



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

March 28, 2017 Government Records Council Meeting

Kevin M. O'Brien
Complainant

Complaint No. 2015-288

v.

Borough of Hillsdale (Bergen)
Custodian of Record

At the March 28, 2017 public meeting, the Government Records Council ("Council") considered the March 21, 2017 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 was insufficient because she failed to state definitively that records responsive to Item Nos. 1 and 3 of the Complainant's OPRA request did not exist and that the provided records were an accommodation. N.J.S.A. 47:1A-5(g); Shanker v. Borough of Cliffside Heights (Bergen), GRC Complaint No. 2007-245 (March 2009). However, the GRC declines to order disclosure of any records because the Custodian certified that no responsive records exist, and the Complainant provided no competent, credible evidence to refute the Custodian's certification. *See Paff v. City of Union City (Hudson)*, GRC Complaint No. 2012-262 (August 2013); Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
2. The Custodian's response was insufficient because, in her initial response to the Complainant, she failed to state definitively that no responsive records existed for Item Nos. 1 and 3 of the OPRA request. N.J.S.A. 47:1A-5(g). However, the Custodian certified in the SOI, and the record reflects, that no responsive records exist and further certified that the documents initially provided were intended to accommodate the Complainant. Further, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions did 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 28th Day of March, 2017



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 31, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 28, 2017 Council Meeting**

**Kevin M. O'Brien¹
Complainant**

GRC Complaint No. 2015-288

v.

**Borough of Hillside (Bergen)²
Custodial Agency**

Records Relevant to Complaint:

1. "A copy of the memo, e-mail or letter sent by the Hillside Planning Board to the various Borough Departments (Fire Department, Police Department, Health Department, Environmental Committee, Construction Code Official and the Fire Inspector . . . Darren) seeking their input on the 49 unit apartment complex on Patterson Street . . . commonly known as the Walsky property."
2. "Copy of the subpoena(s) extended to each of the Hillsdale Department heads calling for them to appear and testify before the Planning Board on the 49 unit apartment complex on Patterson Street."
3. "Copy of the Planning Board document that notes and coordinates all the most recent changes to the plans for the project at the Walsky property, formally known as Jean Marie Gardens."

Custodian of Record: Susan Witowski

Request Received by Custodian: August 27, 2015

Response Made by Custodian: September 8, 2015

GRC Complaint Received: September 9, 2015

Background³

Request and Response:

On August 27, 2015, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On September 8, 2015 the Custodian responded in writing, providing a document each for Item Nos. 1 and 3 and stating that no responsive records exist for Item No. 2.

¹ No legal representation listed on record.

² Represented by Mark D. Madaio, Esq. (Bergenfield, N).

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.

Denial of Access Complaint:

On September 9, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that neither record provided in response to Item Nos. 1 and 3 is responsive to the request. The Complainant stated that the letter provided in response to Item No. 1 was unresponsive, as the sender of the letter was not the Hillside Planning Board (“HPB”) or its representative. Rather, the letter was from the attorney for the property developer to the HPB. The Complainant did not address the record provided in response to Item No. 3 of his OPRA request. The Complainant asserted that the Custodian failed to adhere to OPRA’s mandates.

Statement of Information:⁴

On October 14, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that the office received the Complainant’s OPRA request on August 27, 2015, and responded on September 8, 2015. The Custodian certified that she provided responses to Item Nos. 1 and 3 and stated that no response records exist for Item No. 2.

Elaborating further, the Custodian stated that no responsive records exist for Item No. 1, since it is the responsibility of the zoning applicant and not the HPB to notify the various departments of the proposed plan. Instead, the Custodian provided a copy the letter from the attorney for the property developer to demonstrate compliance with proper procedure. Similarly, the Custodian certified that no responsive records exist for Item No. 2, as it is not a requirement under procedure to have department heads testify before the HPB about the proposed project.

Lastly, the Custodian stated that there are no responsive records to Item No. 3, which sought documents containing a record of changes made to the subject project plans. The Custodian certified that while no such document exists, the fourteen (14) page Engineer’s Report contains a review of the revised plan at issue.

Analysis

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). The Council has held that for a denial of access to be in compliance with OPRA, the custodian must state definitively that records did not exist at the time of the initial response. *See* Shanker v. Borough of Cliffside Heights (Bergen), GRC Complaint No. 2007-245 (March 2009); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2010-175 (September 2011).

Here, the Custodian responded to the Complainant by providing documents in response to Item Nos. 1 and 3 to the Complainant’s OPRA request and stating that no responsive records

⁴ The complaint was referred to mediation on September 24, 2015. The complaint was referred back from mediation on September 28, 2015.

exist for Item No. 2. However, subsequent to the filing of the Denial of Access Complaint, the Custodian certified in the SOI that no responsive records exist for any part of the Complainant's OPRA request and that the documents provided were intended as an accommodation. The facts of the instant complaint are on point with the facts in Shanker, GRC 2007-245. Although the Custodian tried to accommodate the Complainant in her response, she failed to clarify that the provided documents were not intended to be responsive to the Complainant's OPRA request.

Accordingly, the Custodian's response was insufficient because she failed to state definitively that records responsive to Item Nos. 1 and 3 of the Complainant's OPRA request did not exist and that the provided records were an accommodation. N.J.S.A. 47:1A-5(g); Shanker, GRC 2007-245. However, the GRC declines to order disclosure of any records because the Custodian certified that no responsive records exist, and the Complainant provided no credible evidence to refute the Custodian's certification. *See* Paff v. City of Union City (Hudson), GRC Complaint No. 2012-262 (August 2013); Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 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)).

Here, the Custodian's response was insufficient because, in her initial response to the Complainant, she failed to state definitively that no responsive records existed for Item Nos. 1 and 3 of the OPRA request. N.J.S.A. 47:1A-5(g). However, the Custodian certified in the SOI, and the record reflects, that no responsive records exist, and further certified that the documents

initially provided were intended to accommodate the Complainant. Further, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions did 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 response was insufficient because she failed to state definitively that records responsive to Item Nos. 1 and 3 of the Complainant's OPRA request did not exist and that the provided records were an accommodation. N.J.S.A. 47:1A-5(g); Shanker v. Borough of Cliffside Heights (Bergen), GRC Complaint No. 2007-245 (March 2009). However, the GRC declines to order disclosure of any records because the Custodian certified that no responsive records exist, and the Complainant provided no credible evidence to refute the Custodian's certification. *See* Paff v. City of Union City (Hudson), GRC Complaint No. 2012-262 (August 2013); Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
2. The Custodian's response was insufficient because, in her initial response to the Complainant, she failed to state definitively that no responsive records existed for Item Nos. 1 and 3 of the OPRA request. N.J.S.A. 47:1A-5(g). However, the Custodian certified in the SOI, and the record reflects, that no responsive records exist and further certified that the documents initially provided were intended to accommodate the Complainant. Further, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions did 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: Samuel A. Rosado
Staff Attorney

March 21, 2017