



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

March 29, 2022 Government Records Council Meeting

Anonymous
Complainant

Complaint No. 2021-66

v.

City of Clifton (Passaic)
Custodian of Record

At the March 29, 2022 public meeting, the Government Records Council (“Council”) considered the March 22, 2022 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 Complainant’s February 14, 2021 e-mail initially represented an invalid non-form request because it did not mention OPRA in any way. Renna v. Cnty of Union, 407 N.J. Super. 230 (App. Div. 2009); Maness v. Borough of Sayreville (Middlesex), GRC Complaint No. 2009-192 (August 2010). However, the City converted the request into a valid OPRA request by addressing it as such. Thus, the City’s treatment of the e-mail as an OPRA request belies the argument that same was invalid after the fact.
2. The responsive 911 call is exempt from access due to the very nature of same described by the Complainant in the Denial of Access Complaint and Custodian in the Statement of Information. N.J.S.A. 47:1A-9(a); Executive Order No. 26 (Gov. McGreevey, 2002); Rivera v. Town of West New York (Hudson), GRC Complaint No. 2010-208 (Interim Order dated January 29, 2013). Thus, the Custodian, through Ms. Patel, lawfully denied access to the responsive recording, which is no longer in existence. N.J.S.A. 47:1A-6.

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 29th Day of March 2022

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: March 31, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 29, 2022 Council Meeting**

**Anonymous¹
Complainant**

GRC Complaint No. 2021-66

v.

**City of Clifton (Passaic)²
Custodial Agency**

Records Relevant to Complaint: Copies of a 911 recording from Stuyvesant Court on February 14, 2021.³

Custodian of Record: Nancy Ferrigno
Request Received by Custodian: February 16, 2021
Response Made by Custodian: February 25, 2021
GRC Complaint Received: March 25, 2021

Background⁴

Request and Response:

On February 14, 2021, the Complainant sent an e-mail to the Custodian seeking the above-mentioned records. On February 25, 2021, City of Clifton (“City”) Clerk’s Office employee Heeral Patel responded in writing on behalf of the Custodian denying access to the responsive record per the medical records exemption under Executive Order No. 26 (Gov. McGreevey, 2002) (“EO 26”). On the same day, the Complainant responded to Ms. Patel stating that she wished to receive the call with the exempt information redacted. On March 2, 2021, Ms. Patel responded disclosing another record not at issue here, but did not disclose the responsive 911 recording.

Denial of Access Complaint:

On March 25, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that she was unlawfully denied access to the requested 911 call from February 14, 2021. The Complainant noted that she requested the recording, wherein the caller sought an ambulance for a “pa[[]n[]ic attack,” with any medical

¹ No legal representation listed on record.

² Represented by Scott DeRosa, Esq. (Clifton, NJ).

³ The Complainant sought additional records that are not at issue in this complaint.

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 Executive Director the submissions necessary and relevant for the adjudication of this complaint.

information redacted. The Complainant alleged that the recording is already available to the public by “googling the details and searching.”

Statement of Information:⁵

On September 15, 2021, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s e-mailed request on February 16, 2021. The Custodian certified that her search included contacting the City Police Department to locate the responsive recording. The Custodian certified that Ms. Patel responded in writing on her behalf on February 25, 2021 denying access to the recording pursuant to EO 26. The Custodian noted that the City subsequently disclosed another report with redactions on March 2, 2021, but that the 911 recording remained exempt from disclosure.

The Custodian argued that the Complainant’s initial submission was an invalid OPRA request because it was not on the City’s official OPRA request form and did not reference OPRA. Renna v. Cnty of Union, 407 N.J. Super. 230 (App. Div. 2009). The Custodian acknowledged that while requestors may submit non-form OPRA requests, they must clearly invoke OPRA. The Custodian asserted that the GRC has routinely determined that non-form requests not invoking OPRA are invalid. Muhammad v. N.J. Office of Pub. Defender, GRC Complaint No. 2020-35 (April 2020). The Custodian thus argued that this complaint should be dismissed accordingly.

The Custodian argued that, to the extent the GRC does not find the subject request to be invalid, she lawfully denied access to the responsive recording under EO 26. The Custodian certified that the recording at issue was a 911 call to a residence seeking an ambulance for someone suffering from a medical and/or psychological condition. The Custodian affirmed that the call spanned several minutes and consisted of information related to individual’s medical condition. The Custodian noted that in Bart v. City of Passaic, GRC Complaint No. 2007-162 (Interim Order dated February 27, 2008), the Council held that a custodian properly denied access to an EMS report under EO 26. The Custodian argued that the 911 record here is like that report and cannot be effectively redacted.

The Custodian finally argued that OPRA’s privacy interest exemption also applied to the subject recording. N.J.S.A. 47:1A-1; Doe v. Poritz, 142 N.J. 1 (1995). The Custodian argued that when considering each of the seven (7) Doe factors as follows, the test weighs heavily in favor of non-disclosure:

1. The type of record requested: 911 recording
2. The information it does or might contain: Information related solely to the individual’s medical condition and familial relationship between the caller/patient.
3. The potential for harm in any subsequent nonconsensual disclosure: Release of private medical information has the potential for harm and violates Health Information Portability and Accountability Act (“HIPAA”) laws.

⁵ On April 14, 2021, this complaint was referred to mediation. On September 28, 2021, this complaint was referred back to the GRC for adjudication.

4. The injury from disclosure to the relationship in which the record was generated: Disclosure would be injurious to the caller and chill future callers from using the service if they believe their calls will be made public.
5. The adequacy of safeguards to prevent unauthorized disclosure: 911 recordings are maintained on the City Police Departments recording system with security features.
6. The degree of need for access: Not a strong showing of need here.
7. Whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access: EO 26 provides an express mandate against disclosure of the information contained in the recording.

The Custodian noted that none of the individuals referenced in the call provided consent to the City to release any of this information; thus, disclosure would result in a violation of HIPAA.

The Custodian thus argued the Council should uphold her denial of access for all the reasons provided and that this complaint be dismissed. The Custodian also certified that per N.J.A.C. 17:24-2.4 and the recognized retention schedule of thirty-one (31) calendar days, the 911 recording was destroyed on or about March 17, 2021.

Analysis

Validity of Request

The validity of an OPRA request typically falls into three (3) categories. The first is a request that is overly broad (“any and all,” requests seeking “records” generically, *etc.*) and requires a custodian to conduct research. MAG, 375 N.J. Super. 534; Donato v. Twp. of Union, GRC Complaint No. 2005-182 (January 2007). The second is those requests seeking information or asking questions. See e.g. Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012). The final category is a request that is either not on an official OPRA request form or does not invoke OPRA. See e.g. Naples v. N.J. Motor Vehicle Comm’n, GRC Complaint No. 2008-97 (December 2008).

Regarding the submission of a valid non-form OPRA request, OPRA states that “a request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian.” N.J.S.A. 47:1A-5(g). In Renna, 407 N.J. Super. 230, the Appellate Division held that although requestors should continue to use public agencies’ OPRA request forms when making requests, no custodian shall withhold such records if the written request, not presented on the official form, contains the requisite information prescribed in N.J.S.A. 47:1A-5(f). Id. In effect, this permits requestors to write their own correspondence seeking records from a custodian if the request properly invokes OPRA.

In Maness v. Borough of Sayreville (Middlesex), GRC Complaint No. 2009-192 (August 2010), the complainant submitted a letter request that only cited to “New Jersey ‘Sunshine’ laws.” The complainant filed a Denial of Access Complaint after not receiving a response, to which the custodian argued that she was “unaware of a specific OPRA request submitted by the [c]omplainant.” The Council distinguished the facts of Maness from those in Walker v. N.J. Treas., Div. of Purchase & Prop., GRC Complaint No. 2008-44 (November 2008) (holding that the

complainant's letter request sufficiently invoked OPRA) and held that the subject letter was not a valid OPRA request.

Here, the Complainant submitted a non-form request via e-mail on February 14, 2021 without any mention of OPRA in either the subject line or content of the e-mail. After receiving denials from Ms. Patel on February 25, and March 2, 2021, she filed the instant complaint. Therein, the Complainant argued that she was unlawfully denied access to the requested 911 recording. In the SOI, the Custodian contended first and foremost that the e-mail did not constitute a valid OPRA request per Renna, 407 N.J. Super. 230. See also Muhammad, GRC 2020-35. The Custodian thus argued that this complaint should be dismissed accordingly because the Complainant did not submit a valid OPRA request.

The GRC must address the threshold issue of whether the Complainant's February 14, 2021 non-form e-mail seeking access to the requested recording was a valid OPRA request. Upon review, the Council agrees that the Complainant's February 14, 2021 e-mail did not constitute a valid OPRA request. Specifically, the Complainant did not mention OPRA anywhere in her e-mail. Thus, and consistent with Maness, GRC 2009-192, it is reasonable to assume that the City would not have known that the Complainant sought records under OPRA upon receipt of the Complainant's letter.

However, the facts here depart from Maness, and run contrary to the Custodian's assertion that the request should not be considered valid. This departure is due to the City's processing of the e-mail upon receipt, which was sent to the City via opra@cliftonnj.org, effectively converted the e-mail into an official OPRA request. Specifically, Ms. Patel responded on February 25, 2021 under the subject line "OPRA # 195" and denied access under EO 26, an OPRA specific exemption. Ms. Patel subsequently responded to the Complainant's follow-up correspondence on March 2, 2021 stating "please find the response to your OPRA request attached." Even though the original e-mail was not a valid OPRA request, the City treating it as such effectively converted same into an OPRA request, which triggered the statute and all processes provided for therein to include this Denial of Access Complaint. Thus, the City cannot now rely on the invalid request defense after addressing the subject request as if it were an OPRA request.

Accordingly, the Complainant's February 14, 2021 e-mail initially represented an invalid non-form request because it did not mention OPRA in any way. Renna, 407 N.J. Super. 230; Maness, GRC 2009-192. However, the City converted the request into a valid OPRA request by addressing it as such. Thus, the City's treatment of the e-mail as an OPRA request belies the argument that same was invalid after the fact.

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.

OPRA further provides that:

The provisions of this act . . . shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA] . . . any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; *Executive Order of the Governor*; Rules of Court; any federal law; federal regulation; or federal order.

[N.J.S.A. 47:1A-9(a) (emphasis added).]

EO 26 provides that:

The following records shall not be considered to be government records subject to public access pursuant to . . . [i]nformation describing a natural person's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness, except as otherwise required by law to be disclosed.

[Id.]

In Rivera v. Town of West New York (Hudson), GRC Complaint No. 2010-208 (Interim Order dated January 29, 2013), the complainant sought access to an operational report describing a police response to a medical emergency. The complainant argued that the record should be released inasmuch as it relates to criminal activity, but with redactions made to medical information pursuant to EO 26. After conducting an *in camera* review, the Council found that the requested report only contained information pertaining to a medical incident, and nothing related to criminal activity. Therefore, the Council held that the record was exempt from disclosure in its entirety under EO 26. See also Bart, GRC 2007-162. Further, the GRC notes that OPRA and EO 26 do not include an exception to this provision allowing for individuals to obtain medical records where the individual is the requestor. See also Spillane v. N.J. State Parole Bd., 2017 N.J. Super. Unpub. LEXIS 2392 (App. Div. 2017) (affirming the Council's decision in GRC Complaint No. 2014-169 that "[complainant's] claimed entitlement to a report which is exempt from disclosure under OPRA finds no support in the statute." Id. at 6.)

Relevant to destruction of records during the pendency of an OPRA request, in Zayas v. City of Trenton (Mercer), GRC Complaint No. 2008-31 (July 2008), the complainant submitted an OPRA request seeking access to a picture taken from an overhead traffic camera. The custodian extended the time frame and forwarded the request to the Trenton Police Department ("TPD") to retrieve the record. However, the evidence of record there garnered that TPD personnel mishandled the request due to confusion as to the location of the record. Ultimately, TPD informed the custodian that the responsive record was overwritten. This forced the custodian to respond a month later, stating that the responsive record was "no longer available." The complainant subsequently filed a complaint, and the custodian certified to her efforts to locate the responsive record. The Council held that the "confusion as to the location of the record materially hindered the [c]omplainant's right of public access . . . [t]his hindrance should not be borne by a requestor" Id. at 6 (citing N.J.S.A. 47:1A-1).

However, relevant to the destruction of records subject prior to the filing of an OPRA request, in Perry v. N.J. Dep't of Corr., GRC Complaint No. 2012-237 (June 2013), on June 11, 2012, the complainant sought access to surveillance footage from an incident occurring on May 9, 2012. The custodian initially denied access under DOC's regulations. Subsequently, the custodian certified in the SOI that any video would have been overwritten prior to the date of the OPRA request. The Council thus held that the custodian lawfully denied access to said records, if any, because none existed. Id. at 4 (citing Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005)).

In the matter before the Council, the Complainant sought access to a 911 recording from a specific location on a specific date. The Custodian, through Ms. Patel, denied access to the recording under EO 26. This complaint ensued, wherein the Complainant confirmed that the recording contained a call for an ambulance due to an apparent panic attack. The Complainant contended that the City should have redacted all medical information and disclosed the remainder of the record, noting that same was apparently available on the internet. In the SOI, the Custodian maintained the City's position that the recording was exempt from disclosure under EO 26. The Custodian compared the call to an EMS report, which the Council previously determined was not disclosable in Bart, GRC 2007-162. The Custodian also argued that the record was exempt under the privacy exemption. N.J.S.A. 47:1A-1. Notwithstanding, the Custodian certified that the recording was ultimately overwritten on or about March 17, 2021 and no longer existed.

At first glance, the GRC finds support for the conclusion that the responsive recording was wholly exempt under EO 26. This is evident in the Complainant's very description of the reason for the call. The Custodian also provided a detailed description of the recording content within the SOI. When compared to the Council's upholding the wholesale denial of the operations report at issue in Rivera, GRC 2010-208, the GRC is compelled to follow accordingly.

However, complicating the issue is the fact that the recording was ultimately overwritten after Ms. Patel's denial of access and just before the filing of the instant complaint. These facts place this complaint in between Zayas and Perry. This is important to note because the GRC may have been able to perform an *in camera* review to confirm the content of the recording to confirm the parties' description of it. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005). However, the recording was automatically overwritten, thus making it unavailable for review. Also, there is no evidence in the record to indicate that the City had any knowledge that the Complainant intended to challenge the denial, which would have prompted preservation of the recording. For this reason, the GRC's determination that no unlawful denial of access occurred is based on the evidence in the record as discussed above.

Accordingly, the responsive 911 call is exempt from access due to the very nature of same described by the Complainant in the Denial of Access Complaint and Custodian in the SOI. N.J.S.A. 47:1A-9(a); EO 26; Rivera, GRC 2010-208. Thus, the Custodian, through Ms. Patel, lawfully denied access to the responsive recording, which is no longer in existence. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Complainant's February 14, 2021 e-mail initially represented an invalid non-form request because it did not mention OPRA in any way. Renna v. Cnty of Union, 407 N.J. Super. 230 (App. Div. 2009); Maness v. Borough of Sayreville (Middlesex), GRC Complaint No. 2009-192 (August 2010). However, the City converted the request into a valid OPRA request by addressing it as such. Thus, the City's treatment of the e-mail as an OPRA request belies the argument that same was invalid after the fact.

2. The responsive 911 call is exempt from access due to the very nature of same described by the Complainant in the Denial of Access Complaint and Custodian in the Statement of Information. N.J.S.A. 47:1A-9(a); Executive Order No. 26 (Gov. McGreevey, 2002); Rivera v. Town of West New York (Hudson), GRC Complaint No. 2010-208 (Interim Order dated January 29, 2013). Thus, the Custodian, through Ms. Patel, lawfully denied access to the responsive recording, which is no longer in existence. N.J.S.A. 47:1A-6.

Prepared By: Frank F. Caruso
Executive Director

March 22, 2022