



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

June 30, 2015 Government Records Council Meeting

Kevin M. Barry
Complainant

Complaint No. 2014-309

v.

NJ Transit
Custodian of Record

At the June 30, 2015 public meeting, the Government Records Council (“Council”) considered the May 19, 2015 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. The Custodian’s failure to respond in writing to the Complainant’s clarification 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. *See N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Kelley v. Twp. of Rockaway*, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). *See also Kohn v. Twp. of Livingston (Essex)*, GRC 2013-363 (July 2014),
2. The Custodian did not unlawfully deny access to the requested records because the Custodian certified that such records do not exist at the agency, and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. *See Pusterhofer v. NJ Dep’t of Educ.*, GRC Complaint No. 2005-49 (July 2005).
3. Although the Custodian failed to respond to the Complainant’s clarification in a timely manner, the Custodian did not unlawfully deny the Complainant access to said records. 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 an 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 30th Day of June, 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: July 2, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 30, 2015 Council Meeting**

**Kevin M. Barry¹
Complainant**

GRC Complaint No. 2014-309

v.

**New Jersey Transit²
Custodial Agency**

Records Relevant to Complaint: Copies via mail delivery of "...documents related to the investigation surrounding criminal citations tps 103489 and tps 103409. Both criminal citations were issued by Benjamin Zink, and follow-up investigations were conducted by several NJ Transit corporation officers, two of whom were attached to a JTTF and conducted an investigation at 505 Schuyler Ave North Arlington NJ on 01/13/2014 regarding the circumstances surrounding the issuance of the criminal citations and other unknown officer(s) who conducted LEDS database searches of Kevin M. Barry on 01/09/2014 and 01/13/2014 also related to these criminal citations. I am requesting these documents under provisions of N.J.S.A. 47:1A-3.b since an arrest (criminal citation) was made and which states in part: [provisions of OPRA omitted]...Per N.J.S.A. 47:1A-3.b, I am requesting documents relating to the identities and agencies of the officers involved in the investigation surrounding the circumstances of the issuance of criminal citations tps 103489 and tps 103409."

Custodian of Record: Peter N. Spall

Request Received by Custodian: August 8, 2014

Response Made by Custodian: August 18, 2014

GRC Complaint Received: September 3, 2014

Background³

Request and Response:

On August 8, 2014, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On August 18, 2014, the sixth (6th) business day following receipt of said request, the Custodian responded in writing seeking clarification of the Complainant's request. On August 19, 2014, the Complainant clarified his request by narrowing the scope of same to criminal citation tps 103489 and informing the

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Kenneth M. Worton.

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.

Custodian that he is “...requesting documents—specifically, any reports, notes, emails, etc.—that provide information as to the identity of the investigating personnel, what agencies they work for, and the length of the investigation.” On September 2, 2014, the ninth (9th) business day following receipt of the Complainant’s clarification of the request, the Custodian responded in writing informing the Custodian that the requested records are criminal investigatory records not subject to disclosure pursuant to N.J.S.A. 47:1A-1.1.

Denial of Access Complaint:

On September 3, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that on August 8, 2014, he submitted his records request to the Custodian and that the Custodian responded on August 18, 2014, seeking clarification of the request. The Complainant states that on August 19, 2014, he provided the requested clarification. The Complainant states that on September 2, 2014, the Custodian responded, denying him access to the requested records because the Custodian claimed that the records were exempt criminal investigatory records. The Complainant contends that he is entitled to disclosure of the requested identities and agencies of the investigating personnel pursuant to N.J.S.A. 47:1A-3(b).

Statement of Information:

On September 19, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that he received the Complainant’s OPRA request on August 8, 2014. The Custodian also certifies that he responded in writing on August 18, 2014, requesting clarification of the Complainant’s request. The Custodian certifies that he needed clarification because the two tickets issued to the Complainant in December 2013 and the investigations of him in January 2014 were unrelated events. The Custodian states that the Complainant provided the requested clarification on August 19, 2014, and after he received the clarification he knew that the Complainant was requesting documents related to the investigation conducted on January 9, 2014.

The Custodian states that, although he responded to the Complainant on September 2, 2014, informing him that the requested records were criminal investigatory records exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1, this was not a correct response. The Custodian certifies that upon consulting with the New Jersey Transit Police Department, he learned that the January 9, 2014, investigation was conducted by a member of the Police Department who was assigned to the Federal Bureau of Investigation (“FBI”) Joint Terrorism Task Force. The Custodian certifies that if any records were therefore produced as a result of the January 9, 2014, investigation, they are FBI records, and New Jersey Transit does not possess them.

The Custodian further certifies that because the investigation did not lead to the Complainant’s arrest, N.J.S.A. 47:1A-3(b) cited by the Complainant as grounds for disclosure is not applicable in this matter. The Custodian certifies that, for this reason, if New Jersey Transit did possess the requested records they would not have been subject to disclosure.

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).⁴ 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

On August 8, 2014, the Complainant submitted his OPRA request to the Custodian. On August 18, 2014, the sixth (6th) business day following receipt of said request, the Custodian responded in writing seeking clarification of the request. The following day, August 19, 2014, the Complainant clarified his request to the satisfaction of the Custodian. Thereafter, the Custodian failed to respond until September 2, 2014, which was the ninth (9th) business day following receipt of the Complainant's clarification.

In Kohn v. Twp. of Livingston (Essex), GRC 2013-363 (July 2014), the custodian responded to the complainant's OPRA request in a timely manner by disclosing records determined to be responsive to the request. However, the records provided by the custodian were not the records the complainant expected to receive, so the complainant then clarified his request. The custodian responded to the clarified request fourteen (14) business days later. The Council stated that upon receipt of the clarification, the custodian again had seven (7) business days to grant access, deny access, seek clarification, or request an extension of time. Therefore, the Council found that the custodian violated OPRA by responding to the clarification fourteen business days later.

Accordingly, the Custodian's failure to respond in writing to the Complainant's clarification 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. *See* N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Kelley, GRC 2007-11. *See also* Kohn, GRC 2013-363.

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

⁴ 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.

“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 Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005), the custodian certified that no records responsive to the complainant’s request for billing records existed, and the complainant submitted no evidence to refute the custodian’s certification regarding said records. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian’s certification, there was no unlawful denial of access to the requested records.

Here, the Custodian certified that he initially denied the Complainant’s request because the Complainant requested criminal investigatory records exempt from access pursuant to N.J.S.A. 47:1A-1.1. However, the Custodian certified that after consulting with the New Jersey Transit Police Department he learned that the requested records were FBI records and that New Jersey Transit does not possess them.

As such, the Custodian did not unlawfully deny access to the requested records because the Custodian certified that such records do not exist at the agency and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. *See* Pusterhofer, GRC 2005-49.

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 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 (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)).

Here, although the Custodian failed to respond to the Complainant's clarification in a timely manner, the Custodian did not unlawfully deny the Complainant access to said records. 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 an 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's failure to respond in writing to the Complainant's clarification 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. *See N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Kelley v. Twp. of Rockaway*, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). *See also Kohn v. Twp. of Livingston (Essex)*, GRC 2013-363 (July 2014),
2. The Custodian did not unlawfully deny access to the requested records because the Custodian certified that such records do not exist at the agency, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. *See Pusterhofer v. NJ Dep't of Educ.*, GRC Complaint No. 2005-49 (July 2005).
3. Although the Custodian failed to respond to the Complainant's clarification in a timely manner, the Custodian did not unlawfully deny the Complainant access to said records. 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 an unreasonable denial of access under the totality of the circumstances.

Prepared By: John E. Stewart

Approved By: Dawn R. SanFilippo
Deputy Executive Director

May 19, 2015⁵

⁵ This complaint was prepared for adjudication for the Council's May 26, 2015 meeting, but could not be adjudicated due to lack of quorum.