



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

July 27, 2021 Government Records Council Meeting

Anonymous
Complainant

Complaint No. 2020-109

v.

Borough of Haledon (Passaic)
Custodian of Record

At the July 27, 2021 public meeting, the Government Records Council (“Council”) considered the July 20, 2021 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 the responsive riders 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 Rules and Regulations responsive to Complainant’s OPRA request. N.J.S.A. 47:1A-6; Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 2013) (citing Schneble v. N.J. Dep’t of Env’tl. Protection, GRC Complaint No. 2007-220 (April 2008)). However, the GRC need not order disclosure of the Rules and Regulations because the Custodian disclosed it as part of the Statement of Information.
2. The Custodian has borne his burden of proof that he lawfully denied access to the Public Employment Relations Commission certification because his Statement of Information statements support, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The Custodian’s search was insufficient, and he unlawfully denied access to the requested Rules and Regulations, which were identified as a “rider” in the responsive contracts. However, the Custodian disclosed the Rules and Regulations as part of the Statement of Information. Further, the Custodian lawfully denied access to the Public Employment Relations Commission certification because no responsive records exist. 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 27th Day of July 2021

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: July 29, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 27, 2021 Council Meeting**

**Anonymous¹
Complainant**

GRC Complaint No. 2020-109

v.

**Borough of Haledon (Passaic)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of all Police Benevolent Association (“PBA”) “collective bargaining contracts and riders in effect at any time since January 1990.”

Custodian of Record: Allan R. Susen
Request Received by Custodian: April 21, 2020
Response Made by Custodian: July 13, 2020
GRC Complaint Received: June 2, 2020

Background³

Request and Response:

On January 22, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 22, 2020, the Custodian acknowledged receipt of the subject OPRA request. On January 31, 2020, the Custodian responded in writing obtaining an extension of time through February 7, 2020 to respond to the Complainant’s OPRA request. On February 6, 2020, the Custodian responded in writing disclosing nine (9) responsive PBA contracts to the Complainant.

On February 10, 2020, the Complainant e-mailed the Custodian stating that he only received responsive PBA contracts. The Complainant noted that each contract contains “two paragraphs that refer to riders” identified as a certificate of representation issued by the Public Employment Relations Commission (“PERC”) in 1979 and the Police Department “Rules and Regulations.” The Complainant contended that neither of these “riders” were included with the responsive records.⁴

¹ No legal representation listed on record.

² Represented by Andrew Oddo, Esq., of Oddo Law Firm (Oradell, 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 Complainant also made critical statements about errors and issues contained in the current contract.

Denial of Access Complaint:

On June 2, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian failed to disclose riders associated with the PBA contracts disclosed on February 6, 2020. The Complainant noted that he advised the Custodian of this fact but did not receive any additional responses thereafter.

Statement of Information:

On July 17, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that the Borough of Haledon (“Borough”) received the Complainant’s OPRA request on January 22, 2020. The Custodian certified that his search for the records included reviewing the Borough’s “vault files,” which yielded PBA contracts and no riders. The Custodian certified that he responded on February 6, 2020 disclosing nine (9) contracts to the Complainant.

The Custodian asserted that he interpreted the Complainant’s February 10, 2020 e-mail as commentary on the disclosed documents and not as a request for a PERC certificate and the Rules and Regulations of the Borough Police Department. The Custodian noted that he was not aware that certain portions of the PBA contracts mentioned “[r]iders” and same were not attached to them. The Custodian contended that as he allegedly misinterpreted the Complainant’s February 10, 2020 e-mail, he was disclosing the Rules and Regulations as part of the SOI. The Custodian further noted that the Borough did not maintain the above-referenced PERC certification, but that he would obtain a copy from PBA local 349 and disclose it upon receipt.

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 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).

Moreover, in Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 2013), the custodian initially responded to the complainant’s request, producing four (4) responsive records and stating that no other records existed. However, after receiving the denial of access complaint, the custodian performed another search and discovered several other records. Id. In accordance with Schneble, the Council held that the custodian failed to perform an adequate initial search and unlawfully denied access to those additional records. Id.

Here, the Custodian received the subject OPRA request and responded disclosing nine (9) contracts to the Complainant. Thereafter, on February 10, 2020, the Complainant e-mailed the Custodian arguing that he failed to provide the applicable “riders,” which were referenced in Sections 1.1 and 25.1 of one of the disclosed contracts. In the SOI, the Custodian certified that he was unaware of any “riders” included with the responsive contracts and that none contained such attachments. The Custodian further argued that he did not interpret the Complainant’s e-mail as anything other than commentary on the disclosed contracts. Notwithstanding, the Custodian disclosed the Rules and Regulations as part of the SOI and would disclose the PERC statement after as soon as he received it from PBA Local 349.

Before determining whether an insufficient search occurred, the GRC must first determine whether the Complainant’s use of the term “rider” reasonably identified the records he sought. There are two (2) factors to consider here: 1) the definition of a “rider” for contractual purposes; and 2) the usage of the term within the responsive contracts. Regarding the first factor, the term “rider” is defined as “any kind of a schedule or writing annexed to a document which cannot well be incorporated in the body of such document.”⁵ Regarding the second factor, the PBA contract refers to the Rules and Regulations as a “rider,” but does not similarly name the PERC certification as a rider. Based on the forgoing factors, it is reasonable that both documents the Complainant asserted were not provided could fall within the definition of a “rider.” Specifically, the Rules and Regulations are attached to the contract and identified therein as a “rider.” Further, it is reasonable to conclude that the PERC certification, which will be addressed hereafter, is considered a “rider” to the contract as well.

Arriving at the conclusion that, at the least, the Rules and Regulations can be considered a rider to the contracts in question, the facts here are on point with those in Weiner, 2013-52. That is, the contracts identified attachments and same were not provided to the Complainant in response to the subject OPRA request. Thus, it follows that an insufficient search occurred in the instant complaint.

Accordingly, the Custodian’s failure to locate the responsive riders 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 Rules and Regulations responsive to Complainant’s OPRA request. N.J.S.A. 47:1A-6; Weiner, 2013-52 (citing Schneble, GRC 2007-220). However, the GRC need not order disclosure of the Rules and Regulations because the Custodian disclosed it as part of the SOI.

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.

⁵ <https://thelawdictionary.org/rider/> (accessed July 13, 2021).

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). In the matter before the Council, the Custodian certified in the SOI that the Borough did not maintain a copy of the PERC certification. The Custodian noted that he would obtain a copy of the certification from PBA Local 349 and disclose it as soon as possible.

In reviewing the Custodian's SOI certification, it clearly indicates that no responsive record existed within the Borough. Instead, although the contracts in question identified the PERC certification as an attachment, the evidence of record supports that the Borough would be required to obtain same from a third party. Further, there is no evidence in the record to suggest that PBA Local 349 is maintaining the certification on behalf of the Borough, thus representing a difference between this matter and Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010) (holding that a custodian is obligated to obtain records from a third party making or maintaining records on its behalf). Also, whether the Borough had an obligation to maintain the certification because it was supposed to be attached to a contract is of no moment here as the Council has no authority over whether an agency was required to maintain a record. McCaulley v. City of Hoboken (Hudson), GRC Complaint No. 2018-71 (January 2020). Thus, no unlawful denial of access occurred here

Accordingly, the Custodian has borne his burden of proof that he lawfully denied access to the PERC certification because his SOI statements support, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

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 search was insufficient, and he unlawfully denied access to the requested Rules and Regulations, which were identified as a "rider" in the responsive contracts. However, the Custodian disclosed the Rules and Regulations as part of the SOI. Further, the Custodian lawfully denied access to the PERC certification because no responsive records exist. 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's failure to locate the responsive riders 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 Rules and Regulations responsive to Complainant's OPRA request. N.J.S.A. 47:1A-6; Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 2013) (citing Schneble v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008)). However, the GRC need not order disclosure of the Rules and Regulations because the Custodian disclosed it as part of the Statement of Information.
2. The Custodian has borne his burden of proof that he lawfully denied access to the Public Employment Relations Commission certification because his Statement of Information statements support, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The Custodian's search was insufficient, and he unlawfully denied access to the requested Rules and Regulations, which were identified as a "rider" in the responsive contracts. However, the Custodian disclosed the Rules and Regulations as part of the Statement of Information. Further, the Custodian lawfully denied access to the Public Employment Relations Commission certification because no responsive records exist. 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

July 20, 2021