



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

September 28, 2021 Government Records Council Meeting

David Weiner
Complainant

Complaint No. 2020-151

v.

County of Essex
Custodian of Record

At the September 28, 2021 public meeting, the Government Records Council (“Council”) considered the September 21, 2021 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 Denial of Access Complaint resulted in an insufficient search. Thus, the Custodian unlawfully denied access to the record 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). However, the GRC need not order any further actions because the Custodian disclosed all records that existed to the Complainant on December 8, 2020.
2. The Custodian’s search was insufficient; however, she ultimately was able to provide a responsive record to the Complainant on December 8, 2020. Further, the evidence of record supports that said record was only the one that existed. 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 28th Day of September 2021

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: September 30, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 28, 2021 Council Meeting**

**David Weiner¹
Complainant**

GRC Complaint No. 2020-151

v.

**County of Essex²
Custodial Agency**

Records Relevant to Complaint: Copies of:

1. “[A]ny documents delineating” names and titles of all Communications Workers of America (“CWA”) clerical staff members who were granted educational leave and assistance in accordance with Article XXI of the “Clerical Contract” (“Contract”) from January 1, 2010 to present.
2. “[A]ny documents delineating” the amount of the \$13,000 annual allotment expended (per the Contract) for educational leave and assistance each year between January 1, 2010 and present.
3. “[A]ny documents delineating” how the Division of Family Assistance and Benefits (“DFAB”) utilized the unexpended portion of the \$13,000 allotment from January 1, 2010 to present.

Custodian of Record: Olivia Schumann, Esq.
Request Received by Custodian: March 5, 2020
Response Made by Custodian: March 10, 2020
GRC Complaint Received: August 3, 2020

Background³

Request and Response:

On March 4, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 10, 2020, the Custodian responded in writing stating that after consulting with DFAB, an extension of time to respond through March 26, 2020 was necessary because the Fiscal Manager was on vacation. On March 26, 2020, the Custodian responded in writing stating that an extension of time to respond through

¹ No legal representation listed on record.

² No legal representation listed on record.

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.

April 7, 2020 was necessary due to the lack of in-office DFAB staff due to the ongoing public health emergency.

On April 6, 2020, the Custodian responded in writing stating that an extension of time to respond through April 27, 2020 was necessary due to the ongoing public health emergency. On April 27, 2020, the Custodian responded in writing stating that an extension of time to respond through May 18, 2020 was necessary due to the lack of in-office DFAB staff due to the ongoing public health emergency. On May 18, 2020, the Custodian responded in writing stating that an extension of time to respond through June 8, 2020 was necessary due to the lack of in-office DFAB staff due to the ongoing public health emergency. On June 8, 2020, the Custodian responded in writing stating that an extension of time to respond through June 29, 2020 was necessary due to the lack of in-office DFAB staff due to the ongoing public health emergency.

On June 29, 2020, the Custodian responded in writing stating per Albert Fusco of DFAB, no responsive records exist.

Denial of Access Complaint:

On August 3, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian did not disclose any records in responsive to the subject OPRA request.

Statement of Information:⁴

On January 29, 2021, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on March 5, 2020. The Custodian affirmed that her search included sending the OPRA request to DFAB and Human Resources (“HR”), which yielded no responsive records. The Custodian certified that following multiple extensions, she responded in writing on June 29, 2020 stating that no records existed. The Custodian affirmed that following her initial response, it became apparent that the subject OPRA request should have been sent to HR and the Office of Accounts and Control (“OAC”). The Custodian affirmed that she contacted those departments. The Custodian affirmed that HR again stated that no records existed; however, Chief Financial Officer (“CFO”) Hossam Mohamed located a two (2) page spreadsheet of education payments made from 2010 through present and disclosed it to her on December 4, 2020. The Custodian further certified that CFO Mohammad noted that no records responsive to OPRA request Item No. 3 existed but provided an explanation of excess funds cancellation pursuant to N.J.S.A. 40A:4-60. The Custodian certified that she e-mailed the spreadsheet and explanation to the Complainant on December 8, 2020.

The Custodian certified that she provided all records that existed and thus no unlawful denial of access occurred. Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005); Owens v. Mt. Holly Twp. (Burlington), GRC Complaint No. 2013-233 (February 2014). The Custodian certified that the two (2) page spreadsheet is the only record responsive to the subject OPRA request. See Mohamed Cert. ¶ 5, 8. The Custodian further certified

⁴ On September 9, 2020, this complaint was referred to mediation. On January 15, 2021, this complaint was referred back to the GRC for adjudication.

that N.J.S.A. 40A:4-60, an explanation of which was provided to the Complainant, states that excess funds are “cancelled to the main County fund after the second year.” Mohamed Cert. ¶ 6. The Custodian thus argued that all records were provided “and no further responsive documents exist;” no credible, competent evidence exists to refute this statement.

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).

Here, the Custodian received the subject OPRA request and responded advising that no records existed. This complaint ensued, wherein the Custodian admitted in the SOI that the request was not forwarded to at least OAC.⁵ The Custodian further certified that once she forwarded the request to those HR and OAC, CFO Mohamed returned a two (2) page spreadsheet and explanation of N.J.S.A. 40A:4-60 that was disclosed to the Complainant on December 8, 2020.

Taking into consideration the forgoing, the facts here are on point with those in Schneble, GRC 2007-220. Specifically, the Custodian only sent the OPRA request to DFAB and not the additional departments that reasonably could have maintained information given the topic identified therein. That is, it is reasonable to conclude that HR and/or OAC would be involved in leave and financial assistance/tuition reimbursements for employees to engage in educational endeavors. Ultimately, on December 8, 2020, the Custodian disclosed to the Complainant the two (2) page spreadsheet (which included name, title, and amount of funds obtained) as well as the statutory explanation obtained from CFO Mohamed.

Accordingly, the Custodian’s failure to locate responsive records until after she conducted a more reasonable search following receipt of the Denial of Access Complaint resulted in an insufficient search. Thus, the Custodian unlawfully denied access to the record responsive to Complainant’s OPRA request. N.J.S.A. 47:1A-6; Schneble, GRC 2007-220. However, the GRC need not order any further actions because the Custodian disclosed all records that existed to the Complainant on December 8, 2020.

⁵ The Custodian stated that she originally sent the request to HR, but later stated that “it became apparent that [the subject OPRA request] should have been brought to the attention of [HR] and the [OAC].”

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 this matter, the Custodian’s search was insufficient; however, she ultimately was able to provide a responsive record to the Complainant on December 8, 2020. Further, the evidence of record supports that said record was only the one that existed. 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 failure to locate responsive records until after she conducted a more reasonable search following receipt of the Denial of Access Complaint resulted in an insufficient search. Thus, the Custodian unlawfully denied access to the record 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). However, the GRC need not order any further actions because the Custodian disclosed all records that existed to the Complainant on December 8, 2020.
2. The Custodian’s search was insufficient; however, she ultimately was able to provide a responsive record to the Complainant on December 8, 2020. Further, the evidence of

record supports that said record was only the one that existed. 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

September 21, 2021