



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

August 25, 2020 Government Records Council Meeting

Jennifer Nevilles
Complainant

Complaint No. 2019-23

v.

County of Hudson
Custodian of Record

At the August 25, 2020 public meeting, the Government Records Council (“Council”) considered the August 18, 2020 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 Ms. Fernandez failed to forward the Complainant’s OPRA request to the appropriate Custodian or direct the Complainant to the Custodian, Ms. Fernandez violated N.J.S.A. 47:1A-5(h). See Werner v. N.J. Dep’t of Treasury, Div. of Revenue, GRC Complaint No. 2009-95 (April 2010). However, the Council declines to order disclosure of the records as the evidence of record demonstrates that the Custodian located and made responsive records available on February 9, 2019 and the Complainant picked up same on February 11, 2019.
2. Although Ms. Fernandez violated N.J.S.A. 47:1A-5(h), the Custodian rectified the mistake by locating and disclosing responsive records on February 9, 2019. Additionally, the evidence of record does not indicate that Ms. Fernandez’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Ms. Fernandez’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 25th Day of August 2020

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 27, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 25, 2020 Council Meeting**

**Jennifer Nevilles¹
Complainant**

GRC Complaint No. 2019-23

v.

**County of Hudson²
Custodial Agency**

Records Relevant to Complaint: Hard copies via pick-up of:

January 16, 2019 OPRA Request No. 1

1. Weekly off-duty assignments generated by Lt. Rolon with the Hudson County Sheriff's Office ("HCSO") for the 2018 year.
2. List of off-duty assignments managed by Lt. Rolon that have been distributed to sworn personnel for the 2018 year.
3. Copies of all off-duty sheets submitted to payroll for all sworn personnel for all off-duty assignments distributed by Lt. Rolon.
4. How Lt. Rolon determined the selected officers working for the Hudson County Community College detail.
5. HCSO "Off-Duty Assigned List of Personnel" generated and maintained by Lt. Rolon.
6. All assigned detail off-duty list.
7. List of names of officers assigned to the "Off-Duty List" detailing acceptance and refusals of personnel.

January 16, 2019 OPRA Request No. 2

"Recorded audio and video interview statement of my interview ([Complainant's]) on December 3, 2018. Grievance hearing was held by Hearing Officer Richard Campisano at 567 Pavonia Avenue, Jersey City, N.J."

Custodian of Record: Robert Taino
Request Received by Custodian: N/A
Response Made by Custodian: N/A
GRC Complaint Received: February 4, 2019

¹ No legal representation listed on record.

² Represented by Neil J. Carroll, Jr., Assistant County Counsel (Jersey City, N.J.).

Background³

Request and Response:

On January 16, 2019, the Complainant submitted two (2) Open Public Records Act (“OPRA”) requests seeking the above-mentioned records. On January 25, 2019, Charles Cho of the Hudson County Prosecutor’s Office (“HCPO”) responded in writing stating that HCPO did not possess responsive records to either OPRA request.

Denial of Access Complaint:

On February 4, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that her request was clearly intended to be delivered to HCSO but was instead forwarded to HCPO. The Complainant also asserted that Mr. Campisano advised that there should not be an issue with obtaining a copy of her interview since it pertained to her. The Complainant asserted that no records were provided for either request.

Statement of Information:

On March 7, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian’s Counsel provided a certification pertaining to the background events as his duties included forwarding and tracking OPRA requests to the appropriate department. Counsel certified that the Hudson County Office of the County Counsel (“OCC”) initially received the Complainant’s OPRA requests on January 17, 2019. Counsel certified that the requests were erroneously forwarded by Maite Fernandez to HCPO on January 23, 2019. Counsel certified that HCPO responded on January 24, 2019 stating that no responsive records exist.

Counsel certified that HCPO notified him of the error on February 4, 2019, and immediately forwarded the OPRA requests to the Custodian. The Custodian certified that he responded in writing on February 8, 2019, notifying the Complainant that records responsive to both OPRA requests were ready to be picked up. The Custodian also certified that the Complainant picked up the requested records from HCSO on February 11, 2019 and included a copy of a delivery receipt with the Complainant’s signature.

Counsel also asserted that he was advised that there were no responsive records to the portion of the Complainant’s OPRA request seeking “HCSO Off Duty List of Personnel generated by Lt. Rolon.”

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.

Analysis

Forwarding or Directing an OPRA Request

OPRA provides that “[a]ny officer or employee of a public agency who receives a request for access to a government record shall forward the request to the custodian of the record or direct the requestor to the custodian of the record.” N.J.S.A. 47:1A-5(h).

In Werner v. N.J. Dep’t of Treasury, Div. of Revenue, GRC Complaint No. 2009-95 (April 2010), the complainant submitted an OPRA request on an official OPRA request form. An employee at Revenue received the request and responded to same without forwarding to the custodian. The employee subsequently certified that she processed the request as regular work. The Council held that the employee violated OPRA because “[a]lthough Ms. Harrington’s duties do not include responding to requests made pursuant to OPRA, she still has an obligation to . . .” comply with N.J.S.A. 47:1A-5(h). Id. at 9. The Council further noted that “[b]ecause the Complainant’s request was on the official OPRA request form of the [NJ Dep’t] of Law & Public Safety, Ms. Harrington was alerted to the fact that this was a request for records pursuant to OPRA.” Id. See also Redd v. Franklin Twp. Pub. Schs. (Somerset), GRC Complaint No. 2014-185 (February 2015); Kovacs v. Union Cnty. Dep’t of Corr., GRC Complaint No. 2014-353 (September 2015); Werner v. Newark Police Dep’t (Essex), GRC Complaint No. 2014-116 (January 2015).

Here, the evidence of record indicates that OCC received the Complainant’s OPRA requests on January 17, 2019. Thereafter, Ms. Fernandez of the OCC forwarded the request to the custodian at HCPO. However, the request sought records that were evidently intended to be provided by the HCSO, as the Complainant mentioned the agency by name in her request.

Therefore, because Ms. Fernandez failed to forward the Complainant’s OPRA request to the appropriate Custodian or direct the Complainant to the Custodian, Ms. Fernandez violated N.J.S.A. 47:1A-5(h). See Werner, GRC 2009-95. However, the Council declines to order disclosure of the records as the evidence of record demonstrates that the Custodian located and made responsive records available on February 9, 2019 and the Complainant picked up same on February 11, 2019.⁴

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).

⁴ The Council does not address the claim that some requested records do not exist because the Complainant did not raise same at any point during the pendency of this complaint.

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 instant matter, although Ms. Fernandez violated N.J.S.A. 47:1A-5(h), the Custodian rectified the mistake by locating and disclosing responsive records on February 9, 2019. Additionally, the evidence of record does not indicate that Ms. Fernandez's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Ms. Fernandez'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 Ms. Fernandez failed to forward the Complainant's OPRA request to the appropriate Custodian or direct the Complainant to the Custodian, Ms. Fernandez violated N.J.S.A. 47:1A-5(h). See Werner v. N.J. Dep't of Treasury, Div. of Revenue, GRC Complaint No. 2009-95 (April 2010). However, the Council declines to order disclosure of the records as the evidence of record demonstrates that the Custodian located and made responsive records available on February 9, 2019 and the Complainant picked up same on February 11, 2019.
2. Although Ms. Fernandez violated N.J.S.A. 47:1A-5(h), the Custodian rectified the mistake by locating and disclosing responsive records on February 9, 2019. Additionally, the evidence of record does not indicate that Ms. Fernandez's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Ms. Fernandez'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

August 18, 2020