



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

November 9, 2021 Government Records Council Meeting

Anonymous
Complainant

Complaint No. 2020-201, 2020-202,
and 2020-203

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 the 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 reports because same were disclosed as part of the Statement of Information.
2. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s second (2nd) and third (3rd) OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to both OPRA requests either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA requests pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). However, the GRC need not order disclosure because responsive records were disclosed as part of the Statement of Information and just prior respectively.
3. The Custodian’s initial search was insufficient, and he unlawfully denied access to multiple responsive reports responsive to the Complainant’s first (1st) OPRA request. N.J.S.A. 47:1A-6. Further, the Custodian’s failure to timely respond to the Complainant’s second (2nd) and third (3rd) OPRA requests resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian disclosed copies of all responsive records as part of the Statement of Information or just prior to submission thereof. Additionally, the evidence of record does not indicate that the Custodian’s violations 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 9th 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**

**Anonymous¹
Complainant**

**GRC Complaint Nos. 2020-201
2020-202, & 2020-203**

v.

**Borough of Haledon (Passaic)²
Custodial Agency**

Records Relevant to Complaint:

June 25, 2020 OPRA request:³ Electronic copies via e-mail of “[a]ll activity and transactions in Paychex account 119105.”

August 22, 2020 OPRA request:⁴ Electronic copies via e-mail of “[a]ll activity and transactions in Paychex account 119101.”

September 4, 2020 OPRA request:⁵ Electronic copies via e-mail of “[a]ll activity and transactions in Paychex account 128107.”

Custodian of Record: Allan Susen

Request Received by Custodian: June 25, 2020; August 24, 2020; September 4, 2020

Response Made by Custodian: July 7, 2020; None; None

GRC Complaint Received: October 5, 2020

Background⁶

Request and Response:

On June 25, 2020, the Complainant submitted the first (1st) Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 7, 2020, the Custodian responded in writing extending the response time frame through July 14, 2020 due to the ongoing COVID-19 public health emergency. On July 16, 2020, the Custodian responded in writing disclosing multiple records. On July 17, 2020, the Complainant e-mailed the Custodian

¹ No legal representation listed on record.

² Represented by Andrew Oddo, Esq., of Oddo Law Firm (Oradell, NJ).

³ This OPRA request is the subject of GRC Complaint No. 2020-201.

⁴ This OPRA request is the subject of GRC Complaint No. 2020-202.

⁵ This OPRA request is the subject of GRC Complaint No. 2020-203.

⁶ 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.

stating that all reports disclosed in response to the first (1st) OPRA request contained the exact same data, were out of alignment, some text was “cut off,” and footers were deleted. The Complainant requested that the Custodian disclose the actual reports that Paychex created.

On August 22, 2020, the Complainant submitted the second (2nd) OPRA request to the Custodian seeking the above-mentioned records.

On September 4, 2020, the Complainant submitted the third (3rd) OPRA request to the Custodian seeking the above-mentioned records.

Denial of Access Complaint:

On October 5, 2020, the Complainant filed three (3) Denial of Access Complaints with the Government Records Council (“GRC”).

Regarding the first (1st) OPRA request, the Complainant asserted the eleven (11) reports disclosed were manipulated by a Borough of Haledon (“Borough”) employee using Microsoft Word and noted several indications of those edits to support his allegation. The Complainant also argued that each report contained the same data with different years on them. The Complainant argued that the Borough had no “legitimate reason” to alter the disclosed records and that the Custodian failed to disclose 2020 data. The Complainant noted that he e-mailed the Custodian regarding these issues but did not receive a response.

Regarding the second (2nd) and third (3rd) OPRA requests, the Complainant contended that the Custodian failed to respond to them.

Statement of Information:

On October 22, 2020, the Custodian filed two (2) Statements of Information (“SOI”).

Regarding the first (1st) OPRA request, the Custodian certified that he received same on June 25, 2020. The Custodian certified that following an extension of time, he disclosed responsive records to the Complainant via e-mail on July 14, 2020. The Custodian noted that issues with employee turnover, remote work arrangements due to the public health emergency, and the Borough Payroll Clerk’s resignation in June 2020 factored into the additional time needed to respond to Complainant’s OPRA request.

Regarding the second (2nd) OPRA request, the Custodian certified that he received same on August 24, 2020. The Custodian averred that the OPRA request was never entered into the Borough’s OPRA processing system and thus he did not respond to it.

The Custodian argued that his inability to fulfill both OPRA requests 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 remained open and active. The Custodian averred that there was no intent to withhold access

to responsive records and that he was disclosing the missing records for both OPRA requests as an attachment to the SOI.

On October 29, 2020, the Custodian submitted a third (3rd) SOI. Therein, the Custodian certified that he received the Complainant's third (3rd) OPRA request on September 4, 2020. The Custodian averred that the OPRA request was never entered into the Borough's OPRA processing system and thus he did not respond to it.

The Custodian reiterated that his inability to address the subject OPRA request rested on all reasons stated in the previous SOIs, inclusive of staffing issues and the payroll clerk's resignation. The Custodian noted that he disclosed all missing records and same were attached 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 Complainant's first (1st) OPRA request and responded disclosing multiple reports to the Complainant. Upon receipt, the Complainant e-mailed the Custodian alleging significant errors with the disclosed reports but received no additional responses. GRC 2020-201 followed; wherein the Complainant contended that the Custodian disclosed several reports that all contained the same information and appeared to be manipulated by a Borough employee. The Complainant also noted that the Custodian did not disclose any 2020 data. In the SOI, the Custodian certified that his response 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 also noted that he was disclosing all outstanding records as an attachment 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 a version of the reports that ultimately did not satisfy the Complainant's OPRA request. It should be noted that the GRC generally has no authority over the content or veracity of a disclosed record. N.J.S.A. 47:1A-7(b); Kwanzaa v. Dep't of Corr., GRC Complaint No. 2004-167 (March 2005); Cole v. Twp. of Montague (Sussex), GRC Complaint No. 2011-236 (December 2012). However, a review of the reports originally disclosed in response to the first (1st) OPRA request strongly support the Complainant's assertion that the Custodian did not disclose all the responsive records. It was not until after the filing of this complaint that the Custodian located and disclosed complete copies of the correct 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 the 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 reports because same were disclosed as part of the SOI.

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁷ Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

In the matter before the Council, the Complainant filed GRC 2020-202 and 2020-203 alleging that the Custodian failed to respond to the subject OPRA requests. In the SOI, the Custodian admitted to this failure and noted it occurred because neither OPRA request was entered into the Borough's OPRA processing system. The Custodian further certified that he was disclosing records responsive to the second (2nd) OPRA request as part of the SOI and also attaching those records disclosed in response to the third (3rd) OPRA request.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's second (2nd) and third (3rd) OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to both OPRA requests either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated

⁷ A custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

seven (7) business days results in a “deemed” denial of the Complainant’s OPRA requests pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. However, the GRC need not order disclosure because responsive records were disclosed as part of the SOI and just prior respectively.

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 responsive to the Complainant’s first (1st) OPRA request. N.J.S.A. 47:1A-6. Further, the Custodian’s failure to timely respond to the Complainant’s second (2nd) and third (3rd) OPRA requests resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian disclosed copies of all responsive records as part of the SOI or just prior to submission thereof. Additionally, the evidence of record does not indicate that the Custodian’s violations 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 the 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 reports because same were disclosed as part of the Statement of Information.

2. The Custodian did not bear his burden of proof that he timely responded to the Complainant's second (2nd) and third (3rd) OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to both OPRA requests either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA requests pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). However, the GRC need not order disclosure because responsive records were disclosed as part of the Statement of Information and just prior respectively.
3. The Custodian's initial search was insufficient, and he unlawfully denied access to multiple responsive reports responsive to the Complainant's first (1st) OPRA request. N.J.S.A. 47:1A-6. Further, the Custodian's failure to timely respond to the Complainant's second (2nd) and third (3rd) OPRA requests resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian disclosed copies of all responsive records as part of the Statement of Information or just prior to submission thereof. Additionally, the evidence of record does not indicate that the Custodian's violations 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