



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Acting Commissioner

**FINAL DECISION**

**April 28, 2015 Government Records Council Meeting**

David Herron  
Complainant

Complaint No. 2014-167

v.

Montclair Public Schools (Essex)  
Custodian of Record

At the April 28, 2015 public meeting, the Government Records Council (“Council”) considered the April 21, 2015 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 his burden of proof that he 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Complainant’s request is invalid because it failed to include the subject or content of the e-mails sought. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); NJ Builders Assoc. v. NJ 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); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-124 (April 2010). The Custodian has thus lawfully denied access to Complainant’s request. N.J.S.A. 47:1A-6.
3. Although the Custodian failed to prove that he timely responded to the Complainant’s request, he did not unlawfully deny access to same because the request was invalid. N.J.S.A. 47:1A-6; Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). 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 28<sup>th</sup> Day of April, 2015

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: April 30, 2015**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
April 28, 2015 Council Meeting**

**David Herron<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-167**

v.

**Montclair Public Schools (Essex)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of:

1. All emails from October 24, 2013, and January 8, 2014, for Penny MacCormack, Gail Clark, Alan Benezra, and Robin Kulwin.
2. All personal emails from October 24, 2013, to January 8, 2014, for Ms. MacCormick, Ms. Clark, Mr. Benezra, and Ms. Kulwin.
3. All texts from October 24, 2013, to January 8, 2014, for Ms. MacCormick, Ms. Clark, Mr. Benezra, and Ms. Kulwin.

**Custodian of Record:** Brian Fleischer  
**Request Received by Custodian:** January 9, 2014  
**Response Made by Custodian:** April 11, 2014  
**GRC Complaint Received:** April 11, 2014

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

**Request and Response:**

On January 9, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 20, 2014, the Complainant e-mailed the Custodian advising that he also wished to request the records under common law.<sup>4</sup>

**Denial of Access Complaint:**

On April 11, 2014, the Complainant filed a Denial of Access Complaint with the

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

<sup>2</sup> Represented by Mark Tabakin, Esq., of Weiner Lesniak, LLP (Parsippany, NJ).

<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.

<sup>4</sup> Pursuant to N.J.S.A. 47:1A-7, the GRC only has the authority to adjudicate requests made pursuant to OPRA.

Government Records Council (“GRC”). The Complainant asserted that the Custodian failed to respond to his OPRA request.

#### Supplemental Submissions:

On April 11, 2014, the Custodian advised the Complainant that he responded in writing on January 13, 2014. The Custodian noted that he attached a copy of said response in which he denied the Complainant’s request as invalid in accordance with Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010), MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

#### Statement of Information:

On May 2, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on January 9, 2014 and responded in writing on January 13, 2014, denying access to the Complainant’s OPRA request.

The Custodian contended that all three (3) request items were invalid because the Complainant failed to include the subject and sender/recipient. *See Elcavage*, GRC 2009-07. The Custodian further argued that “personal e-mails” are not government records as defined under OPRA. N.J.S.A. 47:1A-1.1.

#### Additional Submissions:

On November 13, 2014, the GRC requested additional information from the Custodian. Specifically, the GRC requested that the Custodian provide supporting documentation to show when he sent the January 13, 2014, response letter to the Complainant.

On December 8, 2014, the Custodian responded by e-mail, advising that he had no proof that the response letter was sent to the Complainant. Further, the Custodian stated that he had no reason to contest the Complainant’s argument that he did not receive said response at the time of the Denial of Access Complaint filing.

### 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>5</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).

The Complainant filed this complaint, arguing that he did not receive a response from the Custodian. On April 11, 2014, the same day as the Complainant filed this complaint, the Custodian advised the Complainant that he responded on January 13, 2014. The GRC subsequently sought proof that the Custodian sent the response to the Complainant. However, he was unable to provide same, stating to the GRC that he had no reason to contest the Complainant's Denial of Access Complaint argument.

The evidence of record herein supports that the Custodian may have failed to send the response to the Complainant prior to April 11, 2014. Specifically, included as part of the complaint was an e-mail from the Complainant to the Custodian on January 20, 2014, in which he made no mention of the Custodian's response. Moreover, the letter does not include an address block nor does it memorialize the method by which the Custodian would have sent the letter. Based on the foregoing, the GRC is satisfied that the Custodian did not timely respond to the Complainant's OPRA request.

Therefore, the Custodian did not bear his burden of proof that he 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.

### **Validity of Request**

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 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*

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<sup>5</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.

*records “readily accessible for inspection, copying, or examination.” N.J.S.A. 47:1A-1.*

MAG, 375 N.J. Super. at 546 (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, 381 N.J. Super. at 37;<sup>6</sup> NJ Builders Assoc. v. NJ 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).

Regarding requests for e-mails, the GRC has established criteria deemed necessary under OPRA to specifically request an email communication. In Elcavage, GRC 2009-07, the Council determined that to be valid, such requests must contain: (1) the content and/or subject of the email, (2) the specific date or range of dates during which the email(s) were transmitted, and (3) the identity of the sender and/or the recipient thereof. Id.; Sandoval v. NJ State Parole Bd., GRC Complaint No. 2006-167 (Interim Order March 28, 2007). The Council has also applied the criteria set forth in Elcavage to other forms of correspondence, such as letters. *See* Armenti, GRC 2009-154.

In Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-124 (April 2010), the complainant's OPRA request sought all e-mails to or from a particular e-mail account for a specific time period. The custodian's counsel responded, advising the complainant that his OPRA request was invalid because it represented an open-ended search of the Borough's files. The Council held that the complainant's request was invalid under Elcavage, GRC 2009-07 because it did not include a subject or content. Id. at 7.

In the matter currently before the Council, the Complainant's OPRA request sought e-mails and text messages for a specific time period and identified senders/recipients. However,

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<sup>6</sup> Affirming Bent v. Stafford Police Dep't, GRC Case No. 2004-78 (October 2004).

the request failed to include a subject or content. The GRC is satisfied that this request, which is similar to the request at issue in Verry, GRC 2009-124, is invalid because it failed to meet the necessary criteria set forth in Elcavage, GRC 2009-07.

Therefore, the Complainant's request is invalid because it failed to include the subject or content of the e-mails sought. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; NJ Builders, 390 N.J. Super. at 180; Schuler, GRC 2007-151; Elcavage, GRC 2009-07; Verry, GRC 2009-124. The Custodian has thus lawfully denied access to Complainant's request. N.J.S.A. 47:1A-6.

### **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)).

Although the Custodian failed to prove that he timely responded to the Complainant's request, he did not unlawfully deny access to same because the request was invalid. N.J.S.A. 47:1A-6; Elcavage, GRC 2009-07. 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 Custodian did not bear his burden of proof that he 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Complainant's request is invalid because it failed to include the subject or content of the e-mails sought. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); NJ Builders Assoc. v. NJ 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); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-124 (April 2010). The Custodian has thus lawfully denied access to Complainant's request. N.J.S.A. 47:1A-6.
3. Although the Custodian failed to prove that he timely responded to the Complainant's request, he did not unlawfully deny access to same because the request was invalid. N.J.S.A. 47:1A-6; Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). 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: Ernest Bongiovanni  
Staff Attorney

Reviewed By: Joseph D. Glover  
Executive Director

April 21, 2015