



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

June 28, 2022 Government Records Council Meeting

Scott Madlinger
Complainant

Complaint No. 2020-228

v.

Berkeley Township (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. To the extent the Complainant’s request was submitted to the Custodian, the request was valid; however, to the extent the *same* request included another recipient, in this case Supervisor Sandra Brelsford, the request was not valid. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-5(g). Thus, Ms. Brelsford did not unlawfully deny access to the Complainant’s request because, as to her, the request was invalid. N.J.S.A. 47:1A-6.
2. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). However, the GRC need not order disclosure because the Custodian did so on November 17, 2020.
3. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian subsequently provided the Complainant with the records responsive to the request. 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. 2020-228

v.

**Berkeley Township (Ocean)²
Custodial Agency**

Records Relevant to Complaint: Via e-mail “I request the list of emails the public information officer uses to distribute public information releases to the press. The list from the month of September 2020, the list for October 2020, the list as it currently exists.”

Custodian of Record: Karen Stallings
Request Received by Custodian: November 4, 2020
GRC Complaint Received: November 17, 2020
Response Made by Custodian: November 17, 2020

Background³

Request:

On November 2, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.

Denial of Access Complaint:

On November 17, 2020, at 6:55 a.m., the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that on November 2, 2020, he e-mailed his OPRA request to Karen Stallings and Sandra Brelsford. The Complainant stated that on November 16, 2020, he notified the Custodian’s Counsel that the response was due, but he failed to receive a response.

¹ No legal representation listed on record.

² Represented by Robin La Bue, 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.

Response:

On November 17, 2020, at 9:54 a.m., the eighth (8th) business day following receipt of the request, the Custodian responded in writing providing the Complainant with a list of e-mail addresses that was responsive to his request.

On November 17, 2020, at 10:59 a.m., the Complainant e-mailed the Custodian asking, “does Sandra plan on responding?”⁴ On that same date, the Custodian replied via e-mail, informing the Complainant that she did not know if the Police Department has a public information officer. Later that same date, the Custodian’s Counsel e-mailed the Complainant, informing him that Police Department press releases are made solely through their Facebook page and not to e-mail recipients.

Statement of Information:

On December 4, 2020, Sandra Brelsford filed a Statement of Information (“SOI”) on behalf of the Custodian. On December 7, 2020, the GRC e-mailed Ms. Brelsford to inform her that the SOI was unclear and confusing. The GRC stated that a clear and concise SOI must be resubmitted to the GRC within five (5) business days.

On December 10, 2020, the Custodian filed a replacement SOI. The Custodian certified that after receiving the request, she contacted Debbi Winogracki because Ms. Winogracki is responsible for press releases. The Custodian certified that she obtained from Ms. Winogracki a list of e-mail addresses used for the distribution of public information releases to the press. The Custodian certified that on November 17, 2020, she disclosed to the Complainant a list of e-mail addresses used for the distribution of press releases.

The Custodian’s Counsel stated that the Complainant e-mailed the OPRA request on November 2, 2020, after close of business. Counsel further stated that the Township was closed for election day on November 3, 2020. Therefore, Counsel stated, the request was not received until November 4, 2020.

Counsel stated that the request was e-mailed to both the Custodian and the police records supervisor; however, the request did not specify the type of press releases sought. Counsel stated that the request failed to make clear that more than one (1) list was being requested. Counsel stated that after the Custodian responded with the requested record on November 17, 2020, the Complainant asked whether the police records supervisor planned to respond. Counsel stated that the Custodian replied, informing the Complainant that because the request did not specify police records, she was not aware that he was requesting the same records from the Police Department.

The Custodian’s Counsel stated that the Police Department posts its press releases on their Facebook page. As such, Counsel stated that the Police Department has no responsive e-mail list, and that the Custodian disclosed to the Complainant the only record responsive to his request.

⁴ The Complainant is referring to the supervisor of police records, Sandra Brelsford.

Analysis

Validity of Request

OPRA defines a custodian as “. . . in the case of a municipality, the municipal clerk . . .” N.J.S.A. 47:1A-1.1. OPRA provides that “[a] request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed *to the appropriate custodian.*” N.J.S.A. 47:1A-5(g). (Emphasis added.)

Here, the Complainant submitted a single e-mail request seeking “. . . the list of emails the public information officer uses to distribute public information . . .” The Complainant sent the e-mail to two (2) recipients: Deputy Clerk Karen Stallings and Sandra Brelsford. The former is the Custodian; the latter is the “Supervisor of Crim. Info. Records” for the Police Department. The evidence of record indicates that the Complainant, by sending a single request to two recipients, expected two separate responses.

N.J.S.A. 47:1A-5(g) requires “a request” to be submitted to “the appropriate custodian.” There is no provision in OPRA that expressly allows a requestor to submit a single request to several recipients, compelling a separate response from each recipient. Based upon the evidence of record, the Complainant presumes to know which employee for a given department will respond to a request on behalf of the Custodian. However, such a presumption does not impose an obligation under OPRA for any employee, other than the Custodian, to respond to the request. *See e.g. Caggiano v. State of N.J. Office of the Governor*, GRC Complaint No. 2014-166 (January 2015) (holding that a request sent to thirty-three (33) different recipients was invalid).

Therefore, to the extent the Complainant’s request was submitted to the Custodian, the request was valid; however, to the extent the *same* request included another recipient, in this case Supervisor Sandra Brelsford, the request was not valid. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-5(g). Thus, Ms. Brelsford did not unlawfully deny access to the Complainant’s request because, as to her, the request was invalid. N.J.S.A. 47:1A-6.

Timeliness

Unless a shorter time period is otherwise provided, a custodian must grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian’s failure to respond accordingly results in a “deemed” denial. *Id.* Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁵ Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

⁵ A custodian’s written response, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

The evidence of record reveals that the Complainant's OPRA request was received by the Custodian on November 4, 2020. On November 17, 2020, the Complainant filed the complaint asserting that he did not receive a response to his request. Later that same date, the eighth (8th) business day following receipt of the request, the Custodian responded to the Complainant's request disclosing the requested records.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. However, the GRC need not order disclosure because the Custodian did so on November 17, 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 N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian subsequently provided the Complainant with the records responsive to the request. 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. To the extent the Complainant's request was submitted to the Custodian, the request was valid; however, to the extent the *same* request included another recipient, in this case Supervisor Sandra Brelsford, the request was not valid. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-5(g). Thus, Ms. Brelsford did not unlawfully deny access to the Complainant's request because, as to her, the request was invalid. N.J.S.A. 47:1A-6.
2. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). However, the GRC need not order disclosure because the Custodian did so on November 17, 2020.
3. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian subsequently provided the Complainant with the records responsive to the request. 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

June 21, 2022