



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

November 10, 2020 Government Records Council Meeting

Adam C. Miller
Complainant

Complaint No. 2018-238

v.

Township of Lawrence (Mercer)
Custodian of Record

At the November 10, 2020 public meeting, the Government Records Council (“Council”) considered the October 27, 2020 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. Catogge’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 the evidence of record supports that the Custodian possesses no responsive records. See Paff v. City of Union City (Hudson), GRC Complaint No. 2012-262 (August 2013); Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
2. Although Ms. Catogge’s response (on behalf of the Custodian) was insufficient, the responsive “orders and pleadings” in the instant complaint did not exist. Additionally, the evidence of record does not indicate that Ms. Catogge’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Ms. Catogge’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 10th Day of November 2020

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: November 13, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 10, 2020 Council Meeting**

**Adam C. Miller¹
Complainant**

GRC Complaint No. 2018-238

v.

**Township of Lawrence (Mercer)²
Custodial Agency**

Records Relevant to Complaint: Hardcopy via U.S. mail of “all documents served upon [the Complainant] upon date September 6, 2017.”

Custodian of Record: Kathleen S. Norcia

Request Received by Custodian: September 20, 2018

Response Made by Custodian: September 24, 2018

GRC Complaint Received: October 16, 2018

Background³

Request and Response:

On September 18, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 24, 2018, Township of Lawrence Police Department (“TLPD”) Records Supervisor Kathy Catogge responded in writing on behalf of the Custodian stated that she believed the Complainant’s “case was handled by the Mercer County Family Court [(“Court”)] division.” Ms. Catogge thus directed the Complainant to contact the Court. On the same day, the Complainant responded via e-mail stating that Ms. Catogge is “incorrect;” he was seeking documents solely from the Township of Lawrence (“Township”). The Complainant requested that Ms. Catogge comply with his OPRA request.

Denial of Access Complaint:

On October 16, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Township failed to provide him with records responsive to his OPRA request. The Complainant noted that the

¹ No legal representation listed on record.

² Represented by David M. Roskos, Esq., of Eckert, Seamans, Cherin & Mellott, LLC (Lawrence, 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.

September 6, 2017 incident resulted in a domestic violence action against him in the Court. The Complainant argued that it was unclear whether the TLPD ever actually served him with a complaint. The Complainant thus argued that he submitted the instant OPRA request in order to determine those documents that the Township served on him on September 6, 2017.

Statement of Information:

On November 9, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on September 20, 2018. The Custodian certified that her search included asking the TLPD to review and locate any responsive records. The Custodian certified that the TLPD determined that the requested records were “in the custody of the Court.” The Custodian certified that Ms. Catogge responded in writing on her behalf on September 24, 2018 directing the Complainant to contact the Court.

The Custodian argued that she complied with OPRA by directing the Complainant to contact the Court to obtain records responsive to this complaint. N.J.S.A. 47:1A-5(h). The Custodian asserted that this is because the Complainant sought “court-generated orders and pleadings that had already been served upon the Complainant on or about September 6, 2017.” The Custodian thus affirmed that no records existed.

Additional Submissions:

On October 1, 2020, the GRC sought additional information from the Custodian. The GRC stated that the SOI did not clearly indicate whether the Custodian maintained the records but they believed some were “court-generated” and must be obtained from the Court. The GRC thus asked the Custodian to submit a certification answering the following:

“Did the Township maintain those “court-generated orders and pleadings” at the time of the Complainant’s OPRA request? Please specifically indicate that either A) the Township did maintain those records; or B) no responsive records existed.”

The GRC requested that the Custodian submit her certification by October 6, 2020.

On October 5, 2020, the Custodian responded to the Complainant’s request for additional information. Therein, the Custodian certified that no records existed at the time of 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, the Complainant sought a copy of “all documents served upon him on September 6, 2017. Ms. Catogge responded on behalf of the Custodian directing the Complainant to the Court because it “handled” his case. In the SOI, the Custodian certified that the records sought were “in the custody of the Court.” Due to the vagueness of this response, the GRC sought additional information from the Custodian. In response to that request, the Custodian certified that the Township did not maintain any responsive records at the time of the subject OPRA request.

The facts of this complaint are on point with the facts in Shanker, GRC 2007-245. Specifically, although Ms. Catogge directed the Complainant to the Court, she did not definitively state that no records existed within the Township. Further, it was not until the GRC’s request for additional information that the Custodian certified that no record existed.⁴ Thus, because Ms. Catogge undertook the responsibility of responding on behalf of the Custodian, her initial response was ultimately insufficient.

Accordingly, Ms. Catogge’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 the evidence of record supports that the Custodian possesses no responsive records. See Paff v. City of Union City (Hudson), GRC Complaint No. 2012-262 (August 2013); Pusterhofer v. N.J. 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

⁴ It appears that the Township interpreted the Complainant’s OPRA request to seek those documents “served” on the Complainant as a result of the September 6, 2017 incident that resulted in the Court action. Given the overly broad nature of the Complainant’s OPRA request and his usage of the word “served,” it was reasonable to interpret the request in such a manner. The Complainant ultimately submitted a new OPRA request on September 24, 2018 seeking “all police reports and . . . arrest reports” naming himself. That OPRA request is the subject of Miller v. Twp. of Lawrence (Mercer), GRC Complaint No. 2018-238, which is being adjudicated concurrently with this complaint.

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 before the Council, although Ms. Catogge's response (on behalf of the Custodian) was insufficient, the responsive "orders and pleadings" in the instant complaint did not exist. Additionally, the evidence of record does not indicate that Ms. Catogge's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Ms. Catogge'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. Catogge'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 the evidence of record supports that the Custodian possesses no responsive records. See Paff v. City of Union City (Hudson), GRC Complaint No. 2012-262 (August 2013); Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
2. Although Ms. Catogge's response (on behalf of the Custodian) was insufficient, the responsive "orders and pleadings" in the instant complaint did not exist. Additionally, the evidence of record does not indicate that Ms. Catogge's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Ms. Catogge'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
Executive Director

October 27, 2020