



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

July 26, 2016 Government Records Council Meeting

Agostinho Livres
Complainant

Complaint No. 2015-38

v.

Township of Bridgewater (Somerset)
Custodian of Record

At the July 26, 2016 public meeting, the Government Records Council (“Council”) considered the July 19, 2016 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. Ms. Broughman’s response on behalf of the Custodian was insufficient because she failed to state definitively that the record responsive to the Complainant’s OPRA request did not exist. 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 it is clear that the Custodian possesses no responsive record. *See also* Paff v. Town of Guttenberg (Hudson), GRC Complaint No. 2014-112 (January 2015).
2. Ms. Broughman’s response on behalf of the Custodian was insufficient because she failed to state definitively that no responsive record existed. N.J.S.A. 47:1A-5(g); Shanker v. Borough of Cliffside Heights (Bergen), GRC Complaint No. 2007-245 (March 2009). However, the Custodian and Ms. Broughman certified that no record existed and there is no evidence in the record to contradict these certifications. Additionally, the evidence of record does not indicate that Ms. Broughman’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Ms. Broughman’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 July 26th Day of July, 2016

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: July 29, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 26, 2016 Council Meeting**

**Agostinho Livres¹
Complainant**

GRC Complaint No. 2015-38

v.

**Township of Bridgewater (Somerset)²
Custodial Agency**

Records Relevant to Complaint: Hardcopy via U.S. mail of the complaint filed against the Complainant regarding his fence to include the name of the person or persons who filed the complaint.

Custodian of Record: Linda Doyle
Request Received by Custodian: January 22, 2015
Response Made by Custodian: January 28, 2015
GRC Complaint Received: February 18, 2015

Background³

Request and Response:

On January 22, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 28, 2015, Marie Broughman, Zoning Officer, responded verbally on behalf of the Custodian, advising the Complainant that he was required to remit \$0.74 for responsive records. On January 29, 2015, the Complainant remitted the required payment. On February 3, 2015, the Complainant received five (5) pages of records.

On February 4, 2015, the Complainant returned to the Township of Bridgewater (“Township”), advising that he did not receive the record at issue in this complaint. On February 6, 2015, the Custodian responded in writing, advising the Complainant that the Township did not maintain a responsive complaint.

¹ No legal representation listed on record.

² Represented by Alexander Fisher, Esq., of Mauro, Savo, Camerino, Grant, & Schalk, P.A. (Somerville, 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.

Denial of Access Complaint:

On February 18, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant disputed the Township’s response that no complaint existed. The Complainant stated that the non-existence of a responsive record is contrary to the Township’s process. Specifically, the Complainant stated that he previously attempted to file a zoning complaint and the Township required him to go to their office and submit a written complaint. The Complainant contended that either the Township misled him on their process or they are unwilling to disclose the responsive record.

Supplemental Submissions:

On March 11, 2015, the Custodian sent a letter to the GRC, stating that she believed the Complainant filed this complaint based on a misunderstanding of the origination of the zoning complaint against him. The Custodian stated that the Complainant previously filed a complaint against a neighboring property for fencing. The Custodian averred that the complaint prompted Ms. Broughman to conduct an on-site investigation of the neighboring property. The Custodian stated that while there, Ms. Broughman found various types of unpermitted fencing on the Complainant’s property. The Custodian stated that Ms. Broughman issued the Complainant a violation letter because of her investigation. The Custodian noted that the Complainant’s confusion may be based on a sentence in the violation letter, which states that “[a] complaint has been referred to this office . . .” The Custodian averred that this sentence, which is part of a form letter, was not accurate in this instance.

On March 27, 2015, the Complainant submitted to the GRC a rebuttal of the Custodian’s March 11, 2015 letter. Therein, the Complainant questioned the Custodian’s “form letter” argument, contending that the letter he received was different from other zoning complaint letters he received in response to unrelated OPRA requests. The Complainant also contended that the zoning complaint letter about his fencing violations did not identify the complaining party; the Custodian should have provided one document that identified Ms. Broughman as the complaining party.

Statement of Information:

On April 6, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on January 22, 2015. The Custodian affirmed that she forwarded the request to Ms. Broughman to locate responsive records. The Custodian certified that Ms. Broughman responded verbally on her behalf on January 28, 2015, providing to the Complainant an estimated copy cost. The Custodian certified that the Complainant remitted payment on January 29, 2015, and the Township immediately sent several pages of records to him via U.S. mail. The Custodian affirmed that the Complainant went to the Township on February 4, 2015, to contest that he did not receive the record at issue here. The Custodian certified that Ms. Broughman and her supervisor separately confirmed to the Complainant that no complaint existed. The Custodian noted that the Township subsequently sent the Complainant a letter to this effect.

The Custodian certified that she provided all records on file and that no complaint exists for the reason set forth in her March 11, 2015 letter to the GRC. The Custodian asserted that, in hindsight, the Township should have denied the request because no complaint existed. The Custodian argued that she could not provide a record that did not exist. Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005); Gartner v. Middlesex Borough (Middlesex), GRC Complaint No. 2013-14 (February 2013).

Additionally, the Custodian argued that the portion of the OPRA request seeking the name of the complaining party is an invalid request seeking information and not identifiable government record. MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Reda v. Twp. of West Milford, GRC Complaint No. 2002-58 (January 2003).

Additional Submissions:

On April 13, 2015, the Complainant submitted a letter rebutting the Custodian's SOI. Therein, the Complainant contended that on February 4, 2015, neither Ms. Broughman nor her supervisor verbally advised him that Ms. Broughman filed the zoning complaint. The Complainant asserted that he did not even speak with Ms. Broughman. The Custodian noted that he also never received any notification from the Township that Ms. Broughman was the complaining party.⁴

On April 30, 2015, Ms. Broughman submitted a legal certification to the GRC. Therein, she certified that she initially investigated the property adjacent to the Complainant because of his October 2014 zoning complaint and took pictures of both properties. Ms. Broughman certified that the Complainant subsequently filed a second complaint against the neighboring property on December 4, 2014, at which point she checked for permits on both properties. Ms. Broughman affirmed that, having failed to locate a permit for the Complainant's fencing, she issued a "Notice of Violation" to him. Ms. Broughman certified that no one filed a formal complaint because she personally found the fencing violation; thus, no records responsive to the Complainant's OPRA request exist.

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 compliant with OPRA, the custodian must definitively state 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

⁴ The Complainant also re-iterated his issue with the difference in the letters he received in response to unrelated OPRA requests. However, it appears that these arguments are not relevant to this complaint, which focuses solely on the Complainant's January 22, 2015 OPRA request.

(Somerset), GRC Complaint No. 2010-175 (September 2011); Paff v. Town of Guttenberg (Hudson), GRC Complaint No. 2014-112 (January 2015).

Here, Ms. Broughman initially responded to the Complainant (on behalf of the Custodian) by providing access to several pages of records not at issue here. Following the Complainant's contention that he did not receive the record at issue here, the Township sent the Complainant a letter, noting that it did not maintain a responsive complaint form. Subsequent to the filing of the Denial of Access Complaint, the Custodian submitted a letter to the GRC stating that no responsive zoning complaint existed because Ms. Broughman issued the complaint letter based on her own observations. Both the Custodian and Ms. Broughman subsequently certified to this fact in the SOI and additional submission respectively.

The facts here are similar to those in Shanker, GRC 2007-245. Specifically, Ms. Broughman, who assumed the responsibility of responding for the Custodian, did not indicate to the Complainant that no responsive record existed. In fact, neither Ms. Broughman nor the Custodian advised the Complainant that no record existed until after the Complainant contended that he did not receive one. Further, the Custodian admitted to the insufficiency of the Township's response by stating in the SOI that "in hindsight" they should have denied the request from the outset because no record existed. Instead, Ms. Broughman compiled records and sent them to the Complainant without stating that the actual record at issue here did not exist.

Therefore, Ms. Broughman's response on behalf of the Custodian was insufficient because she failed to state definitively that the record responsive to the Complainant's OPRA request did not exist. N.J.S.A. 47:1A-5(g); Shanker, GRC 2007-245. However, the GRC declines to order disclosure of any records because it is clear that the Custodian possesses no responsive record. *See also* Paff, GRC 2014-112.

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 instant matter, Ms. Broughman's response (on behalf of the Custodian) was insufficient because she failed to state definitively that no responsive record existed. N.J.S.A. 47:1A-5(g); Shanker, GRC 2007-245. However, the Custodian and Ms. Broughman certified that no record existed and there is no evidence in the record to contradict these certifications. Additionally, the evidence of record does not indicate that Ms. Broughman's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Ms. Broughman'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. Ms. Broughman's response on behalf of the Custodian was insufficient because she failed to state definitively that the record responsive to the Complainant's OPRA request did not exist. 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 it is clear that the Custodian possesses no responsive record. *See also* Paff v. Town of Guttenberg (Hudson), GRC Complaint No. 2014-112 (January 2015).
2. Ms. Broughman's response on behalf of the Custodian was insufficient because she failed to state definitively that no responsive record existed. N.J.S.A. 47:1A-5(g); Shanker v. Borough of Cliffside Heights (Bergen), GRC Complaint No. 2007-245 (March 2009). However, the Custodian and Ms. Broughman certified that no record existed and there is no evidence in the record to contradict these certifications. Additionally, the evidence of record does not indicate that Ms. Broughman's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Ms. Broughman'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

July 19, 2016