



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

June 29, 2021 Government Records Council Meeting

Anonymous
Complainant

Complaint No. 2020-89

v.

Borough of Haledon (Passaic)
Custodian of Record

At the June 29, 2021 public meeting, the Government Records Council (“Council”) considered the June 22, 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 additional 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; 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 declines to order disclosure of the remaining Federal Communication Commission licenses because the Custodian disclosed same to the Complainant as part of the Statement of Information.
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 Custodian ultimately provided the remaining licenses located to the Complainant as part of the Statement of Information. 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 29th Day of June 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 1, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 29, 2021 Council Meeting**

**Anonymous¹
Complainant**

GRC Complaint No. 2020-89

v.

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

Records Relevant to Complaint: Electronic copies via e-mail of all Federal Communication Commission (“FCC”) licenses issued to the Borough of Haledon (“Borough”).

Custodian of Record: Allan R. Susen

Request Received by Custodian: October 7, 2019

Response Made by Custodian: October 17, 2019

GRC Complaint Received: April 27, 2020

Background³

Request and Response:

On October 7, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On October 17, 2019, the Custodian responded in writing disclosing two (2) FCC licenses.

Denial of Access Complaint:

On April 27, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant contended that the Custodian’s response was incomplete. The Complainant first noted that one of the two licenses provided was expired, as the listed transmitter was in a building demolished five (5) years prior. The Complainant further asserted that the Borough maintains at least four (4) FCC licenses but did not disclose all of them.

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.

Statement of Information:

On June 22, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on October 8, 2019. The Custodian certified that his search included reviewing the Borough “vault files” and sending the subject OPRA request to the Haledon Police Department, who provided to him responsive records. The Custodian affirmed that he responded in writing on October 17, 2019 disclosing to the Complainant the two (2) FCC licenses provided to him by the Police Department.

The Custodian argued that he disclosed all records the Borough believed existed. The Custodian asserted that had the Borough believed more than two (2) licenses existed, he would have continued his search. The Custodian averred that upon receipt of the Denial of Access Complaint, he contacted the FCC and located two (2) additional licenses.⁴ The Custodian certified that those additional records were attached to the SOI. The Custodian argued that there was no intent to deny access to the additional licenses, he simply believed that the licenses previously disclosed were all that existed.

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 initially responded to the Complainant’s OPRA request disclosing two (2) FCC licenses he received from the Police Department. In the Denial of Access Complaint, the Complainant alleged that the Custodian failed to disclose at least two (2) additional licenses that he believed the Borough possessed. The Custodian confirmed this fact in the SOI by locating and

⁴ The GRC notes that the Custodian provided two (2) lists of FCC licenses maintained by the Borough identifying seven (7) total licenses. However, three (3) of the seven (7) licenses expired prior to submission of the subject OPRA request, thus resulting in four (4) active licenses.

disclosing two (2) additional licenses. The facts here are on point with those in Weiner, 2013-52; thus, it follows that an insufficient search occurred in the instant complaint.

Accordingly, the Custodian's failure to locate additional 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; Weiner, 2013-52 (citing Schneble, GRC 2007-220). However, the GRC declines to order disclosure of the remaining FCC licenses because the Custodian disclosed same to the Complainant as part of the SOI.

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 Custodian ultimately provided the remaining licenses located to the Complainant as part of the SOI. 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 additional 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; 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 declines to order disclosure of the remaining Federal Communication Commission licenses because the Custodian disclosed same to the Complainant as part of the Statement of Information.

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 Custodian ultimately provided the remaining licenses located to the Complainant as part of the Statement of Information. 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

June 22, 2021