



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 29, 2021 Government Records Council Meeting

Anonymous
Complainant

Complaint No. 2020-93

v.

Borough of Haledon (Passaic)
Custodian of Record

At the June 29, 2021 public meeting, the Government Records Council (“Council”) considered the June 22, 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 did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the 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).
2. The Custodian did not unlawfully deny access to any records responsive to the Complainant’s OPRA request because he certified, and the record reflects, that he disclosed all that existed. N.J.S.A. 47:1A-6; Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010).
3. The Custodian’s failure to timely respond 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 all records that existed on October 18, 2019. 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 29th Day of June 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: July 1, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 29, 2021 Council Meeting**

**Anonymous¹
Complainant**

GRC Complaint No. 2020-93

v.

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

Records Relevant to Complaint: Electronic copies via e-mail of “all e-mails sent or received in connection with OPRA-2018-00065.”

Custodian of Record: Allan R. Susen

Request Received by Custodian: September 30, 2019

Response Made by Custodian: October 18, 2019

GRC Complaint Received: May 7, 2020

Background³

Request and Response:

On September 29, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On October 15, 2019,⁴ the eleventh (11th) business day after receipt of the subject OPRA request, the Custodian allegedly responded obtaining an extension of time to respond until October 22, 2019. On October 18, 2019,⁵ the Custodian allegedly responded in writing disclosing some responsive records and a memorandum from Michael Moore stating this OPRA request was completed under a former records clerk who no longer is employed with” the Police Department; thus, no e-mails could be “accessed or provided.”

Denial of Access Complaint:

On May 7, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant contended that the Custodian failed to “diligently

¹ No legal representation listed on record.

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

⁴ The Complainant noted this date in the Denial of Access Complaint, but neither he nor the Custodian provided supporting documentation of this communication.

⁵ Ibid.

search” for responsive records. The Complainant further argued that the Custodian failed to disclose the “balance of the requested records.” The Complainant noted that the relevant correspondence was likely exchanged between six (6) specific e-mail accounts.

Supplemental Response:

On June 12, 2020, the Custodian sent an e-mail to Lieutenant Waeil Dashoka attaching those e-mails disclosed to the Complainant and asking that the Police Department’s server be searched again. On June 15, 2020, Lt. Dashoka responded advising that he searched all mailboxes, including those disabled, utilizing ten (10) search terms and was attaching OPRA logs located as part of said search.

Statement of Information:

On June 22, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on September 30, 2019. The Custodian certified that his search included reviewing the Borough of Haledon’s (“Borough”) e-mail system. The Custodian noted that he also asked the Police Department to conduct a search although e-mail communications were uncommon. The Custodian averred that Mr. Moore replied that no e-mails could be “accessed nor provided.” The Custodian certified that based on this, he responded in writing on October 18, 2019 disclosing to the Complainant those records located and including a copy of Mr. Moore’s memorandum.

The Custodian certified that on June 15, 2020, the Borough conducted a secondary search and the results were attached to the SOI. The Custodian noted that “no specific e-mails” were located, but spreadsheet OPRA logs associated with OPRA-2018-00065 were located and are included in the SOI.

Additional Submissions:

On June 25, 2020, the Complainant e-mailed the GRC arguing that the Custodian failed to include in the SOI an itemized Vaughn Index.

Analysis

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).⁶ 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

⁶ 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.

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 instant matter, the Complainant argued that the Custodian failed to respond to the subject OPRA request in a timely manner. In the SOI, the Custodian certified that he received the subject OPRA request on September 30, 2019 but did not respond until October 18, 2019. Even assuming that the Custodian extended the time frame on October 15, 2019, as alleged by the Complainant in the Denial of Access Complaint, said response was beyond the statutory response time frame. Thus, the evidence of record thus supports a “deemed” denial of access here.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the 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, GRC 2007-11.

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 Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010), the Council found that the custodian did not unlawfully deny access to the requested records based on the custodian’s certification that all such records were provided to the complainant. The Council held that the custodian’s certification, in addition to the lack of refuting evidence from the complainant, was sufficient to meet the custodian’s burden of proof. See also Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005); Holland v. Rowan Univ., GRC Complaint No. 2014-63, *et seq.* (March 2015). However, in Macek v. Bergen Cnty. Sheriff’s Office, GRC Complaint No. 2017-156, *et seq.* (Interim Order dated June 25, 2019), the Council held that evidence contained in the record suggested that additional responsive records may exist. Based on this, the Council ordered the Custodian to perform another search and submit a certification regarding the results of that search.

Here, the Complainant contended in his Denial of Access Complaint that the Custodian only provided a partial response and failed to disclose additional responsive records. The Complainant presumably based his argument on Mr. Miller’s memorandum regarding the departure of the former records clerk. In the SOI, the Custodian certified that he disclosed to the Complainant copies of e-mails sent and received regarding OPRA 2018-00065. The Custodian further certified that a second search did not yield any additional e-mails, but that two (2) OPRA logs containing an annotation to OPRA 2018-00065 were attached to the SOI.

Having reviewed the evidence of record contained herein, the GRC determines that this complaint more closely mirrors the facts in Danis, GRC 2009-156. That is, the Custodian initially disclosed responsive e-mails and certified in the SOI that no additional records were located. Further, the logs attached to the SOI were not responsive to the subject OPRA request because they were not e-mails.⁷ Also, the Complainant did not provide any evidence to support that the disclosed records represented only a portion of those responsive to the subject OPRA request. To the extent that Complainant is arguing that e-mails he possessed at the time of the subject OPRA request were not disclosed, Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008) (holding that a custodian could not have unlawfully denied access to records in the requestor's possession at the time they submitted the OPRA request) controls. See also Caggiano v. N.J. Office of the Governor, GRC Complaint No. 2014-408 (September 2015).

Accordingly, the Custodian did not unlawfully deny access to any records responsive to the Complainant's OPRA request because he certified, and the record reflects, that he disclosed all that existed. N.J.S.A. 47:1A-6; Danis, GRC 2019-156.

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 currently before the Council, the Custodian's failure to timely respond 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 all records that existed on October 18, 2019. Additionally, the evidence of

⁷ The GRC notes that the Complainant's OPRA request is invalid on their face because does not include all the criteria required to be included in requests seeking e-mails. Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010).

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 did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the 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).
2. The Custodian did not unlawfully deny access to any records responsive to the Complainant's OPRA request because he certified, and the record reflects, that he disclosed all that existed. N.J.S.A. 47:1A-6; Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010).
3. The Custodian's failure to timely respond 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 all records that existed on October 18, 2019. 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

June 22, 2021