



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

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

**September 24, 2019 Government Records Council Meeting**

Scott Madlinger  
Complainant

Complaint No. 2017-224

v.

Berkeley Township (Ocean)  
Custodian of Record

At the September 24, 2019 public meeting, the Government Records Council (“Council”) considered the September 17, 2019 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 response to the Complainant’s OPRA request was insufficient because she failed to grant access to a complete e-mail log. N.J.S.A. 47:1A-5(g); Riley v. City of West Orange, GRC Complaint No. 2008-27 (April 2009); Wolosky v. Twp. of Rockaway (Morris), GRC Complaint No. 2010-242 (February 2012). However, the GRC declines to order disclosure because the Custodian disclosed same on December 1, 2017.
2. The Custodian’s response to the Complainant’s OPRA request for insufficient because she failed to provide a complete responsive e-mail log. N.J.S.A. 47:1A-5(g). However, the Custodian ultimately provided all responsive records to the Complainant on December 1, 2017, inclusive of six (6) entries the Custodian asserted were redacted. 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 24<sup>th</sup> Day of September 2019

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: September 27, 2019**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
September 24, 2019 Council Meeting**

**Scott Madlinger<sup>1</sup>  
Complainant**

**GRC Complaint No. 2017-224**

v.

**Berkeley Township (Ocean)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of e-mail logs for Gina Russo from January 1, 2017 to November 10, 2017 (inclusive of sender, recipient, date, subject, and time).

**Custodian of Record:** Karen Stallings

**Request Received by Custodian:** November 13, 2017

**Response Made by Custodian:** November 21, 2017

**GRC Complaint Received:** November 24, 2017

**Background<sup>3</sup>**

**Request and Response:**

On November 12, 2017, a Sunday, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 13, 2017, the Custodian confirmed receipt of the OPRA request with the Complainant and forwarded it to Berkeley Township (“Township”) employees Bob Coughlin and Gina Russo noting that the time frame to respond expired on November 22, 2017. On November 21, 2017, the Custodian sent the completed log to Counsel asking her to review same and noting that Mr. Coughlin and Ms. Russo redacted certain information under N.J.S.A. 47:1A-1.1. On November 21, 2017, the Custodian responded in writing disclosing an e-mail log and noting that the Personnel Department redacted certain information in accordance with N.J.S.A. 47:1A-1.1. On the same day, the Complainant responded to Custodian asserting that the log provided was not what he requested. The Complainant also questioned the number of redactions present in the record. The Custodian responded stating that the Information Technology (“IT”) Department downloaded the log into an Excel spreadsheet and that any questions should be directed to Mr. Coughlin. The Custodian also reiterated that the Personnel Department made redactions in accordance with N.J.S.A. 47:1A-1.1

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Lauren Staiger, Esq., of Gilmore & Monahan, P.A. (Toms River, NJ).

<sup>3</sup> 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.

but provided no further detail. The Complainant replied noting that he would consider the response a denial of access and would proceed accordingly.

On November 22, 2017, the Custodian responded disputing the Complainant's claim. The Custodian noted that the disclosed e-mail log included each field sought. The Custodian further noted that the Complainant did not identify a preferred file format; thus, IT exported the information to a Microsoft® Excel file. The Complainant responded stating that the log did not fall within the requested time frame. The Custodian responded confirming that the log was incomplete and asking the Complainant for additional time through November 27, 2017 to cure the deficiency. The Custodian noted that she did not review the e-mail log before disclosure because Township employees previously reviewed and redacted it.

#### Denial of Access Complaint:

On November 24, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC").<sup>4</sup> The Complainant asserted that the e-mail log he received was not for the proper dates. The Complainant further contended that the Custodian improperly responded by redacting the log and not providing any specific explanation for the redactions.

#### Supplemental Response:

On November 27, 2017, the Custodian e-mailed Mr. Coughlin noting that the log provided was incomplete. The Custodian stated that the record covered December 2016 through January 2017; however, the Complainant's OPRA request sought a log from January through November 10, 2017. On the same day, the Custodian e-mailed the Complainant stating that Mr. Coughlin was reproducing a new e-mail log to reflect the correct time frame. The Custodian stated that she should be able to provide the new log by December 1, 2017.

On December 1, 2017, the Custodian responded in writing stating that she was attaching a responsive "Sent" e-mail log in Excel format. The Custodian noted that Counsel was still reviewing the "Received" e-mail log for potential redactions. The Custodian stated that she would disclose the log upon receipt from Counsel.

#### Statement of Information:

On December 19, 2017, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on November 13, 2017. The Custodian certified that her search included forwarding the request to Mr. Coughlin and Ms. Russo to create a log and review same for potential redactions. The Custodian further affirmed that she received assistance from Counsel prior to disclosing the responsive log. The Custodian certified that she responded in writing on November 21, 2017 disclosing an e-mail log with redactions from the Personnel Department. The Custodian certified she subsequently spoke with the Complainant, and on December 1, 2017 disclosed a second set of e-mail logs.

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<sup>4</sup> The Complainant verified his complaint and e-mailed same to the GRC on November 22, 2017; however, the GRC did not receive it until after returning from the Thanksgiving holiday.

The Custodian acknowledged that the e-mail log she originally disclosed was not complete. The Custodian certified that she subsequently endeavored to provide a complete e-mail log, which she disclosed to the Complainant on December 1, 2017. The Custodian certified that the log contained a few redactions under N.J.S.A. 47:1A-1.1 for information “generated by or on behalf of a public employee or employees. Additionally, the Custodian affirmed that the redactions were lawful under N.J.S.A. 47:1A-9(a); the Health Insurance Portability and Accountability Act (“HIPAA”), and Executive Order No. 26 (Gov. McGreevey 2002) (“EO 26”).

### Analysis

#### Sufficiency of Response

In Riley v. City of West Orange, GRC Complaint No. 2008-27 (April 2009), the complainant sought a veteran’s property tax deduction claim form from 1976. In response, the custodian provided a veteran’s property tax deduction claim form from an incorrect year. Although the Council recognized that the custodian’s provision of the incorrect record was a mistake, the Council held that the custodian’s response was insufficient pursuant to N.J.S.A. 47:1A-5(g) because she failed to grant access to the record specifically requested by the complainant. See also Wolosky v. Twp. of Rockaway (Morris), GRC Complaint No. 2010-242 (February 2012) (holding that the custodian’s response was insufficient because she failed to disclose responsive records).

In the instant complaint, the Complainant argued, in part, that the Custodian disclosed a log that contained “the wrong dates.” The Custodian, in e-mail correspondence with the Complainant between November 22, 2017 and December 1, 2017, acknowledged that the disclosed log was incomplete. Specifically, the Custodian acknowledged that the log did not cover the entire time frame identified in the subject OPRA request. The Custodian also noted that she did not review the log prior to disclosure because it had already been reviewed and redacted by other Township employees. Thus, the Custodian endeavored to correct the issue by having Mr. Coughlin produce a new log. Upon receipt and review of that log, she disclosed same to the Complainant on December 1, 2017. The Custodian subsequently certified to these facts in the SOI.

Riley could be distinguished from the instant complaint in that the custodian there provided a record that was not responsive to the complainant’s OPRA request. Wolosky could also be distinguished in that the custodian provided a non-responsive record but believed she had provided the proper one. Here, the Custodian timely responded disclosing a record that was at least partially responsive. However, the overarching premise of Riley and Wolosky applies here: the Custodian was required to disclose the record sought and instead provided an incomplete version without first reviewing same to ensure its responsiveness. Thus, and as in Riley, the Custodian’s response disclosing an incomplete e-mail log was insufficient. N.J.S.A. 47:1A-5(g).

Accordingly, the Custodian’s response to the Complainant’s OPRA request was insufficient because she failed to grant access to a complete e-mail log. N.J.S.A. 47:1A-5(g); Riley, GRC 2008-27; Wolosky, GRC 2010-242. However, the GRC declines to order disclosure because the Custodian disclosed same on December 1, 2017.

Finally, to briefly address the Complainant's contention regarding redactions, the e-mail log he initially received did contain redactions. The Complainant argued in the Denial of Access Complaint that the Custodian failed to identify the specific exemption, instead replacing the verbiage in the "Subject" line with "REDACTED." As noted above, the first disclosed e-mail log was marginally responsive to the Complainant's OPRA request. Thus, at the time that the Complainant filed his complaint, redactions contained in the incomplete record were at issue.

Subsequent to the filing of this complaint, the Custodian provided complete "Received" and "Sent" spreadsheets to the Complainant on December 1, 2017. The "Sent" spreadsheets identified six (6) individual "Subject" lines containing redactions under N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-9(a), HIPAA, and EO 26. However, the corresponding e-mails (presumably within the same e-mail chain) in the "Received" spreadsheet were merely highlighted. To wit, the redactions contained in the "Sent" spreadsheet were disclosed in the "Received" spreadsheet. Thus, the redactions issue was effectively mooted when the Custodian cured the incomplete record deficiency on December 1, 2017.

### **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)).

Here, the Custodian's response to the Complainant's OPRA request for insufficient because she failed to provide a complete responsive e-mail log. N.J.S.A. 47:1A-5(g). However, the Custodian ultimately provided all responsive records to the Complainant on December 1, 2017, inclusive of six (6) entries the Custodian asserted were redacted. 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 Executive Director respectfully recommends the Council find that:

1. The Custodian's response to the Complainant's OPRA request was insufficient because she failed to grant access to a complete e-mail log. N.J.S.A. 47:1A-5(g); Riley v. City of West Orange, GRC Complaint No. 2008-27 (April 2009); Wolosky v. Twp. of Rockaway (Morris), GRC Complaint No. 2010-242 (February 2012). However, the GRC declines to order disclosure because the Custodian disclosed same on December 1, 2017.
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Prepared By: Frank F. Caruso  
Executive Director

September 17, 2019