



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**

**June 25, 2019 Government Records Council Meeting**

Rocco Maldonado  
Complainant

Complaint No. 2017-146

v.

Ocean County Prosecutor's Office  
Custodian of Record

At the June 25, 2019 public meeting, the Government Records Council ("Council") considered the June 18, 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 Custodian complied with the Council's May 25, 2019 Interim Order. Specifically, the Custodian responded in the prescribed time frame disclosing to the Complainant via U.S. mail unredacted copies of the correspondence responsive to the subject OPRA request. Further, the Custodian simultaneously provided certified confirmation of compliance to the Council Staff.
2. The Custodian unlawfully denied access to the portion of the Complainant's OPRA request seeking correspondence. Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). However, he lawfully denied access to a majority of said request because it was invalid. Feiler-Jampel v. Somerset Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008). Further, the Custodian lawfully denied access to the portion of the OPRA request seeking a plea agreement because none existed. Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). Also, the Custodian timely complied with the Council's May 21, 2019 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

Final Decision Rendered by the  
Government Records Council  
On The 25<sup>th</sup> Day of June 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: June 28, 2019**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff  
June 25, 2019 Council Meeting**

**Rocco Maldonado<sup>1</sup>  
Complainant**

**GRC Complaint No. 2017-146**

v.

**Ocean County Prosecutor's Office<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of “any/all records/correspondence” concerning State v. Maldonado, Indictment No. 10-07-1246, between James Butler, Esq, the Complainant’s attorney, and Ocean County Prosecutor’s Office (“OCPO”) prosecutor Terry A. Linardekis between May 2009 and September 2009. Also, the plea agreement the Complainant signed in August 2009.

**Custodian of Record:** Shiraz I. Deen

**Request Received by Custodian:** March 2, 2017

**Response Made by Custodian:** March 20, 2017

**GRC Complaint Received:** July 14, 2017

**Background**

May 21, 2019 Council Meeting:

At its May 21, 2019 public meeting, the Council considered the May 14, 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 the amended findings and recommendations. The Council, therefore, found that:

1. The portion of the Complainant’s request seeking “any/all records” relating to Indictment No. 10-07-1246 is invalid because it failed to identify a specific record. 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); Feiler-Jampel v. Somerset Cnty. Prosecutor’s Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008). Thus, the Custodian lawfully denied access to this portion of the request. N.J.S.A. 47:1A-6.

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> No legal representation listed on record. Previously represented by John C. Tassini, Esq. (Toms River, NJ).

2. The portion of the Complainant's OPRA request seeking "correspondence" between his attorney and Prosecutor Linardekis regarding Indictment No. 10-07-1246 from May 2009 through September 2009 is valid. 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). See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2015-133 (Interim Order dated September 29, 2016). Thus, the Custodian unlawfully denied access to this portion of the request on the basis that it was invalid. N.J.S.A. 47:1A-6.
3. The Custodian may have unlawfully denied access to records responsive to the portion of the Complainant's OPRA request seeking correspondence between his attorney and Prosecutor Linardekis from May 2009 through September 2009 regarding Indictment No. 10-07-1246. N.J.S.A. 47:1A-6. The Custodian must locate any responsive records and either: 1) disclose them to the Complainant; and/or 2) identify if any are exempt from disclosure in part or whole. Should the Custodian determine that no records exist, he must certify to this fact.
4. **The Custodian shall comply with conclusion No. 3 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, if applicable. Further, the Custodian shall simultaneously deliver<sup>3</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>4</sup> to the [Council Staff].<sup>5</sup>**
5. The Custodian has borne his burden of proof that he lawfully denied access to the portion of the Complainant's OPRA request seeking a 2004 plea agreement. Specifically, the Custodian certified in the Statement of Information, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
6. 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 May 22, 2019, the Council distributed its Interim Order to all parties. On May 24, 2019, the Custodian responded to the Council's Interim Order. Therein, the Custodian certified that he

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<sup>3</sup> 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.

<sup>4</sup> "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."

<sup>5</sup> 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.

searched his records for all responsive correspondence sought in the Complainant's OPRA request. The Custodian certified that he located two (2) letters between Prosecutor Linardakis and Mr. Butler, which he provided without redactions to the Complainant via U.S. mail on that date.

## Analysis

### Compliance

At its May 21, 2019 meeting, the Council ordered the Custodian to locate responsive correspondence and either disclose them or provide a specific lawful basis for denying access to same. The Council ordered that if no records existed, the Custodian must certify to that fact. The Council further 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 May 22, 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 May 30, 2019.

On May 24, 2019, the second (2<sup>nd</sup>) business day after receipt of the Council's Order, the Custodian responded to the Council's Order by disclosing two (2) unredacted letters to the Complainant via U.S. mail. The Custodian also simultaneously provided certified confirmation of compliance to the Council Staff. Thus, the evidence of record supports that the Custodian complied with the Council's Order.

Therefore, the Custodian complied with the Council's May 25, 2019 Interim Order. Specifically, the Custodian responded in the prescribed time frame disclosing to the Complainant via U.S. mail unredacted copies of the correspondence responsive to the subject OPRA request. Further, the Custodian simultaneously provided certified confirmation of compliance to the Council Staff.

### 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)).

Here, the Custodian unlawfully denied access to the portion of the Complainant's OPRA request seeking correspondence. Elcavage, GRC 2009-07. However, he lawfully denied access to a majority of said request because it was invalid. Feiler-Jampel, GRC 2007-190. Further, the Custodian lawfully denied access to the portion of the OPRA request seeking a plea agreement because none existed. Pusterhofer, GRC 2005-49. Also, the Custodian timely complied with the Council's May 21, 2019 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Council Staff respectfully recommends the Council find that:

1. The Custodian complied with the Council's May 25, 2019 Interim Order. Specifically, the Custodian responded in the prescribed time frame disclosing to the Complainant via U.S. mail unredacted copies of the correspondence responsive to the subject OPRA request. Further, the Custodian simultaneously provided certified confirmation of compliance to the Council Staff.
2. The Custodian unlawfully denied access to the portion of the Complainant's OPRA request seeking correspondence. Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). However, he lawfully denied access to a majority of said request because it was invalid. Feiler-Jampel v. Somerset Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008). Further, the Custodian lawfully denied access to the portion of the OPRA request seeking a plea agreement because none existed. Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). Also, the Custodian timely complied with the Council's May 21, 2019 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso  
Acting Executive Director

June 18, 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**

**May 21, 2019 Government Records Council Meeting**

Rocco Maldonado  
Complainant

Complaint No. 2017-146

v.

Ocean County Prosecutor's Office  
Custodian of Record

At the May 21, 2019 public meeting, the Government Records Council ("Council") considered the May 14, 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 portion of the Complainant's request seeking "any/all records" relating to Indictment No. 10-07-1246 is invalid because it failed to identify a specific record. 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); Feiler-Jampel v. Somerset Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008). Thus, the Custodian lawfully denied access to this portion of the request. N.J.S.A. 47:1A-6.
2. The portion of the Complainant's OPRA request seeking "correspondence" between his attorney and Prosecutor Linardekis regarding Indictment No. 10-07-1246 from May 2009 through September 2009 is valid. 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). See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2015-133 (Interim Order dated September 29, 2016). Thus, the Custodian unlawfully denied access to this portion of the request on the basis that it was invalid. N.J.S.A. 47:1A-6.
3. The Custodian may have unlawfully denied access to records responsive to the portion of the Complainant's OPRA request seeking correspondence between his attorney and Prosecutor Linardekis from May 2009 through September 2009 regarding Indictment No. 10-07-1246. N.J.S.A. 47:1A-6. The Custodian must locate any responsive records and either: 1) disclose them to the Complainant; and/or 2) identify if any are exempt from disclosure in part or whole. Should the Custodian determine that no records exist, she must certify to this fact.

4. **The Custodian shall comply with conclusion No. 3 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, if applicable. Further, the Custodian shall simultaneously deliver<sup>1</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>2</sup> to the Executive Director.<sup>3</sup>**
5. The Custodian has borne her burden of proof that he lawfully denied access to the portion of the Complainant's OPRA request seeking a 2004 plea agreement. Specifically, the Custodian certified in the Statement of Information, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
6. 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 21<sup>st</sup> 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**

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<sup>1</sup> 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.

<sup>2</sup> "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."

<sup>3</sup> 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.



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Rocco Maldonado<sup>1</sup>  
Complainant**

**GRC Complaint No. 2017-146**

v.

**Ocean County Prosecutor's Office<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of “any/all records/correspondence” concerning State v. Maldonado, Indictment No. 10-07-1246, between James Butler, Esq, the Complainant’s attorney, and Ocean County Prosecutor’s Office (“OCPO”) prosecutor Terry A. Linardekis between May 2009 and September 2009. Also, the plea agreement the Complainant signed in August 2009.

**Custodian of Record:** Shiraz I. Deen

**Request Received by Custodian:** March 2, 2017

**Response Made by Custodian:** March 20, 2017

**GRC Complaint Received:** July 14, 2017

**Background<sup>3</sup>**

**Request and Response:**

On February 23, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 20, 2017, the Custodian responded in writing denying first portion of the request as invalid because it failed to identify specific records. The Custodian further stated that no plea agreement existed within OCPO’s files.

**Denial of Access Complaint:**

On July 14, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he twice called OCPO after submitting his OPRA request and was told to call back. The Complainant noted that he called a third time and was told that the OCPO “can’t help” him and that he should contact his attorney.

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by John C. Tassini, Esq. (Toms River, NJ).

<sup>3</sup> 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.

## Additional Submissions

On August 2, 2017, Custodian's Counsel sent a letter to the GRC stating that the Custodian responded in March 2019 denying the subject request as invalid. Counsel further argued that there were two (2) additional reasons why OCPO could not comply with the subject request.

First, Counsel argued that the Complainant should receive responsive records from his attorney, who is bound by New Jersey's "Rules of Profession Conduct" ("R.P.C.") to provide same to him. See N.J. Supreme Court Advisory Committee on Professional Ethics, Opinion 692, 163 N.J.L.J. 220 (January 15, 2001) (providing that "the entire file belongs to the client and must be provided upon request."). Counsel thus argued that the Complainant could easily obtain any records to which he was entitled from his attorney. Counsel further asserted that anything not within the attorney's file amounted to post-trial discovery to which the Complainant is not entitled.

Second, Counsel alleged that the Complainant was attempting to "end run around" N.J. Court Rules R. 3:22-2, *et seq.*, which addresses the post-conviction relief process. To this end, Counsel stated that the New Jersey Supreme Court has held that an evidentiary hearing should not be held for the purpose of allowing defendants to investigate whether "the State failed to deliver discoverable materials to the defendant." State v. Marshall, 148 N.J. 89, 158 (1997). Counsel stated that the Court instead held that post-conviction evidentiary hearings were in place to allow defendants "to prove that [they were] improperly convicted or sentenced; it is not an occasion for defendants to question witnesses in an indiscriminate search for additional grounds for post-conviction relief." Id. Counsel argued that "by the same token," OPRA did not obligate the OCPO to allow the Complainant to conduct a fishing expedition for new grounds for post-conviction relief.

## Statement of Information:

On August 10, 2017, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on or about March 2, 2017. The Custodian certified that she performed a diligent search and determined that no plea agreement existed. The Custodian noted that she performed no other searches because the first portion of the Complainant's request was invalid. The Custodian certified that she responded in writing on March 20, 2017 denying the request as invalid and because no plea agreement existed.

The Custodian certified that no plea agreement existed. Further, the Custodian again contended that the Complainant's request was invalid because it was overly broad. Finally, the Custodian incorporated all arguments from Counsel's August 2, 2017 letter to the GRC in support of her denial of access.

## Analysis

### 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.*

[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. (emphasis added). Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005),<sup>4</sup> 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 validity of an OPRA request typically falls into three (3) categories. The first is a request that is overly broad (“any and all,” requests seeking “records” generically, *etc.*) and requires a custodian to conduct research. MAG, 375 N.J. Super. 534; Donato v. Twp. of Union, GRC Complaint No. 2005-182 (January 2007). The second is those requests seeking information or asking questions. See *e.g.* Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012). The final category is a request that is either not on an official OPRA request form or does not invoke OPRA. See *e.g.* Naples v. N.J. Motor Vehicle Comm’n, GRC Complaint No. 2008-97 (December 2008).

Regarding generic requests for “records,” the request at issue in MAG sought “all documents or records evidencing that the ABC sought, obtained or ordered revocation of a liquor license for the charge of selling alcoholic beverages to an intoxicated person in which such person, after leaving the licensed premises, was involved in a fatal auto accident” and “all documents or records evidencing that the ABC sought, obtained or ordered suspension of a liquor license exceeding 45 days for charges of lewd or immoral activity.” Id. at 539-540. The court noted that plaintiffs failed to include additional identifiers such as a case name or docket number. See also Steinhauer-Kula v. Twp. of Downe (Cumberland), GRC Complaint No. 2010-198 (March 2012) (holding that the

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<sup>4</sup> Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

complainant's request item No. 2 seeking "[p]roof of submission" was invalid); Edwards v. Hous. Auth. of Plainfield (Union), GRC Complaint No. 2008-183 *et seq.* (Final Decision dated April 25, 2012) (accepting the Administrative Law Judge's finding that a newspaper article attached to a subject OPRA request that was related to the records sought did not cure the deficiencies present in the request) Id. at 12-13.

Moreover, in Feiler-Jampel v. Somerset Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008), the Council similarly held that a request seeking "[a]ny and all documents and evidence" relating to an investigation being conducted by the Somerset County Prosecutor's Office was invalid, reasoning that:

[B]ecause the records requested comprise an entire SCPO file, the request is overbroad and of the nature of a blanket request for a class of various documents rather than a request for specific government records. Because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to research the SCPO files to locate records potentially responsive to the Complainant's request pursuant to the Superior Court's decisions in [MAG], [Bent] and the Council's decisions in Asarnow v. Department of Labor and Workforce Development, GRC Complaint No. 2006-24 (May 2006) and Morgano v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (February 2008).

[Id. See also Schulz v. NJ State Police, GRC Complaint No. 2014-390 (Interim Order dated July 28, 2015) (holding that the portion of the request seeking "all documents" was overly broad and thus invalid).]

Here, a portion of the Complainant's request sought "any/all records" relating to Indictment No. 10-07-1246. The Custodian denied access to said portion of the request as invalid, and later restated his position in the SOI. MAG and its progeny support that the "any/all records" portion of the request is invalid. Further, as noted in Feiler-Jampel, this portion of the request invokes research necessary to locate potentially responsive records.

Accordingly, the portion of the Complainant's request seeking "any/all records" relating to Indictment No. 10-07-1246 is invalid because it failed to identify a specific record. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; N.J. Builders, 390 N.J. Super. at 180; Schuler, GRC 2007-151; Feiler-Jampel, GRC 2007-190. Thus, the Custodian lawfully denied access to this portion of the request. N.J.S.A. 47:1A-6.

Regarding requests for e-mails and correspondence, 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).

Here, a portion of the Complainant's OPRA request sought "correspondence" between his attorney and Prosecutor Linardekis regarding Indictment No. 10-07-1246 between May 2009 and September 2009. The Custodian denied access to this portion of the OPRA request as invalid, and later argued this position in the SOI. However, the request as worded contains all the necessary criteria as prescribed in Elcavage and Armenti. For this reason, the GRC disagrees that this portion of the request is invalid, as it clearly conforms with the prevailing case law regarding valid requests for correspondence.

Accordingly, the portion of the Complainant's OPRA request seeking "correspondence" between his attorney and Prosecutor Linardekis regarding Indictment No. 10-07-1246 from May 2009 through September 2009 is valid. Elcavage, GRC 2009-07; Armenti, GRC 2009-154. See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2015-133 (Interim Order dated September 29, 2016). Thus, the Custodian unlawfully denied access to this portion of the request on the basis that it was invalid. 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 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.

### **Correspondence**

Having determined that the portion of the Complainant's OPRA request seeking correspondence is valid, the GRC now turns to whether the Custodian unlawfully denied access to any responsive records. In his August 2, 2017 letter, Custodian's Counsel proffered additional reasons for denying access to the OPRA request. First, Counsel argued that the Complainant should have obtained the requested records from his attorney per the R.P.C. Second, Counsel argued that the Complainant was attempting to "end run" the post-conviction relief process addressed in R. 3:22-2, et seq.

The GRC is not persuaded by Council's first argument. Specifically, the Complainant's ability to obtain his case file directly from his attorney is of no moment here. This portion of Custodian Counsel's argument appears grounded in the theory that the Complainant has other methods of obtaining responsive records. The GRC notes that OPRA is only one means to request records maintained by a governmental agency. The Legislature recognized this fact by including in the statute that "nothing contained in [OPRA] shall be construed as affecting in any way the common law right of access . . ." N.J.S.A. 47:1A-1. Additionally, OPRA is silent as to a requestor's intended use of records sought under OPRA. Thus, whether the Complainant should have obtained his records from his attorney or whether he was attempting to use OPRA for "evidentiary" purposes is of no moment. The GRC also notes that it has no authority to address whether an attorney is properly following the R.P.C.,

The GRC is also not persuaded by Counsel's argument that the Complainant's potential use of the post-conviction relief process precluded him from seeking access to records under OPRA.

Specifically, neither the Custodian nor Custodian's Counsel have identified exemptions that exist either in the R.P.C. or R. 3:22-2 that would apply under N.J.S.A. 47:1A-9(a). R. 3:22-2 provides the frame-work under which a petition for post-conviction relief would be cognizable; no express exemptions are contained within the rule. Also, the GRC does not have the authority to determine whether an individual was not conforming to a particular court proceeding. N.J.S.A. 47:1A-7(b). For these reasons, the GRC finds that the Custodian was obligated to, in the least, search for a locate responsive records, but failed to do so.

Therefore, the Custodian may have unlawfully denied access to records responsive to the portion of the Complainant's OPRA request seeking correspondence between his attorney and Prosecutor Linardekis from May 2009 through September 2009 regarding Indictment No. 10-07-1246. N.J.S.A. 47:1A-6. The Custodian must locate any responsive records and either: 1) disclose them to the Complainant; and/or 2) identify if any are exempt from disclosure in part or whole. Should the Custodian determine that no records exist, she must certify to this fact.

### Plea Agreement

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). Here, a portion of the Complainant's OPRA request sought a plea agreement signed in 2004. The Custodian denied access to the Complainant's OPRA request, stating that no plea agreement existed within its files. In the SOI, the Custodian certified to this fact. Further, there is no evidence in the record to refute that the Custodian did not possess the responsive record plea agreement.

Accordingly, the Custodian has borne her burden of proof that he lawfully denied access to the portion of the Complainant's OPRA request seeking a 2004 plea agreement. Specifically, the Custodian certified in the SOI, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

### 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 portion of the Complainant's request seeking "any/all records" relating to Indictment No. 10-07-1246 is invalid because it failed to identify a specific record. 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); Feiler-Jampel v. Somerset Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (Interim Order

dated March 26, 2008). Thus, the Custodian lawfully denied access to this portion of the request. N.J.S.A. 47:1A-6.

2. The portion of the Complainant's OPRA request seeking "correspondence" between his attorney and Prosecutor Linares regarding Indictment No. 10-07-1246 from May 2009 through September 2009 is valid. 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). See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2015-133 (Interim Order dated September 29, 2016). Thus, the Custodian unlawfully denied access to this portion of the request on the basis that it was invalid. N.J.S.A. 47:1A-6.
3. The Custodian may have unlawfully denied access to records responsive to the portion of the Complainant's OPRA request seeking correspondence between his attorney and Prosecutor Linares from May 2009 through September 2009 regarding Indictment No. 10-07-1246. N.J.S.A. 47:1A-6. The Custodian must locate any responsive records and either: 1) disclose them to the Complainant; and/or 2) identify if any are exempt from disclosure in part or whole. Should the Custodian determine that no records exist, she must certify to this fact.
4. **The Custodian shall comply with conclusion No. 3 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, if applicable. Further, the Custodian shall simultaneously deliver<sup>5</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>6</sup> to the Executive Director.<sup>7</sup>**
5. The Custodian has borne her burden of proof that he lawfully denied access to the portion of the Complainant's OPRA request seeking a 2004 plea agreement. Specifically, the Custodian certified in the Statement of Information, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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<sup>5</sup> 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.

<sup>6</sup> "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."

<sup>7</sup> 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.

Prepared By: Frank F. Caruso  
Acting Executive Director

May 14, 2019