



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**

Caren Caterina (On behalf of  
The Coast Star)  
Complainant

Complaint No. 2014-66

v.

Borough of Sea Girt (Monmouth)  
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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Because the Complainant’s request is overly broad and fails to seek identifiable government records, the request is invalid under OPRA and the Custodian has not unlawfully denied access to the requested records. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30 (App. Div. 2005); NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166 (App. Div. 2007); Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012). *See also* Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009) and Elcavage v. W. Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010).
3. 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, 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**

**Caren Caterina (on behalf of The Coast Star)<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-66**

**v.**

**Borough of Sea Girt (Monmouth)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of any e-mails, faxes, letters or other correspondence exchanged between Sea Girt Mayor Ken Farrell, Sea Girt Tax Assessor Bernard Haney and/or Monmouth County Tax Administrator Matthew Clark during the ninety (90) day period prior to January 10, 2014.

**Custodian of Record:** Lorraine Carafa  
**Request Received by Custodian:** January 13, 2014  
**Response Made by Custodian:** January 24, 2014  
**GRC Complaint Received:** February 4, 2014

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

**Request and Response:**

On January 13, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking to pick up the above-mentioned records. On January 24, 2014, the eighth (8<sup>th</sup>) business day following receipt of said request, the Custodian responded in writing informing the Complainant that the request was denied because it was vague and overly broad. The Custodian also informed the Complainant that the Complainant would have to contact the Monmouth County Counsel’s office for any information related to a County employee.

**Denial of Access Complaint:**

On February 4, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that she filed her OPRA request on January 10, 2014, and the Custodian denied the request on January 24, 2014.

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

<sup>2</sup> Represented by O. Nicholas Monaco, Esq., of Montenegro, Thompson, Montenegro & Genz, P.A. (Brick Township, 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.

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The Complainant further states that the Custodian denied her request because the Custodian asserted that it does not name specifically identifiable records and is vague and overly broad. The Complainant further states that the request “could not be any more specific as it asks for specific items relating to those three specific parties during a specific time period.”

#### Statement of Information:

On February 26, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that she received the Complainant’s request on January 13, 2014, and denied the request on January 24, 2014.

The Custodian argues through counsel that the records requested are not government records as defined under OPRA because the Custodian was never copied on any e-mail correspondence communicated between the parties referenced in the Complainant’s request. The Custodian argues that, because the requested records do not meet the definition of a government record, no denial of access to government records could have occurred and the complaint should be dismissed.

The Custodian further argues that the request was properly denied because it does not name specifically identifiable records and is vague and overly broad. The Custodian cites MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Dep’t, 381 N.J. Super. 30 (App. Div. 2005), among other cases, in support of her denial.

Finally, the Custodian states that a record request for a communication “related to a County employee” such as the Monmouth County Tax Administrator should be directed to the County Counsel’s office.

### 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.

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Here, the Custodian received the Complainant's request on January 13, 2014, but did not provide a written response until January 24, 2014. The Custodian therefore failed to respond to the OPRA request until the eighth (8<sup>th</sup>) business day following receipt of the request.

As such, 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.

OPRA defines a government record as:

...any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof.

N.J.S.A. 47:1A-1.1.

The Custodian asserts that the requested records are not government records as defined under OPRA because the Custodian was never copied on any e-mail correspondence communicated between the parties referenced in the Complainant's request. The Custodian therefore argues that the records have not been made, maintained or kept on file in the course of business by *the Custodian*; accordingly, there was no denial of access to a government record. Here, the requested records are communications between Sea Girt Mayor Ken Farrell, Sea Girt Tax Assessor Bernard Haney and/or Monmouth County Tax Administrator Matthew Clark. The Borough of Sea Girt is a political subdivision of the State of New Jersey. If any of the requested records were made in the course of the Borough's business by any official of the Borough, or received, maintained or kept on file within the Borough, regardless of the actual recipient or possessor, the records would meet the definition of a government record.<sup>5</sup>

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<sup>5</sup> The Custodian's Counsel also suggests that a record request for a communication "related to a County employee" such as the Monmouth County Tax Administrator should be directed to the County Counsel's office. This is not *Caren Caterina (on behalf of The Coast Star) v. Borough of Sea Girt (Monmouth)*, 2014-66 – Findings and Recommendations of the Executive Director

The Custodian also states that the request was properly denied because it does not name specifically identifiable records and is vague and overly broad.

The New Jersey Appellate Division has held that “[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records ‘readily accessible for inspection, copying, or examination.’* N.J.S.A. 47:1A-1.” 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. (emphasis added). *See also Bent v. Stafford Police Dep’t*, 381 N.J. Super. 30, 37 (App. Div. 2005),<sup>6</sup> NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007) and 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).

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correct. Regardless of to whom or what the communication is related, if the record was made or received in the course of Sea Girt’s official business and/or maintained or kept on file in the course of Sea Girt’s official business, Sea Girt would be the custodial agency for such a record and, as such, the proper recipient of an OPRA request for that record.

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

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Here, the Complainant's OPRA request sought "e-mails, faxes, letters or other correspondence" by and between the mayor, the tax assessor and the county tax administrator for a specific period (October 12, 2013 through January 10, 2014). The request in this complaint is similar to the request in Burke, 429 N.J. Super. 169, which sought "all...written or electronic correspondence" between the named sender and recipient. Id. at 173. In Burke, however, the request was narrowed to a specific and clearly identified subject. Conversely, here the Complainant failed to specify the subject of the requested e-mails, faxes, letters or other correspondence. This omission renders the request here overly broad because the Custodian would have been unable to focus upon a discrete and limited subject when conducting a search for the requested records. As such, the Complainant's request is invalid under OPRA.

Accordingly, because the Complainant's request is overly broad and fails to seek identifiable government records, the request is invalid under OPRA and the Custodian has not unlawfully denied access to the requested records. MAG, 375 N.J. Super. 534; Bent, 381 N.J. Super. 30; New Jersey Builders, 390 N.J. Super. at 166; Burke, 429 N.J. Super. 169. *See also* Schuler, GRC 2007-151 and Elcavage, GRC 2009-07.

### **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 (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Although the Custodian violated N.J.S.A. 47:1A-5(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, 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Because the Complainant's request is overly broad and fails to seek identifiable government records, the request is invalid under OPRA and the Custodian has not unlawfully denied access to the requested records. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30 (App. Div. 2005); NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166 (App. Div. 2007); Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012). *See also* Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009) and Elcavage v. W. Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010).
3. 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, 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: John E. Stewart, Esq.

Approved By: Dawn R. SanFilippo, Esq.  
Senior Counsel

July 22, 2013