



State of New Jersey
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Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

September 29, 2020 Government Records Council Meeting

James Babb
Complainant

Complaint No. 2019-27

v.

NJ Department of Health
Custodian of Record

At the September 29, 2020 public meeting, the Government Records Council (“Council”) considered the September 22, 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. The Complainant’s February 7, 2019 letter 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, 232 (App. Div. 2009); Maness v. Borough of Sayreville (Middlesex), GRC Complaint No. 2009-192 (August 2010). However, the Complainant’s invoking of OPRA thirty (30) minutes after Ms. Clelland’s denial and again ten (10) minutes after her second denial made it clear that the subject request was being made pursuant to OPRA. Thus, Ms. Clelland should have treated the February 7, 2019 letter as a valid OPRA request at that time. Further, the GRC declines to order disclosure because the Custodian provided all records that existed to the Complainant as part of the Statement of Information on June 18, 2020.
2. Because Ms. Clelland failed to forward the Complainant’s OPRA request to the appropriate Custodian or direct the Complainant to the Custodian, she 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).
3. Ms. Clelland’s failure to provide a specific lawful basis for denying access to the requested Nursing Home Administrators mailing list resulted in an insufficient response. N.J.S.A. 47:1A-5(g); Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008).
4. Ms. Clelland violated OPRA because she failed to forward the subject OPRA request to the Custodian or return it to the Complainant and direct him to the proper custodian. N.J.S.A. 47:1A-5(h). Further, Ms. Clelland’s response was insufficient because she failed to provide a specific lawful basis for her denial and failed to definitively state that no records existed. N.J.S.A. 47:1A-5(g). However, the Custodian ultimately disclosed to the Complainant the responsive list as part of the Statement of Information



on June 18, 2020. Additionally, the evidence of record does not indicate that Ms. Clelland's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Ms. Clelland'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 29th Day of September 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: October 1, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 29, 2020 Council Meeting**

**James Babb¹
Complainant**

GRC Complaint No. 2019-27

v.

**N.J. Department of Health²
Custodial Agency**

Records Relevant to Complaint: Electronic copy of a mailing list for all Nursing Home Administrators (“NHA”).

Custodian of Record: Wayne Casa³

Request Received by Custodian: February 7, 2019

Response Made by Custodian: February 7, 2019

GRC Complaint Received: February 7, 2019

Background⁴

On February 6, 2019, the Complainant e-mailed Executive Director Lesley M. Clelland seeking the above-mentioned records.⁵ On the same day, Ms. Clelland advised the Complainant that he had to submit a signed letter including the agency or company with whom he was affiliated and the reasons for said request.

Request and Response:

On February 7, 2019, the Complainant sent a letter request not identifying the Open Public Records Act (“OPRA”) via e-mail to Ms. Clelland seeking the above-mentioned records. On the same day, Ms. Clelland responded in writing stating that the responsive mailing list was “not public.” The Complainant responded stating that “[a]ll government records are subject to public access unless specifically exempt under OPRA or any other law.” The Complainant thus asked Ms. Clelland to identify “the specific statute that exempts these records from [sic] [OPRA].” Ms. Clelland responded stating that only the information contained on the New Jersey Department of Health (“DOH”) website was public; however, NHA mailing addresses were not. Ms. Clelland

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Mark D. McNally.

³ The Complainant named Lesley M. Clelland as the “custodian of record” in the Denial of Access 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.

⁵ This non-form request did not mention OPRA. See *Renna v. Cnty. of Union*, 407 N.J. Super. 230 (App. Div. 2009).

thus denied access to the Complainant's request. The Complainant responded again asking Ms. Clelland to "provide the specific lawful basis for a denial of access, as required per the OPRA."

Denial of Access Complaint:

On February 7, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that he was unlawfully denied access to the responsive NHA mailing list. The Complainant contended that although he sought a specific lawful basis for the denial, Ms. Clelland failed to provide one.

Statement of Information:⁶

On June 18, 2020, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that Ms. Clelland received the initial request on February 6, 2019. The Custodian certified that Ms. Clelland responded multiple times between February 6, and 7, 2020 denying the request "because it was not a valid OPRA request and because the responsive list was 'not public.'" The Custodian affirmed that he nonetheless was disclosing the responsive list to the Complainant as part of the SOI.

The Custodian contended that this complaint should be dismissed the Complainant did not submit a proper OPRA request to the New Jersey Department of Health. Renna v. Cnty. of Union, 407 N.J. Super. 230, 232 (App. Div. 2009). The Custodian contended that the Complainant failed to address his request to the Custodian or use the appropriate OPRA request form. The Custodian further contended that at no point did he definitively state that he was making a request pursuant to OPRA.

The Custodian also argued that the Complainant's request was invalid because it failed to identify specific government records. Gannett N.J. Partners, L.P. v. Cnty. of Middlesex, 379 N.J. Super. 205, 212 (App. Div. 2005). The Custodian argued that the Complainant did not identify the type of mailing list sought. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 549 (App. Div. 2005); Bent v Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005).

The Custodian argued that to the extent that the GRC considers the Complainant's request to be valid, this complaint should also be dismissed because it was moot following disclosure of the responsive list to the Complainant. Stop & Shop Supermarket, Co. v. Cnty. of Bergen, 450 N.J. Super. 286, 291-292 (App. Div. 2017); Mason v. City of Hoboken, 2008 N.J. Super. Unpub. LEXIS 1660, 7 (App. Div. 2008).

⁶ On March 1, 2019, after not receiving a response to the offer of mediation, the GRC requested a completed Statement of Information from the Ms. Clelland. Following multiple extensions and receipt of a letter of representation from Custodian's Counsel, the GRC set a final date of April 10, 2018 to respond to the offer of mediation or submit a Statement of Information. After having not received a response from Ms. Clelland or Custodian's Counsel, the GRC tentatively scheduled this complaint for the Council's April 28, 2020 meeting. In response to the GRC's notification of this scheduling, Custodian's Counsel advised that he, in fact, responded on April 9, 2019 by submitting a signed mediation agreement form via e-mail. The GRC confirmed with Custodian's Counsel that it never received the April 9, 2019 e-mail; however, the GRC would refer the complaint to mediation due to procedural anomalies. On May 1, 2020, and notwithstanding the Complainant's objections, the GRC referred this complaint to mediation. On May 8, 2020, this complaint was referred back to the GRC for adjudication.

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, as long as 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 threshold issue is whether the Complainant’s February 7, 2019 non-form letter seeking access to the requested list could effectively be considered a valid OPRA request. The Complainant submitted his non-form request via e-mail without any mention of OPRA in either the letter or transmitting e-mail. However, thirty (30) minutes after receiving Ms. Clelland’s denial, the Complainant sent an e-mail stating that “[a]ll government records” are subject to access “unless specifically exempt under OPRA or any other statute.” The Complainant thus requested that Ms. Clelland provide a specific lawful basis for denying access to the requested list under OPRA. Ms. Clelland responded ten (10) minutes later again denying access and noting that the information on DOH’s website was “a matter of public record; however[,] NHA addresses are not.” The Complainant immediately responded renewing his attempt to obtain a specific basis for the denial “under OPRA.”

The instant complaint ensued, wherein the Complainant argued that Ms. Clelland unlawfully denied access to the requested record and failed to provide a specific lawful basis for said denial. In the SOI, the Custodian contended that not only did the Complainant never submit any request to him, but that the February 7, 2019 letter did not constitute a valid OPRA request per Renna, 407 N.J. Super. 230. The Custodian also contended that aside from failing to utilize DOH's official OPRA request form, the Complainant also failed to definitively state at any point that he was submitting an OPRA request.

Upon review, the Council agrees that the Complainant's February 7, 2019 letter did not constitute a valid OPRA request. Specifically, the Complainant did not mention OPRA either in the letter or transmitting e-mail. Thus, and consistent with Maness, GRC 2009-192, it is reasonable to assume that Ms. Clelland would not have known that the Complainant sought records under OPRA at the time she received the Complainant's letter.

However, the facts here depart from Maness, and run contrary to the Custodian's assertion that the Complainant never invoked OPRA, based on the e-mail exchange that ensued following Ms. Clelland's initial denial. Specifically, approximately thirty (30) minutes following Ms. Clelland's initial denial, the Complainant cited to OPRA when he sought a specific lawful basis for same. This follow-up e-mail, which clearly invoked OPRA, should have signaled to Ms. Clelland that the Complainant's intent was to obtain the records under OPRA even if she believed they were nonetheless exempt. However, Ms. Clelland quickly responded again proffering her denial, which prompted the filing of the instant complaint. The Complainant again responded ten (10) minutes later invoking OPRA; thus, all conjecture as to whether the Complainant sought access to the list under OPRA was settled within an hour after he submitted his initial letter request. Thus, even if the original letter was not a valid OPRA request, the Complainant's invoking of OPRA shortly thereafter triggered the statute and all processes provided for therein to include this Denial of Access Complaint.

Thus, the Complainant's February 7, 2019 letter 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 Complainant's invoking of OPRA thirty (30) minutes after Ms. Clelland's denial and again ten (10) minutes after her second denial made it clear that the subject request was being made pursuant to OPRA. Thus, Ms. Clelland should have treated the February 7, 2019 letter as a valid OPRA request at that time. Further, the GRC declines to order disclosure because the Custodian provided all records that existed to the Complainant as part of the SOI on June 18, 2020.

Finally, because OPRA is not the only method an individual may use when seeking information from government agencies, it is imperative that requestors submitting a non-form OPRA request clearly invoke OPRA either by name or statutory citation. Further, the Renna court's holding stresses that while requestors should use an agency's official OPRA request form, they are not required to so long as the non-form equivalent gives the custodian "sufficient information to make the threshold determination as to the nature of the request and whether it falls within the scope of OPRA." Id. at 245. Here, the GRC's finding is narrowly construed to the unique circumstances set forth in this procedural history. However, this finding should not signal to requestors that it is appropriate to obscure their intent to submit an OPRA request through non-form submissions until contesting a custodian's response in either subsequent communications or

a Denial of Access Complaint. Instead, requestors should use an official OPRA request form where able or specifically cite to OPRA in their non-form equivalent.

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 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).

Here, the evidence of record indicates that Ms. Clelland received the Complainant’s letter request on February 7, 2019. Thereafter, Ms. Clelland responded in writing directly to the Complainant denying the request. As noted above, Ms. Clelland could not have known when initially responding that the Complainant sought the responsive list under OPRA. However, the Complainant subsequently sought from Ms. Clelland a specific lawful basis for the denial “under OPRA” twice within one hour of the original letter submission. Once alerted to the fact that the Complainant sought access to the list under OPRA, Ms. Clelland did not forward the request to the Custodian or return it to the Complainant with instructions for filing with the Custodian. As in Kossup, the evidence of record supports that Ms. Clelland violated OPRA by failing to adhere to N.J.S.A. 47:1A-5(h).

Therefore, because Ms. Clelland failed to forward the Complainant’s OPRA request to the appropriate Custodian or direct the Complainant to the Custodian, she violated N.J.S.A. 47:1A-5(h). See Kossup, GRC 2006-174.

Sufficiency of Response

OPRA provides that if a “custodian is unable to comply with a request for access, the custodian *shall indicate the specific basis therefor* . . . on the request form and promptly return it to the requestor.” N.J.S.A. 47:1A-5(g) (emphasis added). 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, he failed to provide a specific legal basis for said redactions. The Council, relying on prior decisions in Schwarz v. N.J. Dep’t of Human Serv., GRC Complaint No. 2004-60 (February 2005) and Paff v. Twp. of Plainsboro, GRC Complaint No. 2005-29 (July 2005) held that:

The 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 . . . Therefore, the Custodian violated OPRA pursuant to N.J.S.A. 47:1A-5.g. and has not borne his burden of proving the denial of access to the redacted portions was authorized by law pursuant to N.J.S.A. 47:1A-6.

[Id. at 4.]

Here, Ms. Clelland responded in a timely manner denying access to the Complainant's letter request on the basis that the sought NHA mailing list was "not public." The Complainant responded asking the Custodian to provide a specific lawful basis for her denial "as required under OPRA." Ms. Clelland responded reiterating that the request was denied but did not provide a specific lawful basis. Further, Ms. Clelland did not respond to the Complainant's renewed attempt to obtain a specific lawful basis. Thereafter, in the Denial of Access Complaint, the Complainant asserted that Ms. Clelland failed to provide a specific lawful basis for denied access to the requested list. The forgoing evidence of record here is factually on point with Paff, GRC 2007-209. For this reason, and because Ms. Clelland undertook the responsibility of responding to the Complainant's OPRA request, her response was insufficient.

Accordingly, Ms. Clelland's failure to provide a specific lawful basis for denying access to the requested NHA mailing list resulted in an insufficient response. N.J.S.A. 47:1A-5(g); Paff, GRC 2007-209.

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, Ms. Clelland violated OPRA because she failed to forward the subject OPRA request to the Custodian or return it to the Complainant and direct him to the proper custodian. N.J.S.A. 47:1A-5(h). Further, Ms. Clelland's response was insufficient because she failed to provide a specific lawful basis for her denial and failed to definitively state that no records existed. N.J.S.A. 47:1A-5(g). However, the Custodian ultimately disclosed to the Complainant the responsive list as part of the SOI on June 18, 2020. Additionally, the evidence of record does not indicate that Ms. Clelland's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Ms. Clelland'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. The Complainant's February 7, 2019 letter 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, 232 (App. Div. 2009); Maness v. Borough of Sayreville (Middlesex), GRC Complaint No. 2009-192 (August 2010). However, the Complainant's invoking of OPRA thirty (30) minutes after Ms. Clelland's denial and again ten (10) minutes after her second denial made it clear that the subject request was being made pursuant to OPRA. Thus, Ms. Clelland should have treated the February 7, 2019 letter as a valid OPRA request at that time. Further, the GRC declines to order disclosure because the Custodian provided all records that existed to the Complainant as part of the Statement of Information on June 18, 2020.
2. Because Ms. Clelland failed to forward the Complainant's OPRA request to the appropriate Custodian or direct the Complainant to the Custodian, she violated N.J.S.A. 47:1A-5(h). See Kosup v. City of Newark Police Dep't, GRC Complaint No. 2006-174 (February 2007).
3. Ms. Clelland's failure to provide a specific lawful basis for denying access to the requested Nursing Home Administrators mailing list resulted in an insufficient response. N.J.S.A. 47:1A-5(g); Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008).
4. Ms. Clelland violated OPRA because she failed to forward the subject OPRA request to the Custodian or return it to the Complainant and direct him to the proper custodian. N.J.S.A. 47:1A-5(h). Further, Ms. Clelland's response was insufficient because she failed to provide a specific lawful basis for her denial and failed to definitively state that no records existed. N.J.S.A. 47:1A-5(g). However, the Custodian ultimately disclosed to the Complainant the responsive list as part of the Statement of Information on June 18, 2020. Additionally, the evidence of record does not indicate that Ms.

Clelland's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Ms. Clelland'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: Frank F. Caruso
Executive Director

September 22, 2020