



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

April 30, 2019 Government Records Council Meeting

Regino De La Cruz
Complainant

Complaint No. 2017-35

v.

City of Union City (Hudson)
Custodian of Record

At the April 30, 2019 public meeting, the Government Records Council (“Council”) considered the April 23, 2019 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, his response to the Complainant’s February 14, 2017 OPRA request is insufficient. N.J.S.A. 47:1A-5(g); De La Cruz v. City of Union City (Hudson), GRC Complaint No. 2016-229 (October 2018); 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 February 14, 2017 OPRA request seeking every police non-auto accident report from the last seven (7) days available. N.J.S.A. 47:1A-6. The Complainant’s request fails to include a location, the names of parties, or any other identifiable information to be a valid request. 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, 176 (App. Div. 2012), De La Cruz v. City of Union City (Hudson), GRC Complaint No. 2016-229 (October 2018), and Love v. Spotswood Police Dep’t (Middlesex), GRC Complaint No. 2014-223 (Interim Order dated March 31, 2015).
3. The Custodian violated N.J.S.A. 47:1A-5(g) by failing to provide a lawful basis for denying the Complainant’s February 14, 2017 OPRA request. However, the evidence in the record demonstrates that the Complainant’s February 14, 2017 OPRA request was invalid for failing to sufficiently identify government records. 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 April 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: May 3, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
April 30, 2019 Council Meeting**

**Regino De La Cruz¹
Complainant**

GRC Complaint No. 2017-35

v.

**City of Union City (Hudson)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of all non-auto accident reports for the last seven (7) days available. February 1, 2017 through February 6, 2017.³

Custodian of Record: Erin Knoedler⁴

Request Received by Custodian: February 14, 2017

Response Made by Custodian: February 14, 2017

GRC Complaint Received: February 16, 2017

Background⁵

Request and Response:

On February 14, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On February 14, 2017, the Custodian responded in writing, stating that the portion of the request seeking incident reports is protected information pursuant to the “N.J. Law Enforcement Handbook p. 645 volume 3, 2014 Edition.” (“L.E. Handbook”).

Denial of Access Complaint:

On February 16, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant did not elaborate further on the circumstances surrounding the denial of access.

Statement of Information:

¹ No legal representation listed on record.

² Represented by Krystle Nova, Esq., of Scarinci & Hollenbeck, LLC (Lyndhurst, NJ).

³ The Complainant requested additional records not at issue in the instant complaint.

⁴ The current Custodian of Record is Betty Olano.

⁵ 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 February 24, 2017, the Custodian filed a Statement of Information (“SOF”). The Custodian certified that she received the Complainant’s OPRA request on February 14, 2017. The Custodian certified that she responded in writing on February 14, 2017, stating that the portion of the request seeking incident reports was protected information.

The Custodian asserted that the requested reports were protected from disclosure in accordance with the L.E. Handbook, which states that police incident reports are not accessible to non-police personnel except upon court order or to comply with statute, regulation, or executive order. The Custodian contended that no such court order, statute, regulation, or executive order exists.

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).

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 De La Cruz v. City of Union City (Hudson), GRC Complaint No. 2016-229 (October 2018), the Complainant sought the same records as in the current matter, and the Custodian denied access, citing the L.E. Handbook. The Council held that the Custodian’s reference to the L.E. Handbook was insufficient as it couldn’t be shown to have the force of law similar to a statute, regulation or guideline.

In this matter, the Custodian denied access by citing the L.E. Handbook, paralleling the facts in De La Cruz, GRC 2016-229. Additionally, while the Custodian provided the Complainant with a scanned copy of the cited page from the L.E. Handbook, the page does not reference an accompanying statute, regulation, or specific guideline when listing the records that are exempt from disclosure. Thus, it merits a finding that the Custodian’s response was insufficient.

Therefore, because the Custodian failed to provide a specific lawful basis for denying access, his response to the Complainant’s February 14, 2017 OPRA request is insufficient. N.J.S.A. 47:1A-5(g); De La Cruz, GRC 2016-229; Schwarz, GRC 2004-60; Renna, GRC 2008-86.

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 facts in this matter are substantially similar to those in De La Cruz, GRC 2016-229, which involved the same parties. There, the Complainant sought police accident reports pertaining to auto and non-auto accidents for the preceding seven (7) days. The Custodian denied access to the portion of the request seeking non-auto reports on the same grounds as the current matter. The Council, relying upon North Jersey Media Group, Inc. (“NJMG”) v. Twp. of Lyndhurst, 441 N.J. Super. 70 (App. Div. 2015), aff’d in part, 229 N.J. 541 (2017), found that blanket denials for access to police incident reports as criminal investigatory records unacceptable, as such records may not satisfy the elements required to qualify as a criminal investigatory record.⁶ Therefore, in this matter, the Custodian’s response to the Complainant’s request was improper.

Still, a request for a specific type of document or subject matter must still be accompanied by enough identifying information. See MAG Entm’t, LLC. v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), and Burke v. Brandes, 429 N.J. Super. 169, 176 (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 complaints signed against [Kristen Ellis].” The Council held that while the complainant’s request for “police reports” and “complaints” 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. See also Kovacs v. Newark Police Dep’t (Essex), GRC Complaint No. 2014-316 (Interim Order dated June 30, 2015), reconsidered on other grounds, (Final Decision dated October 27, 2015) (request for police reports containing the name of an individual sufficiently identifies the subject matter).

Similar to De La Cruz, GRC 2016-229, the Complainant sought every non-auto accident report received within the last seven (7) days available, from February 1, 2017 through February 6, 2017. Without additional information, such as an address or particular individual as the subject of the reports, the request does not provide enough identifiable information to be a valid OPRA request.

Therefore, notwithstanding the Custodian’s insufficient response, she did not unlawfully deny access to the Complainant’s February 14, 2017 OPRA request seeking every police non-auto accident report from the last seven (7) days available. N.J.S.A. 47:1A-6. The Complainant’s request fails to include a location, the names of parties, or any other identifiable information to be a valid request. See MAG, 375 N.J. Super. at 546, Burke, 429 N.J. Super. at 176, De La Cruz, GRC 2016-229, and Love, GRC 2014-223.

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

⁶ The elements required are that the record 1) is not required by law to be made, maintained or kept on file, and 2) pertains to any criminal investigation or related civil enforcement proceeding. N.J.S.A. 47:1A-1.1.

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 February 14, 2017 OPRA request. However, the evidence in the record demonstrates that the Complainant’s February 14, 2017 OPRA request was invalid for failing to sufficiently identify government records. 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, his response to the Complainant’s February 14, 2017 OPRA request is insufficient. N.J.S.A. 47:1A-5(g); De La Cruz v. City of Union City (Hudson), GRC Complaint No. 2016-229 (October 2018); 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 February 14, 2017 OPRA request seeking every police non-auto accident report from the last seven (7) days available. N.J.S.A. 47:1A-6. The Complainant’s request fails to include a location, the names of parties, or any other identifiable information to be a valid request. 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, 176 (App. Div. 2012), De La Cruz v. City of Union City (Hudson), GRC Complaint No. 2016-229 (October 2018), and Love v. Spotswood Police Dep't (Middlesex), GRC Complaint No. 2014-223 (Interim Order dated March 31, 2015).

3. The Custodian violated N.J.S.A. 47:1A-5(g) by failing to provide a lawful basis for denying the Complainant's February 14, 2017 OPRA request. However, the evidence in the record demonstrates that the Complainant's February 14, 2017 OPRA request was invalid for failing to sufficiently identify government records. 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
Staff Attorney

April 23, 2019