



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

March 25, 2014 Government Records Council Meeting

David H. Weiner
Complainant

Complaint No. 2013-220

v.

County of Essex
Custodian of Record

At the March 25, 2014 public meeting, the Government Records Council (“Council”) considered the March 18, 2014 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian’s response to the Complainant’s OPRA request informing the Complainant that there were no responsive records constitutes an insufficient search and an unlawful denial of access to the two (2) records subsequently located. N.J.S.A. 47:1A-6. *Schneble v. NJ Dep’t of Env’tl. Protection*, GRC Complaint No. 2007-220 (April 2008).
2. Since the Custodian certified in the SOI and in his March 12, 2014 response to the GRC’s Additional Information Request that no other responsive records exist, and because the Complainant did not submit any contrary argument or evidence to refute the Custodian’s certification, the Custodian did not unlawfully deny access to the requested records. *See Pusterhofer v. NJ Dep’t of Educ.*, GRC Complaint No. 2005-49 (July 2005).
3. Although the Custodian conducted an insufficient search in response to the Complainant’s request and thus unlawfully denied access to those two (2) records, the Custodian provided the Complainant with all records responsive to the request. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and an 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 25th Day of March, 2014

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 27, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 25, 2014 Council Meeting**

**David H. Weiner¹
Complainant**

GRC Complaint No. 2013-220

v.

**County of Essex²
Custodial Agency**

Records Relevant to Complaint: Copy of all documents denoting the names, titles and County agencies of those County employees whom attended one, two or all three of the events.³

Custodian of Record: Michael Venezia⁴

Request Received by Custodian: June 20, 2013; July 2, 2013

Response Made by Custodian: June 26, 2013; July 12, 2013

GRC Complaint Received: July 30, 2013

Background⁵

Request and Response:

On June 13, 2013, the Complainant submitted an informal Open Public Records Act (“OPRA”) request⁶ to the Custodian seeking hard copies of the following records:

1. All email messages, including their respective email addresses and the names of their recipients, sent by Anna J. Santos, Assistant/Scheduler on behalf of Essex County Executive Joseph DiVincenzo requesting the presence of County employees at the following events:
 - The Sea Lion Sound Exhibit opening on April 10, 2013.
 - Construction announcement of a Technology Enhanced Active Learning (“TEAL”) Center building at Essex County Newark Tech on May 7, 2013.
 - Construction announcement of a senior residence building in Belleville on May 29, 2013.

¹ No legal representation listed on record.

² Represented by James Paganelli, Esq. (Newark, NJ).

³ The “events” referenced are those listed in the Complainant’s June 13, 2013 OPRA request.

⁴ Al Fusco was the Custodian of Record at the time the OPRA request was submitted.

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.

⁶ This OPRA request is not at issue in this matter but is elaborated here for clarification and context.

On June 19, 2013, four (4) business days later, the Custodian responded in writing informing the Complainant that he could retrieve hard copies the responsive documents at the Essex County Hall of Records.

On June 20, 2013, the Complainant submitted another informal Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.⁷ On June 26, 2013, four (4) business days later, the Custodian denied the Complainant’s request, in writing, stating that the Office of the County Executive (Ana Santos) does not create or maintain any of the requested records.

On July 2, 2013, the Complainant replied to the Custodian, in writing, clarifying that the requested records could be obtained from county agencies and their respective managers beyond Ana Santos’ office. On July 12, 2013, seven (7) business days later, the Custodian produced emails obtained from the Essex County Youth Services Commission and the Division of House & Community Development, stating those were the only responsive records to the Complainant’s request.

Denial of Access Complaint:

On July 30, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant does not provide any basis for filing the complaint, nor does he provide an argument to support his position.

Statement of Information:

On September 20, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies the only records that exist are the two (2) emails containing the names of attendees already provided to the Complainant. The Custodian argues that under OPRA he is not responsible for creating or compiling a record of the names, titles, and agencies of employees who attended three public events. The Custodian maintains that records containing the information the Complainant seeks do not exist for all of the county’s agencies.

Additional Submissions:

On March 12, 2014, the GRC delivered an Additional Information Request to the Custodian via email. The GRC inquired as to how the lists of names contained in the produced records were compiled, and whether there is a source record from which the emails were created.

On March 12, 2014, the Custodian provided a certification in response to the Additional Information Request. The Custodian certifies, “the lists were provided by Department Directors who assembled the list at the time of the request and [I] maintain that no record of attendance existed at the time of request.”

⁷ The Complainant requested other items under OPRA on June 20, 2013, but are not at issue in this matter.

Analysis

Insufficient Search

The Council has maintained that it is among a custodian's duties to perform a complete search for the requested records before responding to an OPRA request, as doing so will help ensure that the Custodian's response is accurate and has an appropriate basis in law. In Schneble v. NJ Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008), the custodian initially responded to the complainant's OPRA request by stating that no records responsive existed. The complainant, however, submitted e-mails that were responsive to her request with the Denial of Access Complaint. The custodian certified that, upon receipt of the e-mails attached to the Denial of Access Complaint, the custodian again searched through DEP files and located records responsive to the request. The GRC held that because the custodian performed an inadequate initial search, the custodian unlawfully denied the Complainant access to the requested records. *See also* Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (January 2011).

Here, as in Schneble, the Custodian on June 26, 2013, responded to the Complainant that there were no responsive records to his request. However, prior to filing his complaint, the Complainant argued in his July 2, 2013 correspondence that the Custodian's search location, the Office of the County Executive, was too narrow and that the Custodian should search all of Essex County's departments. Subsequently, the Custodian performed another search, located two (2) responsive records, and delivered them to the Complainant on July 12, 2013. As in Schneble, the Custodian failed to conduct an adequate search to locate all responsive records prior to his initial response. Accordingly, the Custodian's failure to conduct a sufficient search for all requested records constitutes an unlawful denial of access.

The Custodian's response to the Complainant's OPRA request informing the Complainant that there were no responsive records constitutes an insufficient search and an unlawful denial of access to the two (2) records subsequently located. N.J.S.A. 47:1A-6. Schneble, GRC 2007-220.

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.

In Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005), the complainant sought a copy of a telephone bill from the custodian in an effort to obtain proof that a phone call was made to him by an official from the Department of Education. The custodian provided a certification in his submission to the GRC that certified that the requested record was nonexistent and the complainant submitted no evidence to refute the custodian's certification.

The Council subsequently determined that “[t]he Custodian has certified that the requested record does not exist. Therefore, the requested record cannot (sic) be released and there was no unlawful denial of access.” Id.

Here, the Custodian initially responded stating that there were no records responsive to the Complainant’s request. The Custodian, however, subsequently provided two (2) emails containing the names, titles, and agencies of employees who attended the events described by the Complainant. The Custodian further certified that no other records exist which contain a list of attendees to the above-mentioned events from any other county department. The Custodian clarified and maintained this position in his certification provided to the GRC in response to their Additional Information Request.

Thus, since the Custodian certified in the SOI and in his March 12, 2014 response to the GRC’s Additional Information Request that no other responsive records exist, and because the Complainant did not submit any contrary argument or evidence to refute the Custodian’s certification, the Custodian did not unlawfully deny access to the requested records. *See 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 (Felder 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)).

Although the Custodian conducted an insufficient search in response to the Complainant’s request and thus unlawfully denied access to those two (2) records, the Custodian

provided the Complainant with all records responsive to the request. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an 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 OPRA request informing the Complainant that there were no responsive records constitutes an insufficient search and an unlawful denial of access to the two (2) records subsequently located. N.J.S.A. 47:1A-6. *Schneble v. NJ Dep't of Env'tl. Protection*, GRC Complaint No. 2007-220 (April 2008).
2. Since the Custodian certified in the SOI and in his March 12, 2014 response to the GRC's Additional Information Request that no other responsive records exist, and because the Complainant did not submit any contrary argument or evidence to refute the Custodian's certification, the Custodian did not unlawfully deny access to the requested records. *See Pusterhofer v. NJ Dep't of Educ.*, GRC Complaint No. 2005-49 (July 2005).
3. Although the Custodian conducted an insufficient search in response to the Complainant's request and thus unlawfully denied access to those two (2) records, the Custodian provided the Complainant with all records responsive to the request. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

Prepared By: Samuel A. Rosado, Esq.
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.
Senior Counsel

March 18, 2014