



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

September 24, 2019 Government Records Council Meeting

Stacie Percella
Complainant

Complaint No. 2017-210

v.

City of Bayonne (Hudson)
Custodian of Record

At the September 24, 2019 public meeting, the Government Records Council (“Council”) considered the September 17, 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. The Custodian’s response to the Complainant’s September 19, 2017 OPRA request was legally insufficient because she failed to cite a specific lawful basis for the redactions made to the responsive records. Therefore, the Custodian violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008).
2. The Custodian lawfully denied access to the redacted portions of the Mayor’s calendar. N.J.S.A. 47:1A-6. Specifically, the names of private citizens meeting with the Mayor are protected to preserve the reasonable expectation of privacy pursuant to N.J.S.A. 47:1A-1 and fall under the executive privilege given to such information pursuant to N.J.S.A. 47:1A-9(b). See Gannett N.J. Partners, LP v. Cnty. of Middlesex, 379 N.J. Super. 205, 2017-18 (App. Div. 2005); McDonald v. City of Jersey City, GRC Complaint No. 2015-274 (January 2017).
3. The Custodian provided an insufficient response to the Complainant’s September 19, 2017 OPRA request. N.J.S.A. 47:1A-5(g). However, the Custodian properly redacted the names of private citizens from the Mayor’s calendar under N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-9(b). Additionally, the evidence of record does not indicate that Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’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 24th Day of September 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: September 27, 2019

**TATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 24, 2019 Council Meeting**

**Stacie Percella¹
Complainant**

GRC Complaint No. 2017-210

v.

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

Records Relevant to Complaint: Electronic copies via e-mail of Mayor James M. Davis' calendar from July 2014 to present.³

Custodian of Record: Robert F. Sloan⁴

Request Received by Custodian: September 19, 2017

Response Made by Custodian: September 28, 2017

GRC Complaint Received: November 1, 2017

Background⁵

Request and Response:

On September 19, 2017, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On September 28, 2017, Christina LaGatta responded in writing on behalf of the Custodian, providing copies of the Mayor's calendar with redactions contained therein.

Denial of Access Complaint:

On November 1, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that the City of Bayonne's ("City") response to her OPRA request was incomplete. The Complainant asserted that the Custodian and the City's Law Director, John F. Coffey, II, Esq., redacted all names and dates from the Mayor's calendar despite considered to be public knowledge.

¹ No legal representation listed on record.

² Represented by Jessica H. Connors, Esq. Previously represented by Karla Y. Garcia, Esq. (Bayonne, NJ).

³ The Complainant requested other records that are not at issue in the current matter.

⁴ The current Custodian of Record is Madelene Medina.

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

The Complainant asserted that the Custodian and Law Director failed to adhere to OPRA, stating that they failed to provide an explanation for any of the redactions made to the responsive records. The Complainant contended that the responsive records would only contain public knowledge such as names, dates, and times, and would not contain private information.

The Complainant argued that the Custodian and Law Director have gone above and beyond to deny, fail to respond, or provide incomplete responses to hers and others' OPRA requests. The Complainant contended that the Custodian and the Law Director should be fined in order to stop them from continuing the above actions.

Statement of Information:

On November 30, 2017, the Custodian filed a Statement of Information ("SOF"). The Custodian certified that he received the Complainant's OPRA request on September 19, 2017. The Custodian certified that the request was forwarded to the Executive Assistant to the Mayor. The Custodian certified that, on his behalf, Ms. LaGatta responded in writing on September 28, 2017, providing responsive records containing redactions.

The Custodian asserted that under N.J.S.A. 47:1A-1, the City has "an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosed thereof would violate the citizen's reasonable expectation of privacy." See Burnett v. Cnty. of Bergen, 198 N.J. 408 (2009). The Custodian argued that private citizens did not expect their names to be disclosed, displayed, or subjected to harassment when exercising their right to speak to their public official. The Custodian therefore asserted that the City withheld the names of those private citizens to fulfill its obligation to safeguard their reasonable expectation of privacy. The Custodian argued that the City is complying with OPRA by leaving the names of public officials, business, and other government entities unredacted, but maintained that releasing the identities of private citizens do not provide a public benefit and are not related to OPRA's goal of transparency in government. Id. at 414.

The Custodian argued that contrary to the Complainant's assertion, the City did not redact "all names and dates as they saw fit." The Custodian asserted that private citizens who have questions or concerns with the Mayor regarding potentially personal matters would not expect their identities to be publicized. The Custodian argued that publicizing these names would likely discourage residents from feeling free to speak with their elected officials. The Custodian contended that consideration was made to the overall public policy of transparency by leaving the names of all elected officials, business entities, and other government agencies unredacted during their meetings with the Mayor in his public capacity.

The Custodian requested that the GRC apply the balancing test outlined in Burnett, where the court considered the following factors:

- (1) the type of record requested;
- (2) the information it does or might contain;
- (3) the potential for harm in any subsequent nonconsensual disclosure;
- (4) the injury from disclosure to the relationship in which the record was generated;
- (5) the adequacy of safeguards to prevent unauthorized disclosure;
- (6) the degree of need

for access; and (7) whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access.

[Id. at 427 (quoting Doe v. Poritz, 142 N.J. 1, 88 (1995).]

Analysis

Insufficient Response

OPRA requires that, when providing access to redacted records, a custodian shall provide a specific lawful basis for redactions. In Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008), the custodian responded in a timely manner providing redacted records to the complainant; however, the custodian failed to provide a specific legal basis for said redactions. The Council held that “[t]he Custodian’s response was legally insufficient under OPRA because he failed to provide a written response setting forth a detailed and lawful basis for each redaction . . .” Id. at 4. See also 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, via Ms. LaGatta, timely responded to the Complainant’s September 19, 2017 OPRA request. However, while the Custodian provided the Mayor’s calendar, he failed to cite a specific lawful basis for the redactions contained therein. It was not until he submitted the SOI on November 30, 2017 that he provided the basis for the redactions.

Accordingly, the Custodian’s response to the Complainant’s September 19, 2017 OPRA request was legally insufficient because he failed to cite a specific lawful basis for the redactions made to the responsive records. Therefore, the Custodian violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff, GRC 2007-209.

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 is permitted to raise additional defenses regarding the disclosure of records pursuant to Paff v. Twp. of Plainsboro, 2007 N.J. Super. Unpub. LEXIS 2135 (App. Div.) (certif. denied, 193 N.J. 292 (2007)).⁶ In Paff, the complainant challenged the GRC’s authority to uphold a denial of access for reasons never raised by the custodian. Specifically, the Council did not uphold the basis for the redactions cited by the custodian. The Council, on its own initiative, determined that the Open Public Meetings Act prohibited the disclosure of the redacted portions

⁶ On appeal from Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (March 2006).

to the requested executive session minutes. The Council affirmed the custodian's denial to portions of the executive session minutes but for reasons other than those cited by the custodian. The complainant argued that the GRC did not have the authority to do anything other than determine whether the custodian's cited basis for denial was lawful. The court held that:

The GRC has an independent obligation to "render a decision as to whether the record which is the subject of the complaint is a government record which must be made available for public access pursuant to' OPRA . . . The GRC is not limited to assessing the correctness of the reasons given for the custodian's initial determination; it is charged with determining if the initial decision was correct."

The court further stated that:

Aside from the clear statutory mandate to decide if OPRA requires disclosure, the authority of a reviewing agency to affirm on reasons not advanced by the reviewed agency is well established. Cf. Bryant v. City of Atl. City, 309 N.J. Super. 596, 629-30 (App. Div. 1998) (citing Isko v. Planning Bd. of Livingston, 51 N.J. 162, 175 (1968) (lower court decision may be affirmed for reasons other than those given below)); Dwyer v. Erie Inv. Co., 138 N.J. Super. 93, 98 (App. Div. 1975) (judgments must be affirmed even if lower court gives wrong reason), certif. denied, 70 N.J. 142 (1976); Bauer v. 141-149 Cedar Lane Holding Co., 42 N.J. Super. 110, 121 (App. Div. 1956) (question for reviewing court is propriety of action reviewed, not the reason for the action) (aff'd, 24 N.J. 139 (1957)).

OPRA provides that a ". . . public agency has a responsibility and obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy." N.J.S.A. 47:1A-1. OPRA further provides that "[t]he provisions of [OPRA] shall not abrogate any . . . grant of confidentiality heretofore established or recognized by . . . judicial case law, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record." N.J.S.A. 47:1A-9(b).

In McDonald v. City of Jersey City, GRC Complaint No. 2015-274 (January 2017), the complainant sought the mayor's calendar for a given year. When provided a public calendar, the complainant stated that the calendar did not contain "private meetings" or similar events. The custodian asserted that that release of the mayor's private calendar would run afoul of the privacy expectations of those individuals and of the mayor, citing Gannett N.J. Partners, LP v. Cnty. of Middlesex, 379 N.J. Super. 205 (App. Div. 2005). In reconsidering its prior order, the Council agreed with the custodian, holding that a mayor's private calendar is exempt from access to protect the privacy interests of private citizens communicating with the mayor, thereby falling within the same grant of privilege as similar records documenting communications. N.J.S.A. 47:1A-(9)(b).

In the current matter, there is only one calendar at issue rather than two (2) calendars split between public and private. However, the Custodian certified that he only redacted the names of private citizens meeting with the mayor. Although public events and private meetings were listed within the same calendar, a review of same indicates that the Custodian's redactions comply with

McDonald's intent to protect the privacy of those private citizens. GRC 2015-274. Therefore, the GRC is satisfied that the Custodian properly redacted the names of private citizens from the Mayor's public calendar in accordance with the privilege outlined in Gannett, 379 N.J. Super. at 217-18.

Accordingly, the Custodian lawfully denied access to the redacted portions of the Mayor's calendar. N.J.S.A. 47:1A-6. Specifically, the names of private citizens meeting with the Mayor are protected to preserve the reasonable expectation of privacy pursuant to N.J.S.A. 47:1A-1 and fall under the executive privilege given to such information pursuant to N.J.S.A. 47:1A-9(b). See Gannett, 379 N.J. Super. at 217-18; McDonald, GRC 2015-274.

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 provided an insufficient response to the Complainant's September 19, 2017 OPRA request. N.J.S.A. 47:1A-5(g). However, the Custodian properly redacted the names of private citizens from the Mayor's calendar under N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-9(b). Additionally, the evidence of record does not indicate that Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian'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 Executive Director respectfully recommends the Council find that:

1. The Custodian's response to the Complainant's September 19, 2017 OPRA request was legally insufficient because she failed to cite a specific lawful basis for the redactions made to the responsive records. Therefore, the Custodian violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008).
2. The Custodian lawfully denied access to the redacted portions of the Mayor's calendar. N.J.S.A. 47:1A-6. Specifically, the names of private citizens meeting with the Mayor are protected to preserve the reasonable expectation of privacy pursuant to N.J.S.A. 47:1A-1 and fall under the executive privilege given to such information pursuant to N.J.S.A. 47:1A-9(b). See Gannett N.J. Partners, LP v. Cnty. of Middlesex, 379 N.J. Super. 205, 2017-18 (App. Div. 2005); McDonald v. City of Jersey City, GRC Complaint No. 2015-274 (January 2017).
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Prepared By: Samuel A. Rosado
Staff Attorney

September 17, 2019