



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

November 19, 2013 Government Records Council Meeting

Mary Jean DiLorenzo
Complainant

Complaint No. 2013-264

v.

Township of Bloomfield Board of Health (Essex)
Custodian of Record

At the November 19, 2013 public meeting, the Government Records Council (“Council”) considered the November 12, 2013 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 violated OPRA because the Shelter supervisor, on behalf of the Custodian, refused to allow inspection of some of the requested records and failed to set forth a specific legal basis for withholding said records from inspection. N.J.S.A. 47:1A-5(g). See also Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (December 2008).
2. Although the Complainant was unlawfully denied access to the requested records, the Council declines to order disclosure of the records because the Custodian acknowledged that the Complainant was unlawfully denied access to said records, took corrective action to insure all of the records in each file could be inspected, and offered to arrange another time when the Complainant could conduct such an inspection; however, the Complainant refused the Custodian’s offer.
3. Although the Custodian violated N.J.S.A. 47:1A-5(g), the Custodian took corrective action to insure all of the requested records could be inspected, and offered to arrange another time when the Complainant could conduct such an inspection. 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 an 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 19th Day of November, 2013

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 21, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 19, 2013 Council Meeting**

**Mary Jean Dilorenzo¹
Complainant**

GRC Complaint No. 2013-264

v.

**Township of Bloomfield Board of Health (Essex)²
Custodial Agency**

Records Relevant to Complaint: On-site inspection of dog and cat animal records from January 1, 2012 to December 1, 2012.³

Custodian of Records: Karen Lore
Request Received by Custodian: December 13, 2012
Response Made by Custodian: December 19, 2012
GRC Complaint Received: September 13, 2013

Background⁴

Request and Response:

On December 13, 2012, the Complainant submitted an Open Public Records Act (“OPRA”) request seeking the above-listed records. On December 19, 2012, the fourth (4th) business day following receipt of said request, the Custodian responded in writing informing the Complainant that on December 18, 2012, the Complainant inspected the requested records for January 2012 while at the Board of Health offices and tagged two (2) such records for disclosure via e-mail. The Custodian informed the Complainant that the tagged files, a redacted copy of a file for a dog named Louie and a redacted copy of a file for a dog named Elvis, are attached. The Custodian informed the Complainant that the redactions were made to excise personal information from the disclosed records. The Custodian further confirmed that an appointment was scheduled for December 22, 2012, at which time the Complainant could examine the remainder of the requested records at the Bloomfield Bukowski Animal Shelter (“Shelter”) commencing with the month of February 2012.

¹ No legal representation listed on record.

² Represented by Ronald J. Ricci, Esq., of Ricci & Fava, LLC (Woodland Park, NJ).

³ The Complainant also requested records via e-mail.

⁴ 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.

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Denial of Access Complaint:

On September 13, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant states that she provided the records request to the Custodian on December 13, 2012, and that the Custodian responded to the request on January 3, 2013.⁵

The Complainant states that she examined the requested records for January 2012 at the Board of Health offices and experienced no problems. The Complainant further states that she arranged an appointment for December 22, 2012, at the Shelter to examine the balance of the requested records.

The Complainant states that when she arrived at the Shelter the supervisor, Kathleen Georgevich, informed the Complainant that she would retrieve the files containing the requested records from a file cabinet and remove any records which contained personal information. The Complainant states that after Ms. Georgevich retrieved a file from the cabinet, she removed several documents from the file and placed them face down, then gave the file to the Complainant for examination. The Complainant said that Ms. Georgevich told her that she could tag any of the records she desired and thereafter they would be copied and disclosed to her. The Complainant states that she did not know what records were being withheld from disclosure because Ms. Georgevich removed many documents from the files without explanation other than to tell her the documents contained personal information.

The Complainant states that after three (3) files were examined in this manner, she opted to end the on-site inspection. The Complainant states that she told Ms. Georgevich that she would contact the clerk’s office for further clarification of the inspection process and then reschedule the inspection. The Complainant states that she e-mailed the clerk’s office on December 26, 2012, to relate her unsatisfactory inspection experience and on or about January 9, 2013, the Custodian offered her two future dates to continue the inspection but she declined the Custodian’s offer.

Statement of Information:

On October 3, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that she received the Complainant’s OPRA request on December 13, 2012, and that she responded to the request on December 19, 2012, disclosing to the Complainant some of the records responsive to the request and confirming an on-site inspection of the remaining records at the Shelter.

The Custodian certifies that the Complainant was denied access to some of the records responsive to the request because there was some confusion on the part of the Shelter employee as to what documents could be provided to the Complainant for the on-site inspection. The Custodian further certifies that she determined all of the records in an animal’s file could be inspected by the Complainant in accordance with Board of Health procedures. The Custodian

⁵ The evidence of record reveals the Custodian responded in writing to the Complainant on December 19, 2012. Mary Jean Dilorenzo v. Township of Bloomfield Board of Health (Essex), 2013-264 – Findings and Recommendations of the Executive Director

certifies that she attempted to arrange for another inspection by the Complainant; however, the Complainant did not agree to another inspection and instead filed a Denial of Access Complaint.

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.

OPRA further provides:

[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor...If the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to [OPRA], the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record.

N.J.S.A. 47:1A-5(g).

In Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (December 2008), the Custodian responded in a timely manner providing redacted records to the Complainant; however, the Custodian failed to provide a specific legal basis for said redactions. The Council, relying on prior decisions in Paff v. Twp. of Plainsboro, GRC Complaint No. 2005-29, (July 2005) and Schwarz v. NJ Dep’t of Human Services, GRC Complaint No. 2004-60, (February, 2005) held that:

[t]he Custodian’s response was legally insufficient under OPRA because he failed to provide a written response setting forth a detailed and lawful basis for each redaction...Therefore, the Custodian violated OPRA pursuant to N.J.S.A. 47:1A-5.g. and has not borne his burden of proving the denial of access to the redacted portions was authorized by law pursuant to N.J.S.A. 47:1A-6.

Id.

Here, the Complainant alleged that she was denied access to the requested records because during an on-site inspection of the requested records, the Shelter supervisor removed entire documents from the file claiming the documents were exempt from access because they contained personal information. The Complainant stated that she believed she was being denied access to records responsive to her request and therefore discontinued the inspection pending clarification of the inspection process by the Custodian. The Custodian subsequently certified that the Complainant was denied access to some of the records responsive to the request and

offered the Complainant other dates on which to inspect the records; however, the Complainant refused the Custodian's offer.

Removing records determined to be responsive to the Complainant's request from the file and obscuring them from view in an on-site inspection setting is tantamount to redacting entire records when preparing copies for disclosure. The Shelter supervisor asserted that by removing select documents from the file she was shielding the personal information contained in the documents, but she failed to identify which portion of each record was subject to redaction and instead withheld the entire document without providing a specific legal basis for doing so.

Therefore, the Custodian violated OPRA because the Shelter supervisor, on behalf of the Custodian, refused to allow inspection of some of the requested records and failed to set forth a specific legal basis for withholding said records from inspection. N.J.S.A. 47:1A-5(g). *See also Paff, supra*.

Although the Complainant was unlawfully denied access to the requested records, the Council declines to order disclosure of the records because the Custodian acknowledged that the Complainant was unlawfully denied access to said records, took corrective action to insure all of the records in each file could be inspected, and offered to arrange another time when the Complainant could conduct such an inspection; however, the Complainant refused the Custodian's offer.

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)).

Although the Custodian violated N.J.S.A. 47:1A-5(g), the Custodian took corrective action to insure all of the requested records could be inspected, and offered to arrange another time when the Complainant could conduct such an inspection. 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 an 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 violated OPRA because the Shelter supervisor, on behalf of the Custodian, refused to allow inspection of some of the requested records and failed to set forth a specific legal basis for withholding said records from inspection. N.J.S.A. 47:1A-5(g). *See also* Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (December 2008).
2. Although the Complainant was unlawfully denied access to the requested records, the Council declines to order disclosure of the records because the Custodian acknowledged that the Complainant was unlawfully denied access to said records, took corrective action to insure all of the records in each file could be inspected, and offered to arrange another time when the Complainant could conduct such an inspection; however, the Complainant refused the Custodian's offer.
3. Although the Custodian violated N.J.S.A. 47:1A-5(g), the Custodian took corrective action to insure all of the requested records could be inspected, and offered to arrange another time when the Complainant could conduct such an inspection. 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 an unreasonable denial of access under the totality of the circumstances.

Prepared By: John E. Stewart, Esq.

Approved By: Brandon D. Minde, Esq.
Executive Director

November 12, 2013