



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

January 26, 2021 Government Records Council Meeting

Donna Antonucci
Complainant

Complaint No. 2019-221

v.

Hudson County Sheriff's Office
Custodian of Record

At the January 26, 2021 public meeting, the Government Records Council ("Council") considered the January 19, 2021 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 denying access to the responsive recordings, his response to the Complainant's OPRA request was insufficient. N.J.S.A. 47:1A-5(g). However, the GRC declines to order any further action because the Custodian ultimately disclosed the responsive recordings to the Complainant on November 8, 2019.
2. The Custodian's failure to provide a specific lawful basis for his initial denial of access resulted in an insufficient response. N.J.S.A. 47:1A-5(g). However, the Custodian ultimately disclosed the responsive recordings on November 8, 2019. Additionally, 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 26th Day of January 2021

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: January 28, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 26, 2021 Council Meeting**

**Donna Antonucci¹
Complainant**

GRC Complaint No. 2019-221

v.

**Hudson County Sheriff's Office²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of recordings of phone calls made to the Hudson County Sheriff's Office ("HCSO") on October 21, 2019 between 3:12 p.m. and 3:55 p.m. and on October 23, 2019 between 7:31 p.m. and 7:44 p.m.

Custodian of Record: Robert Taino
Request Received by Custodian: October 24, 2019
Response Made by Custodian: October 31, 2019
GRC Complaint Received: November 4, 2019

Background³

Request and Response:

On October 24, 2019, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On October 31, 2019 the Custodian responded in writing stating that he could "not release that information."

Denial of Access Complaint:

On November 4, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that the Custodian unlawfully denied her access to a total of five (5) calls made to the HCSO on the days identified in her OPRA request. The Complainant noted that the Custodian "simply e-mailed 'we cannot release that information.'"

¹ No legal representation listed on record.

² Represented by Neil J. Carroll, Jr., Esq. (Jersey City, 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 Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Statement of Information:⁴

On January 24, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on October 24, 2019. The Custodian certified that he responded in writing on October 31, 2019 denying access to the Complainant’s OPRA request. The Custodian affirmed that the Office of County Counsel (“Office”) subsequently reviewed several OPRA requests it previously addressed, including the subject OPR request. The Custodian certified that the Office e-mailed him on November 4, 2019 advising that the denial here may be incorrect and that he should reconsider his position. The Custodian certified that upon his return to work on November 8, 2019, he disclosed the responsive calls to the Complainant.

The Custodian stated that he initially denied access to the subject OPRA request under N.J.S.A. 47:1A-3(a) because he mistakenly believed it sought records in connection with an on-going investigation. The Custodian noted that he was also unaware that the Complainant was the individual that placed the calls sought. The Custodian asserted that upon receiving the Office’s e-mail regarding a potential erroneous denial of access on November 8, 2019, he disclosed the responsive call recordings to the Complainant without redactions.

The Custodian asserted that he would not dispute that a timeliness violation occurred here because he disclosed the records three (3) business days after the expiration of the statutory time frame. The Custodian reiterated that, notwithstanding this violation, he ultimately disclosed the responsive records as soon as he was apprised of his error.

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). A custodian’s failure to do so results in an insufficient response and a violation of OPRA. See Schwarz v. N.J. Dep’t of Human Serv., GRC Complaint No. 2004-60 (February 2005) (setting forth the proposition that specific citations to the law that allows a denial of access are required at the time of the denial); 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).

Here, the Custodian initially responded to the Complainant’s OPRA request denying same because and stating that he “could not release that information.” However, the Custodian later disclosed the responsive call recordings on November 8, 2019 upon receipt of advice from the Office. Although the Custodian subsequently asserted that he would accept that he violated OPRA’s timeliness provision, his actions here speak more to the sufficiency of his original response that was within seven (7) business days. Instead, the evidence of record supports a finding

⁴ On November 22, 2019, this complaint was referred to mediation. On December 30, 2019, this complaint was referred back to the GRC for adjudication.

that the Custodian’s initial response was insufficient in accordance with OPRA’s requirement to provide a specific lawful basis at the time of the denial and all prevailing case law.

As such, because the Custodian failed to provide a specific lawful basis denying access to the responsive recordings, his response to the Complainant’s OPRA request was insufficient. N.J.S.A. 47:1A-5(g). However, the GRC declines to order any further action because the Custodian ultimately disclosed the responsive recordings to the Complainant on November 8, 2019.

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 before the Council, the Custodian’s failure to provide a specific lawful basis for his initial denial of access resulted in an insufficient response. N.J.S.A. 47:1A-5(g). However, the Custodian ultimately disclosed the responsive recordings on November 8, 2019. Additionally, 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 Executive Director respectfully recommends the Council find that:

1. Because the Custodian failed to provide a specific lawful basis denying access to the responsive recordings, his response to the Complainant’s OPRA request was

insufficient. N.J.S.A. 47:1A-5(g). However, the GRC declines to order any further action because the Custodian ultimately disclosed the responsive recordings to the Complainant on November 8, 2019.

2. The Custodian's failure to provide a specific lawful basis for his initial denial of access resulted in an insufficient response. N.J.S.A. 47:1A-5(g). However, the Custodian ultimately disclosed the responsive recordings on November 8, 2019. Additionally, 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: Frank F. Caruso
Executive Director

January 19, 2021