



**State of New Jersey**  
**DEPARTMENT OF COMMUNITY AFFAIRS**  
**101 SOUTH BROAD STREET**  
**PO BOX 819**  
**TRENTON, NJ 08625-0819**

**PHILIP D. MURPHY**  
*Governor*

**LT. GOVERNOR SHEILA Y. OLIVER**  
*Commissioner*

**FINAL DECISION**

**November 9, 2021 Government Records Council Meeting**

Anonymous  
Complainant

Complaint No. 2020-200

v.

Borough of Haledon (Passaic)  
Custodian of Record

At the November 9, 2021 public meeting, the Government Records Council (“Council”) considered the October 26, 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 and disclose responsive Reports until after he 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 Reports responsive to Complainant’s OPRA request. N.J.S.A. 47:1A-6; Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 2013) (citing Schneble v. N.J. Dep’t of Env’tl. Protection, GRC Complaint No. 2007-220 (April 2008)). However, the GRC need not order disclosure of the outstanding Reports because same were disclosed as part of the Statement of Information.
2. The Custodian’s initial search was insufficient, and he unlawfully denied access to multiple responsive Reports. N.J.S.A. 47:1A-6. However, the Custodian disclosed copies of all responsive Reports 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 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 9<sup>th</sup> Day of November 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: November 15, 2021**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
November 9, 2021 Council Meeting**

**Anonymous<sup>1</sup>  
Complainant**

**GRC Complaint No. 2020-200**

**v.**

**Borough of Haledon (Passaic)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of “every available Paychex Compensation Detail Report” (“Report”) for Bruce Baker.

**Custodian of Record:** Allan Susen

**Request Received by Custodian:** June 3, 2020

**Response Made by Custodian:** June 12, 2020

**GRC Complaint Received:** October 5, 2020

**Background<sup>3</sup>**

**Request and Response:**

On June 3, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 12, 2020, the Custodian responded in writing extending the response time frame through June 19, 2020 due to the ongoing public health emergency.<sup>4</sup> On June 26, 2020, the Custodian responded in writing extending the response time frame through July 6, 2020 due to the ongoing public health emergency. On July 8, 2020, the Custodian responded in writing extending the response time frame through July 15, 2020 due to the ongoing public health emergency. On July 15, 2020, the Custodian responded in writing disclosing responsive Reports.

On July 17, 2020, the Complainant e-mailed the Custodian noting that the disclosed 2015 file contained 2017 payroll information and that Reports for 2011, 2015, 2019, and 2020 were not disclosed. The Complainant requested that the Custodian send those outstanding Reports. On August 15, 2020, the Complainant renewed his request for outstanding Reports. On August 30,

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Andrew Oddo, Esq., of Oddo Law Firm (Oradell, NJ).

<sup>3</sup> 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.

<sup>4</sup>At the time of the Custodian’s response, the statutory mandated time frame had expired. However, the GRC will not address the “deemed” denial associated with the Complainant’s OPRA request because he did not raise said issue in the Denial of Access Complaint.

2020, the Complainant again renewed his request for outstanding Reports. On September 14, 2020, the Complainant renewed his request for outstanding Reports a fourth time.

#### Denial of Access Complaint:

On October 5, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that the Custodian initially disclosed Reports for 2009, 2010, 2012, 2013, 2014, 2016, 2017, and 2018. The Complainant asserted that notwithstanding four (4) written attempts to obtain the outstanding responsive Reports for 2011, 2015, 2019, and 2020, the Custodian failed to disclose them.

#### Statement of Information:

On October 22, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the subject OPRA request on June 3, 2020. The Custodian certified that following multiple extensions, he responded in writing on July 15, 2020 disclosing multiple Reports. The Custodian stated that thereafter, the Complainant contacted him regarding outstanding records; however, no extensions to address the issue were proffered. The Custodian noted that the Borough of Haledon (“Borough”) was experiencing turnover, remote work due to the public health emergency, and the payroll clerk’s resignation in June 2020 that added to the complications of trying to respond to the subject OPRA request.

The Custodian argued that his inability to fulfill the subject OPRA request was caused by a confluence of events as described above. The Custodian asserted that the Borough was taking active steps to gain access to its payroll system. The Custodian noted that in addition to the issues outlined above, the Borough received 623 OPRA requests to date and that twenty-nine (29) of them remain open and active. The Custodian averred that there was no intent to withhold access to responsive records and that he was disclosing the missing Reports as an attachment to the SOI.

### 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 Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 2013), the custodian initially responded to the complainant’s request, producing four (4) responsive

records and stating that no other records existed. However, after receiving the denial of access complaint, the custodian performed another search and discovered several other records. Id. In accordance with Schneble, the Council held that the custodian failed to perform an adequate initial search and unlawfully denied access to those additional records. Id.

Here, the Custodian received the subject OPRA request and responded disclosing multiple Reports to the Complainant. The Complainant subsequently contacted the Custodian on four (4) occasions identifying multiple missing Reports; however, the Custodian did not respond to that correspondence. This complaint followed; the Complainant contended that the Custodian failed to responsive Reports for 2011, 2015, 2019, and 2020. In the SOI, the Custodian certified that his failure to disclose all responsive records was the result of several factors, including the payroll clerk's resignation, the public health emergency, and an abundance of pending OPRA requests. The Custodian noted that all missing Reports were attached to the SOI.

Notwithstanding the issues the Borough faced during the pendency of this complaint, a custodian has a legal obligation to search for and disclose all records that exist unless otherwise exempt. Here, the Custodian attempted to locate records and disclosed some of the Reports but failed to disclose all that existed. It was not until after the filing of this complaint that the Custodian located and disclosed the remaining Reports. Thus, the facts here are on point with those in Weiner, 2013-52 and it follows that an insufficient search occurred in the instant complaint.

Accordingly, the Custodian's failure to locate and disclose responsive Reports until after he 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 Reports responsive to Complainant's OPRA request. N.J.S.A. 47:1A-6; Weiner, 2013-52 (citing Schneble, GRC 2007-220). However, the GRC need not order disclosure of the outstanding Reports because same were disclosed 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 (*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 initial search was insufficient, and he unlawfully denied access to multiple responsive Reports. N.J.S.A. 47:1A-6. However, the Custodian disclosed copies of all responsive Reports 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. 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 and disclose responsive Reports until after he 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 Reports responsive to Complainant's OPRA request. N.J.S.A. 47:1A-6; Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 2013) (*citing* Schneble v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008)). However, the GRC need not order disclosure of the outstanding Reports because same were disclosed as part of the Statement of Information.
2. The Custodian's initial search was insufficient, and he unlawfully denied access to multiple responsive Reports. N.J.S.A. 47:1A-6. However, the Custodian disclosed copies of all responsive Reports 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 unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso  
Executive Director

October 26, 2021