



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

February 21, 2017 Government Records Council Meeting

Laurie Rupp (o/b/o Society Hill at
Lawrenceville – Board of Trustees)
Complainant

Complaint No. 2016-12

v.

Mercer County Prosecutor's Office
Custodian of Record

At the February 21, 2017 public meeting, the Government Records Council ("Council") considered the February 14, 2017 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. Ms. Robeson's response was insufficient because she failed to state definitively that the records 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 records. *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. Ms. Robeson's response was insufficient because, in her initial response to the Complainant on behalf of the Custodian, she failed to state definitively that no responsive records existed. N.J.S.A. 47:1A-5(g). However, the Custodian certified in the SOI, and the record reflects, that no responsive records exist. Further, the evidence of record does not indicate Ms. Robeson's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, Ms. Robeson'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 21st Day of February, 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: February 23, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 21, 2017 Council Meeting**

**Laurie Rupp (On Behalf of Society Hill
at Lawrenceville – Board of Trustees)¹
Complainant**

GRC Complaint No. 2016-12

v.

**Mercer County Prosecutor’s Office²
Custodial Agency**

Records Relevant to Complaint: Electronic records via e-mail of a police incident report regarding an incident that occurred at a specific address on September 14, 2015.

Custodian of Record: Angelo Onofri, Esq.
Request Received by Custodian: October 21, 2015
Response Made by Custodian: October 30, 2015
GRC Complaint Received: January 14, 2016

Background³

Request and Response:

On October 21, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On October 30, 2015, Renee M. Robeson, Special Deputy Attorney General, responded in writing on behalf of the Custodian by denying access to the responsive record under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp. V. Twp. of Lyndhurst, 441 N.J. Super. 70 (App. Div. 2015). Ms. Robeson noted that the criminal investigatory exemption applied to both open and closed files.⁴

Denial of Access Complaint:

On January 14, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that she sought the requested

¹ No legal representation listed on record.

² No legal representation listed on record.

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.

⁴ Ms. Robeson also addressed the Complainant’s right to access under the common law. However, the GRC has no authority to adjudicate common law issues. N.J.S.A. 47:1A-7; Rowan, Jr. v. Warren Hills Reg’l Sch. Dist. (Warren), GRC Complaint No. 2011-347 (January 2013).

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report due to the Board of Trustees' concern for other homeowners within their community and because the incident was deemed a criminal matter.

Statement of Information:

On February 5, 2016, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on October 21, 2015. The Custodian certified that Ms. Robeson responded in writing on his behalf on October 30, 2015, denying access to the OPRA request under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1; Lyndhurst, 441 N.J. Super. 70.

The Custodian affirmed that, after looking further into the matter, he determined that the Mercer County Prosecutor's Office ("MCPO") did not respond to the incident in question. The Custodian thus certified that the MCPO did not possess any records responsive to the Complainant's OPRA request.

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, Ms. Robeson responded to the Complainant on behalf of the Custodian, stating that the requested record was exempt from disclosure under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1. However, subsequent to the filing of the Denial of Access Complaint, the Custodian certified in the SOI that no record existed because the MCPO did not respond to the incident in question. The facts of this complaint are on point with the facts in Shanker, GRC 2007-245. Thus, because Ms. Robeson undertook the responsibility of responding on behalf of the Custodian, her initial response was ultimately insufficient.

Accordingly, Ms. Robeson's response was insufficient because she failed to state definitively that the records 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 records. *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, Ms. Robeson’s response was insufficient because, in her initial response to the Complainant on behalf of the Custodian, she failed to state definitively that no responsive records existed. N.J.S.A. 47:1A-5(g). However, the Custodian certified in the SOI, and the record reflects, that no responsive records exist. Further, the evidence of record does not indicate Ms. Robeson’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, Ms. Robeson’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. Ms. Robeson’s response was insufficient because she failed to state definitively that the records 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 records. *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. Ms. Robeson’s response was insufficient because, in her initial response to the Complainant on behalf of the Custodian, she failed to state definitively that no responsive records existed. N.J.S.A. 47:1A-5(g). However, the Custodian certified in

the SOI, and the record reflects, that no responsive records exist. Further, the evidence of record does not indicate Ms. Robeson's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, Ms. Robeson'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: Frank F. Caruso
Communications Specialist/Resource Manager

February 14, 2017