



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

March 26, 2019 Government Records Council Meeting

Aakash Dalal
Complainant

Complaint No. 2016-169

v.

NJ Office of Homeland Security and
Preparedness
Custodian of Record

At the March 26, 2019 public meeting, the Government Records Council (“Council”) considered the March 19, 2019 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 current Custodian did not fully comply with the Council’s January 31, 2019 Interim Order. Specifically, although the current Custodian provided to the Complainant additional press releases from 2012 and 2013 and simultaneously provided certified confirmation of compliance to the Council Staff, he failed to do so in a timely manner.
2. The Custodian’s response was insufficient because he failed to address the Complainant’s preferred method of delivery and failed to address each request item. N.J.S.A. 47:1A-5(g). Further, the Custodian unlawfully denied access to press releases for 2012 and 2013. N.J.S.A. 47:1A-6. However, the Custodian lawfully utilized the “Glomar” response with regard to OPRA request item Nos. 2 and 3. Additionally, the evidence of record does not indicate that the Custodian’s violations 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 26th Day of March, 2019

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: March 29, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
March 26, 2019 Council Meeting**

**Aakash Dalal¹
Complainant**

GRC Complaint No. 2016-169

v.

**New Jersey Office of
Homeland Security & Preparedness²
Custodial Agency**

Records Relevant to Complaint: Electronic records on compact disc (“CD”) of:

1. All press releases issued by the New Jersey Office of Homeland Security and Preparedness (“HSP”) or employees between January 1, 2012 and June 1, 2016.
2. All documents, including reports and notes, memorializing a February 2012 meeting at the Bergen County Prosecutor’s Office (“BCPO”) that employees at HSP attended.
3. All documents, including reports and notes, memorializing contacts between HSP Agent John Paige and employees, members, or staff of: 1) the BCPO; 2) Temple Beth El in Maywood; 3) Temple Beth El in Hackensack; 4) Temple K’hal Adath Jeshurun in Paramus; 5) The Jewish Community Center in Paramus; and 6) Congregation Beth El in Rutherford between December 10, 2011 and December 10, 2013.

Custodian of Record: Dennis Quinn³

Request Received by Custodian: June 6, 2016

Response Made by Custodian: June 9, 2016

GRC Complaint Received: June 20, 2016

Background

January 31, 2019 Council Meeting:

At its January 31, 2019 public meeting, the Council considered the January 22, 2019 Findings and Recommendations of the Council Staff 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 Custodian’s June 9, 2016 response was insufficient because he failed to address the Complainant’s preferred method of delivery (electronic disclosure on a compact

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Suzanne Davies.

³ Mr. Quinn retired during the pendency of this complaint. The current custodian of record is Randy Richardson.
Aakash Dalal v. New Jersey Office of Homeland Security and Preparedness, 2016-169 – Supplemental Findings and Recommendations of the Council Staff

- disc). Further, the Custodian's response was insufficient because he failed to respond in writing to each individual request item. Therefore, the Custodian has violated OPRA pursuant to 47:1A-5(g), Delbury v. Greystone Park Psychiatric Hosp. (Morris), GRC Complaint No. 2013-240 (Interim Order dated April 29, 2014), and Graumann v. Newfield Police Dep't (Gloucester), GRC Complaint No. 2014-314 (May 2015).
2. The Custodian may have unlawfully denied access to responsive 2012 and 2013 press releases. N.J.S.A. 47:1A-6. The Custodian shall perform a search for any responsive records and provide those that exist via the Complainant's preferred method of delivery. Should the Custodian not locate any responsive records, he must certify to this fact.
 3. **The Custodian shall comply with conclusion No. 2 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 deliver⁴ certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁵ to the Council Staff.⁶**
 4. The Custodian has borne his burden of proving a lawful denial of access to any records potentially responsive to item Nos. 2 and 3. N.J.S.A. 47:1A-6. Specifically, the Custodian provided a sufficient legal certification proving that acknowledging the existence of records responsive to item Nos. 2 and 3 would run contrary to Executive Order No. 5 (Gov. Corzine, 2006) and Executive Order No. 21 (Gov. McGreevey, 2002). N.J.S.A. 47:1A-9. Thus, the Custodian's use of the "Glomar" response with respect to these request items was valid.
 5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On February 4, 2019, the Council distributed its Interim Order to all parties. On February 28, 2019, Custodian's Counsel e-mailed the Government Records Council ("GRC") advising that she encountered multiple issues with trying to compose compliance. Counsel stated that the Custodian retired, thus requiring the current Custodian to familiarize himself with the matter and conduct an entirely new search. Counsel stated that the current Custodian identified potential responsive records, but it was unclear whether they were available at the time the Complainant

⁴ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁵ "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."

⁶ 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.

submitted his OPRA request. Counsel also averred that the Complainant's address may have changed, but she could not be sure. Finally, Counsel noted that the Complainant, who is incarcerated, was not allowed to receive DVDs. Counsel thus asserted that the current Custodian would have to send responsive records in paper format. Counsel requested that, based on the foregoing, an extension of time to comply with the Council's Order be granted.

On March 1, 2019, the GRC responded to Counsel stating that the last day to comply with the Council's Order was February 13, 2019. The GRC provided Counsel and current Custodian a final deadline of March 8, 2019 to submit compliance. The GRC also provided Counsel with an updated mailing address for the Complainant.

On March 5, 2019, the current Custodian responded to the Council's Interim Order. The current Custodian certified that in response to the Order, he conducted an extensive search of HSP's archived documents for 2012 and 2013. The current Custodian affirmed that he located five (5) press releases for each year which he disclosed along with releases from 2014 through 2016 in paper format to the Complainant at his new address. The current Custodian affirmed that he had to send paper copies of the records to the Complainant because it was his understanding that the Complainant could not obtain a DVD. The Custodian thus affirmed that he could only disclose the responsive records in paper format.

Analysis

Compliance

At its January 31, 2019 meeting, the Council ordered the Custodian to perform a search for any responsive records and provide those that exist via the Complainant's preferred method of delivery. The Council also ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule R. 1:4-4, to the Council Staff. On February 4, 2019, 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 February 13, 2019.⁷

On March 5, 2019, the thirteenth (13th) business day after receipt of the Council's Order, the current Custodian certified that he located and was providing the Complainant paper copies of press releases from 2012 and 2013, as well paper copies of all releases from 2014 through 2016. Although the current Custodian ultimately provided a response to the GRC, same was untimely. For this reason, the current Custodian did not fully comply due to his untimely submission.

Therefore, the current Custodian did not fully comply with the Council's January 31, 2019 Interim Order. Specifically, although the current Custodian provided to the Complainant additional press releases from 2012 and 2013 and simultaneously provided certified confirmation of compliance to the Council Staff, he failed to do so in a timely manner.

⁷ The State closed on February 12, 2019 due to inclement weather.

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 the matter before the Council, the Custodian’s response was insufficient because he failed to address the Complainant’s preferred method of delivery and failed to address each request item. N.J.S.A. 47:1A-5(g). Further, the Custodian unlawfully denied access to press releases for 2012 and 2013. N.J.S.A. 47:1A-6. However, the Custodian lawfully utilized the “Glomar” response regarding OPRA request item Nos. 2 and 3. Additionally, the evidence of record does not indicate that the Custodian’s violations 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 Council Staff respectfully recommends the Council find that:

1. The current Custodian did not fully comply with the Council’s January 31, 2019 Interim Order. Specifically, although the current Custodian provided to the Complainant additional press releases from 2012 and 2013 and simultaneously provided certified confirmation of compliance to the Council Staff, he failed to do so in a timely manner.
2. The Custodian’s response was insufficient because he failed to address the Complainant’s preferred method of delivery and failed to address each request item.

N.J.S.A. 47:1A-5(g). Further, the Custodian unlawfully denied access to press releases for 2012 and 2013. N.J.S.A. 47:1A-6. However, the Custodian lawfully utilized the “Glomar” response with regard to OPRA request item Nos. 2 and 3. Additionally, the evidence of record does not indicate that the Custodian’s violations 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
Acting Executive Director

March 19, 2019



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

January 31, 2019 Government Records Council Meeting

Aakash Dalal
Complainant

Complaint No. 2016-169

v.

NJ Office of Homeland
Security and Preparedness
Custodian of Record

At the January 31, 2019 public meeting, the Government Records Council ("Council") considered the January 22, 2019 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian's June 9, 2016 response was insufficient because he failed to address the Complainant's preferred method of delivery (electronic disclosure on a compact disc). Further, the Custodian's response was insufficient because he failed to respond in writing to each individual request item. Therefore, the Custodian has violated OPRA pursuant to 47:1A-5(g), Delbury v. Greystone Park Psychiatric Hosp. (Morris), GRC Complaint No. 2013-240 (Interim Order dated April 29, 2014), and Graumann v. Newfield Police Dep't (Gloucester), GRC Complaint No. 2014-314 (May 2015).
2. The Custodian may have unlawfully denied access to responsive 2012 and 2013 press releases. N.J.S.A. 47:1A-6. The Custodian shall perform a search for any responsive records and provide those that exist via the Complainant's preferred method of delivery. Should the Custodian not locate any responsive records, he must certify to this fact.
3. **The Custodian shall comply with conclusion No. 2 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 deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,² to the Council Staff.³**

¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

² "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."

³ 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



4. The Custodian has borne his burden of proving a lawful denial of access to any records potentially responsive to item Nos. 2 and 3. N.J.S.A. 47:1A-6. Specifically, the Custodian provided a sufficient legal certification proving that acknowledging the existence of records responsive to item Nos. 2 and 3 would run contrary to Executive Order No. 5 (Gov. Corzine, 2006) and Executive Order No. 21 (Gov. McGreevey, 2002). N.J.S.A. 47:1A-9. Thus, the Custodian's use of the "Glomar" response with respect to these request items was valid.
5. 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 31st Day of January, 2019

Robin Berg Tabakin, Esq., Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: February 4, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
January 31, 2019 Council Meeting**

**Aakash Dalal¹
Complainant**

GRC Complaint No. 2016-169

v.

**New Jersey Office of
Homeland Security & Preparedness²
Custodial Agency**

Records Relevant to Complaint: Electronic records on compact disc (“CD”) of:

1. All press releases issued by the New Jersey Office of Homeland Security and Preparedness (“HSP”) or employees between January 1, 2012 and June 1, 2016.
2. All documents, including reports and notes, memorializing a February 2012 meeting at the Bergen County Prosecutor’s Office (“BCPO”) that employees at HSP attended.
3. All documents, including reports and notes, memorializing contacts between HSP Agent John Paige and employees, members, or staff of: 1) the BCPO; 2) Temple Beth El in Maywood; 3) Temple Beth El in Hackensack; 4) Temple K’hal Adath Jeshurun in Paramus; 5) The Jewish Community Center in Paramus; and 6) Congregation Beth El in Rutherford between December 10, 2011 and December 10, 2013.

Custodian of Record: Dennis Quinn
Request Received by Custodian: June 6, 2016
Response Made by Custodian: June 9, 2016
GRC Complaint Received: June 20, 2016

Background³

Request and Response:

On June 6, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 9, 2016, the Custodian responded in writing advising that he received the Complainant’s OPRA request via facsimile on June 6, 2016. Regarding OPRA request item No. 1, the Custodian stated that the Complainant

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Suzanne Davies.

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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

could access all published press releases issued for 2014, 2015, and 2016 on HSP's website at <http://www.njhomelandsecurity.gov/press>.

The Custodian next denied access to OPRA request item Nos. 2 and 3, citing the Domestic Security Preparedness Act ("Act"), Executive Order No. 5 (Gov. Corzine, 2006) ("EO 5"), and Executive Order No. 21 (Gov. McGreevey, 2002) ("EO 21"). The Custodian also stated that, "in the event that [HSP] is subject to the OPRA statutes, the requested records may also be exempt as 'inter-agency or intra-agency advisory consultative or deliberative ['ACD']' material." N.J.S.A. 47:1A-1.1.

Denial of Access Complaint:

On June 20, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant initially contended that in response to OPRA request item No. 1, the Custodian failed to address whether press releases for 2012 and 2013 existed. The Complainant argued that his failure to address these press releases resulted in a violation of N.J.S.A. 47:1A-5(g).

The Complainant next argued that the Custodian failed to prove that records responsive to OPRA request item Nos. 2 and 3 were exempt (citing Gilleran v. Twp. of Bloomfield, 440 N.J. 490, 497 (App. Div. 2015) and Courier News v. Hunterdon Cnty. Prosecutor's Office, 358 N.J. Super. 373, 382-83 (App. Div. 2003)). The Complainant further contended that the Custodian denied access to records without explicitly stating that any existed. The Complainant contended that the Custodian's failure to identify responsive records resulted in an obstruction of his and the GRC's ability to review the denial of access. The Complainant further contended that the federal courts previously discounted blanket denials under the Freedom of Information Act ("FOIA") (citing CREW v. U.S. Dep't of Justice, 746 F.3d 1082, 1098 (D.C. Cir. 2014)). The Complainant asserted that the Council should perform an *in camera* review of all records responsive to item Nos. 2 and 3.

The Complainant thus requested that the Council: 1) determine that the Custodian violated OPRA; and 2) order HSP to disclose to him all records responsive to the subject OPRA request.

Statement of Information:

On July 25, 2016, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on June 6, 2016. The Custodian certified that he responded in writing on June 9, 2016, advising the Complainant that 2014, 2015, 2016 press releases were available on the HSP's website. Further, the Custodian affirmed that he denied access to item Nos. 2 and 3 under the Act, EO 5, and EO 21.

Regarding item No. 1, the Custodian certified that there were not easily accessible press releases for 2012 and 2013. The Custodian affirmed that press releases were not required to be archived or stored for an extended period of time and there was no central repository. The Custodian noted that press releases were typically drafted by HSP employees and sent to the press for publication.

Regarding item Nos. 2 and 3, the Custodian first noted that he could neither confirm nor deny the existence of any records due to the security issues discussed herein. The Custodian further stated that the Complainant was incarcerated at Bergen County Jail for charges of 29 counts in connection with fire bombings, arson, and attempted murder in Bergen County. The Custodian stated that the Complainant allegedly participated in firebombing multiple synagogues and a rabbi's home, occupied by the rabbi and family at the time of the attack, in 2012.

As to the denial of access, the Custodian affirmed that the Complainant sought notes and reports from alleged meetings HSP had with BCPO and several Jewish institutions. The Custodian stated that HSP records were also considered records of the Domestic Security Task Force ("DSTF"). The Custodian argued that this is because EO 5 placed the DSTF in HSP. The Custodian stated that the Act exempted disclosure of "[any] record held, maintained, or kept on file by the [DSTF] or the planning group." N.J.S.A. App.A:9-74. The Custodian also argued that any potentially responsive records were exempt under EO 21 as a record the disclosure of which would "substantially interfere with the State's ability to protect and defend" against sabotage or terrorism if it "would materially increase the risk or consequence of potential acts . . ." Id.

The Custodian further contended that the Complainant erred in claiming that HSP had an obligation to identify potentially responsive records that existed. The Custodian contended that he could neither confirm nor deny the existence of records without causing significant harm. The Custodian noted that a "Glomar"⁴ response was not recognized under OPRA,⁵ but has been upheld by the Federal Courts in Freedom of Information Act cases. See Ctr. for Constitutional Rights v. CIA, 765 F.3d 161 (2d Cir. 2014). The Custodian asserted that the "Glomar" response did not require the agency to submit a Vaughn Index; nor would the courts perform an *in camera* review. Instead, the Custodian asserted that an agency must bear its burden of proof through an affidavit showing that the records, if they exist, would fall logically within the claimed exemptions. To this end, the Custodian provided the following certification:

- Meetings between BCPO and HSP are conducted to discuss homeland security issues relevant to the County of Bergen ("County"). Those issues include threats and vulnerabilities involving critical infrastructure and other facilities in the County. Disclosure of any notes or reports generated from those meetings would disclose County threat assessment briefings, potential vulnerabilities in critical infrastructure and other institutions, and would detail specific risk mitigation recommendations.
- Meetings between HSP and religious organizations relate to risk assessment, potential threats, and vulnerabilities in current security and mitigation strategies. Disclosure of any of the responsive records would similarly reveal threat assessment briefings, potential vulnerabilities to critical infrastructure and security, as well as increasing the risk of these targets to acts of terrorism.

⁴ A "Glomar" response is represented by a statement that neither confirms nor denies the existence of records. See Phillippi v. CIA, 546 F.2d 1009, 178 U.S. App. D.C. 243 (D.C. Cir. 1976)

⁵ During the pendency of this complaint, the Appellate Division addressed the "Glomar" response issue and its validity under OPRA. In N. Jersey Media Group v. Puccio, 447 N.J. Super. 182 (App. Div. 2016), the Court affirmed the trial court's decision upholding defendant's "Glomar" denial of access that he could "neither confirm nor deny" the existence of responsive records under OPRA in accordance with N.J.S.A. 47:1A-9(b).

- Acknowledgement of a meeting with HSP and religious institutions would present a security threat by exposing it as a potential high value target and/or facility that has potential security deficiencies. Any notes or reports from such meetings could potentially provide a roadmap for a successful act of terrorism or sabotage.

The Custodian further contended that, based on the forgoing, an *in camera* review would be inappropriate in the instant complaint.

Analysis

Insufficient Response

The GRC previously adjudicated complaints in which a custodian did not address the preferred method of delivery. In Delbury v. Greystone Park Psychiatric Hosp. (Morris), GRC Complaint No. 2013-240 (Interim Order dated April 29, 2014), the complainant identified his preferred method of delivery as “electronic copies on compact disc or USB drive.” The custodian timely responded but did not address the complainant’s preferred method of delivery. The Council, relying on its past decision in O’Shea v. Twp. of Fredon (Sussex), GRC Complaint Number 2007-251 (February 2008) (stating “[a]ccording to [the] language of N.J.S.A. 47:1A-5(g), the [c]ustodian was given two ways to comply and should have, therefore, responded acknowledging the [c]omplainant’s preferences with a sufficient response for each.”), held that the custodian’s response was insufficient.⁶ See also Paff v. Borough of Sussex (Sussex), GRC Complaint Number 2008-38 (July 2008) (holding that although the custodian timely responded granting access to the requested record, the custodian’s response was insufficient because she failed to address the preferred method of delivery).

Additionally, OPRA provides that a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g). Further, in Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008), the GRC held that “[t]he Custodian’s response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5(g).” In Graumann v. Newfield Police Dep’t (Gloucester), GRC Complaint No. 2014-314 (May 2015), the subject OPRA request sought multiple items in a single paragraph, as opposed to an enumerated list. In her response, the custodian only addressed a portion of the OPRA request. The Council determined that the custodian’s response was insufficient because it failed to address each request item individually. In reaching this conclusion, the Council reasoned that the custodian “completely failed to acknowledge or address the balance of the request.”

Here, the Complainant’s OPRA request item No. 1 sought access to press releases for the years 2012 through 2016 on a CD. However, when the Custodian responded to the OPRA request on June 9, 2016, he directed the Complainant to HSP’s website for press releases from 2014 through 2016. The Custodian did not address the Complainant’s preferred method of delivery, nor

⁶ Although the Council held that the custodian’s responses was insufficient, it should be noted that the Council also found no unlawful denial of access where the custodian referred the complainant to the specific location on the internet where the records could be accessed. Id. at (citing Rodriguez v. Kean Univ., GRC Complaint No. 2013-69 (March 2014)).

did he address press releases from 2012 or 2013. The Council's decisions in Delbury, GRC 2013-240 and Graumann, GRC 2014-314 are thus applicable here and the Custodian's response was insufficient.

Accordingly, the Custodian's June 9, 2016 response was insufficient because he failed to address the Complainant's preferred method of delivery (electronic disclosure on a CD). Further, the Custodian's response was insufficient because he failed to respond in writing to each individual request item. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g), Delbury, GRC 2013-240, and Graumann, GRC 2014-314.

Unlawful Denial of Access

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

OPRA Request Item No. 1

In the instant matter, the Complainant sought access to press releases for multiple years between 2012 and 2016. The Custodian provided a link to those releases posted to HSP's website, which only ranged from 2014 through 2016. The Custodian did not address the existence of releases for 2012 and 2013. In his Denial of Access Complaint, the Complainant disputed the Custodian's failure to indicate whether any responsive records for 2012 and 2013 existed. In the SOI, the Custodian certified that there were "no easily accessible press releases" from 2012 or 2013.⁷ The Custodian further certified that the releases were generally drafted by employees and sent to press for publication, HSP was not required to maintain press releases, and there was no central repository of releases from those years.

After reviewing HSP's website link and the arguments made by both parties, the GRC is not satisfied by the Custodian's explanation on the 2012 and 2013 releases. While it could be assumed that the explanation amounts to a certification that no records exist, this is not borne out in Custodian's response. The GRC is unclear on whether the Custodian performed any search for 2012 and 2013 press releases, whether through HSP's press office or with those employees commonly tasked with creating them. The GRC's position is supported by the Custodian's assertion that responsive releases could not be easily located, which does not absolve him of at least performing a search. Ultimately, there is insufficient evidence in the record to determine that the Custodian lawfully denied access to this portion of OPRA request item No. 1.

Accordingly, the Custodian may have unlawfully denied access to responsive 2012 and 2013 press releases. N.J.S.A. 47:1A-6. The Custodian shall perform a search for any responsive records and provide those that exist via the Complainant's preferred method of delivery. Should the Custodian not locate any responsive records, he must certify to this fact.

⁷ The GRC notes that based on the Denial of Access Complaint assertions, it will only address the issue of whether the Custodian properly denied the portion of the request seeking 2012 and 2013 press releases.

OPRA Request Item Nos. 2 and 3

OPRA provides that its provisions:

[S]hall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the Legislature; *regulation promulgated under the authority of any statute or Executive Order of the Governor*; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.

[N.J.S.A. 47:1A-9(a) (emphasis added).]

Moreover, the Act provides that “[n]o record held, maintained or kept on file by the [Task Force] or the planning group shall be deemed to be a public record under [OPRA] . . .” N.J.S.A. App.A:9-74(a).

Further, EO 5 provides that “[a]ll documents, materials, and information pertaining to counter-terrorism investigation, intelligence, training, and protocols created, compiled, obtained or maintained by [HSP] shall be deemed confidential, non-public and not subject to [OPRA].” See also EO 21 (containing an exemption for records that would substantially interfere with the State’s ability to defend against sabotage or terrorism).

Additionally, during the pendency of this complaint, the New Jersey Appellate Division issued N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor's Office, 447 N.J. Super. 182 (App. Div. 2016), ruling on whether a public agency was permitted to “neither confirm, nor deny” the existence of records responsive to an OPRA request. This decision controls the complaint at before the Council. In that case, the plaintiff sought records under OPRA concerning an individual who was not charged with a crime. The court established a two-part test to determine when an agency may employ a “Glomar”⁸ response to an OPRA request:

[T]he agency [must] (1) rel[y] upon the exemption authorized by OPRA that would itself preclude the agency from acknowledging the existence of such documents and (2) present[] a sufficient basis for the court to determine that the claimed exemption applies.

[N. Jersey Media Grp., 447 N.J. Super. at 188.]

In N. Jersey Media Grp., the defendant’s initial response to the OPRA request argued that a confirmation of whether or not the subject of the request has been arrested, charged, or involved in an investigation could cause “irreparable harm” to the subject and open the defendant and its employees to civil liability. Id. at 205. It was not until after the plaintiff challenged the defendant in court that they listed specific OPRA exemptions: the criminal investigatory records exemption

⁸ The moniker stems from Phillippi v. CIA, 546 F.2d 1009, 1011 (D.C. Cir. 1979), where the CIA responded to a Freedom of Information Act request regarding the *Hughes Glomar Explorer*, an oceanic ship allegedly owned by the federal government but officially listed as a private vessel.

and the ongoing investigation exemption. Id. The court rejected those exemptions because they only applied where government records actually existed. Id. at 207.

However, the court in N. Jersey Media Grp. noted that N.J.S.A. 47:1A-9(b) protected a preexisting grant of confidentiality for records if established by, among other authorities, judicial case law. Id. at 202. The court then highlighted pre-OPRA precedent, demonstrating the need for confidentiality pertaining to whether an individual has been arrested or charged. Id. at 203. According to the court, the grant of confidentiality benefited law enforcement in conducting investigations as well as protects the privacy interests of individuals. Id. at 203-204. Therefore, the court held that the defendant satisfied its two-part test and found that its “Glomar” response was valid. Id. at 206.

Here, the Custodian initially denied access to records potentially responsive to OPRA request item Nos. 2 and 3 under the Act, EO 5, EO 21, and possibly N.J.S.A. 47:1A-1.1. The Complainant disputed the Custodian’s response, arguing that he was not provided information on potentially responsive records by which he could adequately challenge the denial. The Complainant requested that the GRC conduct an *in camera* to determine whether the responsive records fell under the asserted exemptions.

In the SOI, the Custodian reasserted the above and included additional reasons for denying access. The first reason was that the records were exempt under N.J.S.A. App.A:9-74. The second reason was that HSP could neither confirm nor deny the existence of records: also known as the aforementioned “Glomar” response. In support of the “Glomar” response, the Custodian included a certification detailing why acknowledging the existence of records would go against the cited exemptions. The Custodian further argued that a successful “Glomar” response did not require document indexes or *in camera* reviews.

Initially, the GRC addresses the Custodian’s argument that potentially responsive records were exempt because EO 5 moved the DSTF into HSP, thereby rendering all HSP’s records as exempt under N.J.S.A. App.A:9-74. That exemption provides that records of the DSTF are exempt from disclosure. To this end, the Council recently address this exemption in Anglin v. N.J. Office of Homeland Security & Preparedness, GRC Complaint No. 2017-45 (November 2018). There, the custodian denied access for the above reason and later certified in the SOI that the DSTF handled the investigation. Based on the facts present there, the Council agreed that the custodian lawfully denied access. Id. at 4.

The GRC is not similarly persuaded here: the Custodian only argued that the requested records were exempt because the DSTF was part of HSP. The Custodian did not provide any indication that the request items related to DSTF functions in any way or that potentially responsive records would be in their possession. That EO 5 placed the DSTF in HSP does not correlate directly to allowing HSP to deny its own records through the plain language exemption present in N.J.S.A. App.A:9-74.

Turning to the “Glomar” response, the GRC finds this argument to be compelling. As set forth in N. Jersey Media Grp., the Custodian had to meet the two-prong test evaluated in that case to qualify under the response. As to the first prong, the Custodian cited to two (2) existing

exemptions that would apply to meeting materials between HSP and either BCPO or religious organizations possibly engaging with HSP. Those were the portion of EO 5 relating to HSP records and EO 21 relating to records, the disclosure of which would substantially interfere with the State's ability to defend itself against acts of terrorism.

As to the second prong, the Custodian provided a certification as to how acknowledging the existence of records would present a direct affront to EO 5 and EO 21. The reasons for non-disclosure included exposing vulnerability issues or subjecting organizations to a heightened security risk. The Custodian also certified that disclosure of materials from these meetings would reveal threat assessments, critical infrastructure vulnerabilities, and mitigation recommendations. As noted in N. Jersey Media Grp., “[w]hen evaluating a ‘Glomar’ response, federal courts must ‘accord ‘substantial weight’ to the agency's affidavits.’” *Id.* at 209 (citing Wilner v. NSA, 592 F.3d 60, 68 (2d Cir. 2009) (quoting Minier v. CIA, 88 F.3d 79, 803-04 (9th Cir. 1996)). It is clear here that, by its very function set forth in EO 5, HSP is the first and foremost authority on State anti-terrorism policy. Thus, the GRC gives substantial weight to the Custodian's certification on this matter. Further, “[f]ederal courts have ruled that, when an agency submits a [‘]Glomar[‘] response supported by an affidavit that is ‘sufficient to establish that the requested documents should not be disclosed, a *Vaughn* index is not required.’” *Id.* at 201 (quoting Minier, *supra*, at 804). The GRC is thus satisfied that the Custodian provided a sufficient explanation to prove the “Glomar” response was proper here, and that no document index or *in camera* review is required.

Accordingly, the Custodian has borne his burden of proving a lawful denial of access to any records potentially responsive to item Nos. 2 and 3. N.J.S.A. 47:1A-6. Specifically, the Custodian provided a sufficient legal certification proving that acknowledging the existence of records responsive to item Nos. 2 and 3 would run contrary to EO 5 and EO 21. N.J.S.A. 47:1A-9. Thus, the Custodian's use of the “Glomar” response with respect to these request items was valid.

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 Council Staff respectfully recommends the Council find that:

1. The Custodian's June 9, 2016 response was insufficient because he failed to address the Complainant's preferred method of delivery (electronic disclosure on a compact disc). Further, the Custodian's response was insufficient because he failed to respond in writing to each individual request item. Therefore, the Custodian has violated OPRA pursuant to 47:1A-5(g), Delbury v. Greystone Park Psychiatric Hosp. (Morris), GRC Complaint No. 2013-240 (Interim Order dated April 29, 2014), and Graumann v. Newfield Police Dep't (Gloucester), GRC Complaint No. 2014-314 (May 2015).

2. The Custodian may have unlawfully denied access to responsive 2012 and 2013 press releases. N.J.S.A. 47:1A-6. The Custodian shall perform a search for any responsive records and provide those that exist via the Complainant's preferred method of delivery. Should the Custodian not locate any responsive records, he must certify to this fact.
3. **The Custodian shall comply with conclusion No. 2 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 deliver⁹ certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹⁰ to the Council Staff.¹¹**
4. The Custodian has borne his burden of proving a lawful denial of access to any records potentially responsive to item Nos. 2 and 3. N.J.S.A. 47:1A-6. Specifically, the Custodian provided a sufficient legal certification proving that acknowledging the existence of records responsive to item Nos. 2 and 3 would run contrary to Executive Order No. 5 (Gov. Corzine, 2006) and Executive Order No. 21 (Gov. McGreevey, 2002). N.J.S.A. 47:1A-9. Thus, the Custodian's use of the "Glomar" response with respect to these request items was valid.
5. 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.

Prepared By: Frank F. Caruso
Acting Executive Director

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⁹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

¹⁰ "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."

¹¹ 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.