



State of New Jersey
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

October 30, 2018 Government Records Council Meeting

Tanya Wynn
Complainant

Complaint No. 2016-224

v.

Borough of Maywood (Bergen)
Custodian of Record

At the October 30, 2018 public meeting, the Government Records Council (“Council”) considered the October 23, 2018 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 Custodian failed to provide a specific lawful basis for denying access, the Custodian’s response to the Complainant’s August 1, 2016 OPRA request is insufficient. N.J.S.A. 47:1A-5(g); Schwarz v. N.J. Dep’t of Human Serv., GRC Complaint No. 2004-60 (February 2005); Renna v. Union Cnty. Improvement Auth., GRC Complaint No. 2008-86 (May 2010).
2. Notwithstanding the Custodian’s insufficient response, she did not unlawfully deny access to the Complainant’s August 1, 2016 OPRA request seeking any record, including police reports, that mentions her name. N.J.S.A. 47:1A-6. The Complainant’s request failed to include a date, range or dates, or other identifiable information and is therefore invalid. See MAG Entm’t, LLC. v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 549 (App. Div. 2005), Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005), Burke v. Brandes, 429 N.J. Super. 169, 176 (App. Div. 2012), and Love v. Spotswood Police Dep’t (Middlesex), GRC Complaint No. 2014-223 (Interim Order dated March 31, 2015).
3. The Custodian lawfully denied access to the Complainant’s OPRA request seeking “rap sheets.” N.J.S.A. 47:1A-6. Specifically, Executive Order No. 9 (Gov. Hughes, 1963) provides that said records are exempt from disclosure under OPRA. N.J.S.A. 47:1A-9(a).
4. The Custodian violated N.J.S.A. 47:1A-5(g) by failing to provide a lawful basis for denying the Complainant’s August 1, 2016 OPRA request. However, the evidence in the record demonstrates that the Complainant’s August 1, 2016 OPRA request was invalid for failing to sufficiently identify government records. Additionally, the Custodian lawfully denied access to the Complainant’s August 4, 2016 OPRA request.



Moreover, 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 30th Day of October, 2018

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 1, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
October 30, 2018 Council Meeting**

**Tanya Wynn¹
Complainant**

GRC Complaint No. 2016-224

v.

**Borough of Maywood (Bergen)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of:

August 1, 2016 OPRA Request

“I would like anything (police reports, etc.) that have my name on it: Tanya Wynn.”

August 4, 2016 OPRA Request

“I am requesting a copy of criminal reports “rap sheet” for the following people: Samantha Barto Dietz and Denise Delsalvo, also known as Denise Davis. The records I am requesting which are public knowledge are felony, misdemeanors, infractions minus traffic violations. If my records [are] in Maywood I request those too.”

Custodian of Record: Jean M Pelligra

Requests Received by Custodian: August 1, 2016; August 4, 2016

Response Made by Custodian: August 3, 2016; August 5, 2016

GRC Complaint Received: August 11, 2016

Background³

Request and Response:

August 1, 2016 OPRA Request

On August 1, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records along with two (2) other OPRA requests that are not at issue in this matter. On August 3, 2016, the Custodian responded in writing to the Complainant, asserting that the requests were invalid as they sought information or ask questions. The Custodian added that a proper request must identify with reasonable clarity those

¹ No representation listed on record.

² Represented by Ronald Dario, Esq or Dario, Albert, Metz & Eyerman, LLC (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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

documents desired, citing Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005),⁴ and New Jersey Builders Ass'n v. New Jersey Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007). The Custodian also noted that in regards to police reports on herself, the Complainant could go to the Borough of Maywood ("Borough") Police Department Records Clerk, who could help her find the information she seeks.

That same day, the Complainant requested clarification as to which request the Custodian was referring to in her response. The Complainant also asserted that an employee named "Dawn" supplied her with (1) record but refused to provide others. The Custodian responded thereafter, restating that for access to her own records, the Complainant would need to reach out to the Maywood Police Department ("MPD") Records Clerk to seek those records. The Custodian added that the correspondence attached to the original response e-mail addressed the other two (2) OPRA requests. Furthermore, the Custodian stated that no one named "Dawn" works for the police department, so she is unaware of who the Complainant is referring.

August 4, 2016 OPRA Request

On August 4, 2016, the Complainant submitted a second OPRA request seeking the above-mentioned records. On August 5, 2016, the Custodian responded in writing stating that the Borough was not authorized to keep criminal case history reports.

Denial of Access Complaint:

On August 11, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that an individual named Dawn told her that the only way she could get those records was if she was going to court. After receiving the Custodian's response to the August 1, 2016 OPRA request, the Complainant stated that she submitted her second OPRA request on August 4, 2016. The Complainant asserted that upon being told that the Borough was not authorized to keep the requested records, she asked the Custodian where she find them, but did not receive a response.

Statement of Information:

On August 31, 2016 the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's first (1st) OPRA request on August 1, 2016. The Custodian certified that she responded in writing on August 3, 2016, stating that her request for police records on herself was not an OPRA request, and would have to reach out to the MPD Records Clerk to get assistance in obtaining those records.

The Custodian then certified that she received the Complainant's second (2nd) OPRA request on August 4, 2016. The Custodian certified that she responded in writing on August 5, 2016, stating that the Borough was not authorized to keep criminal history reports. The Custodian also certified that before she could respond to the Complainant's request for advice on where to locate those records, the Complainant informed her that she filed this complaint.

⁴ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Complaint No. 2004-78 (October 2004).

Regarding the August 1, 2016 OPRA request, the Custodian asserted that the request provided a vague description of what she was seeking, but failed to identify documents or date parameters. The Custodian asserted that the request sought information and did not identify a specific government record, referencing N.J. Builders Ass'n, 390 N.J. Super. at 180. The Custodian also cited Bent, 381 N.J. Super. at 37, asserting that an OPRA request must identify with reasonable clarity the documents desired.

The Custodian noted that the Complainant did appear at MPD and met with the Records Custodian, who in turn provided the Complainant with a police complaint.

Regarding the August 4, 2016 OPRA request, the Custodian asserted that the State Bureau of Identification (“SBI”) is the agency repository for processing and dissemination of all criminal history information for criminal justice purposes. The Custodian also contended that N.J.A.C. 13:59-1 et seq. authorizes the dissemination of such criminal history for limited reasons. The Custodian asserted that the Borough is not authorized to store nor disseminate such information. Additionally, the Custodian contended that driver history information is handled by the New Jersey Motor Vehicle Commission, and the Complainant would have to submit a request for a driver abstract from them.

Analysis

Sufficiency of Response

OPRA provides that “[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor.” N.J.S.A. 47:1A-5(g). Thus, OPRA requires that, when providing access to redacted records, a custodian shall provide a specific lawful basis for redactions.

In Schwarz v. N.J. Dep’t of Human Serv., GRC Complaint No. 2004-60 (February 2005), the Council held that that specific citations to the law that allows a denial of access are required at the time of the denial. See also Renna v. Union Cnty. Improvement Auth., GRC Complaint No. 2008-86 (May 2010) (noting that N.J.S.A. 47:1A-5(g) requires a custodian of record to indicate the specific basis for noncompliance).

In this matter, the Custodian failed to provide a specific lawful basis for denying access to the Complainant’s request for police reports on herself. In her initial August 3, 2016 response, the Custodian stated that the Complainant’s request was “not an [OPRA] request,” without reference to the law, while providing such citations in reference to the other OPRA requests. When asked by the Complainant to clarify as to which requests she is responding with legal citations, the Custodian stated that the response was directed at the two (2) requests that are not at issue. The Custodian also restated that for the request seeking her own police records, the Complainant needed to contact the MPD Records Clerk.

Therefore, because the Custodian failed to provide a specific lawful basis for denying access, the Custodian’s response to the Complainant’s August 1, 2016 OPRA request is insufficient. N.J.S.A. 47:1A-5(g); Schwarz, GRC 2004-60; Renna, GRC 2008-86.

Validity of Request

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 New Jersey Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records “readily accessible for inspection, copying, or examination.” N.J.S.A. 47:1A-1.*

[MAG Entm’t, LLC. v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) (emphasis added).]

The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

[Id. at 549 (emphasis added).]

The Court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt . . . In short, OPRA does not countenance open-ended searches of an agency's files.” Id. (emphasis added). Bent, 381 N.J. Super. at 37, N.J. Builders Ass’n, 390 N.J. Super. at 180; Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

In Dawara v. Office of the Essex Cnty. Adm’r, GRC Complaint No. 2013-267 (March 2014), the Council held that a request for “police reports” was not overly broad, as the request was “confined to a specific subject matter.” Furthermore, the Council has long held that “arrest reports” are specifically identifiable records and subject to disclosure. See Morgano v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2007-156 (February 2008).

However, a request for a specific type of document or subject matter must still be accompanied by a sufficient amount of identifying information. See Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012). In Love v. Spotswood Police Dep't (Middlesex), GRC Complaint No. 2014-223 (Interim Order dated March 31, 2015), the complainant sought “police reports and/or complainants signed against [Kristen Ellis].” The Council held that while the complainant’s request for “police reports” and “complainants” reasonably described the subject matter, the complainant failed to provide a specific date or range of dates within his request. Id at 3. The Council therefore found that the complainant’s request was overly broad. Id.

In the instant matter, the Complainant’s August 1, 2016 OPRA request sought access to “anything” that has her name on it, and mentioned police reports specifically. A request for “anything” does not specifically identify the records sought. Bent, 381 N.J. Super. at 37. In addition, the Complainant’s mention of police reports does not cure the defect. Similar to the facts in Love, the Complainant failed to provide a specific date or range of dates or any other identifying information. GRC 2014-223. Thus, the request as a whole lacks sufficient identifying information, and would require the Custodian to locate and search for the entire agency’s files for documents mentioning the Complainant’s name. Id. See also Burke, 429 N.J. Super. at 176.

Therefore, notwithstanding the Custodian’s insufficient response, she did not unlawfully deny access to the Complainant’s August 1, 2016 OPRA request seeking any record, including police reports, that mentions her name. N.J.S.A. 47:1A-6. The Complainant’s request failed to include a date, range or dates, or other identifiable information and is therefore invalid. See MAG, 375 N.J. Super. at 549, Bent, 381 N.J. Super. at 37, Burke, 429 N.J. Super. at 176, and Love, GRC 2014-223.

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 Council is permitted to raise additional defenses regarding the disclosure of records pursuant to Paff v. Twp. of Plainsboro, 2007 N.J. Super. Unpub. LEXIS 2135 (App. Div. 2007) (certif. denied, 193 N.J. 292 (2007)).⁵ In Paff, the complainant challenged the GRC’s authority to uphold a denial of access for reasons never raised by the custodian. Specifically, the Council did not uphold the basis for the redactions cited by the custodian. The Council, on its own initiative, determined that the Open Public Meetings Act prohibited the disclosure of the redacted portions to the requested executive session minutes. The Council affirmed the custodian’s denial to portions of the executive session minutes but for reasons other than those cited by the custodian. The complainant argued that the GRC did not have the authority to do anything other than determine whether the custodian’s cited basis for denial was lawful. The court held that:

⁵ On appeal from Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (March 2006).

The GRC has an independent obligation to “render a decision as to whether the record which is the subject of the complaint is a government record which must be made available for public access pursuant to’ OPRA . . . The GRC is not limited to assessing the correctness of the reasons given for the custodian’s initial determination; it is charged with determining if the initial decision was correct.”

The court further stated that:

Aside from the clear statutory mandate to decide if OPRA requires disclosure, the authority of a reviewing agency to affirm on reasons not advanced by the reviewed agency is well established. Cf. Bryant v. City of Atl. City, 309 N.J. Super. 596, 629-30 (App. Div. 1998) (citing Isko v. Planning Bd. of Livingston, 51 N.J. 162, 175 (1968) (lower court decision may be affirmed for reasons other than those given below)); Dwyer v. Erie Inv. Co., 138 N.J. Super. 93, 98 (App. Div. 1975) (judgments must be affirmed even if lower court gives wrong reason), certif. denied, 70 N.J. 142 (1976); Bauer v. 141-149 Cedar Lane Holding Co., 42 N.J. Super. 110, 121 (App. Div. 1956) (question for reviewing court is propriety of action reviewed, not the reason for the action) (aff’d, 24 N.J. 139 (1957)).

Regarding criminal history background information, colloquially known as criminal “rap sheets,” OPRA provides that it “shall not abrogate any exemption . . . made pursuant to . . . any . . . *Executive Order of the Governor . . .*” N.J.S.A. 47:1A-9(a) (emphasis added). To this end, EO 9 provides that “criminal records required to be made, maintained[,] and kept pursuant to [N.J.S.A. 53:1-20.1] and [N.J.S.A. 53:1-20.2]” are exempt from disclosure. Id. at 2(f). EO 9 is relevant with regard to rap sheets because N.J.S.A. 53:1-20.1 requires this information be collected and submitted into the criminal history background check database through the SBI. Additionally, N.J.S.A. 53:1-20.2 provides that bureaus of identification are established in “the office of the sheriff and . . . prosecutors . . .” Id. Thus, it follows that any information coalesced by county and State SBIs are exempt from access under OPRA in accordance with N.J.S.A. 47:1A-9(a) and EO 9.

To further emphasize the confidential nature of rap sheet information, State agencies have promulgated regulations that either completely exempt the information from access or limit its dissemination to a specific process (with multiple limitations). See N.J.A.C. 13:59-1 *et seq.* (New Jersey State Police regulations providing for the specific process of obtaining background checks and the limitations on who can access this information); N.J.A.C. 10A:22-2.3(a)(6) (New Jersey Department of Corrections regulation exempting from access “[c]omprehensive criminal history information (rap sheet) . . .”). Thus, all relevant statutes, regulations, and executive orders concerning rap sheets support that they are exempt from disclosure under OPRA. N.J.S.A. 47:1A-9(a); EO 9.

Of additional note, the Council recently addressed the disclosability of “rap sheets” under OPRA in Lewis v. Union Cnty. Prosecutor’s Office, GRC Complaint No. 2016-131 (Interim Order dated March 27, 2018). There, the Council held that “rap sheets” were exempt from disclosure under N.J.S.A. 47:1A-9(a) and EO 9. In the instant complaint, the Complainant sought access to “rap sheets” for two (2) individuals as well as herself. The Custodian denied this OPRA request,

asserting that the Borough was not authorized to keep such records. In her SOI, the Custodian certified that the records sought are maintained by the SBI, and made note of N.J.A.C. 13:59-1 et seq. In light of the above, the GRC is persuaded that the Custodian's denial of access was lawful.

Accordingly, the Custodian lawfully denied access to the Complainant's OPRA request seeking "rap sheets." N.J.S.A. 47:1A-6. Specifically, EO 9 provides that said records are exempt from disclosure under OPRA. N.J.S.A. 47:1A-9(a).

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 (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 (E.C.E.S. v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

In the matter before the Council, the Custodian violated N.J.S.A. 47:1A-5(g) by failing to provide a lawful basis for denying the Complainant's August 1, 2016 OPRA request. However, the evidence in the record demonstrates that the Complainant's August 1, 2016 OPRA request was invalid for failing to sufficiently identify government records. Additionally, the Custodian lawfully denied access to the Complainant's August 4, 2016 OPRA request. Moreover, 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 Council Staff respectfully recommends the Council find that:

1. Because the Custodian failed to provide a specific lawful basis for denying access, the Custodian's response to the Complainant's August 1, 2016 OPRA request is insufficient. N.J.S.A. 47:1A-5(g); Schwarz v. N.J. Dep't of Human Serv., GRC Complaint No. 2004-60 (February 2005); Renna v. Union Cnty. Improvement Auth., GRC Complaint No. 2008-86 (May 2010).
2. Notwithstanding the Custodian's insufficient response, she did not unlawfully deny access to the Complainant's August 1, 2016 OPRA request seeking any record, including police reports, that mentions her name. N.J.S.A. 47:1A-6. The Complainant's request failed to include a date, range or dates, or other identifiable information and is therefore invalid. See MAG Entm't, LLC. v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 549 (App. Div. 2005), Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005), Burke v. Brandes, 429 N.J. Super. 169, 176 (App. Div. 2012), and Love v. Spotswood Police Dep't (Middlesex), GRC Complaint No. 2014-223 (Interim Order dated March 31, 2015).
3. The Custodian lawfully denied access to the Complainant's OPRA request seeking "rap sheets." N.J.S.A. 47:1A-6. Specifically, Executive Order No. 9 (Gov. Hughes, 1963) provides that said records are exempt from disclosure under OPRA. N.J.S.A. 47:1A-9(a).
4. The Custodian violated N.J.S.A. 47:1A-5(g) by failing to provide a lawful basis for denying the Complainant's August 1, 2016 OPRA request. However, the evidence in the record demonstrates that the Complainant's August 1, 2016 OPRA request was invalid for failing to sufficiently identify government records. Additionally, the Custodian lawfully denied access to the Complainant's August 4, 2016 OPRA request. Moreover, 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: Samuel A. Rosado, Esq.
Staff Attorney

October 23, 2018