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Governor

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Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

June 28, 2016 Government Records Council Meeting

Frank J. Campisi
Complainant

v.

City of Millville (Cumberland)
Custodian of Record

Complaint No. 2015-386

At the June 28, 2016 public meeting, the Government Records Council (“Council”) considered the June 21, 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:

1. Although the Custodian timely responded in writing to the Complainant’s OPRA request, said response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Hardwick v. NJ Dep’t of Transp., GRC Complaint No. 2007-164 (February 2008), because she failed to provide a date certain upon which she would provide all responsive records. *See also* Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011); Papiez v. Cnty of Mercer, Office of Cnty. Counsel, GRC Complaint No. 2012-65 (Interim Order dated April 30, 2013); Thompson v. Twp. of Mansfield, GRC Complaint No. 2014-420 (September 2015).
2. Because the Custodian provided certified proof, both in her SOI and through subsequent certifications, that all responsive records were provided to the Complainant, and the Complainant provided no competent, credible evidence to refute the certifications, the Custodian has met her burden of proving that there was no unlawful denial of access. Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The Custodian’s response was insufficient pursuant to N.J.S.A. 47:1A-5(i) by failing to provide a specific date by which she would provide all responsive records. However, the records required review and redaction, and the Custodian endeavored to provide all responsive records (over 20,000) during the course of several months. Therefore, there is no evidence in the record to suggest 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 28th Day of June, 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: June 30, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 28, 2016 Council Meeting**

**Frank J. Campisi¹
Complainant**

GRC Complaint No. 2015-386

v.

**City of Millville (Cumberland)²
Custodial Agency**

Records Relevant to Complaint: Via e-mail, electronic copies of “all e-mails both sent and received from public accounts and/or private accounts (if used for public business, from the period January 13, 2014-October 10, 2014 [by] Commissioner Joseph Sooy and Commissioner Lynne Porecca Compari.”

Custodian of Record: Susan G. Robostello

Request Received by Custodian: October 13, 2014³

Response Made by Custodian: October 23, 2014; October 31, 2014; November 7, 2014

GRC Complaint Received: December 2, 2015

Background⁴

Request and Response:

On October 13, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On October 23, 2014, the seventh (7th) business day after receipt of the OPRA request, the Custodian responded in writing, requesting an extension of time until October 31, 2014. On October 31, 2014, the Custodian requested another extension of time to November 7, 2014, to which the Complainant objected. On November 7, 2014, the Custodian cited the extensive volume of the material requested and sought a third extension to November 18, 2015. Beginning on that day and for many months thereafter, the Custodian began sending via e-mail a series of ninety-four (94) different transmissions that contained 20,211 pages of responsive e-mails.

¹ No legal representation listed on record.

² Represented by Brock Russell, Esq., LLC (Millville, NJ).

³ Although the Custodian certified in her SOI that she received the OPRA request on Friday, October 10, 2014, the Complainant instead listed Monday, October 13, 2014, in the Denial of Access Complaint. All other evidence in the record points to October 13 as the date of the request. The GRC notes that October 13, 2014, was a legal holiday.

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.

Denial of Access Complaint:

On December 2, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). Complainant asserted that the Custodian had not obtained from the two Commissioners all e-mails regarding public business. In the Complaint, he suggested that he saw a disproportionate number of “received” e-mails to the number of “sent” e-mails. He also claimed to have seen a four-month “gap” in the Commissioner’s e-mail. He also stated the records were chronologically disorganized. To resolve his concerns, the Complainant proposed that the two Commissioners sign affidavits to affirm that they had supplied all responsive e-mails to the Custodian.

Statement of Information:

On January 11, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that owing to the volume of material (20,211 pages), which she had to review and consider redacting, she provided the records as they became available to her. She also certified that when the deliveries were completed, she assured the Complainant that all responsive e-mails were sent to him. In her SOI, the Custodian further certified to those same facts. The Custodian argued that she could not agree with the Complainant’s request to have an “independent audit” of the Commissioner’s private e-mail accounts because the accounts were not public records. She also argued that the request was overbroad because the time frame of ten months was excessive.

Additional Information:

On May 2, 2016, the GRC sought additional information from the Custodian. To clarify whether or not all e-mails requested had been transmitted, the GRC asked the Custodian whether or not she had sought certifications from the two Commissioners, as suggested by the Complainant, and, if not, whether such certifications be obtained. On May 9, 2016, the Custodian responded by transmitting a signed Certification from City Commissioner Lynne Porreca-Comparsi and another Certification by Commissioner Joseph Sooy. Both Commissioners certified that they searched personal e-mail accounts for the time frames stated in the OPRA request. They further certified that they each had provided all the e-mails pertaining to public business for the defined time frames and had no other personal e-mail accounts.

Analysis

Sufficiency of Response

OPRA provides that a custodian may have an extension of time to respond to a complainant’s OPRA request, but the custodian must provide a date certain. N.J.S.A. 47:1A-5(i). OPRA further provides that should the custodian fail to provide a response on that specific date, “access shall be deemed denied.” N.J.S.A. 47:1A-5(i). Freyer v City of Bayonne (Hudson), GRC Complaint No 2013-110 (January 2014).

In Hardwick v. NJ Dep’t of Transp., GRC Complaint No. 2007-164 (February 2008), the

custodian provided the complainant with a written response to the complainant's OPRA request. In the response, the custodian requested an extension of time to respond to said request but failed to provide a date certain upon which the requested records would be provided. The Council held that the custodian's request for an extension of time was inadequate under OPRA pursuant to N.J.S.A. 47:1A-5(i).

In the present case, the Complainant sent his OPRA request on October 13, 2014. The parties do not dispute that the Custodian properly sought three extensions of time, the first one within seven (7) business days of receipt and the next two prior to the end of the previous extension. However the Custodian last requested an extension of time on November 7, 2014, and indicated that "completion [would be] no later than November 18, 2014."⁵ Although the Custodian began transmitting the requested records on November 18, she never indicated a specific date by which all the records would be supplied. Instead, her assistant simply advised the Complainant that "additional documents will be forwarded upon completion [of review and redactions]." Total delivery occurred over many months.

Therefore, although the Custodian timely responded in writing to the Complainant's OPRA request, said response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Hardwick, GRC 2007-164, because she failed to provide a date certain upon which she would provide all responsive records. *See also* Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011); Papiez v. Cnty of Mercer, Office of Cnty. Counsel, GRC Complaint No. 2012-65 (Interim Order dated April 30, 2013); Thompson v. Twp. of Mansfield, GRC Complaint No. 2014-420 (September 2015).

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.

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*

⁵ The first set of documents consisting of 185 e-mails was delivered that day along with a note from Wendy Mercado of the City Clerk's Office, who stated that each set of documents takes about 12 hours to review and redact and that "additional documents will be forwarded on completion." No specific date was provided.

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 also 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),⁶ 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).

In Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), the custodian produced one (1) responsive record to the complainant’s OPRA request and stated that no other responsive records existed. The complainant argued that more responsive records existed. Id. The GRC asked the custodian to certify as to whether all responsive records were produced. The custodian subsequently certified that the disclosed document was the only responsive record. Id. In reviewing the matter, the GRC held that:

The Custodian certified that the Complainant was in receipt of all contracts and agreements responsive to the request. The Custodian has met the burden of proving that all records in existence responsive to the request were provided to the Complainant. Therefore there was no unlawful denial of access.

Id.

The Courts further ruled in a case where 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.” Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012). *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.”).

The GRC has previously recognized that, although a request on its face might be invalid, the request, as written, might nonetheless provide a custodian with enough information to identify responsive records. In Bond v. Borough of Washington (Warren), GRC Complaint No. 2009-324 (Final Decision dated March 29, 2011), the complainant requested “all proposals submitted for the position of . . . solicitor.” The custodian responded, stating that three (3) records

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

responsive had been identified but that access to same was denied. In that matter, the GRC noted that:

[w]hile the Complainant's OPRA request on its face is overly broad and unclear due to the absence of a specific time period within which the Custodian could narrow her search . . . the Complainant's OPRA request was sufficient for the Custodian to identify the responsive records . . . Additionally, the Custodian responded to the Complainant's OPRA request identifying three (3) proposals as responsive: the Custodian's response is an indication that she needed no additional information to identify the records responsive to the Complainant's OPRA request.

Id. at pg. 15. *See also* Darata v. Monmouth County Board of Chosen Freeholders, GRC Complaint No. 2009-312 (Interim order dated February 24, 2011).

Similar to the facts of Bond, the evidence in the instant matter clearly indicates that the Custodian was able to identify the records sought. Thus, while the Complainant's OPRA request is arguably overly broad and unclear, the OPRA request was evidently clear enough for the Custodian to identify the responsive records.

Here, the Complainant requested all e-mails from Commissioner Joseph Sooy and Commissioner Lynne Porecca Compari, both sent and received from public accounts and/or private accounts if used for public business, from the period January 13, 2014, to October 10, 2014. The City responded by providing 20,211 pages of material over many months. Complainant alleged that the e-mails were delivered in a chronologically disorganized manner. However, the Council does not have authority over the content of a record. Kwanzaa v. Dep't. of Corr., GRC Complaint No. 2094-167 (March 2005). Moreover, the Complainant's main concern was his suspicion that the Custodian had not provided all of the e-mails from the Commissioners' private accounts concerning public business. However, the Complainant alleged mere suspicions that material was missing and did not provide competent, credible evidence to refute the Custodian's certification. Furthermore, following the Complainant's own suggestion, the Custodian obtained certifications from the City Commissioners in which they affirmed that all responsive records had been provided. Therefore the evidence of record demonstrates that no other responsive records exist. *See also* Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

Accordingly, because the Custodian provided certified proof, both in her SOI and through subsequent certifications, that all responsive records were provided to the Complainant, and the Complainant provided no competent, credible evidence to refute the certifications, the Custodian has met her burden of proving that there was no unlawful denial of access. Pusterhofer, GRC 2005-49. *See also* Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).

Knowing and 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. 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)).

In the instant matter, the Custodian’s response was insufficient pursuant to N.J.S.A. 47:1A-5(i) by failing to provide a specific date by which she would provide all responsive records. However, the records required review and redaction, and the Custodian endeavored to provide all responsive records (over 20,000) during the course of several months. Therefore, there is no evidence in the record to suggest 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. Although the Custodian timely responded in writing to the Complainant’s OPRA request, said response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Hardwick v. NJ Dep’t of Transp., GRC Complaint No. 2007-164 (February 2008), because she failed to provide a date certain upon which she would provide all responsive records. *See also* Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011); Papiez v. Cnty of Mercer, Office of Cnty. Counsel, GRC Complaint No. 2012-65 (Interim Order dated April 30, 2013); Thompson v. Twp. of Mansfield, GRC Complaint No. 2014-420 (September 2015).

2. Because the Custodian provided certified proof, both in her SOI and through subsequent certifications, that all responsive records were provided to the Complainant, and the Complainant provided no competent, credible evidence to refute the certifications, the Custodian has met her burden of proving that there was no unlawful denial of access. Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

3. The Custodian's response was insufficient pursuant to N.J.S.A. 47:1A-5(i) by failing to provide a specific date by which she would provide all responsive records. However, the records required review and redaction, and the Custodian endeavored to provide all responsive records (over 20,000) during the course of several months. Therefore, there is no evidence in the record to suggest 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: Ernest Bongiovanni
Staff Attorney

June 21, 2016