



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

June 26, 2018 Government Records Council Meeting

Hector Luis Guillen
Complainant

Complaint No. 2016-155

v.

New Brunswick Police Department (Middlesex)
Custodian of Record

At the June 26, 2018 public meeting, the Government Records Council (“Council”) considered the June 19, 2018 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. McMullan failed to forward the Complainant’s April 14, 2016 OPRA request to the Custodian or direct the Complainant to submit the OPRA request directly to the Custodian, she has violated N.J.S.A. 47:1A-5(h). See Kossup v. City of Newark Police Dep’t, GRC Complaint No. 2006-174 (February 2007).
2. The Custodian has borne his burden of proof that he lawfully denied access to the Complainant’s April 14, 2016 OPRA request because he certified in the Statement of Information, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. Ms. McMullan’s failure to forward the Complainant’s April 14, 2016 OPRA request to the Custodian or direct the Complainant to submit the OPRA request directly to the Custodian resulted in a violation of OPRA. N.J.S.A. 47:1A-5(h). However, the evidence of record does not indicate that Ms. McMullan’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Ms. McMullan’s actions did 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 June, 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: June 29, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
June 26, 2018 Council Meeting**

**Hector Luis Guillen¹
Complainant**

GRC Complaint No. 2016-155

v.

**New Brunswick Police Department (Middlesex)²
Custodial Agency**

Records Relevant to Complaint: Hardcopies via U.S. mail of arrest records regarding the following indictments and complaints between 1985 and 1990:

- | | |
|-----------------------------|--------------------------|
| 1. Indictment No. 76-1-87 | 1. Complaint No. W437527 |
| 2. Indictment No. 180-1-87 | 2. Complaint No. S939978 |
| 3. Indictment No. 1318-7-88 | 3. Complaint No. 7379871 |
| 4. Indictment No. 336-2-90 | 4. Complaint No. 5576473 |
| | 5. Complaint No. 2214456 |
| | 6. Complaint No. 3379075 |

Custodian of Record: Captain J.T. Miller
Request Received by Custodian: N/A
Response Made by Custodian: None
GRC Complaint Received: May 27, 2016

Background³

Request and Response:

On April 14, 2016, the Complainant submitted, via certified mail, an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 19, 2016, Leslie McMullan from the City of New Brunswick (“City”) received and signed for the OPRA request.

¹ No legal representation listed on record.

² Represented by Joseph Catanese, Esq. (New Brunswick, 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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

Denial of Access Complaint:

On May 27, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he received no response to his OPRA request. The Complainant asserted that the records sought were about him and he was willing to pay for them. The Complainant contended that the City should either disclose or deny them, at which point he would proceed accordingly.

Statement of Information:

On July 5, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he did not receive the Complainant’s OPRA request. The Custodian affirmed that an employee with the City who was unfamiliar with OPRA procedures received and signed for the OPRA request. The Custodian further certified that the request was misplaced and never forwarded to him. The Custodian certified that based on this, he never received and did not respond to the subject OPRA request.

The Custodian affirmed that on September 17, 1999, the City was devastated by the effects of Hurricane Floyd. The Custodian certified that Police Headquarters, which housed records storage, was submerged by over six (6) feet of water due to tidal surges from the Raritan River. The Custodian noted that the building contents were either damaged or destroyed. The Custodian affirmed that prior to the building being demolished, efforts made to salvage records resulted in minimal success.

The Custodian certified that upon conducting a search for the records sought, it was revealed that any responsive to the request were lost as a result of Hurricane Floyd. The Custodian thus affirmed that any potential responsive records were destroyed and no longer in the Police Department’s possession. The Custodian noted that he was attaching a response letter to the Complainant as part of the SOI and apologized for any inconveniences caused by the misplacing of the OPRA request.

Analysis

Failure to Forward or Direct Request

OPRA further 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) (emphasis added).

In Kossup v. City of Newark Police Dep’t, GRC Complaint No. 2006-174 (February 2007), the complainant filed a Denial of Access Complaint after not receiving a response from the custodian. On October 4, 2006, OPRA Manager Joyce Lanier asserted that the custodian never received the request because it was sent directly to Lieutenant Caroline Clark of the City of Newark Police Department. Based on the facts presented, the Council held that “. . . [because] the Newark Police Department employee, [Lt. Clark] did not forward the Complainant’s request form or direct the Complainant to the [Custodian], . . . [Lt. Clark] has violated N.J.S.A. 47:1A-5(h).” Id. at 5. See

also Morgano v. N.J. Office of the Pub. Defender, Essex Cnty., GRC Complaint No. 2008-79 (July 2008) (citing Mourning v. Dep't of Corr., GRC Complaint No. 2006-75 (August 2006); Vessio v. N.J. Dep't of Cmty. Affairs, Div. of Fire Safety, GRC Complaint No. 2007-63 (May 2007)); Redd v. Franklin Twp. Pub. Sch. (Somerset), GRC Complaint No. 2014-185 (February 2015).

In the instant matter, the Complainant submitted his OPRA request via certified mail on April 14, 2016, and did not receive a response. As part of the Denial of Access Complaint, the Complainant included the certified mail receipt, which was signed by Ms. McMullan. Further, the Custodian certified in his SOI that he had no knowledge of the Complainant's OPRA request until receiving the Denial of Access Complaint. Thus, Ms. McMullan violated N.J.S.A. 47:1A-5(h) for failing to forward the Complainant's request or direct the Complainant to the Custodian, as required under OPRA.

Therefore, because Ms. McMullan failed to forward the Complainant's April 14, 2016 OPRA request to the Custodian or direct the Complainant to submit the OPRA request directly to the Custodian, she has violated N.J.S.A. 47:1A-5(h). See Kossup, GRC 2006-174.

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 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, the Complainant argued in the Denial of Access Complaint that he should be given copies of the records because they were about him and he was willing to pay applicable costs. Further, the Complainant asserted that the Custodian should either grant or deny access, at which point he would proceed accordingly.

Conversely, the Custodian certified in the SOI that records responsive to the subject OPRA request were destroyed during a natural disaster. The Custodian thus affirmed that the Police Department no longer possessed any responsive records. Additionally, there is no evidence in the record to refute that the Custodian did not possess the responsive records.

Accordingly, the Custodian has borne his burden of proof that he lawfully denied access to the Complainant's April 14, 2016 OPRA request because he certified in the SOI, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; Pusterhofer, GRC 2005-49.

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 currently before the Council, Ms. McMullan’s failure to forward the Complainant’s April 14, 2016 OPRA request to the Custodian or direct the Complainant to submit the OPRA request directly to the Custodian resulted in a violation of OPRA. N.J.S.A. 47:1A-5(h). However, the evidence of record does not indicate that Ms. McMullan’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Ms. McMullan’s actions did 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 Ms. McMullan failed to forward the Complainant’s April 14, 2016 OPRA request to the Custodian or direct the Complainant to submit the OPRA request directly to the Custodian, she has violated N.J.S.A. 47:1A-5(h). See Kossup v. City of Newark Police Dep’t, GRC Complaint No. 2006-174 (February 2007).
2. The Custodian has borne his burden of proof that he lawfully denied access to the Complainant’s April 14, 2016 OPRA request because he certified in the Statement of Information, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. Ms. McMullan’s failure to forward the Complainant’s April 14, 2016 OPRA request to the Custodian or direct the Complainant to submit the OPRA request directly to the Custodian resulted in a violation of OPRA. N.J.S.A. 47:1A-5(h). However, the evidence of record does not indicate that Ms. McMullan’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore,

Ms. McMullan's actions did 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
Communications Specialist/Resource Manager

June 19, 2018