



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

June 28, 2022 Government Records Council Meeting

Scott Madlinger
Complainant

Complaint No. 2020-218

v.

Berkeley Township Police Department (Ocean)
Custodian of Record

At the June 28, 2022 public meeting, the Government Records Council (“Council”) considered the June 21, 2022 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 October 21, 2020 response was legally insufficient under OPRA because she not only disclosed an incorrectly formatted record but also failed to provide a detailed and lawful basis for each redaction made to the record. N.J.S.A. 47:1A-5(g). See Paff v. Borough of Lavallette (Ocean), GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008). See also Wolosky v. Twp. of Sparta (Sussex), GRC Complaint No. 2008-219 (Interim Order dated September 30, 2009). However, the GRC declines to order the Custodian to take further action because the evidence of record reveals that the Custodian provided the Complainant with a redaction index on October 22, 2020, and a correctly formatted copy of the responsive record on October 27, 2020.
2. Although the Custodian violated OPRA by failing to disclose to the Complainant a redaction index explaining the lawful basis for each redaction and erroneously disclosed to the Complainant an improperly formatted copy of the responsive record, she subsequently delivered to the Complainant a properly formatted record and a redaction index explaining the lawful basis for the redactions contained in said record. 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 28th Day of June 2022

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 30, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 28, 2022 Council Meeting**

Scott Madlinger¹
Complainant

GRC Complaint No. 2020-218

v.

Berkeley Township Police Department (Ocean)²
Custodial Agency

Records Relevant to Complaint: Via e-mail copies of “email logs for Kevin Santucci from July 10, 2020 to September 22, 2020. Please include sender, recipient, date and subject.”

Custodian of Record: Sandra Brelsford

Request Received by Custodian: September 22, 2020

Responses Made by Custodian: September 29, 2020, October 14, 2020, and October 21, 2020

GRC Complaint Received: November 23, 2020

Background³

Request and Responses:

On September 22, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 29, 2020, the fifth (5th) business day following receipt of the request, the Custodian responded in writing requesting an extension of time until October 14, 2020, to respond to the request. On October 14, 2020, the Custodian e-mailed the Complainant requesting an extension of time until October 21, 2020, to respond to the request. On October 21, 2020, the Custodian e-mailed the Complainant, attaching the records responsive to the request.

Denial of Access Complaint:

On October 26, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that on September 22, 2020, he submitted his OPRA request to the Custodian. The Complainant stated that on September 29, 2020, the Custodian responded requesting an extension of time until October 14, 2020. The Complainant

¹ No legal representation listed on record.

² Represented by Robin laBue, Esq., of Rothstein, Mandell, Strohm, Halm & Cipriani, P.C. (Lakewood, 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.

stated that on October 14, 2020, the Custodian requested another extension of time until October 21, 2020.

The Complaint stated that on October 21, 2020, he received from the Custodian a one hundred forty-four (144) page “scrambled” e-mail log. The Complainant further stated that the record contained many redactions, but the Custodian failed to provide any reason for those redactions. The Complainant stated that he “pretty much got nothing.”

Statement of Information:

On November 24, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on September 22, 2020. The Custodian certified that the request was forwarded to Kevin Santucci to have his e-mails copied, redacted, and forwarded to the Custodian’s Counsel for review. The Custodian certified that she e-mailed the Complainant on September 29, 2020, and on October 14, 2020, requesting extensions while the record was being reviewed by Counsel. The Custodian certified that when the record was completed, it was converted into a .pdf file. The Custodian stated that she made up a redaction index and transmitted the record to the Complainant via e-mail on October 21, 2020. The Custodian certified that the Complainant filed a complaint on October 22, 2020, because the disclosed record was missing a redaction index.⁴ The Custodian certified that because the disclosure was not satisfactory to the Complainant, she sent it back to Kevin Santucci and Counsel to have it reformatted. The Custodian certified that on October 27, 2020, she sent the Complainant a redaction index for the disclosed record. The Custodian further certified that on October 28, 2020, she sent the Complainant a “final version of redacted request and redaction index.”

The Custodian’s Counsel stated that the e-mail logs requested by the Complainant were for the Deputy Chief of Police, and due to his position, the e-mail logs required redaction of personnel file information, information pertaining to criminal investigations, information pertaining to internal affairs investigations, and information that would expose safety and security measures. Counsel stated that the requested e-mail logs were sent to the Complainant in a .pdf file to protect the data from manipulation following disclosure of the record. Counsel stated that the Custodian was not aware conversion of the record from a spreadsheet to a .pdf file would reformat the record. Counsel stated that on October 21, 2020, when the Custodian disclosed the improperly formatted record to the Complainant, she erroneously omitted from the response the record’s redaction index. Counsel stated that the redaction index was subsequently e-mailed to the Complainant on October 22, 2020.⁵ The Custodian’s Counsel stated that, rather than permitting the Custodian to correct the reformatting error, the Complainant filed a complaint on October 22, 2020. The Custodian’s Counsel stated that on October 27, 2020, the Custodian sent the Complainant a correctly formatted copy of the record.

⁴ The evidence of record reveals the Complainant e-mailed the Denial of Access Complaint to the Custodian and the GRC on October 22, 2020 at 9:37 a.m.

⁵ The evidence of record reveals the Custodian e-mailed the redaction index to the Complainant on October 22, 2020 at 11:05 a.m.

Analysis

Sufficiency of Response

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 also provides that:

If the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor . . . [i]f the custodian of a government record asserts that part of a particular record is exempt from public access . . . 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 (Ocean), GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008), where the custodian disclosed redacted meeting minutes, the Council held that the 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. Subsequently, in Wolosky v. Twp. of Sparta (Sussex), GRC Complaint No. 2008-219 (Interim Order dated September 30, 2009), the custodian certified that in her response she inadvertently failed to disclose some of the requested records and failed to provide the legal basis for redactions made to other disclosed records. The Council held that the custodian’s response was insufficient because the custodian did not provide all requested records and did not provide the lawful basis for the redactions made to the records pursuant to N.J.S.A. 47:1A-5(g).

Here, the Complainant asserted that the Custodian disclosed to him a “scrambled” e-mail log that contained many redactions; however, the Custodian failed to provide any reason for those redactions. The Custodian in the SOI certified that she prepared a redaction index. The evidence of record, however, reveals that the Custodian failed to deliver the redaction index to the Complainant on October 21, 2020, when she disclosed the responsive records. The evidence of record also reveals that the Custodian was unaware that conversion of the record from a spreadsheet to a .pdf file caused a reformatting of the record. It was for this reason that the Complainant stated that he received a “scrambled” record. The Custodian’s Counsel stated that the Custodian cured the errors by e-mailing the redaction index to the Complainant on October 22, 2020, and by sending the Complainant a correctly formatted copy of the responsive record on October 27, 2020.

Like Wolosky, GRC 2008-219, where the Council held that the custodian’s response was insufficient because the custodian did not provide all requested records and did not provide the

lawful basis for redactions made to the records, here the Custodian failed to disclose a correctly formatted record and failed to provide the lawful basis for redactions made to the record.

Therefore, the Custodian's October 21, 2020 response was legally insufficient under OPRA because she not only disclosed an incorrectly formatted record but also failed to provide a detailed and lawful basis for each redaction made to the record. N.J.S.A. 47:1A-5(g). See Paff, GRC 2007-209. See also Wolosky, GRC 2008-219. However, the GRC declines to order the Custodian to take further action because the evidence of record reveals that the Custodian provided the Complainant with a redaction index on October 22, 2020, and a correctly formatted copy of the responsive record on October 27, 2020.

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 OPRA by failing to disclose to the Complainant a redaction index explaining the lawful basis for each redaction and erroneously disclosed to the Complainant an improperly formatted copy of the responsive record, she subsequently delivered to the Complainant a properly formatted record and a redaction index explaining the lawful basis for the redactions contained in said record. 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's October 21, 2020 response was legally insufficient under OPRA because she not only disclosed an incorrectly formatted record but also failed to provide a detailed and lawful basis for each redaction made to the record. N.J.S.A. 47:1A-5(g). See Paff v. Borough of Lavallette (Ocean), GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008). See also Wolosky v. Twp. of Sparta (Sussex), GRC Complaint No. 2008-219 (Interim Order dated September 30, 2009). However, the GRC declines to order the Custodian to take further action because the evidence of record reveals that the Custodian provided the Complainant with a redaction index on October 22, 2020, and a correctly formatted copy of the responsive record on October 27, 2020.

2. Although the Custodian violated OPRA by failing to disclose to the Complainant a redaction index explaining the lawful basis for each redaction and erroneously disclosed to the Complainant an improperly formatted copy of the responsive record, she subsequently delivered to the Complainant a properly formatted record and a redaction index explaining the lawful basis for the redactions contained in said record. 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
Staff Attorney

June 21, 2022