



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

December 18, 2018 Government Records Council Meeting

William A. Goode, Jr.
Complainant

Complaint No. 2016-284

v.

Little Ferry Board of Education (Bergen)
Custodian of Record

At the December 18, 2018 public meeting, the Government Records Council (“Council”) considered the December 11, 2018 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 conducted a more reasonable search, following receipt of the resubmitted OPRA request, resulted in an insufficient search. Thus, the Custodian unlawfully denied access to the e-mails responsive to Complainant’s OPRA request. N.J.S.A. 47:1A-6; Schneble v. N.J. Dep’t of Env’tl. Protection, GRC Complaint No. 2007-220 (April 2008); Scheeler, Jr. v. Woodbine Bd. of Educ. (Cape May), GRC Complaint No. 2014-59 (Interim Order dated January 30, 2015). However, the GRC declines to order disclosure of those records because the current Custodian disclosed same to the Complainant on November 7, 2016.
2. The Custodian’s insufficient search and subsequent delay in disclosure resulted in a “deemed” denial of access. However, the current Custodian ultimately provided all e-mails located to the Complainant on November 7, 2016. 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 18th Day of December, 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: December 20, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
December 18, 2018 Council Meeting**

**William A. Goode, Jr.¹
Complainant**

GRC Complaint No. 2016-284

v.

**Little Ferry Board of Education (Bergen)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of any e-mails between the ticket “source” for the Ramapo College Foundation 34th Annual Distinguished Citizens Award Dinner, Little Ferry Board of Education (“BOE”) administration, BOE staff, and BOE members pertaining to the event, which was held on March 5, 2016 at Rockleigh Country Club.³

Custodian of Record: Donna Alonso⁴

Request Received by Custodian: March 19, 2016

Response Made by Custodian: March 24, 2016

GRC Complaint Received: November 2, 2016

Background⁵

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 24, 2016, the Custodian responded in writing advising that no records beyond those provided in response to a previous request existed. On the same day, the Complainant disputed that no e-mails existed. On March 25, 2016, the Custodian averred that the BOE’s attorney advised that she was not required to respond to overly broad requests. The Custodian further stated that she had no records from “the source” and was told “to not address open ended questions.”

On March 29, 2016, the Complainant resubmitted his OPRA request demanding the Custodian carefully review it and provide responsive records. On March 30, 2016, Superintendent Frank R. Scarafilo forwarded multiple responsive e-mails to the Custodian.

¹ No legal representation listed on record.

² Represented by Marla Wolfe Taus, Esq., of Winne, Bantam Basralian & Kahn, P.C. (Hackensack, NJ).

³ The Complainant sought additional records that were not at issue in this complaint.

⁴ The current Custodian of Record is Dennis R. Frohnappfel.

⁵ 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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

Denial of Access Complaint:

On November 2, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he sought access to the requested e-mails on multiple occasions, copying several individuals within the BOE. The Complainant argued that in each response, the Custodian asserted that no records existed. The Complainant contended that he believed that the individuals copied on his requests, including Superintendent Scarafile, knew that records existed. The Complainant contended that none of the copied individuals intervened during the response process.

The Complainant requested that the GRC require the BOE to disclose all responsive records that exist. The Complainant further requested that if the BOE could not perform an adequate search, it be ordered to contract with a third-party to do so.

Supplemental Response:

On November 4, 2016, Custodian’s Counsel sent a letter to the GRC advising that the BOE was in receipt of the Denial of Access Complaint. Counsel further stated that a thorough search of the BOE’s records yielded multiple responsive e-mails, which were attached. Counsel further stated that no additional records were located.

On November 7, 2016, Custodian’s Counsel forwarded the letter and attachments to the Complainant. On the same day, the Complainant e-mailed all parties expressing his confusion with the disclosure after so many months. The Complainant asserted that he was told no records existed; however, not one of the copied parties appeared to either alert him and/or the Custodian to the existence of them. The Complainant questioned why he had to file this complaint to receive the records sought. The Complainant also suggested that the BOE be forced to contract with a third-party to quality assure OPRA responses.

Statement of Information:

On November 30, 2016, the current Custodian filed a Statement of Information (“SOI”). The current Custodian first noted that the original Custodian’s contract was terminated prior to the filing of this complaint. The current Custodian stated that he completed the SOI based on upon information derived from BOE records and discussions with Superintendent Scarafile and BOE staff.

The current Custodian certified that the BOE received the Complainant’s OPRA request on March 19, 2016. The current Custodian certified that the Custodian conducted a search up to and including contacting Superintendent Scarafile. The current Custodian certified that the Custodian initially responded in writing on March 24, 2016 stating that no records existed. The current Custodian certified that after receiving the Complainant’s March 29, 2016 e-mail resubmitting the subject OPRA request, Superintendent Scarafile identified multiple responsive e-mails. The current Custodian affirmed that he forwarded them to the Custodian on March 30, 2016.

The current Custodian averred that unbeknownst to the BOE and Superintendent Scarafile, it appeared that the responsive e-mails were never sent to the Complainant. The current Custodian certified that upon receipt of this complaint, the BOE disclosed those e-mails to the Complainant on November 7, 2016. The current Custodian noted that the disclosure included two (2) additional e-mails not previously located due to the broad nature of the request.

The current Custodian reiterated that the BOE had no prior knowledge of the Custodian's failure to disclose records contemporaneous with the March 2016 communications between her and the Complainant. The current Custodian argued that the Custodian's failure to disclose the e-mails appeared to be an oversight. The current Custodian relied on the Custodian's e-mails indicating that no responsive records existed and that the request was overly broad as support for this position. The current Custodian also reiterated that he disclosed to the Complainant the responsive records as soon as being notified of this complaint and the BOE's failure to previously disclose same.

Analysis

Insufficient Search

It is the custodian's responsibility to perform a complete search for the requested records 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 Schneble v. N.J. 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. 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. The GRC held that the custodian had performed an inadequate search and thus unlawfully denied access to the responsive records. See also Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (January 2011).

Moreover, in Scheeler, Jr. v. Woodbine Bd. of Educ. (Cape May), GRC Complaint No. 2014-59 (Interim Order dated January 30, 2015), the custodian initially responded that no records existed. However, four (4) business days later, the custodian provided responsive records. Applying its prior decisions in Schneble, Lebbing, and Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 24, 2013), the Council held that the custodian performed an insufficient search.

Here, the Custodian initially responded to the Complainant's OPRA request stating that no records existed. Thereafter, the Complainant resubmitted his OPRA request on March 29, 2016. The evidence of record indicates that the next day, Superintendent Scarafile provided multiple responsive records to the Custodian. Thus, the evidence of record supports that the Custodian's initial search was insufficient and resulted in an unlawful denial of access. Such a finding is consistent with the Council's decision in Scheeler, Jr., GRC 2014-59 and its progeny.

Accordingly, the Custodian's failure to locate responsive records until after she conducted a more reasonable search, following receipt of the resubmitted OPRA request, resulted in an

insufficient search. Thus, the Custodian unlawfully denied access to the e-mails responsive to Complainant's OPRA request. N.J.S.A. 47:1A-6; Schneble, GRC 2007-220; Scheeler, Jr., GRC 2014-59. However, the GRC declines to order disclosure of those records because the current Custodian disclosed same to the Complainant on November 7, 2016.

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 matter currently before the Council, the Custodian's insufficient search and subsequent delay in disclosure resulted in a “deemed” denial of access. However, the current Custodian ultimately provided all e-mails located to the Complainant on November 7, 2016. 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 Council Staff respectfully recommends the Council find that:

1. The Custodian's failure to locate responsive records until after she conducted a more reasonable search, following receipt of the resubmitted OPRA request, resulted in an insufficient search. Thus, the Custodian unlawfully denied access to the e-mails responsive to Complainant's OPRA request. N.J.S.A. 47:1A-6; Schneble v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008); Scheeler, Jr. v.

Woodbine Bd. of Educ. (Cape May), GRC Complaint No. 2014-59 (Interim Order dated January 30, 2015). However, the GRC declines to order disclosure of those records because the current Custodian disclosed same to the Complainant on November 7, 2016.

2. The Custodian's insufficient search and subsequent delay in disclosure resulted in a "deemed" denial of access. However, the current Custodian ultimately provided all e-mails located to the Complainant on November 7, 2016. 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

December 11, 2018