



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

Libertarians for Transparent Government
Complainant

Complaint No. 2016-211

v.

City of Newark (Essex)
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, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian has borne his burden of proof that he timely responded to the Complainant’s OPRA request based upon on a warranted and substantiated extension. N.J.S.A. 47:1A-5(i); Ciccarone v. N.J. Dep’t of Treasury, GRC Complaint No. 2013-280 (Interim Order, dated July 29, 2014); Rivera v. City of Plainfield Police Dep’t (Union), GRC Complaint No. 2009-317 (May 2011). Therefore, there was no “deemed” denial. N.J.S.A. 47:1A-6.
2. With respect to informal or draft agreements, the Custodian did not unlawfully deny access to Item No. 2 of the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Draft or informal agreements between the parties satisfy the requirements to qualify for protection under the deliberative process privilege via N.J.S.A. 47:1A-1.1. Libertarians for Transparent Gov’t v. Gov’t Records Council, 453 N.J. Super. 83, 90-91 (App. Div.), certif. denied, 233 N.J. 484 (2018); O’Shea v. West Milford BOE, GRC Complaint No. 2004-93 (April 2006).
3. The with respect to e-mails or correspondence, Item No. 2 of the Complainant’s OPRA request is invalid because they fail to seek identifiable government records. MAG Entm’t, LLC v. Div. Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007). Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 8, 2010); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011).

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**

**Libertarians for Transparent Government¹
Complainant**

GRC Complaint No. 2016-211

v.

**City of Newark (Essex)²
Custodial Agency**

Records Relevant to Complaint:³

Regarding the case of Rasheen Peppers et al v. City of Newark, Case No. 2:11-cv-03207, electronic copies of:

1. The settlement agreement related to this matter;
2. All informal agreements, draft agreements, correspondence, e-mails, *etc.*, related to this case that disclose the settlement amount and/or any other settlement terms.

Custodian of Record: Kenneth Louis

Request Received by Custodian: July 18, 2016

Response Made by Custodian: July 18, 2016; July 26, 2018

GRC Complaint Received: July 29, 2016

Background⁴

Request and Response:

On July 18, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 18, 2016, the Custodian responded via e-mail, acknowledging receipt of the OPRA request and stating that a response is anticipated on or before Friday, August 5, 2016. The Complainant replied back, asserting that until a valid reason is provided for an extension under N.J.S.A. 47:1A-5, they will maintain that a response is due on July 27, 2016.

On July 26, 2016, the Custodian responded to the Complainant in writing, providing a responsive record to the Complainant’s satisfaction. The Custodian also stated that responsive records to Item Nos. 1 & 2 were anticipated on or before August 5, 2016.

¹ Represented by Richard M. Gutman, Esq. (Montclair, NJ).

² Represented by Willie Parker, Esq., Corporation Counsel (Newark, NJ).

³ The Complainant sought other records within their OPRA request that are not at issue in this matter.

⁴ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Council Staff the submissions necessary and relevant for the adjudication of this complaint.

Denial of Access Complaint:

On July 29, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant noted that N.J.S.A. 47:1A-5(i) states that responses to OPRA are due “as soon as possible, but not later than seven business days after receiving the request, provided that the record is currently available and not in storage or archived.” The Complainant asserted that this means that a custodian has the latitude to announce a reasonable extension of time without the consent of the requestor in instances only where the record is in storage or archived.

The Complainant contended that the Custodian did not ask for permission for an extension in his July 18, 2016 and July 26, 2016 responses, nor did he assert that any of the requested records were in storage or archived. The Complainant contended that the Custodian simply announced that a response would be provided on or before August 5, 2016.

The Complainant asserted that generally, an adequate response by a custodian would be to grant or deny access, or to obtain an agreement with the request for an extension of time to a specific date. N.J.S.A. 47:1A-5(i). The Complainant contended that if custodians could unilaterally grant themselves an extension of time, the seven (7) business day deadline outlined in the statute would be rendered meaningless.

The Complainant argued that because the Custodian failed to assert that the requested records were archived or in storage, he violated OPRA by granting himself an extension of time to respond without obtaining the consent of the Complainant.

The Complainant requested that the GRC find that the Custodian violated OPRA; require that the Custodian disclose the requested records to the Complainant; and find that the Complainant is a prevailing party and entitled to an attorney fee award.

Statement of Information:

On August 10, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on July 18, 2016. The Custodian asserted that on July 18, 2016, he responded to the Complainant, acknowledging receipt of the request and stating that a response was anticipated by August 5, 2016.

The Custodian certified that on July 26, 2018, he responded to the Complainant providing a responsive record, and restating that the remainder of the request would be fulfilled on or before August 5, 2016. The Custodian certified that on August 5, 2016, he responded to the Complainant in writing, stating that there were no responsive records with regards to Item No. 1, and provided seven (7) e-mails with redactions in response to Item No. 2. The Custodian also provided an index explaining the lawful basis for the redactions, asserting attorney-client privilege under N.J.S.A. 47:1A-1.1.

The Custodian asserted that his July 26, 2016 partial response was not a denial of access, but a compromise as a result of the delay in getting a complete response within the initial seven

(7) business days. The Custodian argued that there is no case law in New Jersey which held that the Custodian's two (2) responses to be a denial of access.

Furthermore, the Custodian certified that while the litigation in question had been settled, the terms of the settlement had not yet been memorialized in a final settlement. The Custodian certified that the Office of the Corporation Counsel reviewed their files and discussed the same with outside counsel that litigated the matter. The Custodian certified that the efforts to bring about the settlement did not produce disclosable records.

Furthermore, the Custodian argued that attorney fees are not and should be awarded when a "brief delay" occurs to fully respond to an OPRA request, as it was not the intent of the legislature to prohibit solutions that may involve a delay, citing N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 183 (App. Div. 2007) (holding that when a custodian "advise[s]" a requestor of the date certain on which he/she will respond, that date "becomes the deadline for compliance . . ."). Therefore, the Custodian argued that the matter be dismissed.

Additional Submissions

On October 19, 2016, the Complainant responded to the Custodian's SOI. The Complainant argued that the Custodian's SOI was incomplete, asserting that it failed to sufficiently identify whether or not responsive records actually exist. The Complainant argued that the Custodian's assertion that the litigation settlement did not provide "disclosable" records did not establish that no responsive records exist. The Complainant contended that N.J.S.A. 47:1A-5(g) requires the Custodian to describe the nature of the record(s) and provide a lawful basis for denial, referencing Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 345, 354 (App. Div. 2005). Thus, the Complainant argued that the Custodian's response was inadequate. The Complainant contended that on August 19, 2016, they asked the Custodian for clarification as to whether responsive records exist, but have not received a response.

The Complainant also stated that the Custodian did not perform an adequate search as required under Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506, 512-13, 514-17 (App. Div. 2010). The Complainant asserted that the litigation in question involved the City of Newark ("City")'s use of outside counsel, and the Custodian did not mention whether outside counsel was asked to review their files for responsive records.

Next, the Complainant asserted that the e-mails provided in response to Item No. 3 were not responsive to the OPRA request. The Complainant contended that they explicitly did not wish for communications between the City and/or its attorneys. Rather, the Complainant argued that the request sought communications between the opposing parties in litigation.

The Complainant asked for the GRC to find that the SOI was incomplete, and to require the Custodian to resubmit the SOI, with clarifications to include that a search for responsive records was conducted not only at the Office of the Corporation Counsel, but also at the offices of outside counsel assigned to the litigation. Additionally, the Complainant asked that Item No. 9 of the SOI describe e-mails and communications between the City's attorneys and the other party's attorneys.

On December 8, 2016, the Custodian replied to the Complainant's response. The Custodian asserted that there was no denial of access to the records confirming a settlement agreement but has no records that set forth the terms and amount of settlement, referencing Branin v. Collingswood Borough Custodian, 2016 N.J. Super. Unpub. LEXIS 1874 (App. Div. Aug. 10, 2016) (in responding to a request for a settlement document, a custodian of records is required only to search for and not research to find the document).

The Custodian also asserted that Item No. 9 of the SOI adequately disclosed the existence of responsive records as well as outlined the legal justification for withholding same. Additionally, the Custodian contended that Item No. 10 of the SOI made mention of the City's review of its files and communicating with outside counsel, thereby implying that a search was conducted of outside counsel's files for responsive records.

Lastly, the Custodian noted that the Mercer County Superior Court had dismissed an action filed by the Complainant against a separate agency seeking the same type of records, and the defendant stated that no settlement agreement existed. See Libertarians for Transparent Gov't v. Coll. of New Jersey, No. MER-L-1534-16 (Law. Div. Oct. 14, 2016).

On December 8, 2016, the Complainant responded, asserting that the City still had not stated whether outside counsel possessed responsive records. The Complainant stated that a response which only identifies disclosable records is insufficient. Rather, the Complainant contended that all responsive records, whether disclosable or not, should be identified. Additionally, the Complainant argued that the plaintiff's request in Branin was vague and sought records three (3) years after the litigation ended, whereas here the Complainant's request was specific and submitted just two (2) days after the end of litigation. Moreover, the Complainant provided four (4) Superior Court decisions ruling in favor of the Complainant in seeking the same type of records from other agencies. See Libertarians for Transparent Gov't v. City of Jersey City, No. HUD-L-2952-16 (Law Div. Nov. 4, 2016); Libertarians for Transparent Gov't v. Borough of Caldwell, No. ESX-L-5197-16 (Law Div. Sep. 27, 2016); Libertarians for Transparent Gov't v. William Paterson Univ., No. PAS-L-1541-16 (Law Div. Sept. 1, 2016); John Paff v. Cnty. of Passaic, No. PAS-L-4042-15 (Law Div. Jan. 28, 2016).

Analysis

Timeliness

OPRA provides that a custodian may request an extension of time to respond to the complainant's OPRA request, but the custodian must provide a specific date by which he/she will respond. Should the custodian fail to respond by that specific date, "access shall be deemed denied." N.J.S.A. 47:1A-5(i).

In Rivera v. City of Plainfield Police Dep't (Union), GRC Complaint No. 2009-317 (May 2011), the custodian responded in writing to the complainant's request on the fourth (4th) business day by seeking an extension of time to respond and providing an anticipated date by which the requested records would be made available. The complainant did not consent to the custodian's request for an extension of time. The Council stated that:

The Council has further described the requirements for a proper request for an extension of time. Specifically, in Starkey v. NJ Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316, and 2007-317 (February 2009), the Custodian provided the Complainant with a written response to his OPRA request on the second (2nd) business day following receipt of said request in which the Custodian requested an extension of time to respond to said request and provided the Complainant with an anticipated deadline date upon which the Custodian would respond to the request. The Council held that “because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5(g) [and] N.J.S.A. 47:1A-5(i).”

Further, in Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010), the Council held that the custodian did not unlawfully deny access to the requested records, stating in pertinent part that:

[B]ecause the Custodian provided a written response requesting an extension on the sixth (6th) business day following receipt of the Complainant’s OPRA request and providing a date certain on which to expect production of the records requested, and, notwithstanding the fact that the Complainant did not agree to the extension of time requested by the Custodian, the Custodian’s request for an extension of time [to a specific date] to respond to the Complainant’s OPRA request was made in writing within the statutorily mandated seven (7) business day response time.

Moreover, in Werner v. N.J. Civil Serv. Comm’n, GRC Complaint No. 2011-151 (December 2012), the Council again addressed whether the custodian lawfully sought an extension of time to respond to the complainant’s OPRA request. The Council concluded that because the custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated date by which the requested records would be made available, the custodian properly requested the extension pursuant to OPRA. In rendering the decision, the Council cited as legal authority Rivera, GRC 2009-317, Criscione, GRC 2010-68, and Starkey, GRC 2007-315, *et seq.*

Although extensions are rooted in well-settled case law, the Council need not unquestioningly find valid every request for an extension containing a clear deadline. In Ciccarone v. N.J. Dep’t of Treasury, GRC Complaint No. 2013-280 (Interim Order, dated July 29, 2014), the Council found that the custodian could not lawfully exploit the process by repeatedly rolling over an extension once obtained. In reaching the conclusion that the continuous extensions resulted in a “deemed” denial of access, the Council looked to what is “reasonably necessary.”

Here, the Custodian responded in writing to the Complainant’s request on the same day of receipt, July 18, 2016. The Custodian stated that a response was anticipated on August 5, 2016. On July 26, 2016, the sixth (6th) day after receipt, the Custodian provided a partial response to the

request, and stated that a complete response from the City's Law Department was still expected to arrive on or before August 5, 2016.

The Complainant's OPRA request sought essentially two (2) items comprising of: 1) the settlement agreement in Peppers, Case No. 2:11-cv-03207; or, alternatively, 2) informal or draft agreements, or correspondence indicating the settlement terms and amounts. The Custodian extended the response time once and ultimately responded on August 5, 2016. The Custodian stated that no disclosable records exist as to the settlement agreement, and providing seven (7) e-mails with redactions. As noted above, a requestor's approval is not required for a valid extension.

To determine if the extended time for a response is reasonable, the GRC must first consider the complexity of the request as measured by the number of items requested, the ease in identifying and retrieving requested records, and the nature and extent of any necessary redactions. The GRC must next consider the amount of time the custodian already had to respond to the request. Finally, the GRC must consider any extenuating circumstances that could hinder the custodian's ability to respond effectively to the request.⁵

The evidence of record indicates that the Custodian received the subject OPRA request, which was not overly complex, while the parties were still composing the settlement agreement. The Custodian averred in the SOI that the extended response time frame was needed due to the pending availability of the records. From the Custodian's receipt of the Complainant's OPRA request, he initially sought an additional seven (7) business days on top of the original seven (7), for a total of fourteen (14) business days to respond. From the evidence of record it appears that the Custodian sought the extension for all items in an attempt to provide a record responsive to item Nos. 1 and 2. Additionally, seven (7) business days was unreasonable given the circumstances of this complaint. Specifically, the evidence supports that the Custodian intended to disclose a settlement agreement undergoing review and discussion, by allowing time for the parties to finalize the agreement and be placed in writing. While Complainant's Counsel argued that extensions are only for records stored, in archive, or in use, the Council's long-standing precedent which interprets OPRA permissively in extending the time for response to records requests. See Libertarians for Transparent Gov't v. Summit Pub. Sch. (Union), GRC Complaint No. 2016-193 (March 2018).

Accordingly, the Custodian has borne his burden of proof that he timely responded to the Complainant's OPRA request based upon on a warranted and substantiated extension. N.J.S.A. 47:1A-5(i); Ciccarone, GRC 2013-280; Rivera, GRC 2009-317. Therefore, there was no "deemed" denial. N.J.S.A. 47:1A-6.

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

⁵ "Extenuating circumstances" could include, but not necessarily be limited to, retrieval of records that are in storage or archived (especially if located at a remote storage facility), conversion of records to another medium to accommodate the requestor, emergency closure of the custodial agency, or the custodial agency's need to reallocate resources to a higher priority due to *force majeure*.

exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

The Council is permitted to raise additional defenses regarding the disclosure of records pursuant to Paff v. Twp. of Plainsboro, 2007 N.J. Super. Unpub. LEXIS 2135 (App. Div. 2007) (certif. denied, 193 N.J. 292 (2007)).⁶ In Paff, the complainant challenged the GRC’s authority to uphold a denial of access for reasons never raised by the custodian. Specifically, the Council did not uphold the basis for the redactions cited by the custodian. The Council, on its own initiative, determined that the Open Public Meetings Act prohibited the disclosure of the redacted portions to the requested executive session minutes. The Council affirmed the custodian’s denial to portions of the executive session minutes but for reasons other than those cited by the custodian. The complainant argued that the GRC did not have the authority to do anything other than determine whether the custodian’s cited basis for denial was lawful. The court held that:

The GRC has an independent obligation to “render a decision as to whether the record which is the subject of the complaint is a government record which must be made available for public access pursuant to’ OPRA . . . The GRC is not limited to assessing the correctness of the reasons given for the custodian’s initial determination; it is charged with determining if the initial decision was correct.”

The court further stated that:

Aside from the clear statutory mandate to decide if OPRA requires disclosure, the authority of a reviewing agency to affirm on reasons not advanced by the reviewed agency is well established. Cf. Bryant v. City of Atl. City, 309 N.J. Super. 596, 629-30 (App. Div. 1998) (citing Isko v. Planning Bd. of Livingston, 51 N.J. 162, 175 (1968) (lower court decision may be affirmed for reasons other than those given below)); Dwyer v. Erie Inv. Co., 138 N.J. Super. 93, 98 (App. Div. 1975) (judgments must be affirmed even if lower court gives wrong reason), certif. denied, 70 N.J. 142 (1976); Bauer v. 141-149 Cedar Lane Holding Co., 42 N.J. Super. 110, 121 (App. Div. 1956) (question for reviewing court is propriety of action reviewed, not the reason for the action) (aff’d, 24 N.J. 139 (1957)).

Informal/Draft Agreements

OPRA excludes from the definition of a government record “inter-agency or intra-agency advisory, consultative or deliberative material.” N.J.S.A. 47:1A-1.1. It is evident that this phrase is intended to exclude from the definition of a government record the types of documents that are the subject of the “deliberative process privilege.”

In O’Shea v. West Milford BOE, GRC Complaint No. 2004-93 (April 2006), the Council stated that:

⁶ On appeal from Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (March 2006).

[N]either the statute nor the courts have defined the terms ... “advisory, consultative, or deliberative” in the context of the public records law. The Council looks to an analogous concept, the deliberative process privilege, for guidance in the implementation of OPRA’s ACD exemption. Both the ACD exemption and the deliberative process privilege enable a governmental entity to shield from disclosure material that is pre-decisional and deliberative in nature. Deliberative material contains opinions, recommendations, or advice about agency policies. In Re the Liquidation of Integrity Ins. Co., 165 N.J. 75, 88 (2000); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J. 149 (App. Div. 2004).

In Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83 (App. Div.), certif. denied, 233 N.J. 484 (2018), the Appellate Division discussed the deliberative process privilege at length regarding a request for draft meeting minutes, stating:

The applicability of the deliberative process privilege is government by a two-prong test. The judge must determine both that a document is (1) “pre-decisional,” meaning it was “generated before the adoption of an agency’s police or decision;” and (2) deliberative, in that it “contain[s] opinions, recommendations, or advice about agency policies.” [Educ. Law Ctr. v. Dep’t of Educ., 198 N.J. at 276 (quoting Integrity, 165 N.J. at 83)]. If a document stratifies both prongs, it is exempt from disclosure under OPRA pursuant to the deliberative process privilege.

Regarding the first prong, the court stated that “a draft is not a final document. It has been prepared for another person or persons’ editing and eventual approval.” Id. at 90. Therefore, the court held that by their very nature, draft meeting minutes are pre-decisional since they are subject to revision and not yet approved for public release. Id. at 90-91.

Regarding the second prong, the court held that “the document must be shown to be closely related to the ‘the formulation or exercise of . . . policy-oriented judgment or [to] the process by which policy is formulated.’” [Ciesla v. N.J. Dep’t of Health & Sr. Servs., 429 N.J. Super. 127, 138 (App. Div. 2012) (quoting McGee v. Twp. of E. Amwell, 416 N.J. Super. 602, 619-20 (App. Div. 2010). Id. at 91. The court found that the requested draft minutes, as compiled by the writer in attendance at the meeting, were subject to additions, suggestions, and other edits from the members of the public body. Id. Thus, the draft minutes satisfied the second prong of the test. Id. at 92.

Here, the Complainant explicitly sought “informal” and/or “draft” agreements between the parties to the litigation under Item No. 2 of their OPRA request. Therefore, the records sought satisfy the first prong of the test. Libertarians, 453 N.J. Super. at 90. As to the second prong, an informal or draft settlement agreement is and can be subject to change by the parties. Furthermore, such documents invariably reflect upon whether or not Borough will approve of the settlement as a matter of policy, as well as any revisions suggested that would better reflect the public policy goals of the Borough in the litigation. Therefore, the informal and/or draft settlement agreements satisfy the second prong of the test. Id. at 91.

Therefore, with respect to informal or draft agreements, the Custodian did not unlawfully deny access to Item No. 2 of the Complainant's OPRA request. N.J.S.A. 47:1A-6. Draft or informal agreements exchanged between the parties are documents protected from disclosure under the deliberative process privilege. N.J.S.A. 47:1A-1.1; Libertarians, 453 N.J. Super. at 90-91; O'Shea, GRC 2004-93.

Correspondence/E-mails

The New Jersey Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records "readily accessible for inspection, copying, or examination."* N.J.S.A. 47:1A-1.

[MAG Entm't, LLC v. Div. Alcoholic Beverage Control, 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). See also Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005);⁷ N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007).

Additionally, the GRC established criteria deemed necessary to specifically identify an e-mail communication in Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 8, 2010). In Elcavage, the Council determined that "[i]n accordance with MAG, *supra*, and its progeny, in order to specifically identify an e-mail the OPRA request 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

⁷ Affirming Bent v. Stafford Police Dep't, GRC Complaint No. 2004-78 (October 2004).

was transmitted or the e-mails were transmitted, and (3) identification of the sender and/or the recipient thereof.” Id. The Council 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 dated May 24, 2011).

With respect to Item No. 2 of the Complainant’s OPRA request, it identifies the subject matter. Specifically, the Complainant sought e-mails and correspondence containing the settlement amount or settlement terms pertaining to the subject litigation. However, the request item fails to identify the specific date or range of dates during which the correspondence and/or e-mails were transmitted.

Therefore, with respect to e-mails or correspondence, Item No. 2 of the Complainant’s OPRA request is invalid because it fails to seek identifiable government records. MAG, 375 N.J. Super. 534 at 546; Bent, 381 N.J. Super. 30 at 37; N.J. Builders Ass’n, 390 N.J. Super. 166 at 180; Elcavage, GRC 2009-07; Armenti, GRC 2009-154.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Custodian has borne his burden of proof that he timely responded to the Complainant’s OPRA request based upon on a warranted and substantiated extension. N.J.S.A. 47:1A-5(i); Ciccarone v. N.J. Dep’t of Treasury, GRC Complaint No. 2013-280 (Interim Order, dated July 29, 2014); Rivera v. City of Plainfield Police Dep’t (Union), GRC Complaint No. 2009-317 (May 2011). Therefore, there was no “deemed” denial. N.J.S.A. 47:1A-6.
2. With respect to informal or draft agreements, the Custodian did not unlawfully deny access to Item No. 2 of the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Draft or informal agreements between the parties satisfy the requirements to qualify for protection under the deliberative process privilege via N.J.S.A. 47:1A-1.1. Libertarians for Transparent Gov’t v. Gov’t Records Council, 453 N.J. Super. 83, 90-91 (App. Div.), certif. denied, 233 N.J. 484 (2018); O’Shea v. West Milford BOE, GRC Complaint No. 2004-93 (April 2006).
3. The with respect to e-mails or correspondence, Item No. 2 of the Complainant’s OPRA request is invalid because they fail to seek identifiable government records. MAG Entm’t, LLC v. Div. Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007). Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 8, 2010); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011).

Prepared By: Samuel A. Rosado
Staff Attorney

October 23, 2018