



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

Ruth Townes
Complainant

Complaint No. 2019-216

v.

NJ Transit
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 the Custodian has borne his burden of proof that he lawfully denied access to the Complainant’s OPRA request seeking surveillance footage of an accident at Newark Penn Station on August 25 or 26, 2019. Specifically, the Custodian certified in the Statement of Information, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

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**

**Ruth Townes¹
Complainant**

GRC Complaint No. 2019-216

v.

**N.J. Transit²
Custodial Agency**

Records Relevant to Complaint: Hardcopies via U.S. mail of video camera footage showing her accident on Track 4 at Newark Penn Station between 9:00 p.m. and 10:30 p.m.

Custodian of Record: Rocio Munoz

Request Received by Custodian: September 6, 2019

Response Made by Custodian: September 19, 2019

GRC Complaint Received: October 21, 2019

Background³

Request and Response:

On August 29, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 19, 2019, Board Office employee Princess Kelly responded in writing on behalf of the Custodian stating that no video capturing the incident occurring on “September 26, 2019” exist. The Custodian noted that had such a record existed, it would have been exempt from disclosure under OPRA’s security and surveillance exemptions. N.J.S.A. 47:1A-1.1; Gilleran v. Twp. of Bloomfield, 227 N.J. 159 (2016). On September 30, 2019, Ms. Kelly responded in writing confirming a phone conversation with the Complainant on September 24, 2019. Ms. Kelly reiterated her previous denial on the basis that no records exist and would be otherwise exempt under OPRA if it existed. N.J.S.A. 47:1A-1.1; Gilleran, 227 N.J. 159.

Denial of Access Complaint:

On October 21, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that she recently had an

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Patricia Krogman

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.

accident at Newark Penn Station near the end of August and sought a video recording because the record was the “witness to what happen[ed].” The Complainant argued that she was unlawfully denied access to the recording on two (2) occasions, and that Ms. Kelly’s response contained an erroneous date. The Complainant noted that she subsequently spoke with Ms. Kelly via telephone, who again denied access to the requested surveillance footage.

Statement of Information:⁴

On November 19, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on September 6, 2019. The Custodian certified that his search included obtaining Newark Penn Station surveillance footage from the N.J. Transit Police Department. The Custodian affirmed that upon review, the accident referenced by the Complainant was not captured. The Custodian certified that Ms. Kelly responded in writing on September 19⁵ and 30, 2019 advising that no records existed, but that same would have been exempt if they did exist.

The Custodian stated that the Complainant submitted her OPRA request on a submission that was partially N.J. Transit’s OPRA request form and partially on a notice of tort claim form. The Custodian noted that the Complainant referenced the accident by time but failed to include a date and location. The Custodian averred that he contacted the Complainant via telephone and discussed the request with her on multiple occasions. The Custodian averred that the alleged accident was presumed to have occurred on Track Number 4 in Newark Penn Station on either August 25 or 26, 2019 based on information ascertained from the Complainant during their telephone conversations subsequent to the request filing.

The Custodian argued that he lawfully denied access to the subject OPRA request because no records exist. Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). The Custodian asserted that he has certified to his search and the fact that no records exist and there is no evidence to contradict that certification. The Custodian thus contended that this complaint should be dismissed. The Custodian additionally argued that even if a responsive record existed, it would be exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; Gilleran, 227 N.J. 159; Howard v. N.J. Transit, GRC Complaint No. 2018-43 (November 2019).

Analysis

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.

⁴ On November 12, 2019, this complaint was referred to mediation. On February 24, 2020, this complaint was referred back to the GRC for adjudication.

⁵ The Custodian noted that Ms. Kelly’s reference to “September 26, 2019” in her first response was a typographical error.

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer, GRC 2005-49. In the matter before the Council, the Custodian denied access to the Complainant's OPRA request through Ms. Kelly because no records existed. The Custodian subsequently certified to this fact in the SOI. The Custodian supported his position by describing the search conducted to locate potentially responsive footage. Upon review of the arguments submitted, the GRC is persuaded that the Custodian lawfully denied access to the requested footage because no records existed. The GRC bases this conclusion on the Custodian's certified statements regarding his review of surveillance camera footage from August 25 and 26, 2019. Additionally, while the GRC does not question that the accident occurred, the evidence of record supports that no surveillance footage of it exists.⁶

Accordingly, the Custodian has borne his burden of proof that he lawfully denied access to the Complainant's OPRA request seeking surveillance footage of an accident at Newark Penn Station on August 25 or 26, 2019. Specifically, the Custodian certified in the SOI, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian has borne his burden of proof that he lawfully denied access to the Complainant's OPRA request seeking surveillance footage of an accident at Newark Penn Station on August 25 or 26, 2019. Specifically, the Custodian certified in the Statement of Information, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

Prepared By: Frank F. Caruso
Executive Director

January 19, 2021

⁶ The GRC notes that it will not address the Custodian's assertion that the record would have been exempt under N.J.S.A. 47:1A-1.1 because the evidence supports that no records exist.