



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

November 9, 2022 Government Records Council Meeting

Darlene R. Esposito
Complainant

Complaint No. 2021-238

v.

NJ Department of State, Division of Elections
Custodian of Record

At the November 9, 2022 public meeting, the Government Records Council (“Council”) considered the October 27, 2022 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 unlawfully denied access to the responsive voter registration record by having provided only a partly legible copy. N.J.S.A. 47:1A-6; Lopez v. Cnty. of Hudson, GRC Complaint No. 2009-267 (March 2011). However, the GRC need not order any further disclosure because the Custodian corrected the legibility issue through re-disclosure of the record on November 8, 2021.
2. The Custodian’s disclosure of a partially illegible record resulted in an unlawful denial of access. N.J.S.A. 47:1A-6. However, the Custodian cured this issue through redisclosure on November 8, 2021. 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 2022

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, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 9, 2022 Council Meeting**

**Darlene R. Esposito¹
Complainant**

GRC Complaint No. 2021-238

v.

**N.J. Department of State, Division of Elections²
Custodial Agency**

Records Relevant to Complaint: Copies of the Complainant’s voter affiliation and registration from 1976 to present.

Custodian of Record: Joi Robinson
Request Received by Custodian: August 13, 2021
Response Made by Custodian: August 20, 2021
GRC Complaint Received: October 8, 2021

Background³

Request and Response:

On an unknown date, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 20, 2021, the Custodian responded in writing disclosing a voter registration screenshot to the Complainant.

Denial of Access Complaint:

On October 8, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian denied her access because the record disclosed was “nearly legible and hardly readable.” The Complainant contended that she believes the illegible nature of the records disclosed resulted in an unlawful denial of access.

Supplemental Response:

On November 8, 2021, the Custodian e-mailed the Complainant disclosing “a legible copy

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Steven M. Gleeson.

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.

of the information” previously produced on August 20, 2021.

Statement of Information:

On November 19, 2021, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on August 13, 2021 upon returning from vacation. The Custodian certified that her search included reviewing the Statewide Voter Registration System (“SVRS”). The Custodian affirmed that because the SVRS does not allow for printing, the Division of Elections (“DOE”) utilized a “workaround” by taking a screenshot of the voter record and printing it. The Custodian certified that she responded in writing on August 20, 2021 disclosing the printed screenshot.

The Custodian averred that while records cannot be printed from the SVRS, they can be sent via e-mail. The Custodian noted that here, she was required to take the screenshot approach to fulfill the subject OPRA request because it was received via U.S. mail and did not contain an e-mail. The Custodian stated that the Complainant filed the instant complaint without first contacting DOE to address her concerns of an illegible record. The Custodian averred that upon receiving this complaint, she was able to identify an e-mail address to which she sent a more legible copy of the responsive record to the Complainant on November 8, 2021. The Custodian argued that because she has provided the Complainant with the requested relief, this complaint is now moot and should be dismissed. See Stop & Shop Supermarket Co., LLC v. Cnty. of Bergen, 450 N.J. Super. 286, 291-292 (App. Div. 2017).

Analysis

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 Lopez v. Cnty. of Hudson, GRC Complaint No. 2009-267 (March 2011), the custodian provided records to the complainant that were partially illegible, but provided the fully legible records as part of the SOI thus proving that legible records existed at the time of the complainant’s OPRA request. The Council held “the [c]ustodian’s provision of illegible records to the [c]omplainant in response to the OPRA request when legible records existed constituted a limitation on the right of access accorded by OPRA pursuant to N.J.S.A. 47:1A-1 and a violation of OPRA.”

Here, the Custodian initially disclosed to the Complainant a printed screenshot of her voter record through U.S. mail using the only contact information provided in the subject OPRA request. The Complainant filed this complaint contending that the partly illegible record amounted to an unlawful denial of access under OPRA. Following receipt of the complaint, on November 8, 2021, the Custodian resent another copy of the responsive record via the e-mail address contained within

said complaint. In the SOI, the Custodian argued that the SVRS did not allow records to be printed but did allow for voter records to be sent via e-mail. The Custodian averred that she initially sent the screenshot because the Complainant did not provide an e-mail address in the subject OPRA request. The Custodian further certified that the upon receiving the complaint, she was able to use the e-mail address contained therein to disclose a legible copy of the requested record.

As in Lopez, the initially disclosed screenshot contained small, pixelated print throughout and made it difficult to discern the content in many instances. This is in contrast to the November 8, 2021 disclosure, which provided a clear version of the record. It should also be noted that the second disclosure appeared to contain more information than the screenshot, such as a more complete voting history. While the GRC acknowledges the potential disclosure difficulty arising from SVRS's printing limitations, a custodian is nonetheless obligated to ensure that they are disclosing a record that is complete and legible if same exists. The evidence of record here clearly shows that a legible record existed at the time of the subject OPRA request and that the Custodian should have taken all necessary actions to disclose same. Thus, disclosure of the partly illegible record here does result in a technical unlawful denial of access per Lopez, GRC 2009-267.

Therefore, the Custodian unlawfully denied access to the responsive voter registration record by having provided only a partly legible copy. N.J.S.A. 47:1A-6; Lopez, GRC 2009-267. However, the GRC need not order any further disclosure because the Custodian corrected the legibility issue through re-disclosure of the record on November 8, 2021.

Knowing & Willful

OPRA states that “[a] public official, officer, employee or custodian who knowingly and 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. 1983)); 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, the Custodian's disclosure of a partially illegible record resulted in an unlawful denial of access. N.J.S.A. 47:1A-6. However, the Custodian cured this issue through redisclosure on November 8, 2021. 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 unlawfully denied access to the responsive voter registration record by having provided only a partly legible copy. N.J.S.A. 47:1A-6; Lopez v. Cnty. of Hudson, GRC Complaint No. 2009-267 (March 2011). However, the GRC need not order any further disclosure because the Custodian corrected the legibility issue through re-disclosure of the record on November 8, 2021.
2. The Custodian's disclosure of a partially illegible record resulted in an unlawful denial of access. N.J.S.A. 47:1A-6. However, the Custodian cured this issue through redisclosure on November 8, 2021. 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 27, 2022