



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

May 21, 2019 Government Records Council Meeting

Edwin Sheppard
Complainant

Complaint No. 2016-195

v.

Cape May County
Custodian of Record

At the May 21, 2019 public meeting, the Government Records Council (“Council”) considered the May 14, 2019 Supplemental 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. This matter should be referred to the Office of Administrative Law for a determination on whether the Complainant’s objection to representation of the Custodian in this matter by Jeffrey R. Lindsay, Esq., is valid. And if so, whether Mr. Lindsay should therefore withdraw or be removed for cause as Counsel for the County of Cape May in the instant complaint. N.J.A.C. 5:105-1, et seq.; N.J.A.C. 1:1-5.3; Sheppard v. Cnty. of Cape May, GRC Complaint No. 2019-3 (Interim Order dated April 30, 2019).
2. The Council defers analysis of whether to grant or deny the Complainant’s request for reconsideration pending the outcome of the OAL’s determination on the Complainant’s objection to representation.

Interim Order Rendered by the
Government Records Council
On The 21st Day of May 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: May 22, 2019



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
May 21, 2019 Council Meeting**

**Edwin Sheppard¹
Complainant**

GRC Complaint No. 2016-195

v.

**Cape May County²
Custodial Agency**

Records Relevant to Complaint: Hard copies via U.S. mail of “any and all” communications by any Cape May County (“County”) departments concerning the “Bergre Acquisition, LLC., Bergre Acquisition LLC (D.B.A. HomeCare Specialists), and/or HomeCare Specialists.”

Custodian of Record: Elizabeth Bozzelli
Request Received by Custodian: May 9, 2016
Response Made by Custodian: May 11, 2016
GRC Complaint Received: July 11, 2016

Background

October 30, 2018 Council Meeting:

At its October 30, 2018 public meeting, the Council considered the October 23, 2018 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 did not bear her burden of proof that she timely responded to the Complainant’s OPRA request after receiving clarification. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s clarified OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). See also Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-100 (Interim Order dated June 26, 2012); Holland v. Rowan Univ., GRC Complaint No. 2014-63, *et seq.* (March 2015).

¹ No legal representation listed on record.

² Represented by Jeffrey R. Lindsay, Esq. (Cape May Court House, NJ). Previously represented by James B. Arsenault, Jr., Esq. (Cape May Court House, NJ).

2. The Complainant's request was invalid because it failed to provide ample identifiers, by way of date or range of dates, necessary for the Custodian to locate additionally responsive 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); N.J. Builders Assoc. v. N.J. 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); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011); Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-289 (July 2015). The Custodian has thus lawfully denied access to any records beyond those he has already provided. N.J.S.A. 47:1A-6.
3. The Custodian's failure to respond in a timely manner to the Complainant's clarified request resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Complainant's request, notwithstanding the Custodian's disclosure of a number of records, was invalid because it failed to include the necessary criteria. 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.

Procedural History:

On November 1, 2018, the Council distributed its Final Decision to all parties. On November 8, 2018, the Complainant filed a request for reconsideration of the Council's October 30, 2018 Final Decision based on a mistake, fraud, and illegality.

Thereafter, on January 2, 2019, the Complainant submitted an objection to representation in accordance with N.J.A.C. 5:105-2.3(j). The Complainant asserted that Custodian's Counsel, Jeffrey R. Lindsay, Esq. ("Counsel") has twice taken the Complainant's personal contact information from an OPRA request and disseminated same to a third party with no connection with said OPRA request. Complainant also contended that in response to a request for a status update from the GRC, Counsel copied a non-Cape May County ("County") employee who had not signed a formal letter of representation and thus had no right to be included in the correspondence. The Complainant asserted that Counsel continued to copy said employee to subsequent correspondence despite the Complainant removing the employee's e-mail address. The Complainant contended that the above actions represented a violation of the Complainant's reasonable expectation of privacy under N.J.S.A. 47:1A-1.

The Complainant asserted that Counsel has not apologized or shown remorse for his actions or acknowledge that said actions were improper. The Complainant therefore asserted that the only remedy is to remove Counsel as representation to protect his personal information. The Complainant added that the County has other members readily available to replace the current Counsel, therefore the objection will not place an undue burden on the Custodian.

On January 4, 2019, Counsel responded to the Complainant's objection to representation. Counsel asserted that the employee in question was outside counsel representing the County. Counsel contended that the objection was outside the jurisdiction of the GRC under N.J.S.A. 47:1A-7(b). Additionally, Counsel stated that the Complainant's objection was wholly without merit, and even if it were, a motion to disqualify counsel was not an appropriate remedy at law.

On January 6, 2019, the Complainant replied to Counsel's correspondence. The Complainant noted that N.J.A.C. 5:105-2.3(i) specifically allows for an objection to representation. Thus, the Complainant argued that Counsel's claim that the objection was outside the GRC's jurisdiction was baseless.

Next, the Complainant reiterated that N.J.S.A. 47:1A-1 provides protection of personal information contained in government records. The Complainant argued that Counsel has disseminated his personal information on two (2) occasions to third parties who had no apparent connection with his OPRA request. The Complainant noted that the Custodian continued to add a third party to communications between himself, the GRC, and Counsel despite removing the third party's e-mail address in subsequent correspondence. The Complainant stated that he has filed this objection because of a genuine concern that Counsel will continue to disseminate his personal information to others. The Complainant asserted that he should not have to continue to endure repeated violations of his rights.

Analysis

Objections to Representation

The Administrative Procedures Act (APA or the Act), N.J.S.A. 52:14B-1 to -31, establishes the process and procedures by which administrative agencies carry out their regulatory functions. Administrative agencies possess wide latitude [under the Act] in selecting the appropriate procedures to effectuate their regulatory duties and statutory goals." St. Barnabas Medical Center v. N.J. Hosp. Rate Setting Comm'n, 250 N.J. Super. 132, 142 (App. Div. 1991); Metromedia, Inc. v. Director, Div. of Taxation, 97 N.J. 313, 333 (1984); In re the Petition By Controlled Cable Corp., 95 N.J. 473, 485 (1984); In re Kallen, 92 N.J. 14, 24–25 (1983); Texter v. Dep't of Human Serv., 88 N.J. 376, 385 (1982); Bd. of Educ. of City of Plainfield v. Cooperman, 209 N.J. Super. 174, 207 (App. Div. 1986) (modified, 105 N.J. 587, 523 (1987)). Administrative agencies effectuate out their regulatory responsibilities through rulemaking, adjudication of contested cases, and informal administrative action. Allstars Auto Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 161 (2018); In re Carberry, 114 N.J. 574, 584-85, (1989); In re Unif. Admin. Procedural Rules, 90 N.J. at 93-94 (1982).

GRC regulations promulgated under the APA and OPRA provide "procedures for the consideration of complaints filed pursuant to [OPRA]." N.J.A.C. 5:105-1.1. This includes a process for challenging a complainant's or custodian's legal representative. N.J.A.C. 5:105-2.3(i)-(j), N.J.A.C. 2.4(j)-(k). Specifically:

Objections to a party's representative by another party, and a party's response thereto, to the complaint must be in writing, presented to the Council, served on all parties, and include:

1. The Council's case reference name and number;
2. Clear identification of the representative in question; and
3. A detailed explanation of the reasons for the objections, or conversely the response to such objections.

[N.J.A.C. 5:105-2.3(i).]

A party may respond to any challenge to its representative within five business days of receipt of the challenge.

[N.J.A.C. 5:105-2.3(j).]

Notwithstanding the process set forth above, the remainder of the regulations is silent on the mechanism by which the Council has the authority to render a decision on disqualification of a party's representative. The Uniform Administrative Procedure Rules address such an issue. Specifically, the Office of Administrative Law ("OAL") may address issues of attorney conduct and disqualify them accordingly:

The Uniform Administrative Procedure Rules specifically address issues of attorney conduct and disqualify them accordingly:

In any case where the issue of an attorney's ethical or professional conduct is raised, the judge before whom the issue has been presented shall consider the merits of the issue raised and make a ruling as to whether the attorney may appear or continue representation in the matter. The judge may disqualify an attorney from participating in a particular case when disqualification is required by the Rules of Professional Conduct or the New Jersey Conflict of Interest Law. If disciplinary action against the attorney is indicated, the matter shall be referred to the appropriate disciplinary body.

[N.J.A.C. 1:1-5.3.]

Here, the Complainant has objected to Counsel's representation, asserting that Counsel violated the Complainant's privacy interests under N.J.S.A. 47:1A-1. Counsel, after obtaining an extension, responded that the objections should not be accepted.

Recently, the Council reviewed Sheppard v. Cnty. of Cape May, GRC Complaint No. 2019-3 (Interim Order dated April 30, 2019), a complaint involving the same parties and the same motion objecting to the Custodian's legal representation. The Council determined that matter should be referred to the OAL for a hearing to decide the motion and resolve the contested facts in issue.

Accordingly, this matter should be referred to the OAL for a determination on whether the Complainant's objection to representation of the Custodian in this matter by Jeffrey R. Lindsay, Esq., is valid. And if so, whether Mr. Lindsay should therefore withdraw or be removed for cause as Counsel for the County in the instant complaint. N.J.A.C. 5:105-1, et seq.; N.J.A.C. 1:1-5.3; Sheppard, GRC 2019-3.

Reconsideration

The Council defers analysis of whether to grant or deny the Complainant's request for reconsideration pending the outcome of the OAL's determination on the Complainant's objection to representation.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. This matter should be referred to the Office of Administrative Law for a determination on whether the Complainant's objection to representation of the Custodian in this matter by Jeffrey R. Lindsay, Esq., is valid. And if so, whether Mr. Lindsay should therefore withdraw or be removed for cause as Counsel for the County of Cape May in the instant complaint. N.J.A.C. 5:105-1, et seq.; N.J.A.C. 1:1-5.3; Sheppard v. Cnty. of Cape May, GRC Complaint No. 2019-3 (Interim Order dated April 30, 2019).
2. The Council defers analysis of whether to grant or deny the Complainant's request for reconsideration pending the outcome of the OAL's determination on the Complainant's objection to representation.

Prepared By: Samuel A. Rosado
Staff Attorney

May 14, 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

FINAL DECISION

October 30, 2018 Government Records Council Meeting

Edwin Sheppard
Complainant

Complaint No. 2016-195

v.

Cape May County
Custodian of Record

At the October 30, 2018 public meeting, the Government Records Council (“Council”) considered the October 23, 2018 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request after receiving clarification. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s clarified OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). See also Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-100 (Interim Order dated June 26, 2012); Holland v. Rowan Univ., GRC Complaint No. 2014-63, *et seq.* (March 2015).
2. The Complainant’s request was invalid because it failed to provide ample identifiers, by way of date or range of dates, necessary for the Custodian to locate additionally responsive 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); N.J. Builders Assoc. v. N.J. 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); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011); Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-289 (July 2015). The Custodian has thus lawfully denied access to any records beyond those he has already provided. N.J.S.A. 47:1A-6.
3. The Custodian’s failure to respond in a timely manner to the Complainant’s clarified request resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Complainant’s request, notwithstanding the Custodian’s disclosure



of a number of records, was invalid because it failed to include the necessary criteria. 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 30th Day of October, 2018

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 1, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
October 30, 2018 Council Meeting**

**Edwin Sheppard¹
Complainant**

GRC Complaint No. 2016-195

v.

**Cape May County²
Custodial Agency**

Records Relevant to Complaint: Hard copies via U.S. mail of “any and all” communications by any Cape May County (“County”) departments concerning the “Bergre Acquisition, LLC., Bergre Acquisition LLC (D.B.A. HomeCare Specialists), and/or HomeCare Specialists.”

Custodian of Record: Elizabeth Bozzelli
Request Received by Custodian: May 9, 2016
Response Made by Custodian: May 11, 2016
GRC Complaint Received: July 11, 2016

Background³

Request and Response:

On May 2, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On May 9, 2016, Keyboarding Clerk Michele Morrissey disseminated the subject OPRA request to three (3) offices within the County, including County Counsel. Ms. Morrissey asked that those offices identify any responsive records or determine if an extension is required and notify the Complainant and Custodian simultaneously.

On May 11, 2016, the original Custodian’s Counsel responded in writing on behalf of the Custodian stating that the request was overbroad and unclear. Counsel thus asked the Complainant to clarify his request to include a relevant time frame. On May 18, 2016, the Complainant responded via e-mail noting that he formulated his request based on limited information publicly available to him. The Complainant stated that based on a recent communication he received, he clarified his OPRA request as follows:

¹ No legal representation listed on record.

² Represented by Jeffrey R. Lindsay, Esq. (Cape May Court House, NJ). Previously represented by James B. Arsenault, Jr., Esq. (Cape May, Court House, NJ)

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.

1. All communications that led to Agenda item [378]-16 being placed on the April 26, 2016 County Freeholders meeting agenda.
2. All documentation provided to original Counsel that “made him feel satisfied” that the County complied with County Specification No. 2015-37, Item 51.
3. Written notice that the County gave HomeCare Specialists regarding a breach of the specifications, inclusive of notification of a twenty (20) day window to correct the cited deficiencies.

On July 1, 2016, the Complainant e-mailed the original Counsel recapitulating all events from submission of his OPRA request onward. The Complainant stated that since providing clarification on May 18, 2016, he received no response from the County. The Complainant sought a status update.

Denial of Access Complaint:

On July 11, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that although he provided clarification per original Counsel’s request, the County failed to respond to the subject OPRA request. The Complainant noted that a privilege log he received as part of an unrelated OPRA request showed multiple e-mails sent between employees regarding the subject OPRA request on May 9 and 10, 2016. The Complainant argued that notwithstanding internal discussions, they simply ignored his OPRA request. The Complainant contended that he believed the County’s actions were knowing and willful.

Supplemental Response:

On July 25, 2016, Ms. Morrissey sent two (2) e-mails to the Complainant advising that she was providing multiple records in response to the Complainant’s clarified OPRA request. On July 29, 2016, the Complainant e-mailed Ms. Morrissey asserting that her response was incomplete. The Complainant asserted that at the April 26, 2016 meeting, the original Counsel stated that he received e-mails from Department Heads, including Sarah Maloney and Kevin Lare. The Custodian also noted that original Counsel stated that he received utilization reports. The Complainant asserted that none of these records were included in the July 25, 2016 response.

Statement of Information:

On August 4, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on May 9, 2016. The Custodian certified that her search included distributing the OPRA request to various County offices to search for responsive e-mails. The Custodian also certified that original Counsel also directed a server search. The Custodian certified that Ms. Morrissey ultimately responded in writing on July 25, 2016 disclosing approximately 250 pages of records with some redactions in accordance with Executive Order No. 26 (Gov. McGreevey, 2002) (“EO 26”) and prevailing case law. The Custodian affirmed that these redactions included client names, social security numbers, and birthdates.

The Custodian contended that between May 9 and August 2, 2016, the Complainant submitted, and she responded to, eighteen (18) OPRA requests. The Custodian contended that the subject OPRA request, the first of them, was overly broad. The Custodian noted that a search based on the clarification yielded approximately 250 pages of records, which needed redactions. The Custodian contended that the response process was slowed by the other OPRA requests; however, the County successfully completed this OPRA request (as well as all others).⁴

Additional Submissions:

On August 4, 2016, the Complainant sent an e-mail to the GRC disputing the SOI. The Complainant alleged that without explanation, the County responded on July 25, 2016 providing access to records. The Complainant asserted that this response was incomplete. Specifically, the Complainant reiterated from his July 29, 2016 e-mail that the County did not include communications between original Counsel, Ms. Maloney, and Mr. Lare as stated at the April 26, 2016 meeting. The Complainant noted that references to this “documentation” was included in the meeting minutes. The Complainant asserted that not only did the County ignore his July 29, 2016 e-mail, they provided no indication as to whether this documentation was exempt from disclosure or did not exist.

On June 26, 2017, the Complainant e-mailed the GRC⁵ taking issue with the fact that the County sent the SOI to the GRC via U.S. mail. The Complainant also argued that although original Counsel repeatedly asserted that 250 pages of records were responsive to the subject OPRA request, he only received 240 pages. The Complainant alleged that this discrepancy was not minor given that he contended that the County did not provide all responsive records.

The Complainant also alleged that, in response to a recent unrelated OPRA request, the County disclosed multiple communications that arguably were responsive to item No. 1 of the clarified OPRA request. The Complainant asserted that his allegation was supported by original Counsel’s own admission the e-mail chain disclosed “led to Agenda Item [378]-16 . . . being placed on the [April 26, 2016] agenda.” The Complainant argued that notwithstanding this admission, the e-mail chain was not disclosed as part of the County’s response to the subject OPRA request. The Complainant contended that original Counsel’s failure to produce these e-mails (on which he was copied) was “hard to believe” given his definitive statement that they led to Agenda Item 378-16.

Further, the Complainant argued that he believed the disclosure evidenced that additional records existed that were still being withheld. Specifically, the Complainant contended that he sought recommendations sent to original Counsel, which were not provided. The Complainant disputed original Counsel’s assertion that he received “recommendations” by phone because it did not follow “protocol.” Further, the Complainant noted that an e-mail from Mr. Lare to original Counsel concluded with “[m]ore to come” The Complainant surmised that this meant

⁴ The Custodian included detailed information and documentary evidence of the County’s responses in the other OPRA requests. The GRC notes that none of those requests are at issue here.

⁵ The Complainant characterized his submission as an amendment to the Denial of Access Complaint. Pursuant to the GRC’s regulations, amended Denial of Access Complaints must be filed within thirty (30) business days after the initial filing. N.J.A.C. 5:105-2.3(h)(1). The Complainant’s submission was clearly beyond this time frame, and thus would not be accepted as an amended Denial of Access Complaint. Notwithstanding, the GRC accepts the correspondence as an additional information submission.

additional e-mails were sent. The Complainant again disputed original Counsel's explanation that ensuing conversations took place verbally.

Finally, the Complainant argued that original Counsel's actions were knowing and willful. The Complainant attached a May 9, 2016 e-mail from Counsel to Deputy Attorney General ("DAG") Labinot Berljolli alleging that it shows Counsel "intended to withhold" records before ever reviewing one. The Complainant also questioned why original Counsel would reach out to DAG Berljolli unless the two exchanged communications: none were disclosed in response to the subject OPRA request.

On June 27, 2017, via e-mail, original Counsel disputed Complainant's allegations that the County's response was "suspicious" or nefarious. Counsel first dismissed Complainant's criticism of how he sent the SOI to the GRC. Original Counsel noted that he never sent several hundred pages to any court or administrative agency in electronic form because it was "disrespectful" and "a waste of [the courts'/agencies'] resources."⁶

Regarding the e-mails the Complainant asserted were not disclosed, original Counsel argued that same were disclosed on July 27, 2016 as part of its response to a separate OPRA request. Original Counsel also contended that the April 27, 2016 e-mail, which the Complainant argued was responsive here, was previously withheld in response to a 2016 OPRA request. Original Counsel asserted, however, that he subsequently felt it appropriate to disclose the e-mail in response to the recent OPRA request because the contract matter concluded many months ago. Original Counsel argued that the foregoing proved that the County made no attempt to intentionally withhold responsive records.

On October 1, 2017, the Complainant e-mailed the GRC advised that he received the SOI again in electronic form, but not through U.S. mail. The Complainant again took issue with original Counsel's discrepancy of "250 pages," as he again calculated the response to be 240 pages of records. The Complainant contended that the only viable possibilities for the discrepancy is that: 1) the County did not disclose ten (10) pages; or 2) original Counsel made multiple errors and knowingly allowed the issue to "snowball and drag on" thereby "wast[ing] both the GRC and [Complainant's] time."⁷

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id.

⁶ Original Counsel noted that he would send, on that day, a hardcopy of the SOI to the Complainant to dispel any notion of wrong-doing on the County's part.

⁷ The remainder of the correspondence appears to address responses to other OPRA requests not at issue here. With respect to those requests, the Complainant disputed redactions based on the attorney-client privilege exemption. The GRC notes that the County did not assert this exemption for any of the redacted material here; rather, redactions were made in accordance with EO 26.

Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁸ Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Moreover, should a requestor amend or clarify an OPRA request, it is reasonable that the time frame for a custodian to respond should begin anew; thus, providing a custodian with the statutorily mandated time frame to respond to the new or altered OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). See Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-100 (Interim Order dated June 26, 2012) (holding that the custodian's failure to respond within the new time frame following receipt of clarification resulted in a "deemed" denial of access); Holland v. Rowan Univ., GRC Complaint No. 2014-63, *et seq.* (March 2015).

Here, the Custodian, though Counsel, sought and received clarification from the Complainant on May 11, 2016. The Complainant provided clarification on May 18, 2016 via e-mail. Thus, the seven (7) business day time frame was renewed and the final date for the Custodian to respond was May 27, 2016. Notwithstanding, the Custodian did not respond again within that time frame. In fact, the County's first communication with the Complainant thereafter was Ms. Morrisey's e-mail to the Complainant on July 25, 2016. Thus, and similar to the facts in Carter and Holland, the Custodian's failure to respond within the new time frame after receiving clarification resulted in a "deemed" denial of access.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request after receiving clarification. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's clarified OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. See also Carter, GRC 2011-100; Holland, GRC 2014-63.

Validity of 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.

⁸ A custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

[MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005) (emphasis added).]

The Court reasoned that:

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

[Id. at 549 (emphasis added).]

The Court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt . . . In short, OPRA does not countenance open-ended searches of an agency's files.” Id. at 549 (emphasis added). Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005);⁹ N.J. Builders Assoc. v. N.J. 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).

The GRC has established specific criteria deemed necessary under OPRA to request an e-mail communication. See 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 Elcavage, GRC 2009-07; Sandoval v. N.J. 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). The GRC notes that the Council has routinely determined that requests omitting the specific date or range of dates are invalid. See Tracey-Coll v. Elmwood Park Bd. of Educ. (Bergen), GRC Complaint No. 2009-206 (June 2010); Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2013-118 (January 2014).

Additionally, in Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012), the Court held that 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.” Id. at 177. 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.” Id. at 213).

⁹ Affirming Bent v. Stafford Police Dep't, GRC Case No. 2004-78 (October 2004).

Generally, in situations where a request was overly broad on its face but the custodian nonetheless was able to locate records, the Council has followed Burke in determining that the request contained sufficient information for record identification. See Bond v. Borough of Washington (Warren), GRC Complaint No. 2009-324 (Interim Order dated March 29, 2011); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2010-302 (Interim Order dated January 31, 2012). However, there have been instances where, notwithstanding the custodian's ability to locate certain records, the Council has determined that the request was nevertheless invalid. See Ciszewski v. Newton Police Dep't (Sussex), GRC Complaint No. 2013-90 (October 2013) at 4-5; Gartner v. Borough of Middlesex (Middlesex), GRC Complaint No. 2014-203 (Interim Order dated February 24, 2015).

In Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-289 (July 2015), the complainant's request sought, among other records, communications between commissioners and aides regarding hiring of the custodian's counsel and/or his law firm. After the custodian advised that no communications existed, the complainant responded, advising that he believed additional correspondence existed. However, it was not until he filed the Denial of Access Complaint that he asserted that responsive communications should have dated back to at least 2013. The Council determined that the complainant's request was invalid because it failed to conform with Elcavage, GRC 2009-07; Armenti, GRC 2009-154, reasoning that:

As was the case in Ciszewski . . . the Complainant's Denial of Access Complaint assertion that records exist dating back to at least 2013 sufficiently proves that the request item was deficient. See also Gartner, GRC 2014-203. The Complainant's failure to provide the time frame also inextricably affected the Custodian's ability to locate records responsive to item Nos. 2 and 3. Additionally, the Complainant did not clarify this fact in his e-mail to the Custodian on August 8, 2014. Thus, the GRC is satisfied that the Custodian could not have reasonably identified all responsive records to the first three (3) request items prior to 2014 without the Complainant having included a time frame in item No. 1.

[Id. at 8.]

Here, the Complainant's OPRA request sought "any and all" communications by any County department regarding his company. On behalf of the Custodian, original Counsel sought clarification of the request. In response, the Complainant added additional detail to the subject but did not include a specific date or range of dates. Following the County's disclosure of approximately 250 pages of e-mails, the Complainant filed the instant complaint arguing that he received e-mails from May 9 and 10, 2016 in response to a separate OPRA request that he believed to be responsive here. After the SOI, the Complainant refuted same by arguing that additional e-mails he received in response to other OPRA requests were responsive here. Among them were three (3) e-mails within days of the April 26, 2016 meeting and one (1) e-mail the day after the meeting. The Complainant argued that each was proof that additional undisclosed records existed.

However, as was the case in Verry, GRC 2014-289, the Complainant's request, even after clarification, was invalid and thus the Council's decision should depart from Burke, 429 N.J. Super. 169. The reasons for militating towards Verry are clear. Specifically, as was the case in

Verry, the lack of a range of dates allowed the Complainant to argue that any e-mails disclosed in response to subsequent OPRA requests were responsive to the subject request. Even if the Custodian were to glean from the Complainant's clarification that the "range of dates" ended as of the April 26, 2016 meeting, the Complainant still argued that e-mails post-dating the meeting were responsive to it. Such a discrepancy presents definitive evidence that the Complainant's request is essentially what the MAG court considered a "fishing expedition" rather than concise request for specific "government records."

Therefore, the Complainant's request was invalid because it failed to provide ample identifiers, by way of date or range of dates, necessary for the Custodian to locate additionally responsive records. 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; Elcavage, GRC 2009-07; Armenti, GRC 2009-154; Verry, GRC 2014-289. The Custodian has thus lawfully denied access to any records beyond those he has already provided. N.J.S.A. 47:1A-6.

Finally, the Complainant raised multiple allegations of undisclosed records stemming from his interpretation of the April 26, 2016 minutes, the number of pages the Custodian alleged were provided in her SOI, and a sentence from an April 27, 2016 e-mail the Complainant asserted he should have received in response to the request. The GRC addresses each argument briefly in concluding that they are not persuading here.

Regarding the minutes argument, the verbiage does not confirm the existence of any additional records. The terms "information he received" and "[original Counsel] was assured" do not allude to multiple solutions and could just as easily confirm verbal conversations with County staff members. See April 26, 2016 Minutes of Regular Meeting, at 5.¹⁰ Regarding the SOI discrepancy, the Custodian represented the number of pages as "approximately 250." The 240 pages, which both parties confirmed were disclosed reasonably falls within the term "approximately 250" pages. Regarding the e-mail, whether "more to come" meant "more came" is of no moment here. The request failed to indicate a time frame for the responsive records. Thus, it is reasonable that regardless of whether more e-mails were created, the Custodian could not have reasonably believed they were responsive.

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

¹⁰ https://capemaycountynj.gov/AgendaCenter/ViewFile/Minutes/_04262016-564 (accessed October 4, 2018).

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 failure to respond in a timely manner to the Complainant’s clarified request resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Complainant’s request, notwithstanding the Custodian’s disclosure of a number of records, was invalid because it failed to include the necessary criteria. 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 Council Staff respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request after receiving clarification. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s clarified OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). See also Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-100 (Interim Order dated June 26, 2012); Holland v. Rowan Univ., GRC Complaint No. 2014-63, *et seq.* (March 2015).
2. The Complainant’s request was invalid because it failed to provide ample identifiers, by way of date or range of dates, necessary for the Custodian to locate additionally responsive 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); N.J. Builders Assoc. v. N.J. 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); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011); Verry v. Franklin Fire Dist. No. 1 (Somerset),

GRC Complaint No. 2014-289 (July 2015). The Custodian has thus lawfully denied access to any records beyond those he has already provided. N.J.S.A. 47:1A-6.

3. The Custodian's failure to respond in a timely manner to the Complainant's clarified request resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Complainant's request, notwithstanding the Custodian's disclosure of a number of records, was invalid because it failed to include the necessary criteria. 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.

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