



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

June 24, 2014 Government Records Council Meeting

Jason Todd Alt
Complainant

Complaint No. 2013-205

v.

City of Vineland (Cumberland)
Custodian of Record

At the June 24, 2014 public meeting, the Government Records Council (“Council”) considered the June 17, 2014 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt:

1. The Custodian bore his burden that did not unlawfully deny access to the Complainant’s request for all e-mails pertaining to city business from former Vineland mayor Robert Romano. N.J.S.A. 47:1A-6. The Complainant’s request for e-mails pertaining to “city business” is overly broad and invalid pursuant to MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005), Sandoval v. N.J. State Parole Bd., GRC Complaint No. 2006-167 (Interim Order dated March 28, 2007), and Elcavage v. West Milford Twp., GRC Complaint No. 2009-07 (April 2010).
2. The Custodian bore his burden that he did not unlawfully deny access to the Complainant’s request for all text messages and Facebook messages pertaining to city business from former Vineland mayor Robert Romano. N.J.S.A. 47:1A-6. The Complainant’s request for text messages and Facebook messages pertaining to “city business” is overly broad and invalid pursuant to MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005), and Elcavage v. West Milford Twp., GRC Complaint No. 2009-07 (April 2010).

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 24th Day of June, 2014

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: June 26, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 24, 2014 Council Meeting**

**Jason Todd Alt¹
Complainant**

GRC Complaint No. 2013-205

v.

**City of Vineland (Cumberland)²
Custodial Agency**

Records Relevant to Complaint³:

January 2, 2013 OPRA Request: Inspection of:

1. All communications sent to or from then-mayor Robert Romano via any “public” or “private” Facebook accounts that were related to any city business for the period Oct. 1 to Dec. 31, 2012.
2. All text messages sent to or from then-mayor Robert Romano regarding city business, whether they be to/from a city-issued cellphone or a non-city-issued cellphone, regarding any city business for the period Oct. 1 to Dec. 31, 2012.
3. All e-mails related to city business sent to or from any private accounts belonging to Robert Romano for the period of July 1, 2008 through Dec. 31, 2012.

April 23, 2013 OPRA Request: Electronic copies of:

1. Any text messages sent to or from Robert Romano’s work-issued cellphone between July 1, 2008, and Oct. 8, 2010.
2. Any e-mails related to city business sent to or from any private accounts belonging to Robert Romano or Mimi Bernard for the period of July 1, 2008 through Jan. 1, 2013.
3. All communications sent to or from then-mayor Robert Romano via any “public” or “private” Facebook accounts that were related to any city business for the period July 1, 2008, through Sept. 30, 2012.

May 22, 2013 OPRA Request: Electronic copies of:

1. All text messages regarding city business sent to or from Robert Romano from July 1, 2008, through September 30, 2012.

Custodian of Record: Keith Petrosky

Request Received by Custodian: January 2, 2013; April 23, 2013; May 22, 2013

Response Made by Custodian: January 10, 2013; April 18, 2013; May 1, 2013; May 30, 2013

¹ No legal representation listed on record.

² Represented by Edward F. Duffy, Esq. (Vineland, NJ).

³ The following items are those at issue by the Complainant. The Complainant requested other items, but they are not at issue in this matter.

GRC Complaint Received: July 16, 2013

Background⁴

Request and Response:

On January 2, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking records dated January 2, 2013. On January 10, 2013, five (5) business days later, the Custodian responded in writing, via e-mail, informing the Complainant that he has been unable to reach then-mayor Robert Romano (“Mr. Romano”), the person the Custodian believed to be in possession of responsive records pertaining to Facebook messages, e-mails, or text messages. The Custodian also stated at the time that in order to obtain text messaging data from a cell phone, the city would need to obtain a court order.

On January 16, 2013, the Custodian submitted a supplemental response, via e-mail, to the Complainant clarifying his initial response. The Custodian stated that while Mr. Romano was issued a cellular phone by the city, Verizon Wireless informed the Custodian that the text messaging feature had been blocked since October 8, 2010. Additionally, the Custodian attached other responsive records to the Complainant’s request.

On April 23, 2013, the Complainant submitted another OPRA request seeking the records dated April 23, 2013. On May 1, 2013, six (6) business days later, the Custodian responded, in writing, via e-mail that he has remained unable to reach Robert Romano regarding several of the requested Items. The Custodian also produced responsive documents or denials to the remaining Items that are not at issue in this matter. That same day, the Complainant sent a reply asking for clarification as to whether Mr. Romano used the city-issued cellular phone prior to October 8, 2010, when the text messaging feature was blocked. On May 2, 2013, the Custodian replied to the Complainant, stating that to the best of Vineland’s information technology (“IT”) staff’s knowledge, Mr. Romano never possessed a city-issued cellular phone prior to October 2010.

On May 22, 2013, the Complainant submitted a final OPRA request seeking the above-mentioned records listed under May 22, 2013. On May 30, 2013, six (6) business days later, the Custodian responded, in writing, via e-mail that there were no responsive records to the Complainant’s request, as the cellular phone issued to Mr. Romano was prohibited from being able to send or receive text messages.

Denial of Access Complaint:

On July 16, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant contended that the Custodian’s denial of access spanning three (3) OPRA requests are as follows:

⁴ 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.

1. All “public or “private” communications sent to or from Robert Romano’s Facebook accounts that were related to any city business for the period of July 1, 2008, through Dec. 31, 2012.
2. Any e-mails related to city business sent to or from any private accounts belonging to Robert Romano for the period of July 1, 2008 through Dec. 31, 2012.
3. All text messages sent to or from Robert Romano regarding city business sent on any non-city issued cellphone from July 1, 2008, through Dec. 31, 2012.

The Complainant asserted that he had been in contact with the Custodian, the Custodian’s counsel, and the current mayor of Vineland regarding the above-mentioned OPRA requests. The Complainant stated that he is focused on any communications regarding city business made by or sent to Mr. Romano via his private e-mail, cellular phone, or Facebook accounts during his tenure as mayor of Vineland.

The Complainant asserted that as mayor, Mr. Romano used text messages and his personal Facebook account to communicate with the Complainant as well as the Complainant’s colleagues. In addition, the Complainant claimed that although Mr. Romano published several public announcements on his Facebook page, the Custodian had been unable to provide those communications, let alone any privately communicated Facebook messages.

The Complainant argued that because there was no policy in place by Vineland on the use of private accounts to conduct city business, Mr. Romano is likely in sole possession of these communications. The Complainant stated that he was advised by the Custodian that in order to obtain the requested documents, he would have to obtain a court order. The Complainant also alleges that the Custodian does not contest the presumption that text messages and Facebook posts at issue are public records. Finally, the Complainant claimed that the Custodian acknowledged that the messages on private accounts are subject to OPRA. Therefore, the Complainant posited that it is the Custodian’s responsibility to obtain the records.

Statement of Information:

On October 28, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he has responded in good faith to all of the Complainant’s OPRA requests. The Custodian continued that he had exhausted all reasonable and appropriate means to produce responsive records, including those allegedly in possession by Mr. Romano.

In the Custodian’s SOI, he provided a timeline of events and communications between himself and Mr. Romano. The Custodian certified that Mr. Romano was continuously unresponsive to his inquiries regarding the Complainant’s OPRA requests. The Custodian also provided that in addition to several e-mails, a letter was sent on March 12, 2013, via regular and certified mail. Next, the Custodian stated that the certified mail was returned to his office after the post office attempted to deliver on three (3) different occasions (March 13, March 18, and March 28, 2013), the regular mail was never returned.

Finally, the Custodian certified that following receipt of additional OPRA requests from the Complainant two (2) more letters were sent via regular and certified mail to Mr. Romano.

While the second letter again went unanswered, the Custodian certified that Mr. Romano responded to the final letter via e-mail stating, “[p]lease be advised that I have no available information as to the recent OPRA request from the Daily Journal.”

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.

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...*” N.J.S.A. 47:1A-1.1. (Emphasis added).

The New Jersey Appellate Division has held that:

While 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.

MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) (emphasis added).

The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would

then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

Id. at 549 (emphasis added).

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.” Id. at 549 (emphasis added). Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005);⁵ N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Moreover, the test under MAG is whether a requested record is a specifically identifiable government record. 375 N.J. Super. at 549. If it is, the record is disclosable barring any exemptions to disclosure contained in OPRA. The Council established criteria deemed necessary to specifically identify an e-mail communication in Sandoval v. N.J. State Parole Bd., GRC Complaint No. 2006-167 (Interim Order dated March 28, 2007). 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 held that “[t]he 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.” Id. at 16 (emphasis added).

In Elcavage v. West Milford Twp., GRC Complaint No. 2009-07 (April 2010), the Council examined what constitutes a valid request for e-mails under OPRA. The Council determined that:

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, (2) the specific date or range of dates during which the e-mail was transmitted or the e-mails were transmitted, and (3) a valid e-mail request must identify the sender and/or the recipient thereof.

Id. at 5 (emphasis in original).

Mr. Romano’s E-mails

In the instant matter, unlike the request in Sandoval where the complainant identified seventeen (17) keywords that encompassed the content of the requested e-mails, the Complainant asked for any e-mail that pertains to “city business.” GRC No. 2006-167. Because “city business” is an open-ended term that can encompass multitudes of subjects, there is no mechanism by which the Custodian could search Mr. Romano’s e-mails without resorting to manually reading and analyzing each e-mail sent or received within the identified period. OPRA

⁵ Affirming Bent v. Stafford Police Dep’t, GRC Case No. 2004-78 (October 2004).

does not require a Custodian to conduct an open-ended search of an agency's files. MAG, 375 N.J. Super. at 549.

Therefore, the Custodian bore his burden that did not unlawfully deny access to the Complainant's request for all e-mails pertaining to city business from former Vineland mayor Robert Romano. N.J.S.A. 47:1A-6. The Complainant's request for e-mails pertaining to "city business" is overly broad and invalid pursuant to MAG, 375 N.J. Super. at 534, Sandoval, GRC No. 2006-167, and Elcavage, GRC No. 2009-07.

Mr. Romano's Text Messages and Facebook Messages

The Council has also applied the criteria set forth in Elcavage to other forms of correspondence, such as letters. GRC No. 2009-07; *See Armenti v. Robbinsville BOE (Mercer)*, GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011).

As letters are forms of correspondence subject to the same factors necessary to be a valid request, text messages and messages sent through Facebook are also forms of correspondence. Text and Facebook messages have identifiable senders, recipients, timestamps, and content comparable to e-mail and letter correspondence. Thus, for a request for text messages and Facebook messages to be valid, the GRC looks to the same factors set forth in MAG, 375 N.J. Super. at 549 and Elcavage, GRC No. 2009-07.

In this instance, the Complainant's request for text messages and Facebook messages suffer from the same flaws as his request for e-mails. The Complainant requested all text messages and Facebook messages that pertain to "city business." Thus, the Complainant's request is overly broad, and does not identify and specific government record.

Therefore, the Custodian bore his burden that he did not unlawfully deny access to the Complainant's request for all text messages and Facebook messages pertaining to city business from former Vineland mayor Robert Romano. N.J.S.A. 47:1A-6. The Complainant's request for text messages and Facebook messages pertaining to "city business" is overly broad and invalid pursuant to MAG, 375 N.J. Super. at 534, and Elcavage, GRC No. 2009-07.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian bore his burden that did not unlawfully deny access to the Complainant's request for all e-mails pertaining to city business from former Vineland mayor Robert Romano. N.J.S.A. 47:1A-6. The Complainant's request for e-mails pertaining to "city business" is overly broad and invalid pursuant to MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005), Sandoval v. N.J. State Parole Bd., GRC Complaint No. 2006-167 (Interim Order dated March 28, 2007), and Elcavage v. West Milford Twp., GRC Complaint No. 2009-07 (April 2010).

2. The Custodian bore his burden that he did not unlawfully deny access to the Complainant's request for all text messages and Facebook messages pertaining to city business from former Vineland mayor Robert Romano. N.J.S.A. 47:1A-6. The Complainant's request for text messages and Facebook messages pertaining to "city business" is overly broad and invalid pursuant to MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005), and Elcavage v. West Milford Twp., GRC Complaint No. 2009-07 (April 2010).

Prepared By: Samuel A. Rosado, Esq.
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

June 17, 2014