



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

September 24, 2013 Government Records Council Meeting

David H. Weiner
Complainant

Complaint No. 2013-52

v.

County of Essex
Custodian of Record

At the September 24, 2013 public meeting, the Government Records Council (“Council”) considered the September 17, 2013 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 OPRA request informing the Complainant that only two (2) records existed constitutes an insufficient search and an unlawful denial of access to the four (4) records subsequently located. N.J.S.A. 47:1A-6; Schneble v. NJ Dep’t of Env’t Protection, GRC Complaint No. 2007-220 (April 2008).
2. Since the Custodian certified in the SOI that no Memorandums of Understanding for 1999, 2001, 2002, 2003, 2005, 2007, 2008 and 2010 exist, and because the Complainant did not submit any 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 and thus unlawfully denied access to four (4) of the responsive MOUs, the Custodian did not unlawfully deny access to the MOUs for 1999, 2001, 2002, 2003, 2005, 2007, 2008 and 2010 because same do not exist. 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 24th Day of September, 2013

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 26, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 24, 2013 Council Meeting**

**David H. Weiner¹
Complainant**

GRC Complaint No. 2013-52

v.

**County of Essex²
Custodial Agency**

Records Relevant to Complaint: Copies of all documents, which may include a Memorandum of Agreement or Memorandum of Understanding (“MOU”), from 1999 to 2012 exchanged between the County of Essex (“County”), and the New Jersey Department of Human Services (“DHS”) and/or Division of Family Development delineating an agreement that the State annually advance to the County approximately \$15 million in Temporary Assistance for Needy Families (“TANF”) funds with the proviso that the County Division of Welfare maintain a minimum total staffing level.

Custodian of Record: Al Fusco
Request Received by Custodian: January 14, 2013
Response Made by Custodian: January 22, 2013
GRC Complaint Received: February 19, 2013

Background³

Request and Response:

On January 12, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 22, 2013, the Custodian responded in writing stating that he located two (2) MOUs for 2011 and 2012 in the Treasurer’s Office and is providing same.

Denial of Access Complaint:

On February 19, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant disputes that the Custodian only maintained responsive records for 2011 and 2012. The Complainant states that he simultaneously

¹ No legal representation listed on record.

² Represented by James Paganelli, Esq. (Newark, 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 Executive Director the submissions necessary and relevant for the adjudication of this complaint.

submitted an OPRA request to DHS for similar records and was provided with seven (7) MOUs dating back to 2005. The Complainant notes that the Custodian only referenced records maintained by the Treasurer's Office and did not indicate whether he searched for records at the County's Department of Citizen Services and/or its Division of Welfare, the recipient of the \$15 million dollar annual advance. The Complainant further contends that the 2012 MOU provided by the Custodian does not comport with the amount of money sent to the County indicated in the MOU provided by DHS.

The Complainant thus contends that the Custodian purposely failed to provide responsive records and provided an erroneous 2012 MOU. The Complainant requests that the Council order disclosure of all responsive records.

Statement of Information:

On May 15, 2013, the Custodian filed a Statement of Information ("SOI").⁴ The Custodian certifies that he received the Complainant's OPRA request on January 14, 2013 and responded on January 22, 2013, providing MOUs for 2011 and 2012 maintained by the Treasurer's Office. The Custodian certifies that on March 25, 2013, he provided the Complainant an MOU for 2004. The Custodian certifies that on April 5, 2013, he provided the Complainant MOUs for 2000, 2006 and 2009 that were located in the retired County Treasurer's work papers and advised that he found no other MOUs responsive to the OPRA request. The Custodian certifies that MOUs for 1999, 2001, 2002, 2003, 2005, 2007, 2008 and 2010 no longer exist.

Analysis⁵

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't 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).

This complaint differs from Schneble in that the Custodian initially responded, providing the Complainant two (2) responsive records and advising that no other records were located.

⁴ On February 26, 2013, this complaint was referred to mediation. On May 3, 2013, the complaint was referred back to the GRC for adjudication.

⁵ There may be other OPRA issues in this matter; however, the Council's analysis is based solely on the claims made in the Complainant's Denial of Access Complaint.

However, subsequent to the filing of this complaint, the Custodian performed another search and located four (4) additional records. 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.

Therefore, the Custodian's response to the Complainant's OPRA request informing the Complainant that only two (2) records existed constitutes an insufficient search and an unlawful denial of access to the four (4) 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 providing MOUs for 2011 and 2012 that he located in the Treasurer's Office. The Custodian subsequently provided MOUs for 2000, 2004, 2006 and 2009 and advised that no other MOUs were located. The Custodian further certified in the SOI that no MOUs for 1999, 2001, 2002, 2003, 2005, 2007, 2008 and 2010 exist. The GRC notes that although the Complainant received MOUs from another agency, these records are not sufficient evidence to indicate that the County also possesses these records.

Thus, since the Custodian certified in the SOI that no MOUs for 1999, 2001, 2002, 2003, 2005, 2007, 2008 and 2010 exist, and because the Complainant did not submit any evidence to refute the Custodian's certification, the Custodian did not unlawfully deny access to the requested records. *See* Pusterhofer, GRC 2005-49.

The GRC finally notes that the Complainant takes issue with a discrepancy in the content between the 2012 MOUs provided by the Custodian and DHS. However, the GRC has no authority over the content of a record. N.J.S.A. 47:1A-7(b); Anonymous v. Township of Monroe, GRC Complaint No. 2006-160 (April 2008); Kwanzaa v. Department of Corrections, GRC Complaint No. 2004-167 (March 2005).

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)).

Although the Custodian conducted an insufficient search and thus unlawfully denied access to four (4) of the responsive MOUs, the Custodian did not unlawfully deny access to the MOUs for 1999, 2001, 2002, 2003, 2005, 2007, 2008 and 2010 because same do not exist. 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 only two (2) records existed constitutes an insufficient search and an unlawful denial of access to the four (4) records subsequently located. N.J.S.A. 47:1A-6; Schneble v. NJ Dep’t of Env’t Protection, GRC Complaint No. 2007-220 (April 2008).
2. Since the Custodian certified in the SOI that no Memorandums of Understanding for 1999, 2001, 2002, 2003, 2005, 2007, 2008 and 2010 exist, and because the

Complainant did not submit any 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 and thus unlawfully denied access to four (4) of the responsive MOUs, the Custodian did not unlawfully deny access to the MOUs for 1999, 2001, 2002, 2003, 2005, 2007, 2008 and 2010 because same do not exist. 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: Frank F. Caruso
Senior Case Manager

Approved By: Brandon D. Minde, Esq.
Executive Director

September 17, 2013