



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

December 19, 2017 Government Records Council Meeting

Art Rittenhouse
Complainant

Complaint No. 2016-142

v.

Middlesex County
Custodian of Record

At the December 19, 2017 public meeting, the Government Records Council (“Council”) considered the December 12, 2017 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 complied with the Council’s November 14, 2017 Interim Order because she responded in the extended time frame by providing all responsive records and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian failed to bear her burden of proving a lawful denial of access to a majority of the OPRA request. However, the Custodian lawfully denied access to a minor portion of the request seeking information. Further, the Custodian timely complied with the Council’s November 14, 2017 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.



Final Decision Rendered by the
Government Records Council
On The 19th Day of December, 2017

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: December 21, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
December 19, 2017 Council Meeting**

**Art Rittenhouse¹
Complainant**

GRC Complaint No. 2016-142

v.

**Middlesex County²
Custodial Agency**

Records Relevant to Complaint: All correspondence (including e-mails, text messages, written correspondence, and dates of meetings) from Middlesex County (“County”) Administrator John Pulomena, Fire Marshall Michael Gallagher, and Safety and Health Department Head Joseph Krisza to (but not limited to) Borough of Sayreville (“Borough”) Administrator Dan Frankel, Police Chief John Zebrowski, Captain Ron Batko, Councilwomen Mary Novak and Vicikie Kilpatrick, Councilmen Steve Grillo, Dan Buchanan, Pat Lembo, and Art Rittenhouse, TPS/Harris Representatives, Motorola representatives, and VComm representatives regarding the proposed Borough radio system between April 1, 2013, and April 29, 2016.

Custodian of Record: Jeanne-Marie Scollo, Esq.

Request Received by Custodian: May 2, 2016

Response Made by Custodian: May 6, 2016

GRC Complaint Received: May 12, 2016

Background

November 14, 2017 Council Meeting:

At its November 14, 2017 public meeting, the Council considered the November 8, 2017 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. The portion of the Complainant’s initial and amended OPRA requests seeking “correspondence,” inclusive of e-mails, text messages, and written correspondence, is valid because it contained the necessary criteria as prescribed in Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of

¹ No legal representation listed on record.

² No legal representation listed on record.

Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Thus, the Custodian failed to bear her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6 and must disclose to the Complainant all responsive records falling within the combined time frame of both the initial and amended OPRA request.

2. **The Custodian shall comply with conclusion No. 1 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 1:4-4,³ to the Executive Director.⁴**
3. The portions of the Complainant’s initial and amended requests seeking “meeting dates” is invalid because it fails to seek an identifiable government record: the request portions instead sought information. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005). *See also* LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009). Thus, the Custodian lawfully denied access to this portion of the Complainant’s request. N.J.S.A. 47:1A-6.
4. 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 November 16, 2017, the Council distributed its Interim Order to all parties. On November 21, 2017, the third (3rd) business day after receipt of the Order, the Custodian sought an additional ten (10) business days to respond. On November 22, 2017, the Government Records Council (“GRC”) granted the extension request through December 11, 2017.

On December 1, 2017, the Custodian responded to the Council’s Interim Order (copying the Complainant). Therein the Custodian certified that upon receipt of the Council’s Order, she directed Mr. Pulomena, Mr. Krisza, and Mr. Gallagher to conduct a search of their correspondence and text messages to locate responsive records. The Custodian further certified that she also directed the County Office of Information Technology (“IT”) to perform a search of the County’s e-mail server using the applicable subject matter and recipients. The Custodian certified that she coordinated the compilation and production of records, conducted a legal review, and disclosed all responsive records. The Custodian certified that she was attaching all responsive records.

Mr. Pulomena, Mr. Krisza, Mr. Gallagher, and Silvio Castelluccio from County IT all submitted individual certifications to supplement the Custodian’s compliance. Mr. Pulomena

³ "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."

⁴ 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.

certified that he conducted a search, which produced five (5) pages of e-mails and attachments. Mr. Krisza certified that he conducted a search yielding thirty-three (33) pages of e-mails and attachments. Mr. Gallagher certified that he conducted a search yielding twenty-three (23) pages of e-mails and attachments. Mr. Castelluccio certified that, to the best of his knowledge, he turned all records potentially responsive to the Custodian for a legal review.

Analysis

Compliance

At its November 14, 2017 meeting, the Council ordered the Custodian to disclose all responsive records falling within the both the initial and amended OPRA request item frame, as well as to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On November 16, 2017, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on November 27, 2017 (accounting for holiday closures).

On November 21, 2017, the third (3rd) business day after receipt of the Council's Order, the Custodian sought an extension of time, which the GRC granted through December 11, 2017. On December 1, 2017, the Custodian responded to the Council's Order. The Custodian certified that she was providing all responsive records located to the Complainant. The Custodian also attached individual certifications from Mr. Pulomena, Mr. Krisza, Mr. Gallagher, and Mr. Castelluccio to support her certification. Thus, the evidence of record supports that the Custodian complied with the Council's Order.

Therefore, the Custodian complied with the Council's November 14, 2017 Interim Order because she responded in the extended time frame by providing all responsive records and simultaneously providing certified confirmation of compliance to the Executive Director.

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)).

In this matter currently before the Council, the Custodian failed to bear her burden of proving a lawful denial of access to a majority of the OPRA request. However, the Custodian lawfully denied access to a minor portion of the request seeking information. Further, the Custodian timely complied with the Council's November 14, 2017 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's November 14, 2017 Interim Order because she responded in the extended time frame by providing all responsive records and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian failed to bear her burden of proving a lawful denial of access to a majority of the OPRA request. However, the Custodian lawfully denied access to a minor portion of the request seeking information. Further, the Custodian timely complied with the Council's November 14, 2017 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

December 12, 2017



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
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CHARLES A. RICHMAN
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INTERIM ORDER

November 14, 2017 Government Records Council Meeting

Art Rittenhouse
Complainant

Complaint No. 2016-142

v.

Middlesex County
Custodian of Record

At the November 14, 2017 public meeting, the Government Records Council (“Council”) considered the November 8, 2017 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 portion of the Complainant’s initial and amended OPRA requests seeking “correspondence,” inclusive of e-mails, text messages, and written correspondence, is valid because it contained the necessary criteria as prescribed in Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); 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). Thus, the Custodian failed to bear her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6 and must disclose to the Complainant all responsive records falling within the combined time frame of both the initial and amended OPRA request.
2. **The Custodian shall comply with conclusion No. 1 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**
3. The portions of the Complainant’s initial and amended requests seeking “meeting dates” is invalid because it fails to seek an identifiable government record: the request

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.



portions instead sought information. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005). *See also* LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009). Thus, the Custodian lawfully denied access to this portion of the Complainant's request. N.J.S.A. 47:1A-6.

4. 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 14th Day of November, 2017

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: November 16, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 14, 2017 Council Meeting**

**Art Rittenhouse¹
Complainant**

GRC Complaint No. 2016-142

v.

**Middlesex County²
Custodial Agency**

Records Relevant to Complaint: All correspondence (including e-mails, text messages, written correspondence, and dates of meetings) from Middlesex County (“County”) Administrator John Pulomena, Fire Marshall Michael Gallagher, and Safety and Health Department Head Joseph Krisza to (but not limited to) Borough of Sayreville (“Borough”) Administrator Dan Frankel, Police Chief John Zebrowski, Captain Ron Batko, Councilwomen Mary Novak and Vicikie Kilpatrick, Councilmen Steve Grillo, Dan Buchanan, Pat Lembo, and Art Rittenhouse, TPS/Harris Representatives, Motorola representatives, and VComm representatives regarding the proposed Borough radio system between April 1, 2013, and April 29, 2016.

Custodian of Record: Jeanne-Marie Scollo, Esq.
Request Received by Custodian: May 2, 2016
Response Made by Custodian: May 6, 2016
GRC Complaint Received: May 12, 2016

Background³

Request and Response:

On May 1, 2016, a Sunday, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On May 6, 2016, the Custodian responded in writing, denying the OPRA request as overly broad and invalid. The Custodian stated that the request sought an entire universe of unknown 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).

¹ No legal representation listed on record.

² No legal representation listed on record.

³ 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.

On May 7, 2016, the Complainant e-mailed the Custodian disputing that his OPRA request was invalid. The Complainant noted that he identified a proper subject (the proposed Borough radio system) and identified all parties associated with the approval of the system. The Complainant noted that he would resubmit the request to make it more specific. Later in the day, the Complainant submitted an amended OPRA request to seek “e-mails . . . text message[s] . . . and meeting dates” from all of the same senders and recipients (adding Mayor Kennedy O’Brien as a recipient) and shortening the time frame to January 1, 2016, through May 6, 2016.

On May 9, 2016, the Custodian responded to the Complainant’s amended OPRA request, again denying the request as invalid. The Custodian stated that the request sought information and not identifiable “government records” and that County would therefore be required to perform research to locate communications responsive to the request. The Custodian also noted that she would need to speculate and conduct research to identify parties included as “Motorola representative[s]” and “VComm representative[s].”

On the same day, the Complainant responded, stating that his amended OPRA request was specific: it sought e-mails, text messages, and correspondence related to the relationship between the Borough and County radio systems. The Custodian responded to the Complainant, stating that although she generally understood the information sought, the only way to identify responsive records was to review every communication. The Custodian averred that OPRA does not require a custodian to conduct a manual review of all records to determine whether any responsive to the request exist. The Complainant responded to the Custodian, stating that he believed the identified individuals would easily be able to identify responsive records. The Complainant noted that should the County not be able to comply, he would “[contact] the Attorney General’s office” The Complainant subsequently sent a second e-mail seeking a lawful basis for the denial. The Complainant noted that he, as a Borough Councilman, was required to provide both e-mails and text messages in response to an OPRA request.

Denial of Access Complaint:⁴

On May 12, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant alleged that his OPRA request was based on the Borough’s possible violations of the Open Public Meetings Act and local government ethics laws. The Complainant disputed the Custodian’s denial of his request as overly broad. The Complainant argued that the Custodian would not have to conduct research.

Statement of Information:

On November 18, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on May 2, 2016. The Custodian certified that she did not perform a search because the request failed to identify a specific record. The Custodian certified that she responded in writing on May 6, 2016, denying the request as invalid. The Custodian affirmed that the Complainant submitted an amended OPRA request on May 7, 2016, which was almost identical to his original OPRA request. The

⁴ On June 13, 2016, the complaint was referred to mediation. Following unsuccessful efforts to mediate the matter, the complaint was referred back to the GRC on October 3, 2016.

Custodian certified that she responded on May 9, 2016, again denying the OPRA request as invalid.

The Custodian contended that the Complainant's OPRA request provided a date range and a description of the subject; however, the subject would have required the County to research all records to determine whether any were responsive to the request. The Custodian argued that to locate e-mails, by way of example, a "qualified staff member" would have to perform a search using author and date. The Custodian contended that the staff member would then have to siphon those results to determine whether the e-mails related to the Borough and County radio stations and their relationship. She further argued that the final criterion could only be determined by researching the content of each e-mail: OPRA does not require research.

The Custodian also contended that it would have been impossible to determine individuals representing TPS/Harris, Motorola, and VComm. The Custodian asserted that she would not have been able to determine whether an individual represented any of these companies by performing a routine e-mail search. The Custodian noted that she also wished to incorporate in the SOI her legal arguments from her May 6, 2016 response to the Complainant. 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.

Analysis

Validity of OPRA Request

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, 375 N.J. Super. at 546 (emphasis added).

The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be

required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

Id. at 549 (emphasis added).

The Court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt . . . In short, OPRA does not countenance open-ended searches of an agency’s files.” Id. at 549 (emphasis added). Bent, 381 N.J. Super. at 37;⁵ NJ Builders Assoc., 390 N.J. Super. at 180; Schuler, GRC 2007-151.

Regarding requests for communications, including e-mails, text messages, and written correspondence, the GRC has established criteria deemed necessary under OPRA to request them. 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 e-mail, (2) the specific date or range of dates during which the e-mail(s) were transmitted, and (3) the identity of the sender and/or the recipient thereof. *See also* 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).

Moreover, in Burke v. Brandes, 429 N.J. Super. 169, 172, 176 (App. Div. 2012), the Appellate Division 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.” Id. at 172, 176. The Court noted that the complainant had “narrowed the scope of the inquiry to a discrete and limited subject matter,” and that fulfilling the request would involve “no research or analysis, but only a search for, and production of,” identifiable government records. Id. at 177-78.

Regarding requests seeking information, in LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009), the complainant requested the number of Jamesburg residents that held library cards. The Council determined that the complainant’s request was not for an identifiable government record but for information. Id. As such, the request was deemed invalid pursuant to MAG. Id.; *see also* Ohlson v. Twp. of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009); DeRobertis v. Twp. of Montclair (Essex), GRC Complaint No. 2012-149 (May 2013).

In the instant complaint, a portion of the OPRA request sought “correspondence” between specified individuals or companies regarding the proposed Borough radio station over a set time frame of approximately three (3) years. The Custodian denied access to the request as invalid. The Complainant then submitted an amended request for correspondence from the same parties (but added one additional person), regarding the same topic, but over a substantially

⁵ Affirming Bent v. Stafford Police Dep’t, GRC Case No. 2004-78 (October 2004).

shorter time frame of just over four (4) months. The GRC notes that the time frame provided in the amended OPRA request overlapped the original OPRA request time frame by one (1) week. The Custodian again denied access to the amended request as invalid.

In reviewing the portion of both requests seeking “correspondence,” the GRC finds that each was valid. The request identified senders and recipients, the subject and/or content, and a definitive time frame. Further, the Custodian argued that she would not be able to identify a representative from TPS/Harris, Motorola, and VComm through a routine e-mail search; the GRC disagrees. First, the Burke Court validated a similar type of request that did not identify each specific, individual sender/recipient, stating that the request was narrowly construed. Second, it is not unreasonable that the Custodian could easily identify e-mails and other correspondence sent from these companies based on letterhead, digital signatures, or e-mail suffixes. In fact, the Council’s decision in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint no. 2013-43 *et seq.* (Interim Order dated September 24, 2013), offers clarifying guidance on a custodian’s obligation to search for correspondence:

[A] valid OPRA request requires a search, not research. An OPRA request is thus only valid if the subject of the request can be readily identifiable based on the request. Whether a subject can be readily identifiable will need to be made on a case-by-case basis. When it comes to e-mails or documents stored on a computer, a simple keyword search may be sufficient to identify any records that may be responsive to a request. As to correspondence, a custodian may be required to search an appropriate file relevant to the subject. In both cases, emails and correspondence, a completed “subject” or “regarding” line may be sufficient to determine whether the record relates to the described subject. Again, what will be sufficient to determine a proper search will depend on how detailed the OPRA request is, and will differ on a case-by-case basis. What a custodian is not required to do, however, is to actually read through numerous e-mails and correspondence to determine if same is responsive: in other words, conduct research.

Id. at 5-6.

Considering the Council’s direction in Verry, GRC 2013-43, the Custodian’s contention that she would need to conduct research to locate responsive correspondence is not persuasive.

Accordingly, the portion of the Complainant’s initial and amended OPRA requests seeking “correspondence,” inclusive of e-mails, text messages, and written correspondence, is valid because it contained the necessary criteria as prescribed in Elcavage, GRC 2009-07. 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. Thus, the Custodian failed to bear her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6 and must disclose to the Complainant all responsive records falling within the combined time frame of both the initial and amended OPRA request.

However, a portion of the Complainant’s initial OPRA request also sought “dates of meetings.” The Complainant also included “meeting dates” in his amended OPRA request. For

those portions of both requests, the GRC finds those portions invalid because they seek information and not an identifiable “government record;” the Custodian would necessarily have to perform research to locate all meetings at which the County discussed the Borough radio station and then create a record listing those dates.

Accordingly, the portion of the Complainant’s initial and amended requests seeking “meeting dates” is invalid because it fails to seek an identifiable government record: the request portions instead sought information. MAG, 375 N.J. Super. 534. *See also LaMantia*, GRC No. 2008-140. Thus, the Custodian lawfully denied access to this portion of the Complainant’s request. N.J.S.A. 47:1A-6.

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 portion of the Complainant’s initial and amended OPRA requests seeking “correspondence,” inclusive of e-mails, text messages, and written correspondence, is valid because it contained the necessary criteria as prescribed in Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); 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). Thus, the Custodian failed to bear her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6 and must disclose to the Complainant all responsive records falling within the combined time frame of both the initial and amended OPRA request.
2. **The Custodian shall comply with conclusion No. 1 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 1:4-4,⁶ to the Executive Director.⁷**

⁶ "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."

⁷ 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.

3. The portions of the Complainant's initial and amended requests seeking "meeting dates" is invalid because it fails to seek an identifiable government record: the request portions instead sought information. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005). *See also* LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009). Thus, the Custodian lawfully denied access to this portion of the Complainant's request. N.J.S.A. 47:1A-6.
4. 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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