decision largely fell on the fact that there was no question that the broker was working on behalf of defendants to execute settlement agreements. The Court noted that it previously held that although a third party, such as insurance broker or outside counsel, may execute settlement agreements, “they nonetheless bind the county as principal, and the agreements are made on its behalf.” Id. at 513. In determining that defendants had an obligation to obtain responsive records from the insurance broker, the Court noted that the facts there differed from those in Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 38-39 (App. Div. 2005)⁹(holding that plaintiff made no showing that the defendant was required to obtain records located outside its agency).

In this matter, regarding the relationship between Titan and NJ Transit, the GRC is satisfied that the facts are different from those presented in Burnett. This relationship is unlike that of the defendant and insurance broker in Burnett. Specifically, through the contract, Titan has assumed all financial and legal obligations of contracting out vendors to advertise on NJ Transit property. Contract No. 11-051, ¶1, ¶2, ¶6, ¶8 and ¶9. These obligations include a quarterly minimum payment made to NJ Transit, a capital investment minimum and indemnification of NJ Transit. Thus, Titan’s actions are not binding on NJ Transit, as was the case of the insurance broker in Burnett. In fact, the opposite is true in that under the contract, Titan has assumed full responsibility for its work. For these reasons, it cannot be said that Titan’s records regarding contracts with vendors are made on behalf of NJ Transit and are thus disclosable under OPRA. Additionally, although several clauses in the contract allow NJ Transit to audit Titan’s files to ensure compliance exist, these clauses should not be construed to mean that any document Titan created in the course of contracting with vendors is a government record under OPRA.

Therefore, because NJ Transit’s contract with Titan provides that the entity accept full responsibility for procuring advertising, the Custodian was not obligated to obtain records responsive to OPRA request Item Nos. 2-6 and 8-14 from Titan in order to fulfill the Complainant’s OPRA request. N.J.S.A. 47:1A-1.1. The Custodian has thus not unlawfully denied access to any records. N.J.S.A. 47:1A-6.

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

⁹ Affirming Bent v. Stafford Police Dep’t, GRC Complaint No. 2004-78 (October 2004).

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 (id.; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); 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)).

Although the Custodian's failure to respond in writing in a timely manner resulted in a "deemed" denial, the Custodian did not unlawfully deny access to records responsive to request Item Nos. 2-6 and 8-14. Additionally, 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, 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. 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 NJ Transit's contract with Titan provides that the entity accept full responsibility for procuring advertising, the Custodian was not obligated to obtain records responsive to OPRA request Item Nos. 2-6 and 8-14 from Titan in order to fulfill the Complainant's OPRA request. N.J.S.A. 47:1A-1.1. The Custodian has thus not unlawfully denied access to any records. N.J.S.A. 47:1A-6.

3. Although the Custodian's failure to respond in writing in a timely manner resulted in a "deemed" denial, the Custodian did not unlawfully deny access to records responsive to request Item Nos. 2-6 and 8-14. Additionally, 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, 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: Frank F. Caruso
Senior Case Manager

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

July 22, 2014



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August 29, 2013
VIA OVERNIGHT MAIL

Official Custodian of Records
New Jersey Transit Corporation
One Penn Plaza East, 9th Floor
Newark, NJ 07105-2246

Re: New Jersey Open Public Records Act Request

Dear Sir or Madam:

Pursuant to the New Jersey Open Records Law, N.J.S.A. 47:1A-1 et seq., and the New Jersey common-law right of public access, we request that, within seven (7) days after you receive this request, a copy of the following be made available for inspection and/or duplication, and/or be provided in hard copy or electronic form, to Carl W. Hittinger, DLA Piper LLP (US), One Liberty Place, 1650 Market St., Suite 4900, Philadelphia, PA 19103:

1. All written contracts, memoranda of understanding, term sheets, and other records setting forth the terms of any and all agreement(s) between New Jersey Transit Corporation ("NJ Transit") and the Titan advertising agency ("Titan").
2. All written contracts, memoranda of understanding, term sheets, and other records setting forth the terms of any and all agreement(s) between Titan and Lundy Law, LLP ("Lundy"); and/or between or among NJ Transit, Titan, and Lundy.
3. All written contracts, memoranda of understanding, term sheets, and other records setting forth the terms of any and all agreement(s) between Titan and any legal services provider other than Lundy; and/or between or among NJ Transit, Titan, and any legal services provider other than Lundy.
4. All records, including communications such as e-mails and other correspondence, that refer or relate in any way to the negotiation and execution of the agreement(s) between Titan and Lundy and/or between or among NJ Transit, Titan, and Lundy.
5. All records that in any way refer or relate to NJ Transit's and/or Titan's agreement to place advertisements for Lundy on the interiors or exteriors of buses or trains, in or around bus or train stops, or on any other NJ Transit property from January 1, 2006 through the present.
6. All communications between Titan and Lundy regarding the sale and placement of advertisements for Lundy on the interiors or exteriors of buses or trains, in or



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around bus or train stops, or on any other NJ Transit property from January 1, 2006 through the present.

7. **Financial records sufficient to show all payments made by Lundy to Titan or to NJ Transit from January 1, 2006 through the present.**
 8. **All communications between Titan Account Executive Sara Lundy and Lundy regarding the sale and placement of advertisements for Lundy on the interiors or exteriors of buses or trains, in or around bus or train stops, or on any other NJ Transit property from January 1, 2006 through the present.**
 9. **All communications between Sara Lundy and any representative of a legal services provider regarding the sale and placement of advertisements for the legal services provider on the interiors or exteriors of buses or trains, in or around bus or train stops, or on any other NJ Transit property from January 1, 2006 through the present.**
 10. **All communications between any Titan representative and Lundy regarding the sale and placement of advertisements for Lundy on the interiors or exteriors of buses or trains, in or around bus or train stops, or on any other NJ Transit property from January 1, 2006 through the present.**
 11. **All communications between any Titan representative and any representative of a legal services provider regarding the sale and placement of advertisements for the legal services provider on the interiors or exteriors of buses or trains, in or around bus or train stops, or on any other NJ Transit property from January 1, 2006 through the present.**
 12. **All written contracts, memoranda of understanding, term sheets, and other records setting forth the terms of any and all agreement(s) between Titan and any legal services provider other than Lundy Law, and/or between or among NJ Transit, Titan, and any other legal services provider other than Lundy Law, giving a legal services provider any exclusive right to place advertisements on the interiors or exteriors of buses or trains, in or around bus or train stops, or on any other NJ Transit property from January 1, 2006 through the present.**
 13. **All communications between Titan and NJ Transit regarding any agreement giving any party any exclusive right to place advertisements on the interiors or exteriors**
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of buses or trains, in or around bus or train stops, or on any other NJ Transit property from January 1, 2006 through the present.

14. **All board resolutions, communications, and other records reflecting the approval by NJ Transit of any and all exclusive agreements between Titan and any party, and/or between or among NJ Transit, Titan, and any party, for any exclusive right to place advertisements on the interiors or exteriors of buses or trains, in or around bus or train stops, or on any other NJ Transit property from January 1, 2006 through the present.**

Enclosed for your records is a completed Government Records Request Form. We agree to pay all reasonable postage and duplication fees.

Please note that all documents in the possession of Titan that were generated, produced, maintained, or received by Titan on behalf of NJ Transit in the course of the duties it performs on behalf of NJ Transit, or generated, produced, maintained, or received by Titan as an agent of NJ Transit, must be disclosed by NJ Transit.

Thank you for your assistance and please contact me with any questions.

Very truly yours,

DLA Piper LLP (US)

A handwritten signature in black ink, appearing to read 'Carl W. Hittinger', written over a horizontal line.

Carl W. Hittinger

CWH
Encl.



State of New Jersey
New Jersey Transit Corporation
GOVERNMENT RECORDS REQUEST FORM



Important Notice

This form contains important information related to your rights to request government records. Please read it carefully.

The contact information for the New Jersey Transit Corporation Official Custodian of Records is as follows:

Official Custodian of Records
NJ TRANSIT
One Penn Plaza East, 9th Floor
Newark, NJ 07105-2246
Phone: 973-491-7453
Fax: 973-491-7071

Requestor Information – Please Print

First Name	Carl	MI	W.	Last Name	Hittinger
Company/Affiliation	DLA Piper LLP (US)				
Mailing Address	1650 Market Street, Suite 4900				
City	Philadelphia	State	PA	Zip	19103
Email	carl.hittinger@dlapiper.com				
Business Hours Telephone:	Area Code	(215)	Number	656-2449	Extension
Fax Number:	(215) 606-2149				
Preferred Delivery:	Pick Up	US Mail	<input checked="" type="checkbox"/>	On Site Inspect	<input type="checkbox"/>
<small>Circle One: Under penalty of N.J.S.A. 2C:28-3, I certify that I <u>HAVE</u> / <u>HAVE NOT</u> been convicted of any indictable offense under the laws of New Jersey, any other state, or the United States.</small>					
Signature					Date
					8/29/13

Payment Information

Maximum Authorization Cost \$ _____

Select Payment Method:

Cash _____ Check _____ Money Order _____

Fees: Letter size \$0.06 per page
 Legal size \$0.07 per page
 Other Actual cost of materials

Delivery: Delivery / postage fees additional depending upon delivery type.

Extras: Extraordinary service fees dependent upon request.

Record Request Information: To expedite the request, be as specific as possible in describing the records being requested.

Please see accompanying cover letter.

Requesting Access to Government Records Under the New Jersey Open Public Records Act (N.J.S.A. 47:1A-1 et seq.)

1. To request access to government records under the New Jersey Open Public Records Act (N.J.S.A. 47:1A-1 et seq.), you must complete, sign and date the government records request form and deliver it in person, by mail or electronically during regular business hours to the Custodian of Records. Your request is not considered filed until the Custodian of Records receives the completed request form. If you submit the request form to any other officer or employee of NJ TRANSIT, that officer or employee does not have the authority to accept your request form on behalf of NJ TRANSIT and you will be directed to the Custodian of Records.
2. If you submit a request for access to government records to someone other than the Custodian of Records, do not complete the NJ TRANSIT request form, or attempt to make a request for access by telephone, the Open Public Records Act and its deadlines, restrictions and remedies will not apply to your request.
3. The fees for duplication of a government record in printed form are listed on the government records request form. We will notify you of any special charges, special service charges or other additional charges authorized by State law or regulation before processing your request. Payment shall be made by check or money order payable to NJ TRANSIT.
4. You may be charged a 50% or other deposit when a request for copies exceeds \$25. The NJ TRANSIT custodian will contact you and advise you of any deposit requirements. Anonymous requests, when permitted, require a deposit of 100% of estimated fees. You agree to pay the balance due upon delivery of the records.
5. Under OPRA, a custodian must deny access to a person who has been convicted of an indictable offense in New Jersey, any other state, or the United States, and who is seeking government records containing personal information pertaining to the person's victim or the victim's family.
6. By law, NJ TRANSIT must notify you that it grants or denies a request for access to government records within seven business days after the Custodian of Records receives the request, provided that the record is currently available and not in storage. If the record requested is not currently available or is in storage, NJ TRANSIT will advise you within seven business days when the record can be made available and the estimated cost. You may agree to extend the time NJ TRANSIT has to make records available or review your request.
7. You may be denied access to a government record if your request would substantially disrupt agency operations and the Custodian of Records is unable to reach a reasonable solution with you.
8. If NJ TRANSIT is unable to comply with your request for access to a government record, the Custodian of Records will indicate the reasons for denial.
9. Except as otherwise provided by law or by agreement with the requester, if the Custodian of Records fails to respond to you within seven business days of receiving a completed request form, the failure to respond will be considered a denial of your request.
10. If your request for access to a government record has been denied or unfilled within the time permitted by law, you have a right to challenge the decision by the NJ TRANSIT to deny access. At your option, you may either institute a proceeding in the Superior Court of New Jersey or file a complaint in writing with the Government Records Council (GRC) located in the Department of Community Affairs. You may contact the GRC by toll-free telephone at 866-850-0511.
11. Information provided on the government records request form may be subject to disclosure under the Open Public Records Act.

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