



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

June 30, 2020 Government Records Council Meeting

Stephanie Murray
Complainant

Complaint No. 2018-260

v.

Middletown Township (Monmouth)
Custodian of Record

At the June 30, 2020 public meeting, the Government Records Council (“Council”) considered the June 23, 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. The Custodian unlawfully denied access to the requested records on a technical basis by failing to ensure that disclosure was achieved. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of the requested records because the Custodian disclosed the records to the Complainant on October 31, 2018 and again as part of the Statement of Information.
2. Although the Custodian unlawfully denied access to the responsive records on a technical basis, she disclosed them to the Complainant on October 31, 2018 and as part of the Statement of Information. 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 an 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 30th Day of June 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: July 2, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 30, 2020 Council Meeting**

**Stephanie Murray¹
Complainant**

GRC Complaint No. 2018-260

v.

**Middletown Township (Monmouth)²
Custodial Agency**

Records Relevant to Complaint: Electronic copy of “[a]ny accident report, incident report, or any other document filed by the Middletown police department concerning a motor vehicle crash on town hall property involving Heidi Brunt and an off-duty police officer between September 1, 2018 and October 4, 2018.”

Custodian of Record: Heidi Brunt
Request Received by Custodian: October 4, 2018
Response Made by Custodian: October 5, 2018
GRC Complaint Received: November 1, 2018

Background³

Request and Response:

On October 4, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On October 5, 2018, the Custodian responded in writing advising the Complainant that the requested records were uploaded to Middletown Township’s (“Township”) OPRA portal. On, October 11, 2018, the Complainant replied to the Custodian through the portal stating that the requested records “do not appear in the portal.” On October 17, 2018, the Complainant again replied to the Custodian through the portal stating that the requested records “are still not available.” On October 31, 2018, the Custodian successfully uploaded the requested records.

Denial of Access Complaint:

On November 1, 2018,⁴ the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted she contacted the Custodian

¹ No legal representation listed on record.

² Represented by Michael Collins, Esq. of Archer & Greiner, P.C. (Red Bank, 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.

Stephanie Murray v. Middletown Township (Monmouth), 2018-260 – Findings and Recommendations of the Executive Director

on two occasions to inform her the requested records were not available in the portal. The Complainant alleged that the Custodian ignored her emails. The Complainant further asserted that the records were being withheld because the Custodian was personally involved in the accident.

Statement of Information:

On November 21, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on October 4, 2018. The Custodian certified that on October 5, 2018, she attempted to upload two (2) reports to the Township’s OPRA portal. The Custodian certified that the portal generated a response via email alerting the Complainant that the requested records were available and subsequently closed the request. The Custodian certified that she did not see the Complainant’s October 11, 2018 and October 17, 2018 messages because the portal closed the records request.

The Custodian certified that the upload was unsuccessful apparently due to a technological glitch within the Township’s portal. The Custodian certified that she was subsequently made aware of the error outside of the web portal, and on October 31, 2018 she successfully uploaded the records to the portal.

The Custodian asserted that the instant complaint should be dismissed as moot because the Complainant was provided the requested records on October 31, 2018 and again by way of the SOI. The Custodian further asserted that the Complainant is not represented by counsel, therefore there is no claim for attorney fees to be considered by the GRC.

Analysis

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 the instant complaint, the Complainant contended that the Custodian failed to attach responsive records to her October 5, 2018 response. The Complainant further argued that she twice tried to alert the Custodian to the issue without response. In the SOI, the Custodian admitted that due to a technical glitch, the responsive records did not transfer to the portal. The Custodian further argued that because the portal closed the request, she was not alerted to the Complainant’s follow-up messages. The Custodian certified that upon being made aware of her error, on October 31, 2018, she successfully disclosed the requested records to the Complainant.

The evidence of record before the Council strongly indicates that a technical issue prevented the Custodian from effectuating disclosure of the responsive records on October 5,

⁴ The Complainant sent her complaint filing to the GRC via U.S. mail on October 29, 2018.

2018. Further, the Custodian has relied on the fact that the portal closed the request as the reason why she did not receive the Complainant's messages regarding the error. However, the GRC questions how the Complainant was able to send messages through the portal about a "closed" OPRA request, yet the Custodian did not have the ability to review them. Ultimately, it was incumbent on the Custodian to ensure that disclosure was achieved, whether in this instance or in response to any other OPRA request.⁵ As such, the GRC finds a technical unlawful denial of access occurred here.

Accordingly, the Custodian unlawfully denied access to the requested records on a technical basis by failing to ensure that disclosure was achieved. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of the requested records because the Custodian disclosed the records to the Complainant on October 31, 2018 and again as part of the SOI.

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 (Berg); 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, although the Custodian unlawfully denied access to the responsive records on a technical basis, she disclosed them to the Complainant on October 31, 2018 and as part of the SOI. 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.

⁵ While the GRC understands that a technical issue may have resulted in the Custodian being unaware of additional correspondence within the closed OPRA request, that issue should be explored internally and with the portal service to ensure this issue does not arise again.

Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian unlawfully denied access to the requested records on a technical basis by failing to ensure that disclosure was achieved. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of the requested records because the Custodian disclosed the records to the Complainant on October 31, 2018 and again as part of the Statement of Information.

2. Although the Custodian unlawfully denied access to the responsive records on a technical basis, she disclosed them to the Complainant on October 31, 2018 and as part of the Statement of Information. 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 an unreasonable denial of access under the totality of the circumstances.

Prepared By: Brandon Garcia
Case Manager

June 23, 2020