



**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**

**July 28, 2015 Government Records Council Meeting**

Shawn Musgrave  
Complainant  
v.  
NJ State Police  
Custodian of Record

Complaint No. 2014-342

At the July 28, 2015 public meeting, the Government Records Council (“Council”) considered the July 21, 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:

1. Because the evidence of record indicates that the Custodian initially failed to provide an exact release date for the specific record before disclosing a modified version, the Custodian’s failure to grant access, deny access, or seek an additional extension of time resulted 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, Kelley v. Township of Rockaway, GRC Complainant No. 2007-11 (October 2007).
2. While the Custodian initially disclosed a modified version of the inventory list, this was done pursuant to L&PS’s policy at the time of the request, that such records contained security and public safety information. Following a November 2014 change in policy, made subsequent to the Complainant’s OPRA request, the requested documents were ultimately disclosed, and no unlawful denial of access occurred.

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 28<sup>th</sup> Day of July, 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 30, 2015**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
July 28, 2015 Council Meeting**

**Shawn Musgrave<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-342**

**v.**

**NJ State Police<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies of:

1. The current memorandum of agreement (MOA) or memorandum of understanding (MOU) with the Defense Logistics Agency, Disposition Services.
2. The annual inventory form required to be completed by MSP by the state coordinator of the 1033 program.<sup>3</sup>

**Custodian of Record:** Sgt. Harry Rocheskey, Augusta Barracks (named on record)

**Request Received by Custodian:** August 19, 2014

**Response Made by Custodian:** September 15, 2014

**GRC Complaint Received:** October 10, 2014

**Background<sup>4</sup>**

**Request and Response:**

On August 19, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 27, 2014, the Custodian responded in writing by seeking clarification of to the request. That same day, the Custodian informed the Complainant in writing that he had obtained the requested MOA and was “still working” on locating the annual inventory form. The Custodian, after realizing that the Complainant wanted “the records documenting the equipment that was released, not a blank form,” informed the Complainant later that same day via e-mail that those records were “not ready for release but we do have them.” The Custodian stated that he anticipated the requested record being available “in the next few weeks,” and that once received, it would be forwarded to

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

<sup>2</sup> Represented by Deputy Attorney General Adam Robert Gibbons.

<sup>3</sup> The “1033 program” refers to Section 1033 of the “National Defense Authorization Act for Fiscal Year 1997.” 10 U.S.C. §2576, *et seq.*, a Federal program authorizing the transfer of excess military equipment from the US Department of Defense to state and local law enforcement.

<sup>4</sup> 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.

the Complainant. On September 2, 2014, the Complainant wrote to the Custodian, seeking a clarification as to the estimated completion date for the request.

On September 8, 2014, the Complainant wrote to the Custodian, again seeking clarification as to an estimated release date for the records, noting that he had received a voicemail the week prior (on September 3), indicating the documents would be disclosed “within a couple of days.” On September 15, 2014, the Custodian disclosed the requested records to the Complainant. That same day, the Complainant wrote to the Custodian, asserting that the request was not, in fact, completed, because the spreadsheets released by the New Jersey State Police (“NJSP”) did not provide “full agency-by-agency transfer data for all equipment transfers” and did not indicate “the reason under New Jersey law for splitting the equipment into ‘General’ and ‘Tactical’.”

#### Denial of Access Complaint:

On October 14, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that, while the Custodian had provided a copy of the MOA (item 1 of the request), he provided only a partial inventory of equipment and indicated that he would not provide a full inventory (item 2 of the request). The Complainant stated that the Custodian had not provided a valid OPRA exemption for withholding said documents.

#### Statement of Information:

On May 6, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on August 19, 2014. Following receipt of the Complainant’s OPRA request, the Custodian sent a request to the NJSP Emergency Management Section, seeking responsive records. The Custodian certified that responsive records were received from the NJSP Emergency Management Section on September 15, 2014, and disclosed that same day to the Complainant. The Custodian certified that the records disclosed were: 1) an Excel spreadsheet containing §1033 ESO NJ General Inventory and §1033 NJ LESO Tactical Inventory, consisting of 50 pages and 2) an Excel spreadsheet containing the MOA with the DLA, consisting of 14 pages.

The Custodian noted that records are exempt from public access under OPRA to the extent provided by statute, regulation, or Executive Order. N.J.S.A. 47:1A-1. Pursuant to N.J.S.A. 41:1A-1.1, government records shall not include “security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software.” The Custodian further argued that Executive Order #21 provides that the following records shall not be deemed public records: “Any government record where the inspection, examination or copying of that record would substantially interfere with the State’s ability to protect and defend the State and its citizens against acts of sabotage or terrorism, or which, if disclosed, would materially increase the risk or consequences of potential acts of sabotage or terrorism.”

The Custodian also asserted that, pursuant to N.J.A.C. 13:1E-3.2(a), the following records shall not be considered government records subject to public access:

“5. *That portion* of any inventory of State and local emergency resources compiled and any policies or plans compiled by an agency pertaining to the mobilization, deployment, or tactical operations involved in responding to emergencies, including employee emergency contact information, which, if disclosed, would substantially interfere with the State’s ability to protect and defend the State and its citizens against acts of sabotage or terrorism, or which, if disclosed, would materially increase the risk or consequences of potential acts of terrorism or sabotage . . .” (emphasis added).

The Custodian’s SOI asserted that the tactical inventory list compiled pursuant to the §1033 law provides the location of military grade tactical equipment transferred to State agencies from the Department of Defense. The Custodian stated that the equipment includes assault weapons and other tactical armaments, trucks, tools and heavy machinery, and assorted defensive items, such as vests and safety equipment, among other items. The Custodian certified that when originally responding to the Complainant’s request, the NJSP considered “dissemination of the exact location of select items to have the effect of substantially interfering with the State’s ability to protect and defend the people of this State,” pursuant to N.J.A.C. 13:1E-3.2(a)(5).

The Custodian argued that, pursuant to N.J.S.A. 47:1A-1.1, Executive Order #21, and N.J.A.C. 13:1E-3.2(a)(5), he responded to the Complainant’s request by producing a “version of the inventory list that best reflected this policy of safety and security, while remaining fully compliant with OPRA and other relevant law.” The Custodian certified that the entries for assault weapons, tactical armaments, trucks, and similar items believed to be “too sensitive” to identify by specific town/city were on the inventory list provided to the Complainant on September 15, 2014, but instead identified only by county. As an example, the Custodian certified that an entry for a 5.56 millimeter rifle sent to Belleville, New Jersey, was indicated only as “Essex County” in the spreadsheet. The Custodian stated that other items not believed to pose security concerns were identified by specific town/city and law enforcement agency.

Attached to the SOI was a certification from Deputy Attorney General Bruce J. Solomon, who averred that he had “personal knowledge” of the instant matter. The DAG argued that since 2002, the Department of Law and Public Safety (L&PS) has taken, and still takes, the position that records that reveal the specific inventory and location of weapons and tactical equipment held by State and local law enforcement agencies are confidential and are not subject to public access pursuant to N.J.S.A. 47:1A-1, *et seq.*

However, the DAG noted that, in November 2014, a time period after the Complainant’s filing of a denial access complaint, a determination was made that certain information related to the §1033 program which was not previously disclosed could be. This was a change in L&PS’s policy. The DAG certified that thereafter, under the revised policy, L&PS provided additional disclosures to the inventory lists of tactical and non-tactical equipment provided to New Jersey’s

law enforcement agencies. Further, the DAG certified that following the November 2014 policy change, L&PS has provided the more comprehensive disclosures to OPRA requests.

Finally, the Custodian noted that on April 15, 2015, the NJSP elected to provide the Complainant with a more comprehensive version of the inventory list. However, the Custodian argued that their original production of the modified inventory list, which redacted the specific town/city of items believed to involve security concerns, was in fact fully compliant with their then-OPRA obligations.

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

Here, the Complainant asserted that he submitted his OPRA request on August 19, 2014, and until he received the initial disclosure (the modified inventory form) on September 15, 2014, he was given only vague estimations as to when he would receive the records. After asking for clarifications on separate occasions, the Complainant first heard from the Custodian on August 27, 2014, that he would receive the records "in the next few weeks," then on September 8, 2014, "within a couple of days." The Custodian's certification provides no clarification as to why only an estimated date was provided and not a definitive written response.

Therefore, because the evidence of record indicates that the Custodian initially failed to provide an exact release date for the specific record, before disclosing a modified version, the Custodian's failure to grant access, deny access, or seek an additional extension of time resulted 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), Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

#### **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

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<sup>5</sup> 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.

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.

In the instant matter, the Complainant’s OPRA request sought copies of the NJSP’s MOA with the Defense Logistics Agency and the annual inventory form required to be completed by the state coordinator of the §1033 program. The Complainant received documents responsive to the request from the Custodian but alleges that the inventory form he received did not provide full agency-by-agency transfer data for equipment transfers. The Custodian certifies in his SOI that in the initial disclosure, the document sent to the Complainant was, in fact, a modified inventory list, as entries for certain items considered “too sensitive” to identify by specific town/city were instead identified only by county. The Custodian argues that this initial disclosure was compliant, as it followed the policy of L&PS at the time period of the request, considering dissemination of the exact location of select items to be a security and safety concern. The Custodian further states that, following a November 2014 determination that certain information related to the §1033 program could be released, subsequent OPRA requests filed with L&PS have received a more comprehensive version of the inventory list. Finally, the Custodian noted that the current, more comprehensive inventory list was ultimately disclosed to the Complainant on April 15, 2015. The Complainant has not set forth any argument that the initial response, which withheld records for safety and security reasons, violated OPRA.

L&PS, while maintaining their original response was proper pursuant to N.J.S.A. 47:1A-1.1, Executive Order #21, and N.J.A.C. 13:1E-3.2(a)(5), did ultimately disclose the requested information. The Complainant has not put forth any argument or credible evidence refuting the Custodian’s position that the initial disclosure was proper or that the policy change was not a result of his filing of the complaint.

Thus, while the Custodian initially disclosed a modified version of the inventory list, this was done pursuant to L&PS policy at the time of the request, that such records contained security and public safety information. Following a November 2014 change in policy, made subsequent to the Complainant’s OPRA request, the requested documents were ultimately disclosed, and no unlawful denial of access occurred.

### **Conclusions and Recommendations**

The Deputy Executive Director respectfully recommends the Council find that:

1. Because the evidence of record indicates that the Custodian initially failed to provide an exact release date for the specific record before disclosing a modified version, the Custodian's failure to grant access, deny access, or seek an additional extension of time resulted 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, Kelley v. Township of Rockaway, GRC Complainant No. 2007-11 (October 2007).
2. While the Custodian initially disclosed a modified version of the inventory list, this was done pursuant to L&PS's policy at the time of the request, that such records contained security and public safety information. Following a November 2014 change in policy, made subsequent to the Complainant's OPRA request, the requested documents were ultimately disclosed, and no unlawful denial of access occurred.

Prepared By: Husna Kazmir  
Staff Attorney

Approved By: Dawn R. SanFilippo  
Deputy Executive Director

July 21, 2015