



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

July 31, 2018 Government Records Council Meeting

Gloria Brown & Jeffrey Oster
Complainant
v.
City of Newark (Essex)
Custodian of Record

Complaint No. 2016-289

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, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that the both Custodians have borne their burden of proof that they lawfully denied access to the Complainants OPRA requests seeking the 911 recording and transcript. Specifically, both Custodians initially responded that no records existed, the Custodian certified to these facts in the Statement of Information, and the record reflects that no responsive records existed within the City’s files. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

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**

**Gloria Brown & Jeffrey Oster¹
Complainant**

GRC Complaint No. 2016-289

v.

**City of Newark (Essex)²
Custodial Agency**

Records Relevant to Complaint:

August 8, 2013 OPRA request: Hardcopies via pickup of a 911 recording and transcript from January 7, 2007 between 10:00 a.m. and 2:00 p.m.

May 11, 2015 OPRA request: Hardcopies of a transcribed or recorded 911 call made on January 7, 2007 at or about 12:35 p.m. regarding shots fired (Event No. P07009005). If the City of Newark (“City”) were unable to provide the above, please provide any and all police reports referring to the call.

Custodian of Record: Kenneth Louis³

Request Received by Custodian: August 8, 2013; May 11, 2015

Response Made by Custodian: August 9, 2013; May 15, 2015

GRC Complaint Received: November 7, 2016

Background⁴

Request and Response:

On August 8, 2013, Complainant Brown submitted an Open Public Records Act (“OPRA”) request to the original Custodian seeking the above-mentioned records. On August 9, 2013, Adolfo Furtado from the Newark Police Department (“NPD”) responded on behalf of the original Custodian stating that no records existed. On August 29, 2013, the original Custodian also responded to Complainant Brown in writing stating that no records could be located.

¹ No legal representation listed on record. The GRC notes that the Mr. Oster was a Private Investigator working on behalf of Ms. Brown.

² Represented by Willie Parker, Esq. (Newark, NJ).

³ The Custodian that responded to Complainant Brown’s OPRA request was Robert Marasco, the original Custodian of Record.

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.

On May 11, 2015, Complainant Oster submitted an OPRA request to the Custodian seeking the above-mentioned records. On May 15, 2015, the Custodian responded in writing advising that the NPD was working on locating responsive records, but that the City would need until May 29, 2015 to respond to the request.

On June 9, 2015,⁵ the Custodian again responded to Complainant Oster's OPRA request providing records not at issue in this complaint. The Custodian stated that this response completed the request; however, he suggested that Complainant Oster may contact the City if he believed there were outstanding records. On June 30, 2015, the Custodian responded to the Complainant advising that the NPD was not the custodian of record for the 911 tape. The Custodian thus directed Complainant Oster to the Essex County Prosecutor's Office ("ECPO").

Denial of Access Complaint:

On November 7, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). Complainants stated that the City advised that "no record was found" in relation to the identified 911 tape. Complainants further noted that they received the 911 recording, but that the "tape does not match transcripts."⁶

Statement of Information:

On December 9, 2016, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that the City received Complainants OPRA requests on August 8, 2013 and May 11, 2015 respectively. The Custodian certified that upon receipt of each request, City employees conducted a thorough search based on the information provided by Complainants. The Custodian certified that both Adolfo Furtado and original Custodian responded in writing to the August 8, 2013 OPRA request advising that no records responsive existed. The Custodian further certified that he responded to the May 11, 2015 OPRA request similarly advising that no records existed. The Custodian affirmed that he sent a follow-up response to Complainants advising that the ECPO maintained the responsive record. The Custodian noted that Complainants subsequently contacted the ECPO, who was able to satisfy their request.

The Custodian contended that after passage of significant time, Complainants filed the instant complaint failing to state a claim. The Custodian also contended that Complainants' failure to answer all questions in the Denial of Access Complaint form resulted in a fatal complaint. The Custodian thus argued that the Council should dismiss this complaint for failure to state a claim, as it has previously done in Loigman, Esq. (O.B.O. Middletown Twp. Safety Council) v. Monmouth Cnty. Prosecutor's Office, GRC Complaint No. 2013-342 (July 2014). See also Dewey v. R.J. Reynolds Tobacco Co., 121 N.J. 69, 75 (1990).

⁵ The GRC notes that there was likely a violation of OPRA for failure to respond within the extended time frame. However, the GRC will not address this issue because Complainants did not raise it in the Denial of Access Complaint.

⁶ Complainants submitted documents supporting that they were able to obtain a copy of the relevant 911 recording from the ECPO on August 26, 2015. The GRC notes that there was no evidence of the City providing "transcripts" as part of its June 9, 2015 response.

The Custodian also noted that the subject matter of the requested record ultimately led the City to refer Complainants to the ECPO. The Custodian affirmed that if records did in fact exist, they were likely held by the ECPO because that agency “often supersedes the [NPD] in felony matters.”

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.

Initially, the GRC addresses the Custodian’s argument that this complaint should be dismissed because Complainants failed to state a claim. It is true that Complainants did not complete the “Detail Summary” portion of the Denial of Access Complaint. However, Complainants noted on page 2 of the complaint that they “[were] told that no record was found.” Additionally, Complainants completed the “Records Denied List” portion of the complaint similarly identifying the non-existence issue as the core of their complaint. The GRC could thus easily infer that Complainants were contesting the Custodian’s “no responsive records existed” response. This is also contrary to Loigman, GRC 2013-342, where the complainant did not complete either the “Detail Summary” or “Records Denied List” of the Denial of Access Complaint form. Thus, the GRC is not persuaded that this complaint should be dismissed on the grounds that Complainants failed to state a claim. The GRC will thus address this complaint on the merits.

The threshold issue in this complaint is whether the City’s denial of access on the basis that no records existed was lawful. The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). Here, Complainants filed separate OPRA requests for the same record nearly two (2) years apart. In both instances, City employees responded advising that no record existed. Further, as part of his response to the second (2nd) OPRA request, the Custodian referred Complainants to the ECPO to obtain the record. Complainants heeded this referral and were able to obtain the records sought from the ECPO in August 2015. Thus, the evidence of record supports that the City did not maintain the responsive records. Further, there is no evidence in the record to refute this position.

Accordingly, both Custodians have borne their burden of proof that they lawfully denied access to the Complainants OPRA requests seeking the 911 recording and transcript. Specifically, both Custodians initially responded that no records existed, the Custodian certified to these facts in the SOI, and the record reflects that no responsive records existed within the City’s files. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that the both Custodians have borne their burden of proof that they lawfully denied access to the Complainants OPRA requests seeking the 911 recording and transcript. Specifically, both Custodians initially responded that no records existed, the Custodian certified to these facts in the Statement of Information, and the record reflects that no responsive records existed within the City's files. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

July 24, 2018