



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

March 27, 2018 Government Records Council Meeting

Mark Demitroff
Complainant

Complaint No. 2016-141

v.

Buena Vista Township (Atlantic)
Custodian of Record

At the March 27, 2018 public meeting, the Government Records Council (“Council”) considered the March 20, 2018 Findings and Recommendations of the Council Staff 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 March 23, 2016 response was insufficient because she failed to address the Complainant’s preferred method of delivery (on-site inspection). N.J.S.A. 47:1A-5(g); Delbury v. Greystone Park Psychiatric Hosp. (Morris), GRC Complaint No. 2013-240 (Interim Order dated April 29, 2014).
2. The Custodian did not unlawfully deny access to the Complainant’s OPRA request because she certified, and the record reflects, that she provided all responsive records in existence to the Complainant. N.J.S.A. 47:1A-6; Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint Nos. 2009-156, 2009-157, 2009-158 (Interim Order dated April 28, 2010) (citing Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005)). Further, the GRC does not reach the Complainant’s allegations on whether the Township was “required” to maintain original copies of the responsive records on file because it has no authority under OPRA to do so. N.J.S.A. 47:1A-7(b); Moore v. Twp. of Nutley (Essex), GRC Complaint No. 2010-125 (January 2011).
3. The Custodian’s March 23, 2016 response was insufficient because she failed to address the Complainant’s preferred method of delivery. N.J.S.A. 47:1A-5(g). However, the Custodian did not unlawfully deny access to any records and there is no evidence in the record to refute her Statement of Information certification. Additionally, the evidence of record does not indicate that the Custodian’s technical violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s technical violation does 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 27th Day of March, 2018

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 29, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
March 27, 2018 Council Meeting**

**Mark Demitroff¹
Complainant**

GRC Complaint No. 2016-141

v.

**Buena Vista Township (Atlantic)²
Custodial Agency**

Records Relevant to Complaint: On-site inspection of Federal Emergency Management Agency (“FEMA”) files associated with Declaration No. “FEMA 1873 DR NJ” and “FEMA 1889 DR NJ.”

Custodian of Record: Lisa Tilton

Request Received by Custodian: March 21, 2016

Response Made by Custodian: March 23, 2016

GRC Complaint Received: April 19, 2016

Background³

Request and Response:

On March 19, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 23, 2016, the Custodian responded in writing disclosing records in two (2) .pdf attachments with a redaction index indicating that she redacted personal and financial information under N.J.S.A. 47:1A-1.1. The Custodian stated that the Complainant’s OPRA request was “complete and closed.”

On March 25, 2016, the Complainant e-mailed the Custodian advising that he sought on-site inspection of the original files, and not “actual depiction[s]” of the records. The Complainant noted that Buena Vista Township (“Township”) was required to keep original FEMA documentation in one location for seven (7) years. Further, the Complainant alleged that the Custodian did not disclose all records. The Complainant asserted that some records referenced the existence of others, and he was previously provided with records responsive to this request that were not included in the Custodian’s response. The Complainant noted that he attached some invoices regarding FEMA 1873 DR NJ as an example of those the Custodian did

¹ No legal representation listed on record.

² Represented by John Doe, Esq., of Doe & Smith, LLC (Camden, 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.

not disclose. The Complainant averred that his request was not “complete” until the Custodian allowed on-site inspection of the original files. On March 29, 2016, the Complainant e-mailed the Custodian reiterating that he requested on-site inspection and that some records were not provided. The Complainant included screen shots of a project worksheet relevant to each file. The Complainant also asked the Custodian to either advise if records were destroyed or, alternatively, provide the lawful basis for denying access to the missing records.

On March 31, 2016, the Custodian responded advising that she provided all records received from the Township’s Department of Administration (“Department”). The Custodian further stated that she would have no way of knowing whether records were missing because she relied on the Department to provide all responsive records. The Custodian averred that she believed the records she provided represented all that were sent to FEMA in response to the claims in question. The Custodian stated that she provided the Complainant electronic copies of the records for convenience purposes. The Custodian stated that should the Complainant still wish to review the files on-site, a special service charge would apply to the inspection for the work necessary to recompile the records, review and redact them, and to supervise the inspection.

On the same day, the Complainant responded advising that he still wanted to review records on-site and asked the Custodian to provide a proposed special service charge. Additionally, the Complainant questioned the Custodian’s explanation regarding whether all records were provided. The Complainant argued that the Custodian had an obligation to ensure that she was responding in full to his OPRA request. The Complainant also sought clarification of whether the Custodian provided all records based on her “nebulous response” casting doubt on whether the Department gave her all responsive records. On the same day, the Custodian advised the Complainant that she would complete the 14-point analysis and “get back to” the Complainant.

On April 1, 2016, the Custodian e-mailed the Complainant advising that she spoke with the Township Administrator the prior day regarding the Department’s response. The Custodian stated that the Township located additional responsive records in “the central file.” The Custodian stated that she was reviewing those records for possible redactions. The Custodian further stated that the Complainant could conduct an on-site inspection on April 4, 2016 between 12:00 p.m. and 4:00 p.m. On the same day, the Complainant confirmed that he would appear at the Township on April 4, 2016 at 12:00 p.m. to conduct his inspection. The Complainant noted that it was his understanding that the records provided for on-site inspection represent all responsive records pertaining to the FEMA files.

On April 4, 2016, the Complainant e-mailed the Custodian stating that he wished to review the original documents, but was only given copies. The Complainant further requested he be given a new time to review the remainder of the FEMA 1873 file. The Complainant also requested that the Custodian explain Committeeman John Armato’s role in the OPRA process, as he was present during the inspection and directly caused it to end early. The Complainant also requested that, as promised, the Custodian “make digital copies” of the FEMA 1873 file that he was denied a chance to inspect.

On April 5, 2016, the Custodian disclosed copies of both files associated with Declaration No. "FEMA 1873 DR NJ" and "FEMA 1889 DR NJ" via four (4) e-mails.

Denial of Access Complaint:

On April 19, 2016 the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted the Township unlawfully denied him the ability to complete his on-site inspection. Further, the Complainant contended that "not a single original" record was provided to him during inspection; the Custodian provided only copies of the files and not the "originals." The Complainant contended that he believed multiple records were missing from the files. The Complainant noted that the Chief Financial Officer Kenia Nunez-Acuna advised that she had never seen the original files, which he believed.

Statement of Information:

On July 13, 2016, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on March 21, 2016. The Custodian affirmed that her search included searching her files in the Clerk's Office. The Custodian certified that after not locating any responsive records, she reached out to other departments within the Township. The Custodian certified that she ultimately determined that the Department possessed the responsive FEMA files. The Custodian affirmed that she obtained the files and provided them to the Complainant; however, he sought clarification that resulted in the discovery of additional records.

The Custodian certified that she initially responded in writing on March 23, 2016 disclosing two (2) files comprising of 111 pages and a redaction index. The Custodian certified that after multiple correspondence with the Complainant, he came to the Township on April 4, 2016 at 12:00 p.m. and inspected 664 pages of records. The Custodian stated that the Complainant brought a handheld camera and personal scanner. Further, the Custodian noted that the Complainant made continuous inquiries about the subject documents and other FEMA projects not subject to the OPRA request. The Custodian also affirmed that the Complainant repeatedly questioned whether all records were provided, which she responded to in the affirmative each time. The Custodian certified that, at one point during the inspection, she advised the Complainant that the inspection would need to end prior to 1:30 p.m. because Township staff had another obligation. The Custodian noted that she also advised the Complainant that he could schedule another time to complete his review if necessary. The Custodian certified that about an hour and fifteen minutes into the inspection, she noticed that the Complainant completed his review. The Custodian affirmed that she retrieved the records from him at that point. The Custodian certified that the Complainant asked for electronic copies of all records, which she sent to him in four (4) e-mails on April 5, 2016. The Custodian certified that she provided the Complainant all responsive records and no other records exist.

The Custodian contended that no unlawful denial of access occurred here. The Custodian affirmed that she provided responsive records to the Complainant in two (2) ways: via on-site inspection and electronically via e-mail. The Custodian argued that the Complainant has routinely asserted a right to ask questions regarding the responsive records; however, OPRA

does not require her or any other Township employee to entertain said questions. Further, the Custodian certified that the Township did not possess the records in “original” format. The Custodian noted that even if this were the case, she would have had to make copies to redact personal information anyway.

Further, the Custodian stated that the Complainant may be contending that the Township should possess additional records. The Custodian argued that whether the Township did not possess records it should have maintained is not an issue properly before the GRC.⁴

Additional Submissions:

On July 13, 2016, the Complainant e-mailed the GRC disputing the Custodian’s SOI statements. The Complainant contended that, contrary to the Custodian’s assertions, he never completed his inspection. The Complainant averred that his inspection was cut short by Committeeman Armato at 12:57 p.m. The Complainant noted that he told the Custodian at that time that he had not completed his inspection of FEMA 1873. Additionally, the Complainant asserted that he sought copies only as an alternative to continuing his on-site inspection. The Complainant contended that disclosure of the records electronically did not abrogate the Township’s obligation to provide for a full on-site inspection.

Analysis

Insufficient Response

The GRC previously adjudicated complaints in which a custodian did not address the preferred method of delivery. In Delbury v. Greystone Park Psychiatric Hosp. (Morris), GRC Complaint No. 2013-240 (Interim Order dated April 29, 2014), the complainant identified his preferred method of delivery as “electronic copies on compact disc or USB drive.” The custodian timely responded, but did not address the complainant’s preferred method of delivery. The Council, relying on its past decision in O’Shea v. Twp of Fredon (Sussex), GRC Complaint Number 2007-251 (February 2008) (stating “[a]ccording to [the] language of N.J.S.A. 47:1A-5(g), the [c]ustodian was given two ways to comply and should have, therefore, responded acknowledging the [c]omplainant’s preferences with a sufficient response for each.”), held that the custodian’s response was insufficient. See also Paff v. Borough of Sussex (Sussex), GRC Complaint Number 2008-38 (July 2008) (holding that although the custodian timely responded granting access to the requested record, the custodian’s response was insufficient because she failed to address the preferred method of delivery); Wolosky v. N.J. Dep’t of Env’tl. Prot., GRC Complaint No. 2009-194 (Interim Order dated August 24, 2010) (holding that the custodian’s response was insufficient because he did not address the complainant’s preferred method of delivery).

⁴ The Custodian requested that the GRC consider assessing penalties against the Complainant for having to defend the complaint, to include prevailing party attorney’s fees. The GRC notes that OPRA’s civil penalty provision only applies to custodians, employees, and/or officials of a “public agency” as defined under OPRA. N.J.S.A. 47:1A-11. Further, OPRA’s fee shifting provision only applies to complainants represented by an attorney. N.J.S.A. 47:1A-6.

Here, the Complainant sought access to the responsive records via on-site inspection. However, when the Custodian responded to the OPRA request on March 23, 2016, she disclosed 111 pages of records via e-mail. At no point in her initial response does she address the Complainant's preferred method of delivery. The GRC does note that it was not until after the Complainant contacted the Custodian providing additional commentary and clarification that she offered on-site inspection. Nonetheless, consistent with the Council's decision in Delbury, GRC 2013-240, the Custodian's initial response was insufficient.

Accordingly, the Custodian's March 23, 2016 response was insufficient because she failed to address the Complainant's preferred method of delivery (on-site inspection). N.J.S.A. 47:1A-5(g); Delbury, GRC 2013-240.

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 Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint Nos. 2009-156, 2009-157, & 2009-158 (Interim Order dated April 28, 2010), the Council found that the custodian did not unlawfully deny access to the requested records based on the custodian's certification that all such records were provided to the complainant. The Council held that the custodian's certification, in addition to the lack of refuting evidence from the complainant, was sufficient to meet the custodian's burden of proof. See also Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005); Holland v. Rowan Univ., GRC Complaint No. 2014-63, *et seq.* (March 2015).

Moreover, the Council's limited authority to adjudicate denial of access complaints is statutorily defined and mandated by N.J.S.A. 47:1A-7(b). To this end, the Council's inability to adjudicate an agency's requirement to create or maintain records is based on long-standing precedent. See Anonymous v. Twp. of Monroe, GRC Complaint No. 2006-160 (April 2008); Van Pelt v. Edison Twp. Bd. of Educ., GRC Complaint No. 2007-179 (January 2008); LoBosco v. N.J. Dep't of Health & Senior Serv., Div. of Certificate of Need & Healthcare Facility Licensure, GRC Complaint No. 2010-64 (October 2010); Moore v. Twp. of Nutley (Essex), GRC Complaint No. 2010-125 (January 2011).

The Complainant has advanced two (2) issues: 1) that he was not shown any "originals" of the responsive records; and 2) that multiple documents were missing. Conversely, the Custodian certified in the SOI that she provided to the Complainant all 664 pages of records that existed for an on-site inspection and via e-mail. The Custodian also certified that she did not possess any originals, but would have had to make copies for limited redaction purposes anyway.

The threshold issue here ultimately rests on whether the Custodian unlawfully denied access to any responsive records. The Custodian has certified that she provided to the

Complainant all records within the Township's possession through inspection and electronically. The Custodian also contended that the Township's alleged failure to not maintain certain records was not properly before the GRC.

As for competing evidence to refute the Custodian's certification, the Complainant sent screenshots to the Custodian of two (2) project worksheets he previously received from an unknown source and a number of invoices from a previous OPRA request. The GRC was able to locate multiple project worksheets as part of the disclosed records; however, they appeared to be digital versions of the screenshots. The GRC should also note that it is unsure of what invoices the Complainant attached to his e-mail. Nonetheless, the Complainant provided definitive proof that he possessed these records at the time of his OPRA request by way of screenshots and attachments to both the Denial of Access Complaint. Thus, the Custodian was under no obligation to again disclose them. See *Bart v. City of Paterson Hous. Auth.*, 403 N.J. Super. 609 (App. Div. 2008) (duplicating disclosure of records already in the requestor's possession does not advance the purpose of OPRA, which is to ensure an informed citizenry). Further, the Complainant's allegations that the Township was "required" to keep originals on file is not within the Council's authority to adjudicate. N.J.S.A. 47:1A-7(b). It should also be noted that the Complainant never expressly cited to any statute or regulation requiring originals to be maintained. Notwithstanding, the Complainant's proffered arguments do not amount to sufficient evidence overturning the Custodian's certification.

Accordingly, the Custodian did not unlawfully deny access to the Complainant's OPRA request because she certified, and the record reflects, that she provided all responsive records in existence to the Complainant. N.J.S.A. 47:1A-6; Danis, GRC 2009-156, *et seq.* (citing Burns, GRC 2005-68). Further, the GRC does not reach the Complainant's allegations on whether the Township was "required" to maintain original copies of the responsive records on file because it has no authority under OPRA to do so. N.J.S.A. 47:1A-7(b); Moore, GRC 2010-125.

Finally, the GRC notes that OPRA allows requestors to inspect records "during regular business hours" with all limitations on the right of access "construed in favor of the public's right of access." N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-5(a). Thus, it follows that conducting an inspection should be a cooperative effort between the parties based on the disclosability of the responsive records, availability of staff, and the requestor's right to access those records sought for inspection in an expeditious manner. Based on this, the GRC is compelled to express its concerns regarding both the Complainant and Custodian's versions of the events that occurred during the inspection session on April 4, 2016. These events include a brief verbal altercation between extant individuals that were neither the Complainant and Township staff members and the premature discontinuation of the session. The events as described by the parties bring into question the parties' adherence to the cooperative effort necessary to ensure an orderly inspection and is duly noted.

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 March 23, 2016 response was insufficient because she failed to address the Complainant’s preferred method of delivery. N.J.S.A. 47:1A-5(g). However, the Custodian did not unlawfully deny access to any records and there is no evidence in the record to refute her SOI certification. Additionally, the evidence of record does not indicate that the Custodian’s technical violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s technical violation does 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 Council Staff respectfully recommends the Council find that:

1. The Custodian’s March 23, 2016 response was insufficient because she failed to address the Complainant’s preferred method of delivery (on-site inspection). N.J.S.A. 47:1A-5(g); Delbury v. Greystone Park Psychiatric Hosp. (Morris), GRC Complaint No. 2013-240 (Interim Order dated April 29, 2014).
2. The Custodian did not unlawfully deny access to the Complainant’s OPRA request because she certified, and the record reflects, that she provided all responsive records in existence to the Complainant. N.J.S.A. 47:1A-6; Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint Nos. 2009-156, 2009-157, 2009-158 (Interim Order dated April 28, 2010) (citing Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005)). Further, the GRC does not reach the Complainant’s allegations on whether the Township was “required” to maintain original copies of

the responsive records on file because it has no authority under OPRA to do so. N.J.S.A. 47:1A-7(b); Moore v. Twp. of Nutley (Essex), GRC Complaint No. 2010-125 (January 2011).

3. The Custodian's March 23, 2016 response was insufficient because she failed to address the Complainant's preferred method of delivery. N.J.S.A. 47:1A-5(g). However, the Custodian did not unlawfully deny access to any records and there is no evidence in the record to refute her Statement of Information certification. Additionally, the evidence of record does not indicate that the Custodian's technical violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's technical violation does 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

March 20, 2018