



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 25, 2023 Government Records Council Meeting

Eleanore Rogalski
Complainant

Complaint No. 2021-260

v.

Township of Barnegat (Ocean)
Custodian of Record

At the July 25, 2023 public meeting, the Government Records Council (“Council”) considered the July 18, 2023 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 ensure disclosure of the responsive permit resulted in an unlawful denial of access to same. N.J.S.A. 47:1A-6. However, the GRC declines to order any further action because the Custodian, through Counsel, disclosed the responsive record to the Complainant via e-mail on November 19, 2021.
2. The Custodian unlawfully denied access to responsive permit by failing to provide it after both Mr. Durasky and Custodian’s Counsel acknowledged its existence. N.J.S.A. 47:1A-6. However, the Custodian ultimately effectuated disclosure through Custodian’s Counsel on November 19, 2021. Additionally, the evidence of record does not provide 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 25th Day of July 2023

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 27, 2023

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 25, 2023 Council Meeting**

**Eleanore Rogalski¹
Complainant**

GRC Complaint No. 2021-260

v.

**Township of Barnegat (Ocean)²
Custodial Agency**

Records Relevant to Complaint: Pickup of “[a]ny and all permits, permit applications, and any and all documents supplied in support thereof” for a specific property from January 2019 through present.

Custodian of Record: Donna M. Manno
Request Received by Custodian: October 13, 2021
Response Made by Custodian: October 14, 2021
GRC Complaint Received: October 28, 2021

Background³

Request and Response:

On October 12, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On October 14, 2021, Construction Office employee Marge Vitale e-mailed the Complainant stating that no permits or any additional records for the identified property existed during the specified time frame.

On October 18, 2021, the Complainant e-mailed the Custodian stating that the Township of Barnegat (“Township”) was aware that a fence was installed at the identified property on October 4, 2021 and the property owner incurred “multiple summonses” dating back to March 2020 for historic district violations. The Complainant further noted that she called the Township on October 4, 2021: the “Building” and “Code Enforcement” offices confirmed the submission of an application with property survey and subsequent permit for the fence. The Complainant noted that she was surprised to receive a response that no records existed and asked whether she was given “false information” by both Offices. On October 19, 2021, Zoning Officer John Durasky confirmed that in checking his records, a “[z]oning” permit was issued on May 18, 2021 for a

¹ No legal representation listed on record.

² Represented by Christopher J. Dasti, Esq., of Dasti & Associates (Forked River, 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.

fence. Mr. Durasky apologized for the confusion, noting that the Building Department only checks for building permits and not zoning permits. On the same day, the Complainant thanked Mr. Durasky for his response and noted that the Custodian should be alerted to their incorrect OPRA response. Custodian's Counsel subsequently e-mailed the Complainant stating that the response was a mistake: the Township "did not and does not give out intentionally false information." Counsel suggested that the Complainant could contact him with any additional issues. The Complainant responded stating that her only requirement is that the Township respond to her OPRA request properly.

Denial of Access Complaint:

On October 28, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that notwithstanding the Township's identification of responsive records and multiple e-mails between the parties thereafter, the Custodian has yet to disclose any responsive records to the subject OPRA request.

The Complainant contended that this complaint is like Schneble v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008) and that the Custodian similarly committed an insufficient response. The Complainant argued that while the Council did not find a knowing and willful violation in Schneble, such a violation occurred here. The Complainant argued that the Township and Custodian's Counsel have acknowledged the existence of records and have yet to provide them; thus, the Custodian's failure to disclose supports that her inaction rises to the level of a knowing and willful violation.

Supplemental Response:

On November 19, 2021, Custodian's Counsel stated that he left a voicemail for the Complainant regarding the instant complaint, which he had just received. Counsel stated that upon receipt of the complaint, the Custodian forwarded same with a copy of the responsive record. Counsel averred that the OPRA request was inadvertently not responded to because the Custodian thought it was "being handled by a different department." Counsel stated that notwithstanding the foregoing, attached is the record responsive to the subject OPRA request.

Statement of Information:

On November 19, 2021, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on October 13, 2021. The Custodian certified that her search included sending the OPRA request to the construction office: Ms. Vitale responded on October 14, 2021 advising that no records existed for the identified address. The Custodian certified that upon receipt of the Complainant's October 18, 2021 e-mail, she contacted Mr. Durasky, who stated that he would advise the Complainant a fence permit was issued and ask Ms. Vitale to provide a copy to the Custodian. The Custodian noted that she also assumed that the permit would be attached to Mr. Durasky's e-mail to the Complainant but this did not occur. The Custodian thus averred that the foregoing caused an internal misunderstanding on whether she was required to follow up on the subject OPRA request.

The Custodian certified that she was not aware that the OPRA request was not satisfied until she received the instant complaint. The Custodian affirmed that she immediately located the responsive record and forwarded it to Custodian's Counsel, who disclosed same to the Complainant on November 19, 2021.

The Custodian stated that the Council has long held that a custodian's actions must be "much more than negligent conduct" and "must have been intentional and deliberate, with knowledge of their wrongfulness. . . ." See Blay v. Twp. of Lakewood (Ocean), GRC Complaint No. 2018-30 (February 2020) (internal citations omitted). The Custodian noted that the Council previously found a knowing and willful violation where the custodian testified that she did not like the complainant and failed to disclose records to that person. Bart v. City of Paterson Hous. Auth., GRC Complaint No. 2005-145 (May 2007) rev'd 403 N.J. Super. 609 (App. Div. 2008). The Custodian asserted that the evidence of record here supports that her actions were the result of a simple mistake and not a knowing and willful violation. The Custodian acknowledged that while it was her responsibility to satisfy the OPRA request, her actions were "human errors that were accidental and unintentional" rather than intentional, deliberate, or reckless.

Analysis

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.

Initially, the GRC notes that it will decline to fully address the Complainant's allegation that the Custodian committed an insufficient search per Schneble, GRC 2007-220. This is because the facts here are inapposite to that prior complaint. Specifically, the custodian there initially responded that no records existed but was able to locate them after the complainant filed a complaint. Here, although the Custodian similarly failed to locate the record initially, same was found prior to the filing of this complaint. Thus, Schneble does not apply here and the GRC will proceed accordingly.

In the matter before the Council, the Custodian initially responded to the subject OPRA request advising that no records existed. The Complainant responded disputed the Custodian's response and noting that the property in question recently had a fence installed. Based on that explanation, Mr. Durasky stated that a review of zoning permits produced the responsive record and noted that the Building Department only checks for building permits and not zoning permits. Custodian's Counsel subsequently confirmed the existence of a record; yet, neither he nor Mr. Durasky disclosed it to the Complainant. This complaint followed, wherein the Complainant argued that she was unlawfully denied access to a record the Township acknowledged existed but failed to disclose to her. In the SOI, the Custodian affirmed that the responsive record existed; however, an internal misunderstanding resulted in same not being disclosed. Specifically, the Custodian averred that Mr. Durasky offered to respond and she assumed the permit would be

attached to that e-mail. The Custodian further asserted that she did not know the request remained outstanding until receiving the Denial of Access Complaint, at which point Custodian's Counsel disclosed the record to the Complainant on November 19, 2021.

OPRA imparts on a custodian the responsibility to "promptly comply" with an OPRA request. N.J.S.A. 47:1A-5(g). In instances where a custodian fails to disclose that record that exists, and absent a specific lawful basis for denial, such failure results in an obvious unlawful denial of access. The facts here present such an issue: both Mr. Durasky and Custodian's Counsel acknowledged the existence of a responsive permit. Further, the Custodian assumed that Mr. Durasky provided the record to the Complainant via e-mail; however, he did not. Finally, there is no evidence in the record indicating that the Custodian took steps to ensure the record was disclosed prior to this complaint filing.

Accordingly, the Custodian's failure to ensure disclosure of the responsive permit resulted in an unlawful denial of access to same. N.J.S.A. 47:1A-6. However, the GRC declines to order any further action because the Custodian, through Counsel, disclosed the responsive record to the Complainant via e-mail on November 19, 2021.

Knowing & Willful

OPRA states that "[a] public official, officer, employee or custodian who knowingly and 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. 1983)); 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 unlawfully denied access to responsive permit by failing to provide it after both Mr. Durasky and Custodian's Counsel acknowledged its existence. N.J.S.A. 47:1A-6. However, the Custodian ultimately effectuated disclosure through Custodian's Counsel on November 19, 2021. Additionally, the evidence of record does not provide 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 ensure disclosure of the responsive permit resulted in an unlawful denial of access to same. N.J.S.A. 47:1A-6. However, the GRC declines to order any further action because the Custodian, through Counsel, disclosed the responsive record to the Complainant via e-mail on November 19, 2021.
2. The Custodian unlawfully denied access to responsive permit by failing to provide it after both Mr. Durasky and Custodian's Counsel acknowledged its existence. N.J.S.A. 47:1A-6. However, the Custodian ultimately effectuated disclosure through Custodian's Counsel on November 19, 2021. Additionally, the evidence of record does not provide 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

July 18, 2023