



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

September 29, 2022 Government Records Council Meeting

Jeffrey Voigt
Complainant

Complaint No. 2021-75

v.

Village of Ridgewood (Bergen)
Custodian of Record

At the September 29, 2022 public meeting, the Government Records Council (“Council”) considered the September 22, 2022 Supplemental 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 current Custodian did not fully comply with the Council’s August 30, 2022 Interim Order. Specifically, although the current Custodian disclosed to the Complainant the additional records located and simultaneously provided certified confirmation of compliance to the Executive Director, she did not do so in the prescribed time frame.
2. The Custodian unlawfully denied access to several e-mails and attachments. N.J.S.A. 47:1A-6; Lewen v. Robbinsville Pub. Sch. Dist. (Mercer), GRC Complaint No. 2008-211 (Interim Order dated December 22, 2009). However, the current Custodian did disclose several outstanding records to the Complainant, albeit just outside of the prescribed compliance time frame. 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 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**

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

**Jeffrey Voigt¹
Complainant**

GRC Complaint No. 2021-75

v.

**Village of Ridgewood (Bergen)²
Custodial Agency**

Records Relevant to Complaint: Copies of “any and all e-mails that the Village [of Ridgewood (“Village”)] received between March 10, 2021 at 7:00pm and March 11, 2021 at 9:00am.

Custodian of Record: Donna Jackson³
Request Received by Custodian: March 11, 2021
Response Made by Custodian: March 22, 2021
GRC Complaint Received: April 1, 2021

Background

August 30, 2022 Council Meeting:

At its August 30, 2022 public meeting, the Council considered the August 23, 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, found that:

1. The Custodian unlawfully denied access to at least on e-mail attachment and may have unlawfully denied access to others. N.J.S.A. 47:1A-6; Lewen v. Robbinsville Pub. Sch. Dist. (Mercer), GRC Complaint No. 2008-211 (Interim Order dated December 22, 2009). Therefore, the Custodian shall identify, locate, and determine the disclosability of attachments to the responsive e-mails and disclose same. Should the Custodian believe that a particular e-mail attachment is exempt from disclosure, she must provide the specific lawful basis for such denial. Finally, should the Custodian conclude that no additional attachments exist, she must certify to this fact.
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions,**

¹ No legal representation listed on record.

² Represented by Matthew S. Rogers, Esq. of Law Office of Matthew S. Rogers, LLC (Ridgewood, NJ).

³ The current Custodian of Record is Heather A. Mailander, who was previously the Deputy Clerk until the Custodian’s retirement on August 1, 2021.

including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver⁴ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁵ to the Executive Director.⁶

3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On August 31, 2022, the Council distributed its Interim Order to all parties.

On September 9, 2022, the current Custodian responded to the Council's Interim Order. Therein, the current Custodian certified that she had the Village Information Technology ("IT") Department perform a search for additional responsive records and attachments to include those cc'ing Village Councilmembers. The Custodian noted that the original search did not include these perimeters, and thus several new records that were either attachments to other e-mails or were e-mails not directly sent to Councilmembers were located and redacted. The current Custodian thus certified that she was disclosing to the Complainant those responsive records inclusive of seven (7) new e-mails (with minor redactions) and two (2) attachments. The current Custodian asserted that the Village's failure to disclose the forgoing records was not the result of a willful attempt to "conceal" any records from the Complainant.

Analysis

Compliance

At its August 30, 2022 meeting, the Council ordered the Custodian to identify, locate, and determine the disclosability of attachments to the responsive e-mails and disclose same, certify to the applicable exemption, or certify if no additional records exist. The Council also ordered the Custodian to submit certified confirmation of compliance, in accordance with R. 1:4-4, to the Executive Director. On August 31, 2022, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on September 8, 2022.

On September 9, 2022, the sixth (6th) business day after receipt of the Council's Order, the current Custodian certified that she had the IT Department perform a new search for responsive

⁴ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁶ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

records and was able to locate seven (7) additional e-mails and two (2) attachments not previously disclosed to the Complainant. The current Custodian certified that was disclosing to the Complainant those outstanding records with minor redactions.

Although the current Custodian followed the Council's Order through her search and disclosure of additional responsive records, she did not provide her response within the prescribed time frame set forth within the Order. Thus, full compliance was not achieved here.

Therefore, the current Custodian did not fully comply with the Council's August 30, 2022 Interim Order. Specifically, although the current Custodian disclosed to the Complainant the additional records located and simultaneously provided certified confirmation of compliance to the Executive Director, she did not do so in the prescribed time frame.

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)).

Here, the Custodian unlawfully denied access to several e-mails and attachments. N.J.S.A. 47:1A-6; Lewen v. Robbinsville Pub. Sch. Dist. (Mercer), GRC Complaint No. 2008-211 (Interim Order dated December 22, 2009). However, the current Custodian did disclose several outstanding records to the Complainant, albeit just outside of the prescribed compliance time frame. 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 current Custodian did not fully comply with the Council's August 30, 2022 Interim Order. Specifically, although the current Custodian disclosed to the Complainant the additional records located and simultaneously provided certified confirmation of compliance to the Executive Director, she did not do so in the prescribed time frame.
2. The Custodian unlawfully denied access to several e-mails and attachments. N.J.S.A. 47:1A-6; Lewen v. Robbinsville Pub. Sch. Dist. (Mercer), GRC Complaint No. 2008-211 (Interim Order dated December 22, 2009). However, the current Custodian did disclose several outstanding records to the Complainant, albeit just outside of the prescribed compliance time frame. 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

September 22, 2022



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

INTERIM ORDER

August 30, 2022 Government Records Council Meeting

Jeffrey Voigt
Complainant

Complaint No. 2021-75

v.

Village of Ridgewood (Bergen)
Custodian of Record

At the August 30, 2022 public meeting, the Government Records Council (“Council”) considered the August 23, 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 unlawfully denied access to at least on e-mail attachment and may have unlawfully denied access to others. N.J.S.A. 47:1A-6; Lewen v. Robbinsville Pub. Sch. Dist. (Mercer), GRC Complaint No. 2008-211 (Interim Order dated December 22, 2009). Therefore, the Custodian shall identify, locate, and determine the disclosability of attachments to the responsive e-mails and disclose same. Should the Custodian believe that a particular e-mail attachment is exempt from disclosure, she must provide the specific lawful basis for such denial. Finally, should the Custodian conclude that no additional attachments exist, she must certify to this fact.
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³**

¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

² "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

³ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 30th Day of August 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: August 31, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 30, 2022 Council Meeting**

**Jeffrey Voigt¹
Complainant**

GRC Complaint No. 2021-75

v.

**Village of Ridgewood (Bergen)²
Custodial Agency**

Records Relevant to Complaint: Copies of “any and all e-mails that the Village [of Ridgewood (‘Village’)] received between March 10, 2021 at 7:00pm and March 11, 2021 at 9:00am.

Custodian of Record: Donna Jackson

Request Received by Custodian: March 11, 2021

Response Made by Custodian: March 22, 2021

GRC Complaint Received: April 1, 2021

Background³

Request and Response:

On March 11, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 22, 2021, the Custodian responded in writing stating that an extension of time until March 26, 2021 would be required to respond to the instant OPRA request. On March 24, 2021, the Custodian e-mailed the Complainant seeking a topic or subject relevant to the e-mails sought. On the same day, the Complainant questioned why a search by Councilmember could not be conducted. On March 26, 2021, the Custodian e-mailed the Complainant stating that another extension of time through March 30, 2021 was required.

On March 30, 2021, the Custodian responded in writing advising that she was disclosing records responsive to the subject OPRA request with redactions for personal and attorney-client privileged information. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-1.1.

¹ No legal representation listed on record.

² Represented by Matthew S. Rogers, Esq. of Law Office of Matthew S. Rogers, LLC (Ridgewood, 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.

Denial of Access Complaint:

On April 1, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian did not disclose all e-mails responsive to the subject OPRA request. The Complainant noted that “e-mails from others were missing,” such as the e-mail from a constituent to members of the Village Council on March 10, 2021 at 10:47 p.m.

Statement of Information:

On April 28, 2021, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on March 11, 2021. The Custodian certified that her search included contacting the Village’s Information Technology Director and Village Council on March 22, and 23, 2021 respectively to conduct searches. The Custodian certified that she responded in writing on March 22, 2021 extending the response time frame through March 26, 2021. The Custodian affirmed that she continued to communicate with the Complainant and relevant parties to locate responsive records.

The Custodian noted that on March 26, 2021, she obtained another extension of time through March 30, 2021. The Custodian affirmed that the Village Deputy Clerk received and redacted responsive e-mails that she then sent to the Village attorney on March 29, 2021 for a review. The Custodian certified that she subsequently disclosed seventeen (17) pages of responsive records, with redactions for personal and attorney-client privileged information. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-1.1.

The Custodian contended that at the time that she received the subject OPRA request, the Complainant filed six (6) additional OPRA requests within three (3) days. The Custodian noted that five (5) of those requests were for similar records or duplicative. The Custodian further noted that the Village received eight (8) additional OPRA requests, and spent significant time sorting through the Complainant’s various requests. The Custodian argued that due to the forgoing, additional time to respond was necessary. The Custodian acknowledged that the constituent e-mail not disclosed was an attachment; the Custodian specifically requested that attachments not be included because “they had not been requested . . .” The Custodian asserted that she was not aware that this directive would have resulted in excluded responsive records, but that the e-mail in question was attached to the SOI. The Custodian contended that this omission was not knowing and willful in nature; rather, it was an attempt to shorten the process and response time.

The Custodian also argued that her actions were lawful and consistent with amendments made to OPRA on March 20, 2020 in response to the COVID-19 Public Health Emergency (“PHE”). The Custodian stated that on that day, the Legislature amended OPRA to waive the statutory response time frame during a PHE under the Emergency Health Powers Act (N.J.S.A. 26:13-1, et seq.) or other state of emergency under the Disaster Control Act (N.J.S.A. App. A. 9-33, et seq.). N.J.S.A. 47:1A-5(i)(2). The Custodian noted that the amendment nonetheless required a custodian to “make a reasonable effort” to respond during that time. The Custodian asserted that reasonable efforts include extensions of time, which she utilized here to ensure compliance with

the subject OPRA requests. The Custodian thus argued that she conformed to the intent of OPRA as amended.

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.

In Lewen v. Robbinsville Pub. Sch. Dist. (Mercer), GRC Complaint No. 2008-211 (Interim Order dated December 22, 2009), the Council was tasked with determining the disclosability of e-mails responsive to the subject OPRA request. The question of attachments was raised when the custodian contended that attachments were not included because they were not specifically requested. The Council disagreed and determined that an unlawful denial of access to responsive e-mail attachments occurred. In reaching this conclusion, the Council noted that:

There is a fundamental nexus between a document and the attachment(s) to that document. Once a document incorporates another document by reference, the incorporated document becomes one with it; the attachment cannot then be severed without destroying the integrity of the whole. Often an e-mail serves only as a carrier of the message which is appended as an attachment. To require the requestor to request an e-mail attachment in addition to the e-mail itself or to file separate requests for the e-mail and its attachment strains the purpose of OPRA, which is to make government records readily accessible.

[Id. at 11. See also Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2012-284 et seq. (Interim Order dated March 25, 2014).]

In the matter before the Council, the Complainant filed this complaint contending that the Custodian failed to disclose at least one (1) responsive e-mail.⁴ In the SOI, the Custodian admitted that her disclosure did not include any attachments because: 1) the Complainant did not expressly request them; and 2) doing so was a way of quickening the response process. This allegedly led to a failure to disclose the constituent e-mail identified by the Complainant, which the Custodian disclosed via the SOI. Further, a review of the e-mails disclosed contain references to other attachments as well.

However, Lewen is clear that e-mail attachments are part of the individual e-mails whereon they reside and are not severable from that record. Thus, attachments, whether directly included in the language of the request or not, are part of the responsive universe of records subject to disclosure unless otherwise exempt in part or whole. Thus, at the least the Custodian unlawfully

⁴ The Complainant obtained said e-mail from the constituent a half hour before filing his Denial of Access Complaint with the GRC.

denied access to the March 10, 2021 constituent e-mail. However, the disclosed records indicate that additional attachments not disclosed to the Complainant may exist.

Accordingly, the Custodian unlawfully denied access to at least on e-mail attachment and may have unlawfully denied access to others. N.J.S.A. 47:1A-6; Lewen, GRC 2008-211. Therefore, the Custodian shall identify, locate, and determine the disclosability of attachments to the responsive e-mails and disclose same. Should the Custodian believe that a particular e-mail attachment is exempt from disclosure, she must provide the specific lawful basis for such denial. Finally, should the Custodian conclude that no additional attachments exist, she must certify to this fact.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian unlawfully denied access to at least on e-mail attachment and may have unlawfully denied access to others. N.J.S.A. 47:1A-6; Lewen v. Robbinsville Pub. Sch. Dist. (Mercer), GRC Complaint No. 2008-211 (Interim Order dated December 22, 2009). Therefore, the Custodian shall identify, locate, and determine the disclosability of attachments to the responsive e-mails and disclose same. Should the Custodian believe that a particular e-mail attachment is exempt from disclosure, she must provide the specific lawful basis for such denial. Finally, should the Custodian conclude that no additional attachments exist, she must certify to this fact.
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver⁵ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁶ to the Executive Director.⁷**

⁵ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁶ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁷ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Executive Director

August 23, 2022