



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Commissioner

**FINAL DECISION**

**November 17, 2015 Government Records Council Meeting**

Kevin J. Watts  
Complainant

Complaint Nos. 2015-222

v.

City of Pleasantville (Atlantic)  
Custodian of Record

At the November 17, 2015 public meeting, the Government Records Council (“Council”) considered the November 10, 2015 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 failure to locate responsive records until after she had conducted a second (2<sup>nd</sup>) search, following her receipt of the instant Denial of Access Complaint, resulted in an insufficient search. Thus, the Custodian unlawfully denied access to the additional documents responsive to Complainant’s November 24, 2014 OPRA request. N.J.S.A. 47:1A-6; Schnebel v. NJ Dep’t of Env’tl. Protection, GRC Complaint No. 2007-220 (April 2008); Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 24, 2013).
2. The Custodian did not unlawfully deny access to portion of the Complainant’s OPRA request seeking “paystubs” because she certified in the SOI that the City of Pleasantville did not maintain these records. Additionally, there is no evidence in the record to refute the Custodian’s certification. *See* Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. Although the Custodian’s search was insufficient, thus resulting in an unlawful denial of access to several records, she rectified the issue and provided to the Complainant the remaining responsive records that existed as part of the SOI. Further, the Custodian did not unlawfully deny access to “paystubs” because the City of Pleasantville does not maintain same. 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 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 17<sup>th</sup> Day of November, 2015

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: November 19, 2015**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
November 17, 2015 Council Meeting**

**Kevin J. Watts<sup>1</sup>  
Complainant**

**GRC Complaint No. 2015-222**

v.

**City of Pleasantville (Atlantic)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of the Complainant’s payroll records for 1992, 1993, 1995, 1998, and 1999, to include the last paystub for each year and “from 1999 to the beginning of [the Complainant’s] employment as a full time employee” and paystubs for the first half of 1997.<sup>3</sup>

**Custodian of Record:** Gloria V. Griffin  
**Request Received by Custodian:** November 24, 2014  
**Response Made by Custodian:** December 15, 2014  
**GRC Complaint Received:** July 21, 2015

**Background<sup>4</sup>**

**Request and Response:**

On November 24, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 15, 2014, Davinna P. King, Personnel Officer, responded in writing on behalf of the Custodian, granting access to payroll histories for 1992, 1995, and 1998. Ms. King also stated that payroll records for 1993, 1997, and 1999 were not accessible and could not be disclosed. Ms. King stated that the Complainant owed \$0.45 in copying costs.

On December 17, 2014, the Complainant sent a letter to the City of Pleasantville (“City”), asserting that the Custodian failed to comply fully with his OPRA request. The Complainant stated that the City failed to provide him records for certain years, such as 1993 and 1999. The Complainant also contended that the City failed to provide him with records of every pay period in full for the identified years. On December 26, 2014, Ms. King responded in writing, advising the Complainant that the City complied with the Complainant’s OPRA request.

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Alfred R. Scerni, Esq., of Parker McCay, P.A. (Atlantic City, NJ).

<sup>3</sup> The Complainant sought additional information that is not at issue in this complaint.

<sup>4</sup> 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.

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### Denial of Access Complaint:

On July 21, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”).<sup>5</sup> The Complainant asserted that the City failed to comply with his OPRA request.

### Statement of Information:

On August 19, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on November 24, 2014. The Custodian certified that Ms. King responded in writing on her behalf on December 15, 2014, granting access to records for 1992, 1995, and 1998, pending payment of copy costs. The Custodian noted that the City redacted other employees’ personal information from those records. N.J.S.A. 47:1A-1.

The Custodian contended that she properly complied with Complainant’s OPRA request. Specifically, the Custodian certified that the City initially disclosed records for 1992, 1995, and 1998. However, the Custodian certified that she renewed a search after receiving the instant Denial of Access Complaint and was able to locate supplemental records. The Custodian affirmed that she attached payroll registers for 1992, 1993, 1998, and 1999 to the SOI. Further, the Custodian affirmed that the City did not maintain pay stubs but was providing a payroll register for 1997 as part of the SOI. Also, the Custodian certified that the City did not maintain a payroll register for 1995. The Custodian asserted that one possible issue with disclosing all responsive records was a City Payroll Register format difference in the years prior to 1998 and 1999.

The Custodian certified that the City and the Complainant were in litigation for several years, which ultimately concluded in January 2014. The Custodian affirmed that, during the pendency of the litigation, the Complainant’s attorney utilized discovery and OPRA to obtain similar records regarding the Complainant’s employment with the City. The Custodian averred that the City provided Complainant’s attorney several opportunities to review all of the Complainant’s personnel records. The Custodian also noted that the City provided the Complainant records in response to his previous OPRA requests. The Custodian asserted that her discussion of the litigation supports that the City has continued to respond to the Complainant’s various requests for similar records over an extended period of time.<sup>6</sup>

## Analysis

### Insufficient Search

It is the custodian’s responsibility to perform a complete search for the requested records

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<sup>5</sup> The Complainant included a second (2<sup>nd</sup>) OPRA request in his Denial of Access Complaint. However, he did not identify same on the complaint form as being part of the instant complaint. Accordingly, the GRC will not address that request.

<sup>6</sup> The Complainant submitted additional information and records on August 24, 2015. The submission appears to take issue with the Custodian’s interpretation of the unrelated litigation and challenges certain information contained in the records. However, the GRC has no authority to address such issues. N.J.S.A. 47:1A-7(b).

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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 Schnebel v. NJ Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008), the custodian initially stated that no records responsive to the complainant's OPRA request existed. GRC Complaint No. 2007-220 (April 2008). The custodian certified that after receipt of the complainant's denial of access complaint, which contained e-mails responsive to the complainant's request, the custodian conducted a second search and found records responsive to the complainant's request. Id. The GRC held that the custodian had performed an inadequate search and thus unlawfully denied access to the responsive records. Id. See also Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (January 2011).

Moreover, in Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 24, 2013), the custodian initially responded to the complainant's request, producing four (4) responsive records and stating that no other records existed. However, after receiving the denial of access complaint, the custodian performed another search and discovered several other records. Id. In accordance with Schnebel, the Council held that the custodian failed to perform an adequate initial search and unlawfully denied access to those additional records. Weiner, GRC 2013-52.

The complaint currently before the Council is analogous to Weiner, because Ms. King initially provided records to the Complainant for 1992, 1995, and 1998, but advised that records for 1993, 1997, and 1999 were not accessible or would not be provided. Subsequent to receiving the Complainant's Denial of Access Complaint, the Custodian conducted a second (2<sup>nd</sup>) search and located payroll registers for all years except 1995, which she provided to the Complainant as part of the SOI. In accordance with Schnebel, the Custodian had a responsibility to perform an adequate initial search and to locate all records responsive but failed to do so.

Accordingly, the Custodian's failure to locate responsive records until after she had conducted a second (2<sup>nd</sup>) search, following her receipt of the instant Denial of Access Complaint, resulted in an insufficient search. Thus, the Custodian unlawfully denied access to the additional documents responsive to Complainant's November 24, 2014, OPRA request. N.J.S.A. 47:1A-6; Schnebel, GRC 2007-220; Weiner, GRC 2013-52.

### **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. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005), the custodian certified that no records responsive to the complainant's request for billing records existed, and the complainant submitted no evidence to refute the custodian's certification regarding said records. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian's certification, there was no unlawful denial of access to the requested records.

In the instant matter, the Complainant's OPRA request sought payroll records with an emphasis on the last paystub for 1992, 1993, 1995, 1998, and 1999, as well as paystubs for the first half of 1997. However, the Custodian certified in the SOI that the City did not maintain paystubs. Based on the foregoing, the Custodian did not unlawfully deny access to this portion of the Complainant's OPRA request.

Accordingly, the Custodian did not unlawfully deny access to portion of the Complainant's OPRA request seeking "paystubs" because she certified in the SOI that the City did not maintain these records. Additionally, there is no evidence in the record to refute the Custodian's certification. 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 (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)).

Here, although, the Custodian's search was insufficient, thus resulting in an unlawful denial of access to several records, she rectified the issue and provided to the Complainant the remaining responsive records that existed as part of the SOI. Further, the Custodian did not unlawfully deny access to "paystubs" because the City does not maintain same. 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 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 failure to locate responsive records until after she had conducted a second (2<sup>nd</sup>) search, following her receipt of the instant Denial of Access Complaint, resulted in an insufficient search. Thus, the Custodian unlawfully denied access to the additional documents responsive to Complainant's November 24, 2014 OPRA request. N.J.S.A. 47:1A-6; Schnebel v. NJ Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008); Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 24, 2013).
2. The Custodian did not unlawfully deny access to portion of the Complainant's OPRA request seeking "paystubs" because she certified in the SOI that the City of Pleasantville did not maintain these records. Additionally, there is no evidence in the record to refute the Custodian's certification. *See* Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
3. Although the Custodian's search was insufficient, thus resulting in an unlawful denial of access to several records, she rectified the issue and provided to the Complainant the remaining responsive records that existed as part of the SOI. Further, the Custodian did not unlawfully deny access to "paystubs" because the City of Pleasantville does not maintain same. 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 unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso  
Communications Specialist/Resource Manager

Reviewed By: Joseph D. Glover  
Executive Director

November 10, 2015