



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

July 31, 2018 Government Records Council Meeting

Anonymous
Complainant

Complaint No. 2015-107

v.

Burlington Township (Burlington)
Custodian of Record

At the July 31, 2018 public meeting, the Government Records Council (“Council”) considered the July 24, 2018 Supplemental 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 Council should lift the abeyance order and proceed with adjudication of the complaint. Scheeler v. Office of the Governor, 448 N.J. Super. 333, 344-45 (App. Div. 2017). The Council should thus address whether the Custodian lawfully denied access to the Complainant’s OPRA request seeking third-party OPRA requests received in 2014.
2. The Custodian erred in denying access to the Complainant’s April 6, 2015 OPRA request. N.J.S.A. 47:1A-6. In accordance with Scheeler v. Atl. Cty. Mun. Joint Ins. Fund, ___ N.J. Super. ___ (App. Div. 2018), out-of-state requestors have a right to seek access to public records under OPRA. However, the Council declines to order disclosure since the Custodian produced the responsive records via his SOI on April 29, 2015.
3. The Custodian erred in denying access to the OPRA request, the evidence in the record demonstrates that the Custodian provided the responsive records to the Complainant as part of his 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.

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 31st Day of July, 2018

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: August 3, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
July 31, 2018 Council Meeting**

**Anonymous¹
Complainant**

GRC Complaint No. 2015-107

v.

**Burlington Township (Burlington)²
Custodial Agency**

Records Relevant to Complaint: Hard copies via facsimile:

“[A]ll OPRA requests made in 2014. I am only requesting the requests themselves and not the documents released.”

Custodian of Record: Anthony J. Carnivale, Jr.

Request Received by Custodian: April 6, 2015

Response Made by Custodian: March 9, 2015

GRC Complaint Received: April 9, 2015

Background

June 28, 2016 Council Meeting:

At its June 28, 2016 public meeting, the Council considered the June 21, 2016 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, found that:

1. The issue of whether the Custodian unlawfully denied access to OPRA requests made in 2014 should be held in abeyance until the Appellate Division has ruled on the consolidated appeal in Scheeler, Jr. v. Office of the Governor, et al., Docket No. A-1236-14T3. Such an action will benefit all parties and give the GRC an adequate opportunity to apply the Appellate Division’s decision to this complaint.
2. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the further adjudication of this complaint.

¹ No representation listed on record.

² Represented by David M. Serlin, Esq. (Moorestown, NJ).

Procedural History:

On June 29, 2016, the Council distributed its Interim Order to all parties. Thereafter, on September 26, 2016, the Council held that out-of-state requestors do not have standing under OPRA. Scheeler v. Burlington Twp. (Burlington), GRC Complaint No. 2015-93 (September 2016). During this time, litigation in the Superior Court pertaining to the issue of out-state-requestors had been granted appeal and consolidated at the Appellate Division.

On January 27, 2017, the Appellate Division decided on the consolidated matter that warranted the abeyance, finding in favor of the plaintiffs. Scheeler v. Office of the Governor, 448 N.J. Super. 333 (App. Div. 2017). On May 16, 2018, the Appellate Division ruled on the consolidated matter pertaining to out-of-state requestors, finding that such requestors have standing under OPRA. Scheeler v. Atl. Cty. Mun. Joint Ins. Fund, Nos. A-2092-15T2, A-2704-15T2, A-2716-15T2, 2018 N.J. Super. LEXIS 79 (App. Div. May 16, 2018).

Analysis

Abeyance

At its June 28, 2016 meeting, the Council held the instant complaint in abeyance, pending the outcome of Scheeler v. Office of the Governor. Thereafter, on January 27, 2017, the Appellate Division affirmed the trial court's decision. The court held that OPRA requests received by an agency are government records and subject to access. 448 N.J. Super. at 344-45.

Accordingly, the Council should lift the abeyance order and proceed with adjudication of the complaint. Scheeler, 448 N.J. Super. at 344-45. The Council should thus address whether the Custodian lawfully denied access to the Complainant's OPRA request seeking third-party OPRA requests received in 2014.

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 provides that "government records shall be readily accessible for inspection, copying, or examination *by the citizens of this State . . .*" N.J.S.A. 47:1A-1. The question of whether non-residents of New Jersey have standing to request records under OPRA was unsettled for several years until recently. The Appellate Division, in the published decision Scheeler v. Atl. Cty. Mun. Joint Ins. Fund, ___ N.J. Super. ___ (App. Div. 2018), held that "the right to request records under OPRA is not limited to 'citizens' of New Jersey." Id. at 3.

Scheeler determined that "unlike the former Right To Know Law ("RTKL"), the absence of the term 'citizen' or a definitive definition in OPRA indicated the Legislature's 'intent to expand

the public's right of access to public records, beyond that permitted by the RTKL.' Id. at 10. The court supported its conclusion by stating that "any doubts about the meaning of the phrase should be resolved in favor of public access, and hence in favor of construing the phrase as a generality rather than an intentional limit on standing. See Serrano v. South Brunswick Twp., 358 N.J. Super. 352, 366 (App. Div. 2003) (ambiguities in OPRA are to be resolved in favor of public access)." Id. at 10-11.

The out-of-state requestor issue had been in controversy for several years. In 2013, the United States Supreme Court in McBurney v. Young, 133 S.Ct. 1709, 1720 (2013) considered the issue in a suit brought to challenge Virginia's Freedom of Information Act ("the Act"). The Act permitted only state residents to access government records. The Supreme Court determined that the Act did not violate the Privileges and Immunities Clause of the United States Constitution. As part of the rationale for the decision, the Court noted that several other States, including New Jersey, have enacted freedom of information laws that are available only to their citizens.

Subsequent to McBurney, New Jersey courts, in 2016, began addressing the issue of whether OPRA permits non-citizens to submit OPRA requests. In Lawyers Committee, Docket No. ATL-L-832-15 (Law Div. Feb. 19, 2016), Scheeler v. City of Cape May, et al., Docket No. CPM-L-444-15 (Law Div. Feb. 19, 2016), and Twp. of Wantage, Docket No. SSX-C-21-15, the respective vicinages held that out-of-state requestors did not have standing to submit OPRA requests. However, in Scheeler v. Atlantic Cnty. Muni. Joint Ins. Fund, et al., Docket No. BUR-L-990-15 (Law Div. Oct. 2, 2015) and Scheeler v. Ocean Cnty. Prosecutor's Office, et al., Docket No. OCN-L-3295-15 (Law Div. Apr. 14, 2016), the respective vicinages held that out-of-state requestors did have standing to submit OPRA requests.

Following these decisions, plaintiffs in Docket No. BUR-L-990-15, ATL-L-832-15, and CPM-L-444-15 appealed. The appeals were consolidated under Scheeler v. Atl. Cty. Mun. Joint Ins. Fund, supra. During the pendency of the appeal, the GRC issued a final decision in Scheeler, Jr. v. Burlington Twp. (Burlington), GRC Complaint No. 2015-93 (Final Decision dated September 27, 2016) wherein the Council determined that out-of-state requestors did not have standing to submit OPRA requests based on a plain reading of N.J.S.A. 47:1A-1.

The records at issue are copies OPRA requests received by the Custodian in 2014. Since the Complainant's only contact information was a fax number with a North Carolina area code, the Custodian denied access to the records on the basis that the Complainant was not a New Jersey resident. However, in light of the Scheeler decision, the Custodian cannot deny access to records solely because the requester does not reside in New Jersey.

Therefore, the Custodian erred in denying access to the Complainant's April 6, 2015 OPRA request. N.J.S.A. 47:1A-6. In accordance with Scheeler, out-of-state requestors have a right to seek access to public records under OPRA. Id. at 3. However, the Council declines to order disclosure since the Custodian produced the responsive records via his SOI on April 29, 2015.

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 erred in denying access to the OPRA request, the evidence in the record demonstrates that the Custodian provided the responsive records to the Complainant as part of his 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 Council Staff respectfully recommends the Council find that:

1. The Council should lift the abeyance order and proceed with adjudication of the complaint. Scheeler v. Office of the Governor, 448 N.J. Super. 333, 344-45 (App. Div. 2017). The Council should thus address whether the Custodian lawfully denied access to the Complainant’s OPRA request seeking third-party OPRA requests received in 2014.
2. The Custodian erred in denying access to the Complainant’s April 6, 2015 OPRA request. N.J.S.A. 47:1A-6. In accordance with Scheeler v. Atl. Cty. Mun. Joint Ins. Fund, ___ N.J. Super. ___ (App. Div. 2018), out-of-state requestors have a right to seek access to public records under OPRA. However, the Council declines to order disclosure since the Custodian produced the responsive records via his SOI on April 29, 2015.

3. The Custodian erred in denying access to the OPRA request, the evidence in the record demonstrates that the Custodian provided the responsive records to the Complainant as part of his 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.

Prepared By: Samuel A. Rosado
Staff Attorney

July 24, 2018



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

June 28, 2016 Government Records Council Meeting

Anonymous
Complainant

Complaint No. 2015-107

v.

Burlington Township (Burlington)
Custodian of Record

At the June 28, 2016 public meeting, the Government Records Council (“Council”) considered the June 21, 2016 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 issue of whether the Custodian unlawfully denied access to OPRA requests made in 2014 should be held in abeyance until the Appellate Division has ruled on the consolidated appeal in Scheeler, Jr. v. Office of the Governor, et al., Docket No. A-1236-14T3. Such an action will benefit all parties and give the GRC an adequate opportunity to apply the Appellate Division’s decision to this complaint.
2. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the further adjudication of this complaint.

Interim Order Rendered by the
Government Records Council
On The 28th Day of June, 2016

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: June 29, 2016



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 28, 2016 Council Meeting**

**Anonymous¹
Complainant**

GRC Complaint No. 2015-107

v.

**Burlington Township (Burlington)²
Custodial Agency**

Records Relevant to Complaint: Hard copies via facsimile:

“[A]ll OPRA requests made in 2014. I am only requesting the requests themselves and not the documents released.”

Custodian of Record: Anthony J. Carnivale, Jr.
Request Received by Custodian: April 6, 2015
Response Made by Custodian: March 9, 2015
GRC Complaint Received: April 9, 2015

Background³

Request and Response:

On April 6, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 9, 2015, the Custodian responded in writing, denying the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-1, quoting specifically:

47:1A-1 Legislative Findings – The Legislature finds and declares it to be the public policy of this State that public records shall be readily accessible for examination by the citizens of this State, with certain exceptions, for the protections of the public interest. (Emphasis in the original).

The Custodian noted that the Complainant’s fax number originates from North Carolina.⁴

¹ No representation listed on record.

² Represented by David M. Serlin, Esq. (Moorestown, 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 fax number area code is “704” and encompasses the Charlotte, NC region. "704 Area Code." 704. N.p., n.d. Web. 11 May 2016.

Denial of Access Complaint:

On April 9, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian denied the request because the “internet based fax company” used by the Complainant “assigned” a North Carolina area code. The Complainant provided no other identifying information beyond the fax number and did not provide an explanation for filing anonymously.

Statement of Information:

On April 29, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on April 6, 2015, and responded in writing on April 9, 2015.

The Custodian did not build upon his April 6, 2015 response to the Complainant, which denied the OPRA request because the requestor is an out-of-state (“OOS”) requestor pursuant to N.J.S.A. 47:1A-1. The Custodian based his claim that the Complainant is an OOS requestor because the Complainant’s only contact information is the fax number, which uses a North Carolina area code.

Analysis

Abeyance of Complaint

The GRC begins by noting that the Administrative Procedures Act gives the GRC broad latitude to effectuate the purposes of OPRA. N.J.S.A. 52:14B-1 *et seq.* Regarding the disclosability of OPRA request forms pursuant to an OPRA request, the Appellate Division is currently addressing this issue in Scheeler, Jr. v. Office of the Governor, et al., Docket No. A-1236-14T3. There, defendants are arguing that they lawfully denied access to OPRA requests based on the court’s holding in Gannett N.J. Partners, L.P. v. Cnty. of Middlesex, 379 N.J. Super. 205, 212 (App. Div. 2005). The GRC notes that it has issued a few decisions regarding the disclosability of OPRA requests in the past. *See* Wolosky v. Twp. of Parsippany-Troy Hills (Morris), GRC Complaint No. 2010-317 (March 27, 2012); Anonymous v. NJ State Police, GRC Complaint No. 2014-78 (Interim Order January 30, 2015). However, the pending decision from the Appellate Division might affect the GRC’s analysis on this issue going forward.

Considering all the issues presented, as well as the prevailing question of disclosure currently being reviewed by the Appellate Division, the instant complaint should be held in abeyance pending the Appellate Division’s decision in Scheeler. Any decision to the contrary might lead to additional litigation and could entail unnecessary costs for all parties. Additionally, by holding the complaint in abeyance, the GRC will avoid unnecessary adjudication and conserve public resources. The GRC is thus satisfied that abeyance is the most acceptable course of action at this time for all parties involved. *See, e.g.* Verry v. Franklin Fire District No. 1 (Somerset), GRC Complaint No. 2014-365 (September 2015).

Accordingly, the issue of whether the Custodian unlawfully denied access to OPRA requests made in 2014 should be held in abeyance until the Appellate Division has ruled on the consolidated appeal in Scheeler, Docket No. A-1236-14T3. Such an action will benefit all parties and give the GRC an adequate opportunity to apply the Appellate Division's decision to this complaint.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the further adjudication of this complaint.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The issue of whether the Custodian unlawfully denied access to OPRA requests made in 2014 should be held in abeyance until the Appellate Division has ruled on the consolidated appeal in Scheeler, Jr. v. Office of the Governor, et al., Docket No. A-1236-14T3. Such an action will benefit all parties and give the GRC an adequate opportunity to apply the Appellate Division's decision to this complaint.
2. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the further adjudication of this complaint.

Prepared By: Samuel A. Rosado, Esq.
Staff Attorney

June 21, 2016