



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

July 31, 2018 Government Records Council Meeting

Scott Madlinger
Complainant

Complaint No. 2016-242

v.

Atlantic City Police Department (Atlantic)
Custodian of Record

At the July 31, 2018 public meeting, the Government Records Council (“Council”) considered the July 24, 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. The original Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the 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, GRC 2007-11.
2. The Custodian did not unlawfully deny access to the Complainant’s 1st and 3rd OPRA requests seeking incident reports involving two (2) individuals. 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 as overly broad. See MAG Entm’t, LLC. V. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 549 (App. Div. 2005), Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012), Dawara v. Office of the Essex Cnty. Adm’r, GRC Complaint No. 2013-267 (March 2014), and Love v. Spotswood Police Dep’t (Middlesex), GRC Complaint No. 2014-223 (Interim Order dated March 31, 2015).
3. While the original Custodian denied access to the Complainant’s 2nd OPRA request, the circumstances surrounding the denial were outside of her control, as the computer system containing the responsive records were inaccessible at the time of the request, and through the date of the SOI. Therefore, there was no unlawful denial of access. N.J.S.A. 47:1A-6.
4. The original Custodian’s failure to timely respond to the Complainant’s August 16, 2016 OPRA requests resulted in a violation of OPRA. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the evidence of record does not indicate that the original Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original Custodian’s actions did 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 31st Day of July, 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: August 3, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
July 31, 2018 Council Meeting**

**Scott Madlinger¹
Complainant**

GRC Complaint No. 2016-242

v.

**Atlantic City Police Department (Atlantic)²
Custodial Agency**

Records Relevant to Complaint:

1st OPRA Request

Incident reports involving Rick Minassian

2nd OPRA Request

Phone logs, officer notes, incident reports for calls involving 3101 BDWK 2112-2 and 3101 BDWK 2108-2 located in Atlantic City, NJ

3rd OPRA Request

Incident reports involving Paula Minassian

Custodian of Record: Paula Geletei³

Request Received by Custodian: August 16, 2016

Response Made by Custodian: August 29, 2016

GRC Complaint Received: August 30, 2016

Background⁴

Request and Response:

On August 16, 2016, the Complainant submitted three (3) Open Public Records Act (“OPRA”) requests to the Custodian seeking the above-mentioned records. On August 29, 2016, the thirteenth (13th) business day after receipt, the Custodian notified the Complainant via telephone that the Computer-Aided Dispatch (“CAD”) system had crashed and was unable to access any responsive records.

¹ No legal representation listed on record.

² Represented by Karl Timbers, Esq. (Atlantic City, NJ).

³ The Custodian of Record at the time the requests were submitted was Rhonda Williams.

⁴ 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.

Denial of Access Complaint:

On August 30, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant did not elaborate further on the circumstances of the alleged denial beyond reiterating the Custodian’s claim that the CAD system had crashed.

Statement of Information:

On September 27, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA requests on August 16, 2016. The Custodian certified that he responded on August 29, 2016 via telephone that the CAD system had crashed and were unable to search for records.

The Custodian certified that the CAD system had crashed on August 16, 2016, and that the city of Atlantic City (“City”) was working on restoring the system. The Custodian certified that the City was working on retrieving the information, but as of the date of the SOI, the City had not succeeded.

Analysis

Timeliness/Insufficient Response

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) (emphasis added).⁵ 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 dated October 31, 2007).

In the instant matter, the Complainant submitted his OPRA requests on August 16, 2016. The Custodian asserted that she responded to the Complainant’s request via telephone on August 29, 2016, thirteen (13) business days after receiving the request.

Therefore, the original Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7)

⁵ 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.

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, GRC 2007-11.

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.

Further, 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)).⁶ 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:

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)).

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*

⁶ On appeal from Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (March 2006).

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 v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005),⁷ N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); 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 1st and 3rd OPRA request sought access to incident

⁷ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Complaint No. 2004-78 (October 2004).

reports regarding two (2) individuals. However, similar to the facts in Love, the Complainant failed to provide a specific date or range of dates, or any other identifying information to accompany the requests. GRC 2014-223. Thus, the requests lack enough identifying information for a request for incident reports. See Burke, 429 N.J. Super. at 176.

Therefore, notwithstanding the original Custodian's "deemed" denial, she did not unlawfully deny access to the Complainant's 1st and 3rd OPRA requests seeking incident reports involving two (2) individuals. 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 as overly broad. See MAG, 375 N.J. Super. at 549, Burke, 429 N.J. Super. at 176, Dawara, GRC 2013-267, 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.

In the instant matter, the Custodian certified that on August 16, 2016, the CAD system had crashed, preventing the City from being able to access responsive records to the Complainant's 2nd OPRA request. The Custodian also certified that at the time she submitted her SOI, the system was still non-functioning, and it was unknown whether they could retrieve the information.

Thus, while the original Custodian denied access to the Complainant's 2nd OPRA request, the circumstances surrounding the denial were outside of her control, as the computer system containing the responsive records were inaccessible at the time of the request, and through the date of the SOI. Therefore, there was no unlawful denial of access. N.J.S.A. 47:1A-6.

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 (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

In the matter currently before the Council, the original Custodian's failure to timely respond to the Complainant's August 16, 2016 OPRA requests resulted in a violation of OPRA. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the evidence of record does not indicate that the original Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original Custodian's actions did 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. The original Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the 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, GRC 2007-11.
2. The Custodian did not unlawfully deny access to the Complainant's 1st and 3rd OPRA requests seeking incident reports involving two (2) individuals. 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 as overly broad. See MAG Entm't, LLC. V. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 549 (App. Div. 2005), Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012), Dawara v. Office of the Essex Cnty. Adm'r, GRC Complaint No. 2013-267 (March 2014), and Love v. Spotswood Police Dep't (Middlesex), GRC Complaint No. 2014-223 (Interim Order dated March 31, 2015).
3. While the original Custodian denied access to the Complainant's 2nd OPRA request, the circumstances surrounding the denial were outside of her control, as the computer system containing the responsive records were inaccessible at the time of the request, and through the date of the SOI. Therefore, there was no unlawful denial of access. N.J.S.A. 47:1A-6.
4. The original Custodian's failure to timely respond to the Complainant's August 16, 2016 OPRA requests resulted in a violation of OPRA. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the evidence of record does not indicate that the original Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original Custodian's actions did 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
Staff Attorney

July 24, 2018