



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

February 26, 2020 Government Records Council Meeting

Colleen Wilson
Complainant

Complaint No. 2018-48

v.

NJ Transit
Custodian of Record

At the February 26, 2020 public meeting, the Government Records Council (“Council”) considered the January 21, 2020 Supplemental 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 the Council dismiss this complaint because the Complainant withdrew it in an e-mail to the GRC on January 6, 2020. Therefore, no further adjudication is required.

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 26th Day of February 2020

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: March 3, 2020



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration
Supplemental Findings and Recommendations of the Executive Director
February 26, 2020 Council Meeting

Colleen Wilson¹
Complainant

GRC Complaint No. 2018-48

v.

N.J. Transit²
Custodial Agency

Records Relevant to Complaint: Electronic copies via e-mail of the most recent bridge inspection reports for seven (7) specific rail lines.

Custodian of Record: Orlando Cor-Dova
Request Received by Custodian: October 9, 2017
Response Made by Custodian: November 17, 2017
GRC Complaint Received: March 22, 2018

Background

November 12, 2019 Council Meeting:

At its November 12, 2019 public meeting, the Council considered the October 30, 2019 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

1. The GRC must conduct an *in camera* review of the responsive bridge inspection reports withheld from disclosure to determine the validity of the Custodian's assertion that the record was exempt under the security and surveillance exemptions present in OPRA, as well as Executive Order No. 21 (Gov. McGreevey, 2002). N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).

¹ No legal representation listed on record. This complaint was originally filed by Curtis Tate in his official capacity as a reporter for The Record and NorthJersey.com. However, Mr. Tate left employment during the pendency of this complaint. Thus, the GRC provided Ms. Wilson, who assumed Mr. Tate's workload at The Record, the opportunity to substitute as the Complainant herein. Ms. Wilson confirmed her intent to substitute in as the Complainant via e-mail on October 16, 2019.

² Represented by Deputy Attorney General ("DAG") Patricia A. Krogman. Previously represented by DAG Jonathan Peitz and DAG Adam Phelps.

2. **The Custodian shall deliver³ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), a document or redaction index⁴, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁵ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On November 14, 2019, the Council distributed its Interim Order to all parties. On November 21, 2019, prior Custodian's Counsel requested additional time until December 6, 2019 to submit a response to the Council's Order or file a request for reconsideration. On the same day, the Government Records Council ("GRC") granted prior Counsel's request for an extension until through December 6, 2019. On December 5, 2019, Custodian's Counsel sought a second extension through December 9, 2019 to file a request for reconsideration. On December 6, 2019, the GRC granted said extension. On December 9, 2019, Custodian's Counsel filed a request for reconsideration of the Council's Interim Order based on a mistake and attaching multiple legal certifications.

On January 6, 2020, the Complainant withdrew the instant complaint in writing (via e-mail) to the GRC.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends that the Council dismiss this complaint because the Complainant withdrew it in an e-mail to the GRC on January 6, 2020. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso
Executive Director

January 21, 2020⁶

³ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

⁴ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁶ This complaint was prepared for adjudication at the Council's January 28, 2020 meeting, but could not be adjudicated due to lack of quorum.



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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

November 12, 2019 Government Records Council Meeting

Colleen Wilson
Complainant

Complaint No. 2018-48

v.

NJ Transit
Custodian of Record

At the November 12, 2019 public meeting, the Government Records Council (“Council”) considered the October 30, 2019 Findings and Recommendations of the Council Staff 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 GRC must conduct an *in camera* review of the responsive bridge inspection reports withheld from disclosure to determine the validity of the Custodian’s assertion that the record was exempt under the security and surveillance exemptions present in OPRA, as well as Executive Order No. 21 (Gov. McGreevey, 2002). N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
2. **The Custodian shall deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,³ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council’s Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

¹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

² The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Interim Order Rendered by the
Government Records Council
On The 12th Day of November 2019

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: November 14, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 12, 2019 Council Meeting**

**Colleen Wilson¹
Complainant**

GRC Complaint No. 2018-48

v.

**N.J. Transit²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of the most recent bridge inspection reports for seven (7) specific rail lines.

Custodian of Record: Orlando Cor-Dova

Request Received by Custodian: October 9, 2017

Response Made by Custodian: November 17, 2017

GRC Complaint Received: March 22, 2018

Background³

Request and Response:

On October 6, 2017, Curtis Tate, a reporter for The Record, submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 17, 2017,⁴ the Custodian responded in writing denying access to records responsive to the request under the safety and security exemptions. N.J.S.A. 47:1A-1.1.

Denial of Access Complaint:

On March 22, 2018, Mr. Tate filed a Denial of Access Complaint with the Government Records Council (“GRC”). Mr. Tate asserted that he disagreed with the Custodian’s denial of access. Mr. Tate noted that in response to a previous OPRA request to the Office of the Governor,

¹ No legal representation listed on record. This complaint was originally filed by Curtis Tate in his official capacity as a reporter for The Record and NorthJersey.com. However, Mr. Tate left employment during the pendency of this complaint. Thus, the GRC provided Ms. Wilson, who assumed Mr. Tate’s workload at The Record, the opportunity to substitute as the Complainant herein. Ms. Wilson confirmed her intent to substitute in as the Complainant via e-mail on October 16, 2019.

² Represented by Deputy Attorney General (“DAG”) Jonathan Peitz. Previously represented by DAG Adam Phelps.

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.

⁴ The GRC notes that the Custodian did not respond until after the expiration of the statutory time frame. However, the GRC will not address this issue because Mr. Tate did not raise it in this complaint.

he received in an unredacted version of CSX Transportation's New Jersey "Bridges Resource Guide" ("Guide"), which listed the location, type, and condition of all 91 rail bridges, without redactions. Mr. Tate further noted that N.J. Transit also published its most recent "Positive Train Control Implementation Plan" ("Plan") on its website. Mr. Tate argued that the "Plan" contained "detailed diagrams of various stations and interlockings." Mr. Tate contended that if the forgoing were so readily available to the public, the Custodian has no justification to deny access to the requested inspection reports. Mr. Tate thus requested that GRC find that the Custodian unlawfully denied access to the responsive reports and order disclosure of same.

Statement of Information:

On April 11, 2018, the Custodian filed a Statement of Information ("SOI") attaching a certification from Chief Engineer Lisa Fanning. The Custodian certified that he received Mr. Tate's OPRA request on October 9, 2017. The Custodian certified that his search included contacting the Capital Planning & Programs Department, who located responsive inspection reports. The Custodian certified that he responded in writing on November 17, 2017 denying access to eight (8) inspection reports under the safety and security exemptions. N.J.S.A. 47:1A-1.1.

The Custodian contended that OPRA supports a denial of access where disclosure would jeopardize the safety of a building or facility or persons therein" or would "create a risk to the safety of persons, property, electronic data or software." N.J.S.A. 47:1A-1.1. See also Executive Order No. 21 (Gov. McGreevey, 2002) ("EO 21") (exempting access to records that would "substantially interfere with the State's ability to protect and defend the State and its citizens against acts of sabotage or terrorism . . ."). The Custodian noted that in Gilleran v. Twp. of Bloomfield, 227 N.J. 159 (2016), the Supreme Court applied said exemptions to security camera footage sought by plaintiff in finding that it was exempt from disclosure. The Custodian also noted that the Appellate Division also found in favor of non-disclosure of the Motor Vehicle Commission's "Enhanced Motor Vehicle Inspection and Maintenance System" contract based on the exemptions. See Parsons Infrastructure & Envtl. Grp., Inc. v. State, 2018 N.J. Super. Unpub. LEXIS 432 (App. Div. 2018).

The Custodian affirmed that 460 reports responsive to Mr. Tate's OPRA request reveal vulnerabilities of N.J. Transit's bridges virtually State-wide. The Custodian argued that he properly denied access to the responsive reports under the security exemptions. The Custodian affirmed that the reports contained detailed information on each bridge inclusive of location, access and egress, as well as structural deficiencies. Fanning Cert. ¶ 7-10. The Custodian further certified that the reports identify basic measurements for each bridge, an assessment of specific conditions affecting them, and a narrative identifying weaknesses or deficiencies in need of attention or repair. Id. The Custodian also certified that in 2007, the New Jersey Department of Homeland Security issued a "Homeland Security Assessment" ("Assessment") advising government and private sector companies to protect sensitive bridge inspection information from disclosure "to prevent adversaries from exploiting such information in conducting attacks. Fanning Cert. ¶ 11-14. The Custodian averred that armed with information present in the reports, nefarious individuals could target those areas in the bridges to maximize damage. Fanning Cert. ¶ 10-11.

The Custodian argued that disclosure of the inspection reports, even with redactions, would pose a significant risk to the citizens of the State. The Custodian noted that multiple recent transportation-related attacks make clear that transportation systems are still a target for terrorist activity. The Custodian argued that he based his denial on advice from Chief Engineer Fanning, the “Assessment,” as well as OPRA, EO 21, and N.J.A.C. 16:1A-4.3.

The Custodian finally argued that the documents Mr. Tate relied on to refute his denial are of no moment in this complaint. The Custodian noted that the Office of the Governor disclosed the Guide in response to a request seeking e-mails. The Custodian averred that the Guide was CSX’s own report showing maintenance on its own bridges. The Custodian further noted that N.J. Transit was required to provide the Plan to the Federal Rail Administration (“FRA”). The Custodian stated that the FRA then posted the Plan to its own website. The Custodian contended that in both situations, the records were not inspection reports and were not disclosed by N.J. Transit in response to an OPRA request.

Additional Submissions:

On April 16, 2018, Mr. Tate e-mailed the GRC requesting that it conduct an *in camera* review of the responsive inspection reports.

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.

In Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council⁵ that accepted the custodian’s legal conclusion for the denial of access without further review. The Appellate Division noted that “OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.” Id. The court stated that:

[OPRA] also contemplates the GRC’s *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’

⁵ Paff v. NJ Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

[Id. at 355.]

Further, the court found that:

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal . . . There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC's obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

[Id.]

Here, Mr. Tate sought access to the most recent bridge inspection reports for seven (7) rail lines. The Custodian responded denying access to the reports under the security and surveillance exemptions present in N.J.S.A. 47:1A-1.1. This complaint followed, wherein Mr. Tate argued that N.J. Transit should be compelled to disclose the reports. In the SOI, the Custodian maintained his position that the 460 responsive reports were not disclosable under OPRA (citing N.J.S.A. 47:1A-1.1; EO 21; N.J.A.C. 16:1A-4.3; Fanning Cert.; the Assessment). Mr. Tate subsequently requested that the GRC conduct an *in camera* review of the reports.

While the Custodian and Chief Engineer Fanning provided some information regarding the sensitivity of the reports, a “meaningful review” is necessary to determine same reasonably fall within the cited security exemptions, as well as EO 21. The GRC must thus review the reports to determine the full applicability of those exemptions. Such an action is similar to Parsons, 2018 N.J. Super. Unpub. LEXIS 432, and Kasko v. Town of Westfield (Union), GRC Complaint No. 2014-389 (Interim Order dated June 28, 2016), where each venue conducted an *in camera* review to address whether responsive records were exempt in part or whole under the security exemptions

Therefore, the GRC must conduct an *in camera* review of the responsive bridge inspection reports withheld from disclosure to determine the validity of the Custodian's assertion that the record was exempt under the security and surveillance exemptions present in OPRA, as well as EO 21. N.J.S.A. 47:1A-1.1. See Paff, 379 N.J. Super. at 346.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The GRC must conduct an *in camera* review of the responsive bridge inspection reports withheld from disclosure to determine the validity of the Custodian's assertion that the record was exempt under the security and surveillance exemptions present in OPRA, as well as Executive Order No. 21 (Gov. McGreevey, 2002). N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
2. **The Custodian shall deliver⁶ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), a document or redaction index⁷, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁸ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Executive Director

October 30, 2019

⁶ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

⁷ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

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