



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

September 29, 2016 Government Records Council Meeting

Greg Bogert
Complainant

Complaint Nos. 2015-207 and 2015-208

v.

Borough of Riverdale (Morris)
Custodian of Record

At the September 29, 2016 public meeting, the Government Records Council (“Council”) considered the September 22, 2016 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 the original Custodian did not unlawfully deny access to the requested records because the current Custodian certified that she provided the correspondence she believed to be responsive to the request. Further, the Complainant already possessed the e-mail record at issue in these two (2) complaints at the time the requests were made. Additionally, requiring the original Custodian to duplicate another copy of the requested record for Complainant does not advance the purpose of OPRA, which is to ensure an informed citizenry. *See* Bart v. City of Paterson Hous. Auth., GRC Complaint No. 2005-145 (May 2006) and Owoh (on behalf of O.R.) v. West Windsor-Plainsboro Reg’l Sch. Dist. (Mercer), GRC Complaint No. 2012-330 (Interim Order dated February 26, 2013).

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 29th Day of September, 2016

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: October 4, 2016



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 29, 2016 Council Meeting**

**Greg Bogert¹
Complainant**

GRC Complaint No. 2015-207, 2015-208²

v.

**Borough of Riverdale (Morris)³
Custodial Agency**

Records Relevant to Complaint:

April 29, 2013 OPRA request:⁴ Copies of any and all e-mails from April 1, 2011, through April 29, 2013, which contain the name: Sgt. Greg Bogert, Gregory Bogert, G. Bogert, Bogert including e-mails pertaining to me or the family name (BOGERT), which were sent or received between four (4) specific e-mail addresses.

May 15, 2013 OPRA request:⁵ Copies of all those e-mails, both sent and received between Mayor William Budesheim and the Complainant's ex-wife, from April 1, 2011, to May 15, 2013, between five (5) specific e-mail addresses.

Custodian of Record: Abubakar Jalloh⁶

Request Received by Custodian: April 29, 2013; May 15, 2013

Response Made by Custodian: May 2013 (exact date unknown); May 30, 2013; June 24, 2013

GRC Complaints Received: July 10, 2015

Background⁷

Request and Response:

April 29, 2013 OPRA Request

On April 29, 2013, the Complainant submitted an Open Public Records Act ("OPRA") request to the original Custodian seeking the above-mentioned records. On an unknown date in

¹ Represented by Patrick Toscano, Jr., Esq. (Caldwell, NJ)

² The GRC has consolidated these complaints for adjudication because of the commonality of the parties and issues.

³ Represented by James T. Bryce, Esq. (Riverdale, NJ)

⁴ This request is the subject of GRC Complaint No. 2015-207.

⁵ This request is the subject of GRC Complaint No. 2015-208.

⁶ Carol Talerico was the original Custodian of Record and responded to the requests at issue in this complaint.

⁷ 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.

May 2013, the Custodian's Counsel responded by providing four (4) responsive e-mails.⁸

May 15, 2013 OPRA Request

On May 15, 2013, the Complainant submitted a second OPRA request to the original Custodian seeking the above-mentioned records. On May 29, 2013, the original Custodian e-mailed the Mayor, requesting that he advise her in writing that he provided her with all e-mails he had located. On the same day, the Mayor e-mailed the Custodian, advising that he provided her all located e-mails.

On May 30, 2013, the original Custodian responded in writing, stating that she requested that the Mayor conduct a search for e-mails responsive to the Complainant's OPRA request in his e-mail account. The original Custodian stated that she "visually viewed his screen which stated that there were no search results for that e-mail." She then advised that, with respect to the other e-mail addresses, the Mayor stated that they were his personal e-mail addresses and that he would not respond to those on the advice of his attorney.

On June 24, 2013, the original Custodian e-mailed the Complainant, stating "I am responding to you in writing regarding the Mayor's response to your OPRA request for copies of e-mails he has with regard to . . ." the e-mail addresses identified in the instant OPRA request. The original Custodian stated that the Mayor informed her that "he does not have any other e-mails beside the one that he has already made available to you through your May 9, OPRA request." She further stated that there is no other way to request those documents from the Mayor because she has no access to his computers.

Denial of Access Complaint:

April 29, 2013 OPRA Request

On July 10, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that, in early April 2013, his then-six-year-old daughter brought "art work home from her mother's house." The Complainant attached a copy of the work, containing a print-out of a November 2012 e-mail.

The Complainant stated that on the back of this work was a copy of an e-mail between the Mayor and the Complainant's ex-wife. The Complainant stated that "after reading the e-mail, it became apparent that the Mayor and my ex-wife" previously corresponded about his medical history. The Complainant stated that he submitted the first (1st) of two (2) separate OPRA requests on April 29, 2013, the subject of GRC 2015-207. The Complainant asserted that "when the Mayor failed to provide the e-mail" following his first (1st) request, he submitted a more detailed, second request on May 15, 2013. The Complainant stated that "[a]gain the mayor failed to supply e-mails, including the one which was already in my possession."

⁸ The Complainant did not raise the issue of timeliness. The GRC therefore declines to examine that issue with respect to the underlying request.

The Complainant stated that the original Custodian “tried her best” to obtain the requested records but argued that the mayor did not cooperate and did not provide the correspondence as requested. The Complainant stated that he received an e-mail from the original Custodian on May 30, 2013, advising that the Mayor searched for the ex-wife’s e-mail address “with negative results” but would not release e-mails from his personal e-mail without first speaking to his attorney.

May 15, 2013 OPRA Request

The Complainant filed a second Complaint on July 10, 2015. Therein, the Complainant stated that he submitted a more detailed second request on May 15, 2013, after he did not receive the e-mail in question in response to his April 29, 2013 request. He stated that “[a]gain the mayor failed to supply e-mails, including the one which was already in my possession.” The Complainant acknowledged that, to the best of his knowledge, the original Custodian tried her best to obtain all records, but he contended that the mayor did not cooperate. He stated that he received a May 30, 2013 e-mail from the original Custodian, who asserted that the mayor had searched for his ex-wife’s e-mail address with “negative results” but that he would not release others from “his personal e-mail” without speaking to his attorney.

Statement of Information:

May 15, 2013 OPRA Request

On July 31, 2015, the current Custodian filed a Statement of Information (“SOI”) for GRC 2015-208. The current Custodian certified that the Borough received the Complainant’s second (2nd) OPRA request on May 15, 2013. He certified that the original Custodian responded on May 30, 2013, and June 24, 2013. According to the current custodian, the record indicated that the original Custodian requested the Mayor to search e-mails “from or to the requested e-mail address” and personally viewed the computer screen showing no search results. He stated that the original Custodian also requested that the Mayor search his other e-mail accounts for e-mails from or to the requested e-mail address and that the Mayor had notified her that no e-mails existed, other than what was previously provided.

The current Custodian argued that the complaint was “stale” pursuant to Mason v. City of Hoboken, 196 N.J. 51 (2008). He noted that, in the two years since the alleged cause of the complaint accrued, the original Custodian had retired. The current Custodian further contended that he has no knowledge of the request, its history, facts, or details “that could otherwise prove or disprove the substantive and technical aspects of the request made and the response.”

The current Custodian additionally argued that, regardless of the “late filing,” the original Custodian took reasonable steps in attempting to obtain the requested documents. He contended that if a custodian is informed that no responsive document exists and there is no independent method by which to verify the statement or obtain the record, the custodian cannot release a record that does not exist.

The Custodian then argued that the underlying request here was invalid, pursuant to

Herron v. Montclair Pub. Sch. (Essex), GRC Complaint No. 2014-167 (April 2015)(holding that a request for e-mails between individuals within a specific timeframe was invalid if the request did not contain the subject matter or content of the e-mail). *See* Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). The current Custodian contended that this request, while it contained the date range and identity of sender and/or receiver, did not contain the content or subject of the requested e-mail. The current Custodian furthermore argued that the records sought in this request were not, in fact, government records, because the Complainant sought e-mails that were personal in nature and not in the course of official business.

April 29, 2013 OPRA Request

On August 5, 2015, the current Custodian filed an SOI for 2015-207. The current Custodian certified that the Borough received the Complainant's first (1st) OPRA request on April 29, 2013. The current Custodian certified that the original Custodian responded in writing in "May 2013, exact date unknown," providing the following four (4) responsive records: 1) e-mail of April 14, 2011; 2) e-mail of January 11, 2013; 3) e-mail of November 9, 2012; and 4) e-mail of November 12, 2012. The current Custodian additionally noted that original Custodian retired in the intervening period between the request and the complaint being filed and was therefore unavailable to assist.

The current Custodian argued that, in response to the Complainant's request, the original Custodian conducted a search of the stated e-mail accounts, resulting in the four e-mails provided. He additionally disputed that the e-mail attached to the complaint, which the Complainant alleges was kept from him, was in fact responsive to the subject request.

The current Custodian further referenced a previous GRC decision, Herron, GRC 2014-167. *See also* Elcavage, GRC 2009-07. The current Custodian stated that the contested November 12, 2012 e-mail was within the time frame and identifiers of the request. However, a "thorough review" of the e-mail in question demonstrated that it contained no references to the identified content or subject. He further argued that no violation of OPRA occurred because the attached e-mail was not responsive to the request.

Finally, the current Custodian was unable to specify the exact date the previous Custodian responded to the request, noting only that it was "May 2013" and argued that, should the GRC determine there was a timing violation, there was in fact no unlawful denial of access.

Analysis

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008), the Appellate Division held that a complainant could not have been denied access to a requested record if he already had in his possession at the time of the OPRA request the document he sought. Id. at 617. The Appellate Division further noted that requiring a custodian to duplicate another copy of the requested record and send it to the complainant does not advance the purpose of OPRA, which is to ensure an informed citizenry. Id.

The Appellate Division's decision in Bart turns upon the specific facts of that case. The Council's decision there noted the custodian's certification that copies of the requested record were available at the Housing Authority's front desk upon simple verbal request by any member of the public. Moreover, the complainant actually admitted that he was in possession of this record at the time of the OPRA request for the same record. Bart v. City of Paterson Hous. Auth., GRC Complaint No. 2005-145 (May 2006).

Additionally, in Owoh (on behalf of O.R.) v. West Windsor-Plainsboro Reg'l Sch. District (Mercer), GRC Complaint No. 2012-330 (Interim Order dated February 26, 2013), the complainant sought access to student discipline reports. The custodian's counsel responded, indicating that he provided the records in response to a prior OPRA request. The Council held that:

The Custodian did not unlawfully deny access to the records responsive to request item no. 8 because at the time of the Complainant's December 14, 2012 OPRA request, the Complainant had already been provided with full access to the requested records in both hard copy and in electronic format. Thus, requiring the Custodian to duplicate another copy of the requested records and send them to the Complainant does not advance the purpose of OPRA, which is to ensure an informed citizenry, pursuant to [Bart, *supra*].

Id.

Here, the Complainant argued that the Borough violated OPRA in failing to provide him with an e-mail that he admitted in GRC 2015-208 "was already in [his] possession." Additionally, the current Custodian averred that the original Custodian conducted a search and did obtain four e-mails responsive to the specific identifiers in the Complainant's request, which she then disclosed to the Complainant.

Therefore, the original Custodian did not unlawfully deny access to the requested records because the current Custodian certified that she provided the correspondence she believed to be responsive to the request. Further, the Complainant already possessed the e-mail record at issue in these two (2) complaints at the time the requests were made. Additionally, requiring the original Custodian to duplicate another copy of the requested record for Complainant does not advance the purpose of OPRA, which is to ensure an informed citizenry. *See* Bart, *supra* and Owoh, *supra*.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the original Custodian did not unlawfully deny access to the requested records because the current Custodian certified that she provided the correspondence she believed to be responsive to the request. Further, the Complainant already possessed the e-mail record at issue in these two (2) complaints at the time the requests were made. Additionally, requiring the original Custodian to duplicate another copy of the requested record for Complainant does not advance the purpose of OPRA, which is to ensure an informed citizenry. *See* Bart v. City of Paterson Hous. Auth., GRC Complaint No. 2005-145 (May 2006) and Owoh (on behalf of O.R.) v. West Windsor-Plainsboro Reg'l Sch. Dist. (Mercer), GRC Complaint No. 2012-330 (Interim Order dated February 26, 2013).

Prepared By: Husna Kazmir
Staff Attorney

September 22, 2016