



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

July 29, 2014 Government Records Council Meeting

Jeff Hoffman  
Complainant

Complaint No. 2013-333

v.

Borough of Woodcliff Lakes (Bergen)  
Custodian of Record

At the July 29, 2014 public meeting, the Government Records Council (“Council”) considered the July 22, 2014 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 did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian has borne her burden of proving that she did not unlawfully deny access to the requested invitation because, though the document is only partially legible, the GRC does not have authority over the condition of requested records, and the provided document is the only copy of the invitation in the Borough’s possession. *See* N.J.S.A. 47:1A-6; Lopez v. County of Hudson, GRC Complaint No. 2009-267 (March 2011); Toscano v. New Jersey Department of Labor, GRC Complaint No. 2005-59 (September 2005); Katinsky v. River Vale Township, GRC Complaint No. 2003-68 (November 2003).
3. The Custodian has borne her burden of proving that she lawfully denied access to the responsive advisory opinion because the document was exempt from access pursuant to statute and its disclosure had not been approved by the vote of two-thirds of all members of the Board. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9(a); N.J.S.A. 40A:9-22.8.



4. The Custodian has borne her burden of proving that she lawfully denied access to the Complainant's requests for emails and "everything" regarding the gala because the requests are overly broad and she certified that no responsive records exist. *See* Burke v. Brandes, 429 N.J. Super. 172, 176 (App. Div. 2012); MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 549 (App. Div. 2005); Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (April 2010); Pusterhofer v. New Jersey Department of Education, GRC 2005-49 (July 2005).
5. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to respond to the Complainant's request within the statutorily mandated seven (7) business days, she eventually disclosed the responsive letter/invitation and did not unlawfully deny access to the other requested documents. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the  
Government Records Council  
On The 29<sup>th</sup> Day of July, 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: July 31, 2014**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
July 29, 2014 Council Meeting**

**Jeff Hoffman<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2013-333**

v.

**Borough of Woodcliff Lakes (Bergen)<sup>2</sup>**  
**Custodial Agency**

**Records Relevant to Complaint:** The invite to the United Nations (“U.N.”) gala for the BMW CEO, the letter to the mayor, the ruling from the Department of Community Affairs (“DCA”) or any agency on the gala, any emails regarding the gala, and everything on BMW and the U.N. gala.

**Custodian of Record:** Debbie Dakin  
**Request Received by Custodian:** October 29, 2013  
**Response Made by Custodian:** November 19, 2013  
**GRC Complaint Received:** November 13, 2013

**Background<sup>3</sup>**

**Request and Response:**

On October 29, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 19, 2013, thirteen (13) business days later, Counsel for the Custodian (“Counsel”) responded by providing a responsive gala invitation letter and by denying the remainder of the request for seeking either exempt or non-existent records, or for being overly broad.

**Denial of Access Complaint:**

On November 13, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that the Borough of Woodcliff Lakes’ (“Borough’s”) mayor showed the invitation and letter regarding the gala in question at a public meeting. The Complainant contends that the mayor has emails regarding the gala, and that the mayor informed Borough council members that DCA opined that he could attend the gala.

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented Paul Kaufman, Esq. and Deena B. Rosendahl, Esq. (Fort Lee, N.J.).

<sup>3</sup> 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.

### Statement of Information:

On November 19, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that the request was received on October 29, 2013 and responded to on November 19, 2013. The Custodian states that documents responsive to the Complainant’s request for a ruling from DCA could not be fulfilled because, pursuant to N.J.S.A. 40A:9-22.8, advisory opinions of DCA’s Local Finance Board (“Board”) shall not be made public unless a two-thirds vote of all of the Board’s members directs as such, and no vote occurred here. Additionally, the Custodian argues that the responsive documents are intra-agency advisory, consultative, or deliberative (“ACD”) materials exempt from disclosure under OPRA. *Citing N.J.S.A. 47:1A-1.1*. The Custodian certifies that, regarding the remaining requests, no responsive documents exist.

### Additional Submissions:

On November 22, 2013, the Complainant provided an email to the GRC in which he states that the copy of the letter/invitation he received is illegible. Also, the Complainant contends that there are additional records, such as meeting minutes or emails, which should have been disclosed to him.

On June 24, 2014, Counsel submitted an additional certification dated June 9, 2014 from Jeffrey Goldsmith, the mayor of the Borough, which stated:

1. I am the Mayor of the Borough of Woodcliff Lake.
2. I have conducted a search of all my records with respect to the above referenced matter.
3. The document previously submitted as Exhibit “A,” an invitation from BMW Group dated September 17, 2012, is the only copy of the document in my or the Borough’s possession.

### Analysis

#### Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Id. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).<sup>4</sup> Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

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<sup>4</sup> A custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

Here, the Custodian received the Complainant's request on October 29, 2013, but did not provide an initial response until November 19, 2013. The Custodian's reply, delivered concurrently with the SOI, came thirteen (13) business days after the Complainant filed his request.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

### **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.

### **Legibility of the Provided Record**

N.J.S.A. 47:1A-1 states in pertinent part that:

"[G]overnment records shall be readily accessible for inspection, copying, or examination by the citizens of this State, . . . and any limitations on the right of access accorded by [OPRA] . . . shall be construed in favor of the public's right of access[.]"

Moreover, the GRC has the statutory authority and the obligation to "receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian[.]" N.J.S.A. 47:1A-7(b).

The Council has previously determined that it has no authority over the condition or legibility of records provided by a custodian, and that the integrity of a requested record is similarly outside the Council's authority. *See Lopez v. Cnty. of Hudson*, GRC Complaint No. 2009-267 (March 2011); *Toscano v. N.J. Dep't of Labor*, GRC Complaint No. 2005-59 (September 2005); *Katinsky v. River Vale Twp.*, GRC Complaint No. 2003-68 (November 2003).

In *Katinsky*, the complainant indicated to the GRC that the records provided to him by the custodian were "incomplete, improper and inaccurate" and one disclosure form was illegible. *Katinsky*, GRC 2003-68. However, the custodian certified that copies of the requested documents given to the complainant were complete, correct, and unredacted, and that the agency did not have a more legible set of the documents. *Id.* The GRC determined that because the

custodian provided the requester with the requested documents, and the custodian certified that they were complete, correct and contained no redactions, the request had been satisfied. Id.

In contrast, the custodian in Lopez provided illegible records to the complainant, although legible copies of the requested records were subsequently provided after the complainant objected to the records provided to him. Lopez, GRC 2009-267. The record indicated that legible copies of the requested records existed at time of the complainant's request; thus, the custodian's provision of illegible records to the complainant constituted a limitation on the right of access accorded by N.J.S.A. 47:1A-1 and a violation of OPRA. Id.

Here, the Complainant requested the "invite to U.N. gala for BMW CEO" and the "letter to mayor." The Custodian identified one (1) responsive document, which she disclosed with her November 19, 2013 response. The GRC also received a copy on November 19, 2013. The Complainant objected to the legibility of the record on November 22, 2013, and the record indicates that the provided document is in fact only partially legible. However, on June 24, 2014, Counsel provided a certification from the Borough's mayor in which the mayor certified that the invitation provided to the Complainant on November 19, 2013 is the only copy of said document in the Borough's or mayor's possession.

Therefore, the Custodian has borne her burden of proving that she did not unlawfully deny access to the requested invitation because, though the document is only partially legible, the GRC does not have authority over the condition of requested records, and the provided document is the only copy of the invitation in the Borough's possession. See N.J.S.A. 47:1A-6; Lopez, GRC 2009-267; Toscano, GRC 2005-59; Katinsky, GRC 2003-68.

#### Complainant's Request for Advisory Opinions

OPRA, by its own terms, shall not "abrogate any exemption of a public record or government record from public access heretofore made pursuant to [N.J.S.A. 47:1A-1 et seq.]; [or] any other statute . . . ." N.J.S.A. 47:1A-9(a).

N.J.S.A. 40A:9-22.8, in turn, states that:

A local government officer or employee not regulated by a county or municipal code of ethics may request and obtain from the Local Finance Board an advisory opinion as to whether any proposed activity or conduct would in its opinion constitute a violation of the provisions of this act. Advisory opinions of the board shall not be made public, except when the board by the vote of two-thirds of all of its members directs that the opinion be made public. Public advisory opinions shall not disclose the name of the local government officer or employee unless the board in directing that the opinion be made public so determines.

Id.

Here, the Custodian stated that the record identified as responsive to the Complainant's request for any "ruling from DCA or any agency on gala" is an advisory opinion covered by

N.J.S.A. 40A:9-22.8. Thus, the advisory opinion is exempt from disclosure because its release has not been approved by the requisite two-thirds vote of all Board members. Id.

Therefore, the Custodian has borne her burden of proving that she lawfully denied access to the responsive advisory opinion because the document was exempt from access pursuant to statute and its disclosure had not been approved by the vote of two-thirds of all members of the Board. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9(a); N.J.S.A. 40A:9-22.8.

### Complainant's Additional Requests

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.”

MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) (citing N.J.S.A. 47:1A-1).

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.

Id. at 549.

The Court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt . . . .” Id. at 549; Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); 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).

More recently, the Appellate Division has found a request for “EZ Pass benefits afforded to retirees of the Port Authority, including all . . . correspondence between the Office of the Governor . . . and the Port Authority . . .” to be valid under OPRA because it “was confined to a specific subject matter that was clearly and reasonably described with sufficient identifying information . . . [and] was limited to particularized identifiable government records, namely, correspondence with another government entity, rather than information generally.” Burke v. Brandes, 429 N.J. Super. 169, 172, 176 (App. Div. 2012). Similarly, the Council has held that a valid request for emails should contain the subject of the emails, the specific range of dates during which the messages were transmitted, and the sender(s) and/or recipient(s) thereof. *See* Elcavage v. W. Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010).

Additionally, the Council has previously found that, in light of a custodian's certification that no records responsive to the request exist, no unlawful denial of access occurred. *See Pusterhofer v. N.J. Dep't of Educ.*, GRC 2005-49 (July 2005).

Here, the Complainant requested "emails regarding gala" and "everything on BMW [and] U.N. gala." These requests constitute only broad, generic descriptions of the records sought, and do not sufficiently identify specific government records. *See Burke*, 429 *N.J. Super.* 172, 176; *MAG*, 375 *N.J. Super.* at 549; *Elcavage*, GRC 2009-07. Additionally, the Custodian certified that no responsive records exist. *See Pusterhofer*, GRC 2005-49.

Therefore, the Custodian has borne her burden of proving that she lawfully denied access to the Complainant's requests for emails and "everything" regarding the gala because the requests are overly broad and she certified that no responsive records exist. *See Burke*, 429 *N.J. Super.* 172, 176; *MAG*, 375 *N.J. Super.* at 549; *Elcavage*, GRC 2009-07; *Pusterhofer*, GRC 2005-49.

### **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 (*Felder v. Stonack*, 141 *N.J.* 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (*Berg v. Reaction Motors Div.*, 37 *N.J.* 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*Id.*; *Marley v. Borough of Palmyra*, 193 *N.J. Super.* 271, 294-95 (Law Div. 1993)); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (*ECES v. Salmon*, 295 *N.J. Super.* 86, 107 (App. Div. 1996)).

Although the Custodian violated *N.J.S.A.* 47:1A-5(g) and *N.J.S.A.* 47:1A-5(i) by failing to respond to the Complainant's request within the statutorily mandated seven (7) business days, she eventually disclosed the responsive letter/invitation and did not unlawfully deny access to the



other requested documents. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian has borne her burden of proving that she did not unlawfully deny access to the requested invitation because, though the document is only partially legible, the GRC does not have authority over the condition of requested records, and the provided document is the only copy of the invitation in the Borough's possession. *See* N.J.S.A. 47:1A-6; Lopez v. County of Hudson, GRC Complaint No. 2009-267 (March 2011); Toscano v. New Jersey Department of Labor, GRC Complaint No. 2005-59 (September 2005); Katinsky v. River Vale Township, GRC Complaint No. 2003-68 (November 2003).
3. The Custodian has borne her burden of proving that she lawfully denied access to the responsive advisory opinion because the document was exempt from access pursuant to statute and its disclosure had not been approved by the vote of two-thirds of all members of the Board. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9(a); N.J.S.A. 40A:9-22.8.
4. The Custodian has borne her burden of proving that she lawfully denied access to the Complainant's requests for emails and "everything" regarding the gala because the requests are overly broad and she certified that no responsive records exist. *See* Burke v. Brandes, 429 N.J. Super. 172, 176 (App. Div. 2012); MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 549 (App. Div. 2005); Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (April 2010); Pusterhofer v. New Jersey Department of Education, GRC 2005-49 (July 2005).
5. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to respond to the Complainant's request within the statutorily mandated seven (7) business days, she eventually disclosed the responsive letter/invitation and did not unlawfully deny access to the other requested documents. Additionally, the evidence

of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

Prepared By: Robert T. Sharkey, Esq.  
Staff Attorney

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

July 22, 2014