



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

September 29, 2022 Government Records Council Meeting

Scott Madlinger
Complainant

Complaint No. 2021-21

v.

Berkeley Township Police Department (Ocean)
Custodian of Record

At the September 29, 2022 public meeting, the Government Records Council (“Council”) considered the September 22, 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 failure to locate the records responsive to the Complainant’s request until after conducting a more thorough search following receipt of the Denial of Access Complaint evidenced an insufficient search. N.J.S.A. 47:1A-6; Schneble v. N.J. Dep’t of Env’tl. Protection, GRC Complaint No. 2007-220 (April 2008).
2. The Custodian, by informing the Complainant that there were no records responsive to his request, when in fact there were records responsive to the request that she failed to locate, unlawfully denied the Complainant access to the requested records. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of the requested records because the Custodian certified that all records responsive to the Complainant’s request were disclosed to him on January 19, 2021.
3. Although the Custodian failed to locate records responsive to the request due to an insufficient search which resulted in an unlawful denial of access, the Custodian did subsequently disclose all responsive records to the Complainant. 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 29th Day of September 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: October 6, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 29, 2022 Council Meeting**

**Scott Madlinger¹
Complainant**

GRC Complaint No. 2021-21

v.

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

Records Relevant to Complaint: Copies via e-mail of:

1. “[A]ll CAD reports with narratives for police response to 22 orlando (sic) blvd (sic) on the day of 01/11/2021.”
2. “[A]ll body worn camera (bwc) footage for police response to 22 orlando (sic) blvd (sic) on the day of 01/11/2021.”

Custodian of Record: Sandra Brelsford

Request Received by Custodian: January 12, 2021

Response Made by Custodian: January 15, 2021

GRC Complaint Received: January 19, 2021

Background³

Request and Response:

On January 12, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 15, 2021, the third (3rd) business day following receipt of said request, the Custodian responded in writing informing the Complainant that there are no records responsive to his request.

Denial of Access Complaint:

On January 19, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that on January 12, 2021, he requested records for an incident of which he has personal knowledge because he was involved in the incident. The Complainant stated that on January 15, 2021, Marcy Novellino, on behalf of the

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.

Custodian, responded by informing him that there are no records responsive to the request. The Complainant stated that Ms. Novellino's response is not true. The Complainant stated that on January 11, 2021, he submitted an OPRA request for "copies of all CAD reports with narratives for police response to Orlando Blvd (sic) during the time period of December 29, 2020 – January 11, 2021." The Complainant stated that the CAD report he requested on January 12, 2021 (request item number 1) was contained within the records disclosed to him in response to his January 11, 2021 request. The Complainant attached to the complaint a copy of the CAD report.

Statement of Information:

On February 4, 2021, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on January 12, 2021. The Custodian certified that she did a search in the computer for the date, street and specific address requested; however, she could find no responsive records. The Custodian certified that Ms. Novellino, on her behalf, responded in writing on January 15, 2021, informing the Complainant that there were no records responsive to the request.

In the body of the February 4, 2021 e-mail forwarding the SOI, the Custodian stated she was responding to Item 12 of the SOI. The Custodian stated that at the time of the request no responsive documents were located. The Custodian further stated that CAD dispatch entries are instantaneous but there could be reasons why an address search may not yield the information sought. The Custodian stated that the dispatcher may enter an incorrect address based upon inaccurate or insufficient information provided by the caller or erroneously enter the caller's address instead of the incident address. The Custodian also stated that once the responding officer completes the call and enters the accurate information, the record becomes available. The Custodian stated that when she again searched for the requested records on January 19, 2021, the records were available and disclosed to the Complainant.

The Custodian attached to the SOI the Complainant's January 12, 2021 OPRA request and Ms. Novellino's January 15, 2021 response. The Custodian also attached an e-mail dated January 19, 2021, from Ms. Novellino to the Complainant in which Ms. Novellino stated that she could not initially locate the specific address contained in the request and therefore informed him that there were no responsive records. However, Ms. Novellino also stated in the e-mail that after she received notice that he filed a complaint, she again conducted a search and the address "is now appearing." Ms. Novellino further stated in the e-mail that she attached the requested CAD report as well as a link for the body camera footage.

Additional Submissions:

On February 5, 2021, the GRC sent the Custodian a request for additional information. The GRC informed the Custodian that the SOI was deficient because Item 9 inaccurately listed responsive records and Item 12 was not made under certification. The GRC asked the Custodian to submit the corrected SOI no later than February 10, 2021.

On February 8, 2021, the Custodian replied to the GRC's request for additional information. The Custodian corrected Item 9 and inserted into a legal certification format the Item

12 facts that previously were only contained within the Custodian's February 4, 2021 e-mail to the GRC.

On February 16, 2021, the GRC sent the Complainant a request for additional information. The GRC asked the Complainant to certify the order in which he received the responses to his January 11, 2021 and January 12, 2021 OPRA requests. The GRC also asked the Complainant to submit to the GRC evidence supporting his allegation in the complaint that he knew Ms. Novellino's response to his January 12, 2021 request was untruthful.

On February 17, 2021, the Complainant replied to the GRC's request for additional information. The Complainant certified that he submitted his January 11, 2021 OPRA request to the Custodian at 6:52 p.m. The Complainant certified that he submitted his January 12, 2021 OPRA request to the Custodian at 12:48 p.m. The Complainant further certified that the Custodian responded to the January 11, OPRA request on January 13, 2021 at 9:48 a.m. informing him that the requested records were available and that there was a \$0.35 copying charge. The Complainant certified that he paid the copying charge and received the records which contained, among other records, the CAD report he requested on January 12, 2021. The Complainant certified that he received a response to his January 12, 2021 OPRA request on January 15, 2021. The Complainant further certified that he knew Ms. Novellino's response to his January 12, 2021 request was untruthful because he was present "while all of this police action was happening." The Complainant also certified that he had the requested CAD report in his possession when he received the response from Ms. Novellino that there were no records responsive to his January 12, 2021 request. The Complainant attached copies of all referenced request and response e-mails to the certification.

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 request existed. The custodian certified that after receipt of the 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).

The facts in the instant complaint are similar to those in Schneble. On January 13, 2021, in response to a January 11, 2021 OPRA request filed with Berkeley Township, the Complainant received the record that is responsive to request item number 1 of his January 12, 2021 request. As such, the Complainant certified that he knew the record responsive to request item number 1 existed. However, on January 15, 2011, Ms. Novellino on behalf of the Custodian, informed the Complainant that there were no records responsive to his request. Thereafter, on January 19, 2021,

after the Complainant filed the within complaint, the Custodian located and disclosed the records responsive to the Complainant's January 12, 2021 request. Thus, it follows that an insufficient search occurred because the record the Custodian determined did not exist on January 15, 2021, was previously located and disclosed to the Complainant on January 13, 2021.

Accordingly, the Custodian's failure to locate the records responsive to the Complainant's request until after conducting a more thorough search following receipt of the Denial of Access Complaint evidenced an insufficient search. N.J.S.A. 47:1A-6; Schneble, GRC 2007-220.

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.

For both request item number 1 and request item number 2 the Custodian certified that Ms. Novellino, on her behalf, responded to the Complainant's January 12, 2021 OPRA request on January 15, 2021, informing him that there were no records responsive to his request. However, the evidence of record reveals that an earlier search was successful in producing records responsive to the request.

Therefore, the Custodian, by informing the Complainant that there were no records responsive to his request, when in fact there were records responsive to the request that she failed to locate, unlawfully denied the Complainant access to the requested records. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of the requested records because the Custodian certified that all records responsive to the Complainant's request were disclosed to him on January 19, 2021.

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 failed to locate records responsive to the request due to an insufficient search which resulted in an unlawful denial of access, the Custodian did subsequently disclose all responsive records to the Complainant. 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 failure to locate the records responsive to the Complainant's request until after conducting a more thorough search following receipt of the Denial of Access Complaint evidenced an insufficient search. N.J.S.A. 47:1A-6; Schneble v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008).
2. The Custodian, by informing the Complainant that there were no records responsive to his request, when in fact there were records responsive to the request that she failed to locate, unlawfully denied the Complainant access to the requested records. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of the requested records because the Custodian certified that all records responsive to the Complainant's request were disclosed to him on January 19, 2021.
3. Although the Custodian failed to locate records responsive to the request due to an insufficient search which resulted in an unlawful denial of access, the Custodian did subsequently disclose all responsive records to the Complainant. 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

September 22, 2022