



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

October 27, 2015 Government Records Council Meeting

Paul Nichols
Complainant

Complaint No. 2014-291

v.

Housing Authority of Bergen County
Custodian of Record

At the October 27, 2015 public meeting, the Government Records Council (“Council”) considered the October 20, 2015 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 because the Council takes judicial notice of the court’s decision in Nichols v. Hous. Auth. of Bergen Cnty., 2014 N.J. Super. Unpub. LEXIS 2884, 17 (December 12, 2014), the Custodian did not unlawfully deny access to the Shelter list. N.J.S.A. 47:1A-6. Specifically, the court performed a balancing test for the exact same record and determined that “the individual’s privacy right justified . . .” the Custodian’s denial of access. Id. at 22. N.J.S.A. 47:1A-1; Burnett v. Cnty. of Bergen, 198 N.J. 408 (2009).

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 27th Day of October, 2015

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: October 29, 2015



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 27, 2015 Council Meeting**

**Paul Nichols¹
Complainant**

GRC Complaint No. 2014-291

v.

**Housing Authority of Bergen County²
Custodial Agency**

Records Relevant to Complaint: “List provided to security (Department of Public Safety-Security Division) of persons banned from the property of the Housing, Health & Human Services Center (“Shelter”) located at 120 South River Street in Hackensack.”

Custodian of Record: Heather Wei

Request Received by Custodian: August 4, 2014

Response Made by Custodian: August 12, 2014

GRC Complaint Received: August 13, 2014

Background³

Request and Response:

On August 4, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian, seeking the above-mentioned records. On August 12, 2014, the Custodian responded in writing to deny the request, stating that the disclosure would violate citizens’ reasonable expectation of privacy. N.J.S.A. 47:1A-1 and Executive Order No. 21 (Governor McGreevey, 2002)(“EO 21”).

Denial of Access Complaint:

On August 13, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that the Custodian could have redacted personal information from the record. The Complainant further asserted that non-“personal” information on the record is not exempt; however, the Custodian denied access on the basis that the record might contain personal information. The Complainant argued that such a denial was not consistent with OPRA.

¹ No legal representation listed on record.

² Represented by Terrence Corrison, Esq., Breslin & Breslin (Hackensack, NJ).

³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Statement of Information:

On September 5, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on August 4, 2014. The Custodian affirmed that she sought to obtain the record from the Director of the Shelter. The Custodian certified that she subsequently responded to the Complainant in writing on August 12, 2014, denying access to the responsive record under the personal privacy exemption. N.J.S.A. 47:1A-1.1.

The Custodian certified that the agency’s responsibility included “safeguarding from public access a citizen’s personal information with which it has been entrusted when disclosure would violate the citizens’ expectation of privacy.” She stated that the Complainant sought personal information of those using the Shelter, which is comprised of “homeless people, some of whom have medical mental and/or emotional issues.” She also noted that some have pending criminal or civil legal matters. The Custodian contended that the release of information concerning “guests,” who had been banned from the Shelter for various reasons, such as past behavior, failure to follow rules, and “certain physical emotional or mental issues which the Shelter is not equipped to handle,” would violate their reasonable expectation of privacy. The Complainant noted that the exemption is particularly applicable “in light of the stigma associated with homelessness.”

Superior Court Action:

On November 3, 2014, the Complainant filed a cause of action in Superior Court, encompassing several requests, including the subject OPRA request. One of the other OPRA requests (dated October 22, 2014) sought the exact same records at issue here.

On December 12, 2014, the court held that the portion of the Complainant’s cause of action regarding the subject OPRA request “must be dismissed because prior to filing this matter in [S]uperior [C]ourt, [the Complainant] has a complaint pending, which remains pending, with the GRC over identical requests for the same documents.” Nichols v. Hous. Auth. of Bergen Cnty., 2014 N.J. Super. Unpub. LEXIS 2884, 17 (December 12, 2014).⁴ However, the court proceeded with a few of the other OPRA requests, including the October 22, 2014, OPRA request seeking the Shelter list.

Analysis

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.

⁴ A requestor may only challenge a custodian's denial by either “filing an action in Superior Court *or* a complaint with the GRC.” Mason v. City of Hoboken, 196 N.J. 51, 57 (2008)(*citing* N.J.S.A. 47:1A-6)(emphasis added).

OPRA also provides that “a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy . . .” N.J.S.A. 47:1A-1.

The record at issue in this complaint is a list of persons banned from the Shelter. The Complainant disputed the Custodian’s denial of access under the privacy exemption, arguing that she could have redacted the list.

Subsequent to filing the instant complaint, the Complainant submitted additional OPRA requests to the Custodian one on October 22, 2014, seeking the exact same record. Following receipt of the Custodian’s denial of those requests, the Complainant filed a cause of action in Superior Court. His action included both the subject OPRA request and the October 22, 2014, OPRA request seeking the same record. The court rendered a decision on December 12, 2014, dismissing the portion of the cause of action regarding the subject OPRA request. However, the court proceeded to hold on the disclosability of the Shelter list based on the October 22, 2014, OPRA request. Therein, the court conducted a balancing test in accordance with Doe v. Poritz, 142 N.J. 1 (1995), and Burnett v. Cnty. of Bergen, 198 N.J. 408 (2009). Based on the parties’ arguments, the court held that “[w]ith only two factors supporting disclosure, and three . . . weighing heavily in favor of a denial of access . . .” the Custodian lawfully denied access to the Shelter list.

N.J.A.C. 1:1-15.2(a) and (b) state that official notice may be taken of judicially noticeable facts (as explained in N.J.R.E. 201 of the New Jersey Rules of Evidence), as well as of generally recognized technical or scientific facts within the specialized knowledge of the agency or the judge. The Appellate Division has held that it was appropriate for an administrative agency to take notice of an appellant’s record of convictions because judicial notice could have been taken of the records of any court in New Jersey, and appellant's record of convictions were exclusively in New Jersey. *See* Sanders v. Div. of Motor Vehicles, 131 N.J. Super. 95 (App. Div. 1974).

Thus, the GRC takes judicial notice of the court’s decision in Nichols, 2014 N.J. Super. Unpub. LEXIS 2884, regarding the disclosability of the Shelter list. The court has already addressed the issue; thus, a full adjudication of this complaint would only result in a duplicative adjudication of same. Additionally, the court addressed the issue through a balancing test: the GRC routinely engages in the same test when determining whether a custodian lawfully denied access to certain records or information based on the privacy interest. *See* Faulkner v. Rutgers Univ., GRC Complaint No. 2007-149 (May 2008); Levitt v. Twp. of Monclair (Essex), GRC Complaint No. 2012-150 (August 2013); Smith v. NJ Dep’t of Banking & Ins., GRC Complaint No. 2014-301 (March 2015).

Accordingly, because the Council takes judicial notice of the court’s decision in Nichols, 2014 N.J. Super. Unpub. LEXIS 2884, the Custodian did not unlawfully deny access to the Shelter list. N.J.S.A. 47:1A-6. Specifically, the court performed a balancing test for the exact same record and determined that “the individual’s privacy right justified . . .” the Custodian’s denial of access. *Id.* at 22. N.J.S.A. 47:1A-1; Burnett, 198 N.J. 408.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Council takes judicial notice of the court's decision in Nichols v. Hous. Auth. of Bergen Cnty., 2014 N.J. Super. Unpub. LEXIS 2884, 17 (December 12, 2014), the Custodian did not unlawfully deny access to the Shelter list. N.J.S.A. 47:1A-6. Specifically, the court performed a balancing test for the exact same record and determined that "the individual's privacy right justified . . ." the Custodian's denial of access. Id. at 22. N.J.S.A. 47:1A-1; Burnett v. Cnty. of Bergen, 198 N.J. 408 (2009).

Prepared By: Ernest Bongiovanni
Staff Attorney

Reviewed By: Joseph Glover
Executive Director

October 20, 2015