



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

March 31, 2015 Government Records Council Meeting

Peter Gartner
Complainant

Complaint No. 2014-203

v.

Borough of Middlesex (Middlesex)
Custodian of Record

At the March 31, 2015 public meeting, the Government Records Council (“Council”) considered the March 31, 2015 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian has failed to establish in her request for reconsideration of the Council’s February 24, 2015 Interim Order that either: 1) the Council’s decision is based upon a “palpably incorrect or irrational basis,” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The Custodian failed to establish that the complaint should be reconsidered based on extraordinary circumstances or a mistake. The Custodian has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. Specifically, although the Custodian asserted that the Council should reconsider its decision and provided evidence to show that she provided raw data to the Complainant’s satisfaction as an alternative to creating a record, the Custodian nonetheless attached the spreadsheet to her filing. While the Council’s case law supports that a custodian is not obligated to create a record, the Custodian offered a spreadsheet and failed to provide any indication that she would have to create same at the time that she filed the Statement of Information. Thus, the Custodian’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. at 384; D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). However, because the Custodian provided the spreadsheet by way of attachment, the Council should consider compliance satisfied.
2. The Custodian failed to respond timely to two (2) of the request items and unlawfully denied access to the record responsive to the Complainant’s OPRA request item No. 2.



However, the Custodian did not unlawfully deny access to request item No. 1 because same was invalid and did not unlawfully deny access to item Nos. 3 and 4 because no records responsive existed. Further, although the Custodian's request for reconsideration was unsuccessful, she effectively complied with the Council's February 24, 2015 Interim Order by attaching the responsive spreadsheet. 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 unlawful denial of access did 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 31st Day of March, 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 2, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration
Supplemental Findings and Recommendations of the Executive Director
March 31, 2015 Council Meeting

Peter Gartner¹
Complainant

GRC Complaint No. 2014-203

v.

Borough of Middlesex (Middlesex)²
Custodial Agency

Records Relevant to Complaint: Copies of:³

1. All communications between the Mayor and Council, Recreation Commission, and Borough of Middlesex (“Borough”) officers regarding any and all violations of Borough ordinances, recreation commission policy guidelines, and State laws, including verbal communications.
2. All coaches appointed by the Recreation Director (“Director”) in the last five (5) years, all coaches approved by the Recreation Commission in the last five (5) years, and proof that coaches met requirements set forth in the Recreation Commission policy guidelines for coaching.
3. Recreation Department review for 2012.
4. Mike Girvan’s weekly assignments, as assigned by the Director, for the last five (5) years.

Custodian of Record: Kathleen Anello
Request Received by Custodian: April 30, 2014
Response Made by Custodian: May 8, 2014
GRC Complaint Received: May 22, 2014

Background

February 24, 2015 Council Meeting:

At its February 24, 2015 public meeting, the Council considered the February 17, 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, found that:

¹ No legal representation listed on record.

² Represented by Aravind Aithal, Esq., of Bob Smith & Associates (Piscataway, NJ).

³ The Complainant requested additional records that are not at issue in this complaint.

1. The Custodian's failure to respond to the Complainant's OPRA request item No. 2 within the new time frame results in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-100 (Interim Order dated June 26, 2012). Further, although the Custodian timely responded to the Complainant's OPRA request item No. 4 in writing requesting an extension of time until May 21, 2014 to respond, the Custodian's failure to respond timely in writing within the extended deadline results in a "deemed" denial of access. N.J.S.A. 47:1A-5(i); Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
2. The Complainant's request item No. 1 is invalid because it failed to provide ample identifiers necessary for the Custodian to locate additional responsive records. 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); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011). The Custodian has thus lawfully denied access to any records beyond those she has already provided. N.J.S.A. 47:1A-6.
3. The Custodian unlawfully denied access to the record responsive to the Complainant's OPRA request item No. 2. N.J.S.A. 47:1A-6. Thus, the Custodian must either disclose the responsive spreadsheet to the Complainant or legally certify to the date she disclosed the responsive records to him and include supporting documentation.
4. **The Custodian shall comply with item No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁴ to the Executive Director.⁵**
5. The Custodian did not unlawfully deny access to OPRA request item Nos. 3 and 4 because the Custodian initially responded that no records exist, subsequently certified to same in the Statement of Information, and there is no evidence in the record to refute the Custodian's certification. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

⁴ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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

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

Procedural History:

On February 25, 2015, the Council distributed its Interim Order to all parties.

On March 4, 2015, the Custodian filed a request for reconsideration of the Council's February 24, 2015 Interim Order, conclusion Nos. 3 and 4, based on a mistake and extraordinary circumstances. The Custodian first noted that the Complainant's initial OPRA request item No. 2 failed to identify specific government records; rather, the item sought names of individuals and proof that they met certain policy guidelines for coaching. The Custodian further asserted that responding to the Complainant's request was a fluid situation due to numerous correspondences between the parties and her reliance on obtaining information from the Director.

The Custodian averred that subsequent to her May 14, 2014 offer to produce a spreadsheet of coaches that did not receive background checks, the Custodian's Counsel advised her that she was under no obligation to create a record in order to respond to an OPRA request. The Custodian stated that she notified the Complainant of Counsel's guidance on May 27, 2014. The Custodian averred that the Complainant agreed to accept the raw number of coaches that did not receive background checks, which she provided via e-mail on May 28, 2014. The Custodian contended that she believed that she adequately satisfied OPRA request item No. 2 at that time and provided e-mails to support her position. The Custodian asserted that, although she received the spreadsheet that the Complainant originally agreed to accept on May 27, 2014 (which is attached to the request for reconsideration), the Complainant indicated his satisfaction with the raw number in writing on May 28, 2015 in an e-mail to the Custodian.

On March 5, 2015, the Complainant submitted objections to the request for reconsideration. The Complainant contended that the Custodian's request for reconsideration is another attempt to delay the disclosure of embarrassing information, which is not a valid exemption under OPRA. The Complainant argued that the Custodian clearly agreed to disclose a spreadsheet without any personal information. The Complainant asserted that he merely sought the date that each coach met the coaching criteria set forth by the Recreation Commission and Borough ordinance. The Complainant contended that the Borough should have disclosed the responsive information.

Analysis

Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council, and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following

receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, the Custodian filed the request for reconsideration of the Council's Order dated February 24, 2015 on March 4, 2015, five (5) business days from the issuance of the Council's Order.

Applicable case law holds that:

“A party should not seek reconsideration merely based upon dissatisfaction with a decision.” D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a “palpably incorrect or irrational basis;” or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, . . . 242 N.J. Super. at 401. “Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.” Ibid.

In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

In this matter, the Custodian argued that, regarding conclusion Nos. 3 and 4, the GRC made a mistake and that extraordinary circumstances warrant reconsideration. In support of her request for reconsideration, the Custodian attached e-mail exchanges available to her prior the Borough's filing of the Statement of Information (“SOI”). These exchanges between the parties provide the following new information:

1. Although the Custodian offered to provide a spreadsheet in response to OPRA request item No. 2, the Director allegedly had to create same from scratch.
2. The Custodian received legal advice that a custodian was not required to create a record after offering the spreadsheet to the Complainant.
3. On May 28, 2014, the Custodian provided a raw number of coaches that did not receive a background check and asked if same satisfied the Complainant's request item No. 2.
4. On the same day, the Complainant confirmed his satisfaction with the Custodian's response.

Although available to the Custodian at the time that she filed the SOI, she did not provide either arguments or documentation supporting her compliance with the Complainant's OPRA request item No. 2 prior to the request for reconsideration. Additionally, the Custodian attached a spreadsheet as part of her filing, which was copied to the Complainant. Notwithstanding the fact that a custodian is not obligated to create a new record, there was no evidence at the time of the

Council's Interim Order to suggest that this action was necessary to comply with the request item. Further, the Custodian has essentially complied with the Council's Order by attaching to the request for reconsideration the spreadsheet of which the Council's Order required disclosure.

To briefly address the Complainant's objections, the evidence of record contradicts his assertions that the Custodian was attempting to delay any disclosure through the filing of the request for reconsideration. Specifically, the evidence supports his acceptance of the raw number of coaches not receiving background checks. Further, the Custodian attached the spreadsheet at issue to the request for reconsideration. Finally, the Complainant reverted to his original request item No. 2 by asserting that he was seeking dates on which coaches met all coaching criteria. However, he amended his request item to seek background check information through various correspondence prior to and during the pendency of this complaint.

As the moving party, the Custodian was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis," or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See Cummings*, 295 N.J. Super. at 384. The Custodian failed to establish that the complaint should be reconsidered based on extraordinary circumstances or a mistake. Thus, the Custodian has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. *See D'Atria*, 242 N.J. Super. at 401. Specifically, although the Custodian asserted that the Council should reconsider its decision and provided evidence to show that she provided raw data to the Complainant's satisfaction as an alternative to creating a record, the Custodian nonetheless attached the spreadsheet to her filing. While the Council's case law supports that a custodian is not obligated to create a record, the Custodian offered a spreadsheet and failed to provide any indication that she would have to create same at the time that she filed the SOI. Thus, the Custodian request for reconsideration should be denied. *Cummings*, 295 N.J. Super. at 384; *D'Atria*, 242 N.J. Super. at 401; *Comcast*, 2003 N.J. PUC at 5-6. However, because the Custodian provided the spreadsheet by way of attachment, the Council should consider compliance satisfied.

Knowing & Willful

OPRA states that "[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . ." *N.J.S.A.* 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states ". . . [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . ." *N.J.S.A.* 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent

conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless, or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Here, the Custodian failed to respond timely to two (2) of the request items and unlawfully denied access to the record responsive to the Complainant's OPRA request item No. 2. However, the Custodian did not unlawfully deny access to request item No. 1 because same was invalid and did not unlawfully deny access to item Nos. 3 and 4 because no responsive records existed. Further, although the Custodian's request for reconsideration was unsuccessful, she effectively complied with the Council's February 24, 2015 Interim Order by attaching the responsive spreadsheet. 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 unlawful denial of access did 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 has failed to establish in her request for reconsideration of the Council's February 24, 2015 Interim Order that either: 1) the Council's decision is based upon a "palpably incorrect or irrational basis," or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The Custodian failed to establish that the complaint should be reconsidered based on extraordinary circumstances or a mistake. The Custodian has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. Specifically, although the Custodian asserted that the Council should reconsider its decision and provided evidence to show that she provided raw data to the Complainant's satisfaction as an alternative to creating a record, the Custodian nonetheless attached the spreadsheet to her filing. While the Council's case law supports that a custodian is not obligated to create a record, the Custodian offered a spreadsheet and failed to provide any indication that she would have to create same at the time that she filed the Statement of Information. Thus, the Custodian's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. at 384; D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). However, because the Custodian

provided the spreadsheet by way of attachment, the Council should consider compliance satisfied.

2. The Custodian failed to respond timely to two (2) of the request items and unlawfully denied access to the record responsive to the Complainant's OPRA request item No. 2. However, the Custodian did not unlawfully deny access to request item No. 1 because same was invalid and did not unlawfully deny access to item Nos. 3 and 4 because no records responsive existed. Further, although the Custodian's request for reconsideration was unsuccessful, she effectively complied with the Council's February 24, 2015 Interim Order by attaching the responsive spreadsheet. 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 unlawful denial of access did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

Approved By: Dawn R. SanFilippo
Deputy Executive Director

March 31, 2015



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

February 24, 2015 Government Records Council Meeting

Peter Gartner
Complainant

Complaint No. 2014-203

v.

Borough of Middlesex (Middlesex)
Custodian of Record

At the February 24, 2015 public meeting, the Government Records Council (“Council”) considered the February 17, 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’s failure to respond to the Complainant’s OPRA request item No. 2 within the new time frame results in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-100 (Interim Order dated June 26, 2012). Further, although the Custodian timely responded to the Complainant’s OPRA request item No. 4 in writing requesting an extension of time until May 21, 2014 to respond, the Custodian’s failure to timely respond in writing within the extended deadline results in a “deemed” denial of access. N.J.S.A. 47:1A-5(i); Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
2. The Complainant’s request item No. 1 is invalid because it failed to provide ample identifiers necessary for the Custodian to locate additional responsive records. 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); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011). The Custodian has thus lawfully denied access to any records beyond those she has already provided. N.J.S.A. 47:1A-6.
3. The Custodian has unlawfully denied access to the record responsive to the Complainant’s OPRA request item No. 2. N.J.S.A. 47:1A-6. Thus, the Custodian must either disclose the responsive spreadsheet to the Complainant or legally certify to the date she disclosed the responsive records to him to include supporting documentation.



4. **The Custodian shall comply with item No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**
5. The Custodian did not unlawfully deny access to OPRA request item Nos. 3 and 4 because the Custodian initially responded that no records exist, subsequently certified to same in the Statement of Information, and there is no evidence in the record to refute the Custodian's certification. *See Pusterhofer v. N.J. Dep't of Educ.*, GRC Complaint No. 2005-49 (July 2005).
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 24th Day of February, 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: February 25, 2015

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 24, 2015 Council Meeting**

**Peter Gartner¹
Complainant**

GRC Complaint No. 2014-203

v.

**Borough of Middlesex (Middlesex)²
Custodial Agency**

Records Relevant to Complaint: Copies of:³

1. All communications between the Mayor and Council, Recreation Commission, and Borough of Middlesex (“Borough”) officers regarding any and all violations of Borough ordinances, recreation commission policy guidelines, and State laws, including verbal communications.
2. All coaches appointed by the Recreation Director (“Director”) in the last five (5) years, all coaches approved by the Recreation Commission in the last five (5) years, and proof that coaches met requirements set forth in the Recreation Commission policy guidelines for coaching.
3. Recreation Department review for 2012.
4. Mike Girvan’s weekly assignments, as assigned by the Director, for the last five (5) years.

Custodian of Record: Kathleen Anello

Request Received by Custodian: April 30, 2014

Response Made by Custodian: May 8, 2014

GRC Complaint Received: May 22, 2014

Background⁴

Request and Response:

On April 30, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On May 8, 2014, the Custodian

¹ No legal representation listed on record.

² Represented by Aravind Aithal, Esq., of Bob Smith & Associates (Piscataway, NJ).

³ The Complainant requested additional records that are not at issue in this complaint.

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.

responded in writing advising that additional time until May 15, 2014 would be necessary to fulfill the Complainant's OPRA request.

On May 13, 2014, the Custodian advised the Complainant that a response to the OPRA request would cost \$75.00. The Custodian stated that, if the Complainant did not wish to pay the fee, she would provide a spreadsheet to the Complainant with the responsive information. However, the Custodian would require that the Complainant withdraw the current request item and submit a new request for the spreadsheet. On May 14, 2014, the Complainant agreed to accept a spreadsheet and amended his OPRA request item No. 2 to seek a summary of the total number of background checks missed over the last five (5) years and a summary of any other paperwork that went uncollected by the Recreation Department for the same period.

On May 15, 2014, the Custodian responded to the Complainant as follows:

1. The Custodian attached fourteen (14) pages of e-mails responsive to this item and three (3) additional pages of e-mails with redactions for information that is attorney-client privileged.
2. The Custodian acknowledged receipt of the Complainant's amendment and advised that the time frame to respond, which began anew upon submission of the "new" request, will end on May 23, 2014.
3. The Custodian stated that no responsive records exist.
4. The Custodian stated that because the Director is out on medical leave, she would not be able to respond until May 21, 2014.

On May 16, 2014, the Complainant questioned why the Custodian's response to item No. 1 only contained records from 2014 when his request sought all communications regarding violations. Further, regarding item No. 3, the Complainant stated that he became aware of the issue from executive session minutes and asked if there were subsequent minutes reflecting that the Mayor no longer requested individual department reviews. On the same day, the Custodian advised that the records provided were all records she received from the Borough. The Custodian further noted that executive session minutes were available when approved and that a valid request does not seek answers to questions.

Denial of Access Complaint:

On May 22, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that, in response to his OPRA request, he received limited e-mails from 2014; however, violations date back to 2011. Further, the Complainant asserted that he did not receive responsive records to item Nos. 2, 3, and 4.

Supplemental Responses and Submissions:

On May 23, 2014, the Complainant e-mailed the GRC, noting that the Custodian agreed to provide records responsive to item No. 2 on this day and failed to do so. The Complainant contended that the Custodian's failure to respond constitutes a knowing and willful violation of

OPRA. The Complainant contended that the Borough is attempting to delay disclosure of records, which he alleged would prove that the Director is ignoring Borough ordinances.

On May 27, 2014, the Custodian sought additional clarification of request item No. 2. Specifically, the Custodian asked the Complainant to confirm whether he was seeking only the number of individuals that did not have background checks.

On May 29, 2014, the Custodian e-mailed the Director asking her to clarify an earlier e-mail regarding request item No. 4. On May 30, 2014, the Director resent the relevant e-mail including her response.

On May 30, 2014, the Custodian responded to the Complainant's request item No. 4 stating that, per the Director, the Recreation Commission Policy ("Policy") has never been interpreted to require that the Director create weekly assignments for Mr. Girvan. Finally, the Custodian apologized for the delayed response, noting that the Director did provide a response to item No. 4 in a timely manner.

On June 2, 2014, the Complainant e-mailed the GRC stating that he received the Complainant's May 30, 2014 response. The Complainant stated that the Custodian initially advised that she would respond by May 21, 2014; however, she has now advised that she actually had the answer from the Director but simply failed to provide same to him. The Complainant asserted that this response further proves that the Custodian knowingly and willfully violated OPRA.

Statement of Information:

On June 16, 2014, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on April 30, 2014. The Custodian certified that she forwarded the request to all individuals possibly in possession of responsive records with a due date to provide same to her for dissemination. The Custodian certified that she responded to the Complainant four (4) times beginning on May 8, 2014 and ending on May 30, 2014.

The Custodian certified that, in response to OPRA request item No. 1, she provided fourteen (14) e-mails to the Complainant. The Custodian affirmed that she redacted attorney-client privileged material from a few of the e-mails. Further, the Custodian certified that the Complainant rescinded item No. 2 and submitted a new request.

The Custodian also certified that no records responsive to item Nos. 3 and 4 existed. The Custodian affirmed that the delay in her response to item No. 4 was due to a miscommunication between the Director and herself as to whether or not records existed. The Custodian certified that certain records were not provided because they did not exist; however, she mistakenly failed to advise the Complainant of this fact until May 30, 2014.

Additional Submissions:

On June 21, 2014, the Complainant reiterated his Denial of Access Complaint arguments that the Borough knowingly and willfully violated OPRA by unlawfully denying access to responsive records.

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).⁵ 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).

Moreover, should a requestor amend or clarify an OPRA request, it is reasonable that the time frame for a custodian to respond should begin anew; thus, providing a custodian with the statutorily mandated time frame to respond to the new or altered OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). See Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-100 (Interim Order dated June 26, 2012)(holding that the custodian's failure to respond within the new time frame following receipt of clarification resulted in a "deemed" denial of access).

Additionally, OPRA provides that:

If the government record is in storage or archived, the requestor shall be so advised within seven business days after the custodian receives the request. The requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied.

N.J.S.A. 47:1A-5(i).

In Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5th) business day after receipt of the complainant's March 19, 2007 OPRA request seeking an extension of time until April 20, 2007. However, the custodian responded again on April 20, 2007, stating that the requested records would be provided later in the week. Id. The evidence of record showed that no records were provided until May 31, 2007. Id. The GRC held that:

⁵ 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.

The [c]ustodian properly requested an extension of time to provide the requested records to the [c]omplainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) . . . however . . . [b]ecause the [c]ustodian failed to provide the [c]omplainant access to the requested records by the extension date anticipated by the [c]ustodian, the [c]ustodian violated N.J.S.A. 47:1A-5(i) resulting in a “deemed” denial of access to the records.

Id.

Here, the Custodian timely responded to the Complainant’s OPRA request seeking an extension until May 15, 2014 to respond. The Custodian subsequently responded on the last day of the extended time frame acknowledging receipt of the Complainant’s amended OPRA request item No. 2 and advising that the new time frame to respond would end on May 23, 2014. Further, the Custodian sought a second extension for request item No. 4. However, the Custodian failed to respond until May 27, 2014 (seeking additional clarification of item No. 2) and May 30, 2014 (providing a response to item No. 4) respectively.

Therefore, the Custodian’s failure to respond to the Complainant’s OPRA request item No. 2 within the new time frame results in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Carter, GRC 2011-100. Further, although the Custodian timely responded to the Complainant’s OPRA request item No. 4 in writing requesting an extension of time until May 21, 2014 to respond, the Custodian’s failure to timely respond in writing within the extended deadline results in a “deemed” denial of access. N.J.S.A. 47:1A-5(i); Kohn, GRC 2007-124.

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 request item No. 1

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 ABC, 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);⁶ 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).

The GRC established criteria deemed necessary under OPRA to specifically request an email communication in Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). 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. *See Elcavage*, GRC 2009-07; 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 v. Robbinsville Bd. of Educ. (Mercer)*, GRC Complaint No. 2009-154 (Interim Order May 24, 2011). The GRC notes that the Council has routinely determined that requests omitting the specific date or range of dates are invalid. *See Tracey-Coll v. Elmwood Park Bd. of Educ. (Bergen)*, GRC Complaint No. 2009-206 (June 2010); Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2013-118 (January 2014).

Additionally, in Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012), the Court held that the defendant “performed a search and was able to locate records responsive . . .” which “. . . belied any assertion that the request was lacking in specificity or was overbroad.” Id. at 177. *See also Gannett v. Cnty. of Middlesex*, 379 N.J. Super. 205 (App. Div. 2005)(holding that “[s]uch a voluntary disclosure of most of the documents sought . . . constituted a waiver of whatever right the County may have had to deny Gannett's entire OPRA request on the ground that it was improper.” Id. at 213).

Generally, in situations where a request was overly broad on its face but the custodian was able to locate records, the Council has followed Burke, in determining that the request

⁶ Affirming Bent v. Stafford Police Dep’t, GRC Case No. 2004-78 (October 2004).

contained sufficient information for record identification. See Bond v. Borough of Washington (Warren), GRC Complaint No. 2009-324 (Interim Order dated March 29, 2011); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2010-302 (Interim Order dated January 31, 2012). However, there have been instances where, notwithstanding the custodian's ability to locate certain records, the Council has determined that the request was nonetheless invalid. See Ciszewski v. Newton Police Dep't (Sussex), GRC Complaint No. 2013-90 (October 2013) at 4-5.

Here, in response to request item No. 1 seeking "communications . . . including verbal communications," the Custodian provided fourteen (14) e-mails (some with redactions for which the Complainant did not take issue). In the Denial of Access Complaint, the Complainant asserted that the Custodian failed to provide records as far back as 2011. However, the request item did not include a time frame, as is required of a valid request for communications per Elcavage, GRC 2009-07; Armenti, GRC 2009-154.

Similar to the facts in Ciszewski, notwithstanding that the Custodian provided responsive records for 2014, the Complainant's assertion that records exist dating back to 2011 sufficiently proves that the request item was deficient. The GRC is satisfied that the Custodian could not have reasonably assumed that the Complainant's request sought correspondence as far back as 2011 because the Complainant did not indicate this in his initial OPRA request.

Finally, based on a plain reading of the definition of a government record under OPRA, "verbal communications" not otherwise memorialized in physical form (such as a voice recording) do fall within the universe of disclosable records. N.J.S.A. 47:1A-1.1.

Therefore, the Complainant's request item No. 1 is invalid because it failed to provide ample identifiers necessary for the Custodian to locate additional responsive records. 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; Armenti, GRC 2009-154. The Custodian has thus lawfully denied access to any records beyond those she has already provided. N.J.S.A. 47:1A-6.

OPRA request item No. 2

In accordance with the Complainant's amendment to this request item, the record currently as issue is a spreadsheet summary of missed background checks and uncollected documents. On May 15, 2014, the Custodian advised the Complainant that she would respond by close of business on May 23, 2014. The next communication in the record was a May 27, 2014 e-mail from the Custodian to the Complainant seeking additional clarification of the request item. There is no other evidence in the record to support any additional action on this request item.

The evidence indicates that, at the very least, the Custodian was prepared to disclose a record to the Complainant. However, there is no indication as to whether such a disclosure took place.

Based on the foregoing, the Custodian has unlawfully denied access to the record responsive to the Complainant's OPRA request item No. 2. N.J.S.A. 47:1A-6. Thus, the Custodian must either disclose the responsive spreadsheet to the Complainant or legally certify to the date she disclosed the responsive records to him to include supporting documentation.

OPRA request item Nos. 3 and 4

In Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005), the custodian certified that no records responsive to the complainant's request for billing records existed and the complainant submitted no evidence to refute the custodian's certification regarding said records. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian's certification, there was no unlawful denial of access to the requested records.

In the instant matter, the Custodian responded on May 15, 2014 stating that no records responsive to item No. 3 existed. The Custodian subsequently responded again on May 30, 2014, similarly stating that no record responsive to item No. 4 existed. The Custodian further certified to these facts in the SOI. Further, there is no evidence in the record to contradict the Custodian's certification.

Accordingly, the Custodian did not unlawfully deny access to OPRA request item Nos. 3 and 4 because the Custodian initially responded that no records exist, subsequently certified to same in the SOI, and there is no evidence in the record to refute the Custodian's certification. *See Pusterhofer*, GRC 2005-49.

Knowing & Willful

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond to the Complainant's OPRA request item No. 2 within the new time frame results in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-100 (Interim Order dated June 26, 2012). Further, although the Custodian timely responded to the Complainant's OPRA request item No. 4 in writing requesting an extension of time until May 21, 2014 to respond, the Custodian's failure to timely respond in writing within the extended deadline results in a "deemed" denial of access. N.J.S.A. 47:1A-5(i); Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).

2. The Complainant's request item No. 1 is invalid because it failed to provide ample identifiers necessary for the Custodian to locate additional responsive records. 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); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011). The Custodian has thus lawfully denied access to any records beyond those she has already provided. N.J.S.A. 47:1A-6.
3. The Custodian has unlawfully denied access to the record responsive to the Complainant's OPRA request item No. 2. N.J.S.A. 47:1A-6. Thus, the Custodian must either disclose the responsive spreadsheet to the Complainant or legally certify to the date she disclosed the responsive records to him to include supporting documentation.
4. **The Custodian shall comply with item No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁷ to the Executive Director.⁸**
5. The Custodian did not unlawfully deny access to OPRA request item Nos. 3 and 4 because the Custodian initially responded that no records exist, subsequently certified to same in the Statement of Information, and there is no evidence in the record to refute the Custodian's certification. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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Approved By: Dawn R. SanFilippo
Deputy Executive Director

February 17, 2015

⁷ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁸ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.