



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 15, 2020 Government Records Council Meeting

William M. Pankowski
Complainant

Complaint No. 2019-188

v.

Township of Washington (Bergen)
Custodian of Record

At the December 15, 2020 public meeting, the Government Records Council (“Council”) considered the December 8, 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’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 the Custodian’s response was insufficient, records responsive to the Complainant’s OPRA request did not exist. 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 15th Day of December 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: December 17, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 15, 2020 Council Meeting**

**William M. Pankowski¹
Complainant**

GRC Complaint No. 2019-188

v.

**Township of Washington (Bergen)²
Custodial Agency**

Records Relevant to Complaint: Hardcopies of the following regarding a grading and shed project on a property adjacent to the Complainant:

1. The “Variance” for increasing the level of the property by two and half feet (noting April 12, 2005).
2. The “Soil Test” conducted by the Township of Washington’s (“Township”) Engineer.
3. Written consent from the Complainant to allow for discharge of drainage onto his property.

Custodian of Record: Susan Witkowski
Request Received by Custodian: August 23, 2019
Response Made by Custodian: September 4, 2019
GRC Complaint Received: September 9, 2019

Background³

Request and Response:

On August 23, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 4, 2019, the Custodian responded in writing disclosing two (2) letters dated October 23, 2013 and October 31, 2014.

Denial of Access Complaint:

On September 9, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the records disclosed were

¹ No legal representation listed on record.

² Represented by Kenneth G. Poller, Esq., of Kenneth G. Poller, P.A. (Ramsey, 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 responsive to his OPRA request. The Complainant contended that the Custodian attempted to deceive him by disclosing these records, which were of no use to him.

Statement of Information:

On September 26, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on August 23, 2019. The Custodian certified that her search included forwarding the subject OPRA request to the Zoning Office, Building Department Planning and Zoning Department, and Planning and Zoning Engineer. The Custodian affirmed that the first three responded that no records existed, but the Engineer returned two (2) letters. The Custodian certified that she responded in writing on September 4, 2019 disclosing the two (2) letters to the Complainant.

The Custodian contended that she did not unlawfully deny access to the Complainant’s OPRA request. The Custodian argued that she could not disclose records responsive to the subject OPRA request because there “were [none] to produce.”

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 variance, soil test and written consent regarding an adjacent property. The Custodian responded in writing disclosing two (2) letters, none of which appear to satisfy the Complainant’s OPRA request. Following the Custodian’s response, the Complainant filed the instant complaint. In the SOI, the Custodian certified that she disclosed the only letters sent to her by the Engineer and that none of the other relevant Township departments maintained responsive records. The Custodian further averred that she could not disclose records because there “were [none] to produce.”

The facts of this complaint are on point with the facts in Shanker, GRC 2007-245. Specifically, although the Custodian disclosed records associated with the project at the adjacent property; it was not until the SOI that the Custodian certified that no record existed. Further, there is no evidence in the record to refute the conclusion that no records exist. Thus, the Custodian’s response was ultimately insufficient.

Accordingly, the Custodian’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 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 the Custodian’s response was insufficient, records responsive to the Complainant’s OPRA request did not exist. 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 Executive Director respectfully recommends the Council find that:

1. The Custodian’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 the Custodian's response was insufficient, records responsive to the Complainant's OPRA request did not exist. 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
Executive Director

December 8, 2020