



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

August 25, 2020 Government Records Council Meeting

Louis Shockley
Complainant

Complaint No. 2019-10

v.

City of Newark (Essex)
Custodian of Record

At the August 25, 2020 public meeting, the Government Records Council (“Council”) considered the August 18, 2020 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 failure to locate responsive records until after he conducted a more reasonable search, following receipt of the Denial of Access Complaint, resulted in an insufficient search. Thus, the Custodian unlawfully denied access to the record responsive to Complainant’s OPRA request. N.J.S.A. 47:1A-6; Schneble v. N.J. Dep’t of Env’tl. Protection, GRC Complaint No. 2007-220 (April 2008). However, the GRC declines to order disclosure of the “General Activity Ledger” because the current Custodian disclosed same to the Complainant on February 22, 2019.
2. The Custodian’s insufficient search and subsequent delay in disclosure resulted in an unlawful denial of access. N.J.S.A. 47:1A-6. However, the current Custodian ultimately provided all e-mails located to the Complainant on February 22, 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 25th Day of August 2020

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 27, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 25, 2020 Council Meeting**

**Louis Shockley¹
Complainant**

GRC Complaint No. 2019-10

v.

**City of Newark (Essex)²
Custodial Agency**

Records Relevant to Complaint: Hard copies via pickup of “all project money taken from the car rental tax” from 2011 through present.

Custodian of Record: Kenneth Louis

Request Received by Custodian: December 19, 2018

Response Made by Custodian: December 20, 2018

GRC Complaint Received: January 17, 2019

Background³

Request and Response:

On December 19, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 20, 2018, OPRA Unit employee Soraida Lara responded in writing on behalf of the Custodian advising that the OPRA request was sent to the Finance Department. Ms. Lara stated that she anticipated the City of Newark (“City”) would be able to respond by January 11, 2019. On January 8, 2019, the Custodian responded in writing attaching a memorandum from the Finance Department indicating that no records exist.

Denial of Access Complaint:

On January 17, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant contended that the Custodian’s denial of access was unlawful but provided no additional arguments in support of his position.

¹ No legal representation listed on record.

² Represented by Kenyatta Stewart, Esq. (Newark, 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.

Supplemental Response:

On February 4, 2019, City employee Kathleen Marchetti e-mailed Finance Department and Economic and Housing Development (“EHD”) Department employees advising of the instant complaint filing. Ms. Marchetti noted that she was told a dedicated trust account and reports may exist. Ms. Marchetti asked that a new search be conducted to locate responsive documents. On February 19, 2019, Ms. Marchetti asked the Finance Department to forward to OPRA Unit Manager Ana Golinski a copy of the “General Ledger Activity” for Trust Account 38740 (Motor Vehicle Tax) from 2011 to present. On February 21, 2019, the Finance Department forwarded the requested report to Ms. Marchetti and Ms. Golinski.

On February 22, 2019, Ms. Golinski responded to the Complainant disclosing the “General Ledger Activity” report. Ms. Golinski noted that she was awaiting a response from EHD Department on the existence of additional responsive records. Ms. Golinski stated that she would respond to the Complainant by the end of the day if she receives their response.⁴ On March 5, 2019, Ms. Golinski e-mailed the Complainant forwarding an e-mail from the EHD Department advising that no records existed. Ms. Golinski stated that she was providing this e-mail in lieu of a more formal response and that same “completes [the Complainant’s] request.”

Statement of Information:

On March 8, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on December 19, 2018. The Custodian certified that his search included sending the subject OPRA request initially to the Finance Department. The Custodian certified that, after an extension, he responded in writing on January 8, 2019 advising the Complainant that no records existed. The Custodian affirmed that following receipt of this complaint, his staff requested that the Finance Department and EHD conduct another search based on new information regarding a dedicated trust account. The Custodian certified that his staff received the responsive “General Ledger Activity” report from 2011 to present from the Finance Department and disclosed it on February 22, 2019. The Custodian further certified that his staff again responded on March 5, 2019 stating that EHD advised that they did not maintain any responsive records.

Analysis

Insufficient Search

It is the custodian’s responsibility to perform a complete search for the requested records before responding to an OPRA request, as doing so will help ensure that the custodian’s response is accurate and has an appropriate basis in law. In Schneble v. N.J. Dep’t of Env’tl. Protection, GRC Complaint No. 2007-220 (April 2008), the custodian initially stated that no records responsive to the complainant’s OPRA request existed. The custodian certified that after receipt of the complainant’s denial of access complaint, which contained e-mails responsive to the complainant’s request, the custodian conducted a second search and found records responsive to

⁴ Also on February 22, 2019, the EHD Department determined that it had no responsive records because it did not track Trust Account 38740.

the complainant's request. The GRC held that the custodian had performed an inadequate search and thus unlawfully denied access to the responsive records. See also Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (January 2011).

Here, the Custodian initially responded to the Complainant's OPRA request stating that no records existed. Following the filing of the instant complaint, Clerk's Office staff initiated a second search based on the understanding that the information was contained within "General Ledger Activity" for Trust Account 38740. Upon locating the responsive "General Activity Ledger," Ms. Golinski disclosed it to the Complainant on February 22, 2019. The facts here are on point with those in Schneble, GRC 2007-220; thus, it follows that an insufficient search occurred in the instant complaint.

Accordingly, the Custodian's failure to locate responsive records until after he conducted a more reasonable search, following receipt of the Denial of Access Complaint, resulted in an insufficient search. Thus, the Custodian unlawfully denied access to the record responsive to Complainant's OPRA request. N.J.S.A. 47:1A-6; Schneble, GRC 2007-220. However, the GRC declines to order disclosure of the "General Activity Ledger" because the current Custodian disclosed same to the Complainant on February 22, 2019.

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 insufficient search and subsequent delay in disclosure resulted in an unlawful denial of access. N.J.S.A. 47:1A-6. However, the current Custodian ultimately provided all e-mails located to the Complainant on

February 22, 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to locate responsive records until after he conducted a more reasonable search, following receipt of the Denial of Access Complaint, resulted in an insufficient search. Thus, the Custodian unlawfully denied access to the record responsive to Complainant's OPRA request. N.J.S.A. 47:1A-6; Schneble v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008). However, the GRC declines to order disclosure of the "General Activity Ledger" because the current Custodian disclosed same to the Complainant on February 22, 2019.
2. The Custodian's insufficient search and subsequent delay in disclosure resulted in an unlawful denial of access. N.J.S.A. 47:1A-6. However, the current Custodian ultimately provided all e-mails located to the Complainant on February 22, 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

August 18, 2020