



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

November 30, 2010 Government Records Council Meeting

Stuart J. Alterman, Esq.
(on behalf of Louis Mercurio)
Complainant

Complaint No. 2010-117

v.

Borough of Haledon (Passaic)
Custodian of Record

At the November 30, 2010 public meeting, the Government Records Council (“Council”) considered the November 23, 2010 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. Although the Custodian provided a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days in which the Custodian requested an extension of time to fulfill said request, the Custodian’s written response was insufficient pursuant to N.J.S.A. 47:1A-5.i. and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008) because the Custodian failed to provide an anticipated deadline date upon which he would provide the requested records to the Complainant.
2. Because the Complainant’s request for every e-mail sent by all Borough electronic equipment between Police Chief Louis Mercurio and the eight (8) enumerated individuals from January 1, 2006 to June 30, 2009 failed to include a content or subject matter applicable to such e-mails, the Complainant’s request fails to seek specific identifiable government records and is therefore invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), and the Council’s decision in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). See Sandoval v. NJ State Parole Board, GRC Complaint No. 2006-167 (October 2008) and Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (March 2010).



3. Although the Custodian violated N.J.S.A. 47:1A-5.i., by providing an insufficient response to the Complainant's request the Council has determined that the Complainant's request was invalid under OPRA because it fails to seek a specific identifiable government record. Therefore, it is concluded that 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 30th Day of November, 2010

Robin Berg Tabakin, Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: December 6, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 30, 2010 Council Meeting**

Stuart J. Alterman, Esq.
(on behalf of Louis Mercurio)¹
Complainant

GRC Complaint No. 2010-117

v.

Borough of Haledon (Passaic)²
Custodian of Records

Records Relevant to Complaint: All e-mails sent via Borough e-mail electronic equipment sent by the following people to their personal computer, Blackberry and/or other electronic equipment, to Chief Louis Mercurio from January 1, 2006 through June 30, 2009:

1. Heather Kilminster
2. Dominic Stampone
3. Allan Susen
4. William Close
5. Dominic Fusco
6. Mahah Cardis
7. Ray Martinez
8. Michael Tirri

Request Made: April 14, 2010³

Response Made: April 27, 2010

Custodian: Allan Susen

GRC Complaint Filed: June 7, 2010⁴

Background

April 14, 2010

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

April 27, 2010

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the first (1st) business day following receipt of such

¹ The evidence of record indicates that the Complainant is an attorney representing Louis Mercurio.

² Represented by Andrew P. Oddo, Esq. (Oradell, NJ).

³ The OPRA request is stamped as received on April 26, 2010.

⁴ The GRC received the Denial of Access Complaint on said date.

request. The Custodian acknowledges receipt of the Complainant's OPRA request. The Custodian states that to retrieve this information from the server, he contacted the Information Technology Consultant to provide a cost estimate and that such estimate will be forwarded to the Complainant.

May 10, 2010

Letter from the Custodian to the Complainant. The Custodian informs the Complainant that he had identified 1,300 e-mails during the time period requested. The Custodian asks the Complainant in what medium he would like the e-mails to be provided. The Custodian states that if the Complainant wants copies, the Custodian would require a deposit with a balance to be paid when the number of pages of responsive records has been identified.

May 14, 2010

Letter from the Complainant to the Custodian. The Complainant states that he wants all the e-mails in electronic format. In addition, the Complainant states that there should be no cost in sending the records electronically.

May 20, 2010

Letter from the Custodian to the Complainant. The Custodian states that that he must review all 1,300 responsive e-mails to determine if redactions are necessary. The Custodian informs the Complainant that the Custodian will contact the Borough Attorney to determine if a special service charge is necessary. In addition, the Custodian informs the Complainant that he needs additional time to respond to the OPRA request. Furthermore, the Custodian notifies the Complainant that he will be out of the office until June 1, 2010 and will contact the Complainant again on June 4, 2010. Lastly, the Custodian states that if a special service charge is applicable, he will contact the Custodian prior to starting any work.

June 7, 2010

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- Complainant's OPRA request dated April 14, 2010
- Letter from the Custodian to the Complainant dated April 27, 2010
- Letter from the Custodian to the Complainant dated May 10, 2010
- Letter from the Complainant to the Custodian dated May 14, 2010

The Complainant does not agree to mediate this complaint.⁵

June 8, 2010

Request for the Statement of Information ("SOI") sent to the Custodian.

June 8, 2010

⁵ The Complainant made no legal arguments or factual assertions in support of the Denial of Access Complaint.

Letter from the Custodian to the Complainant. The Custodian informs the Complainant that his office has reviewed all 1,300 responsive e-mails. The Custodian also states that the Deputy Clerk has invested ten (10) hours of time to review the records and the Custodian has invested one (1) hour of time. The Custodian states that he has identified 56 e-mails that require review by the Borough Attorney to determine if they are releasable. The Custodian states that the Deputy Clerk's hourly rate is \$18.00 per hour and his hourly rate is \$52.88 per hour. The Custodian also requests that the Complainant forward a check for \$232.88 to complete the OPRA request. Furthermore, the Custodian states that upon receipt he will forward all public e-mails in electronic format and the remaining e-mails will be sent after the Borough Attorney reviews them.

June 14, 2010

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated April 14, 2010
- Letter from the Custodian to the Complainant dated April 27, 2010
- Letter from the Custodian to the Complainant dated May 10, 2010
- Letter from the Custodian to the Complainant dated May 20, 2010
- Letter from the Custodian to the Complainant dated June 8, 2010

The Custodian certifies that he consulted with the Borough of Haledon's technology consultant regarding how the requested e-mails could be retrieved. The Custodian certifies that he found 1,300 responsive e-mails. The Custodian also certifies that these records are maintained on the Borough's e-mail server indefinitely and thus are not scheduled for destruction.

The Custodian certifies he complied with OPRA by responding to the Complainant's OPRA request within seven (7) business days and that he advised the Complainant that an additional cost may be assessed due to the volume of documents. The Custodian also certifies that each of the 1,300 responsive e-mails had to be reviewed to determine if any redactions were necessary and that he asked the Complainant in which medium he wanted the e-mails provided. In addition, the Custodian certifies that there has been no denial of access to any records, because the voluminous nature of the request and the time necessary to review all 1,300 e-mails has delayed providing any documents. Furthermore, the Custodian states that once the e-mails have been reviewed, these e-mails will be provided. The Custodian also asserts that it would have been irresponsible to release all 1,300 e-mails between Police Chief Louis Mercurio and the members of the governing body without reviewing the e-mails and making any necessary redactions.

July 1, 2010

The Complainant's response to the Custodian's SOI. The Complainant asserts that he is requesting all 1,300 e-mails. The Complainant also states that this complaint is based on the excessive service charge sought by the Borough. Lastly, the Complainant argues that the Borough was required to give notice of the proposed special service charge before incurring such cost by reviewing the responsive e-mails, but failed to do so.

August 6, 2010

Letter from the GRC to the Custodian. The GRC requests that the Custodian complete a special service charge analysis.

August 17, 2010

Letter from the Custodian to the GRC. The Custodian responds to the GRC's request for a completed special service charge analysis.

Questions	Custodian's Response
1. What records are requested?	1. E-mails
2. Give a general nature description and number of the government records requested.	2. 1,326 e-mail records from various Borough officials to Chief Louis Mercurio.
3. What is the period of time over which the records extend?	3. January 1, 2006 through June 30, 2009
4. Are some or all of the records sought archived or in storage?	4. All records are stored on the Borough server.
5. What is the size of the agency?	5. The Municipal Clerks' office has three (3) employees.
6. What is the number of employees available to accommodate the records request?	6. One
7. To what extent do the requested records have to be redacted?	7. Each record had to be reviewed in its entirety for possible confidential information.
8. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to locate, retrieve, and assemble the records for copying?	8. Because of the possible confidential nature of the records, a part time Deputy Clerk was assigned to review the records first. Her review of the 1,326 records took 10 hours. A significantly smaller group was identified by her to require the Custodian's review which took only one (1) hour. Fifty-six (56) records remained which were reviewed by the Borough Attorney at no charge. Fee breakdown: Deputy Clerk: 10 hours at \$18.00 per hour Clerk/Administrator: 1 hour at \$52.88 per hour.
9. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to monitor the inspector or examination of the records	9. No charge

requested?	
10. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to return records to their original storage place?	10. No charge
11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?	11. Because of the possible confidential nature of the e-mails, this task could not be assigned to clerical staff.
12. Who in the agency will perform the work associated with the records request and that person's hourly rate?	12. Deputy Clerk Leena Abaza – hourly rate \$18.00 Municipal Clerk/Acting Administrator Allan Susen – hourly rate \$52.88
13. What is the availability of information technology and copying capabilities?	13. The Borough will be able to accommodate the request in electronic format.
14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.	14. This is answered in #8 above.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

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.

The Complainant requested all e-mails sent via all electronic equipment from January 1, 2006 to June 30, 2009 between Chief Louis Mercurio and eight (8) enumerated individuals. The Custodian responded to the Complainant’s OPRA request on the first (1st) business day following receipt of the Complainant’s request. The Custodian stated that he would provide a cost estimate in order to retrieve this information. The Custodian provided such cost estimate to the Complainant on June 8, 2010.

In Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), the Custodian provided the Complainant with a written response to the Complainant’s OPRA request on the seventh (7th) business day following receipt of said request. In said response, the Custodian requested an extension of time to respond to said request but failed to provide an anticipated deadline date upon which the requested records would be provided. The Council held that the Custodian’s request for an extension of time was inadequate under OPRA pursuant to N.J.S.A. 47:1A-5.i.

The facts in Hardwick are similar to the facts in this instant complaint; specifically, the Custodian provided a written response to the Complainant’s request within the statutorily mandated seven (7) business days. In said response, the Custodian stated that in order to retrieve the records requested from the server, he contacted the Information/Technology Consultant to provide a cost estimate. The Custodian further stated that he will contact the Complainant once he receives that estimate. The Custodian requested an extension of time to respond to the request but failed to provide an anticipated deadline date upon which the records would be provided.

Therefore, although the Custodian provided a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days in which the Custodian requested an extension of time to fulfill said request, the Custodian’s written response was insufficient pursuant to N.J.S.A. 47:1A-5.i. and Hardwick, *supra*, because the Custodian failed to provide an anticipated deadline date upon which he would provide the requested records to the Complainant.

Notwithstanding the Custodian’s insufficient response, the Custodian’s request is invalid under OPRA because it fails to identify a subject matter or content applicable to the requested e-mails.

The New Jersey Superior Court has held that “[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials*

to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records ‘readily accessible for inspection, copying, or examination.’ N.J.S.A. 47:1A-1.” (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). The Court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency’s files.” (Emphasis added.) *Id.* at 549.

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),⁶ the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records “accessible.” “As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency’s documents.”⁷

Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) the court cited MAG by stating that “...when a request is ‘complex’ because it fails to specifically identify the documents sought, then that request is not ‘encompassed’ by OPRA...” The court also quoted N.J.S.A. 47:1A-5.g in that “[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.” The court further stated that “...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency’s need to...generate new records...”

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009) the Council held that “[b]ecause the Complainant’s OPRA requests # 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005).”

The test under MAG then, is whether a requested record is a *specifically identifiable* government record. If so, the record is disclosable, barring any exemptions to disclosure contained in OPRA. The GRC established the criteria deemed necessary to specifically identify an e-mail communication in Sandoval v. NJ State Parole Board, GRC Complaint No. 2006-167 (October 2008). In Sandoval, the Complainant requested “e-mail...between [two individuals] from April 1, 2005 through June 23, 2006 [using seventeen (17) different keywords].” The Custodian denied the request, claiming that it was overly broad. The Council determined:

⁶ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁷ As stated in Bent, *supra*.

“The Complainant in the complaint now before the GRC requested specific e-mails *by recipient, by date range and by content*. Based on that information, the Custodian has identified [numerous] e-mails which fit the specific recipient and date range criteria Complainant requested.”(Emphasis added.) *Id.*

The GRC recently undertook the task of expanding on Sandoval in Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (March 2010). In that complaint, the Complainant requested electronic copies of all e-mails from Bettina Bieri’s township account from January 1, 2008 to June 17, 2008. The GRC stated in its analysis that in expanding on Sandoval:

“... an OPRA request for an e-mail or e-mails shall therefore focus upon the following four (4) characteristics:

- Content and/or subject
- Specific date or range of dates
- Sender
- Recipient

In accord with MAG, supra, and its progeny, in order to specifically identify an e-mail, OPRA requests must contain (1) the content and/or subject of the e-mail and (2) the specific date or range of dates during which the e-mail was transmitted or the e-mails were transmitted. Additionally, a valid e-mail request must identify the sender and/or the recipient thereof.”

The GRC found that, based on the above standard, the Complainant’s request was invalid under OPRA because it failed to identify the content and/or subject of the e-mails sought.

In the matter currently before the Council, the Complainant identified the e-mails sought by date range as well as by sender and/or recipient. The Complainant failed, however, to specify the content and/or subject of the e-mails sought. Without specific reference to the content and/or subject of the e-mails sought, the Custodian would be required to conduct research to identify records responsive to the request; custodians are not required to conduct research in order to respond to requests under OPRA. MAG, supra. As such, the Complainant’s request failed to seek specifically identifiable e-mail records and is therefore invalid under OPRA.

Accordingly, because the Complainant’s request for every e-mail sent by all Borough electronic equipment between Police Chief Louis Mercuro and the eight (8) enumerated individuals from January 1, 2006 to June 30, 2009 failed to include a content or subject matter applicable to such e-mails, the Complainant’s request fails to seek specific identifiable government records and is therefore invalid under OPRA pursuant to MAG, supra, Bent, supra, New Jersey Builders, supra, and the Council’s decision in Schuler, supra. See Sandoval, supra, and Elcavage, supra.

Because the Council has determined that the Complainant's request is invalid under OPRA, the Council declines to address the validity of the proposed special service charge in the instant complaint.

Whether the Custodian's insufficient response on April 27, 2010 rises to the level of a knowing and willful violation of OPRA under the totality of the circumstances?

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:

"... If 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.

The Custodian provided the Complainant a written response within the seven (7) business days. The Custodian informed the Complainant that he contacted the Information/Technology Consultant in order to provide a cost estimate and once that estimate was received he would be contacting the Complainant. However, the Custodian did not provide a date certain as to when the records or the cost-estimate would be made available.

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 (Berg); 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.i., by providing an insufficient response to the Complainant's request the Council has determined that the Complainant's request was invalid under OPRA because it fails to seek a specific identifiable government record. Therefore, it is concluded that 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. Although the Custodian provided a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days in which the Custodian requested an extension of time to fulfill said request, the Custodian's written response was insufficient pursuant to N.J.S.A. 47:1A-5.i. and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008) because the Custodian failed to provide an anticipated deadline date upon which he would provide the requested records to the Complainant.
2. Because the Complainant's request for every e-mail sent by all Borough electronic equipment between Police Chief Louis Mercuro and the eight (8) enumerated individuals from January 1, 2006 to June 30, 2009 failed to include a content or subject matter applicable to such e-mails, the Complainant's request fails to seek specific identifiable government records and is therefore invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), and the Council's decision in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). *See* Sandoval v. NJ State Parole Board, GRC Complaint No. 2006-167 (October 2008) *and* Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (March 2010).
3. Although the Custodian violated N.J.S.A. 47:1A-5.i., by providing an insufficient response to the Complainant's request the Council has determined that the Complainant's request was invalid under OPRA because it fails to seek a specific identifiable government record. Therefore, it is concluded that 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: Harlynn A. Lack, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

November 23, 2010