



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

January 31, 2019 Government Records Council Meeting

Duggan L. Salley
Complainant

Complaint No. 2018-158

v.

City of Newark (Essex)
Custodian of Record

At the January 31, 2019 public meeting, the Government Records Council (“Council”) considered the December 11, 2018 Supplemental 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 not complied with the Council’s August 28, 2018 Interim Order because he failed to comply with the terms of said Order or file a request for reconsideration of the Order by September 25, 2018.
2. “The Council shall, pursuant to New Jersey Rules Governing the Courts, R. 4:67-6, have the authority to enforce compliance with the orders and decisions issued by the Council.” N.J.A.C. 5:105-2.9(c). The Council’s August 28, 2018 Interim Order to disclose the relevant records is enforceable in the Superior Court if the Complainant decides to exercise that option. R. 4:67-6.
3. Although the Custodian failed to respond in writing to the Complainant’s OPRA request within the statutorily mandated time period, failed to bear his burden of proving that the denial of access to request item numbers 3 and 6 was authorized by law, and failed to comply with the terms of the Council’s August 28, 2018 Interim Order in a timely manner, the Custodian did express his intention to comply with the terms of said Order. Furthermore, there is evidence in the record that the Complainant’s OPRA request and the GRC’s Statement of Information request may have been transmitted to an ex-employee, and that neither the City Clerk nor the OPRA Unit Manager was aware of the circumstances so as to take corrective action. Moreover, the evidence of record indicates that, although the Custodian was less than diligent in addressing this complaint, it does not appear under the totality of the circumstances that the Custodian’s actions were intentional and deliberate. Therefore, the Custodian’s actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.



4. With respect to the Complainant's request for reconsideration, as the moving party the Complainant was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The Custodian failed to establish that the complaint should be reconsidered based on a mistake or extraordinary circumstances. The Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. See D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Specifically, in its August 28, 2018 Interim Order, the Council relied upon sound legal authority in reaching its decision that the Complainant's request for e-mails was invalid. Thus, the Complainant's request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

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 31st Day of January, 2019

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: February 5, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

Duggan L. Salley¹
Complainant

GRC Complaint No. 2018-158

v.

City of Newark (Essex)²
Custodial Agency

Records Relevant to Complaint: Copies of the following records related to the position for Emergency Management Coordinator with the City of Newark, Newark Health Department:

1. All correspondence, emails, meeting notes, interview notes, regarding the vacancy.
2. All correspondence, emails, meeting notes, interview notes, regarding my interview on February 22, 2018.
3. Résumés with redacted privacy information on all applicants.
4. All correspondence, emails, regarding Dug Salley, Duggan L. Salley, Dug L. Salley.
5. Any or all correspondence regarding other applicants, selection, offer to any applicants.
6. Salary range of published position.
7. Meeting notes, emails, or any correspondence from team members who participated in the interview.

The Complainant contends the City of Newark Emergency Management Coordinator position is closed and filled.

Custodian of Record: Kenneth Louis³

Request Received by Custodian: June 12, 2018

Response Made by Custodian: June 19, 2018, July 13, 2018 and July 16, 2018

GRC Complaint Received: August 1, 2018

Background

August 28, 2018 Council Meeting:

At its August 28, 2018 public meeting, the Government Records Council (“Council”) considered the August 21, 2018 Findings and Recommendations of the Council Staff and all

¹ No legal representation listed on record.

² Represented by Samora Noguera, Esq. (Newark, NJ).

³ Nicole Rondon was listed as the original custodian; however, OPRA Unit Manager Ana Golinski informed the GRC that Kenneth Louis is the Custodian.

related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian's failure to respond in writing to the 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).
2. With respect to correspondence and e-mails, the Complainant's request item numbers 1, 2, 4, 5 and 7 are 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). With respect to the meeting notes and/or interview notes sought in request item numbers 1, 2 and 7, such notes serve as a memory aid to assist in subsequently preparing a more formal record. As such, they are exempt from access. O'Shea v. West Milford Bd. of Educ., 391 N.J. Super. 534 (App. Div. 2007).
3. Because Executive Order No. 26 (Gov. McGreevey, 2002) provides that the résumés of successful candidates shall be disclosed once the successful candidate has been hired, and because the Complainant asserted in his OPRA request that the Emergency Management Coordinator position is closed and filled and the Custodian did not dispute such assertion, the Custodian unlawfully denied access to request item number 3. N.J.S.A. 47:1A-6. Therefore, the Custodian must disclose to the Complainant the responsive résumé. *See* Fallstick v. Haddon Twp. (Camden), GRC Complaint No. 2008-156 (Interim Order August 11, 2009).
4. **The Custodian shall comply with paragraph #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, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Council Staff.**
5. The Complainant's request for item number 6, which is a record containing the salary range for the position of Emergency Management Coordinator for the City of Newark, was valid. Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012). The Custodian thus failed to bear her burden of proof that the denial of access to said record was lawful and, as such, must disclose it. N.J.S.A. 47:1A-6.
6. **The Custodian shall comply with paragraph #5 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions,**

including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Council Staff.

7. 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 August 29, 2018, the Council distributed its August 28, 2018 Interim Order to all parties. On September 5, 2018, the Council Staff ("GRC") returned a phone call to City of Newark OPRA Unit Manager Ana Golinski. Ms. Golinski informed the GRC that neither the City Clerk nor the OPRA Unit received a request for the Statement of Information ("SOI") in this matter because the request was sent to ex-employee Nicole Rondon, who is not the Custodian of Records. Ms. Golinski stated that, although the GRC on August 24, 2018, sent a copy of an e-mail to her regarding the complaint adjudication, she did not receive it because she was out of the office and did not have access to e-mail. Ms. Golinski stated that her office corresponded with the Complainant and sent a formal response to him on August 31, 2018. Ms. Golinski asked the GRC if her office could rectify the situation by filing a completed SOI. The GRC informed Ms. Golinski that since the Council already issued an Interim Order, the City would likely have to request reconsideration of the Order; however the GRC would check with its legal counsel regarding the proper procedure for the City to follow. The GRC informed Ms. Golinski that it would get back to her later this date.

On September 5, 2018, the GRC e-mailed Ms. Golinski confirming the parties' earlier telephone conversation. The GRC informed Ms. Golinski that the GRC understood that Kenneth Louis, and not Ms. Rondon, was the Custodian. The GRC informed Ms. Golinski that it would change its records accordingly. The GRC also informed Ms. Golinski that the GRC was granting a five (5) business day extension of time for the City to respond to the Council's Interim Order, and that the response would now be due on September 13, 2018.

On September 5, 2018, the GRC e-mailed Custodian Kenneth Louis and Ms. Golinski to inform them that, after receiving advice from counsel, the GRC would not accept a Statement of Information at this time. Rather, the City should submit a request for a stay and request for reconsideration of the Council's Interim Order. The GRC informed the Custodian and Ms. Golinski that if the City asserted that any of the requested records should be withheld in whole or in part, a document index containing the legal explanation and statutory citation for denial must be included.

On September 10, 2018, the GRC received an e-mail from Samora Noguera, Esq., Assistant Corporation Counsel for the City of Newark. The e-mail transmitted a request for a stay of the enforcement of the Council's August 28, 2018 Interim Order pending a motion for reconsideration. The request for the stay provided that, although the Council's Order required disclosure to the Complainant of résumés of successful candidates for the position of Emergency Management Coordinator, that position still remained open; therefore disclosing the résumés would violate the

privacy interests of the remaining candidates and violate Executive Order No. 26 (McGreevey). The request further asserted that there was danger of irreparable harm in the absence of a stay because the City would either risk disobeying the Council's Order if it did not disclose the résumés or risk violating Executive Order No. 26 by providing the résumés. Counsel also transmitted to the Complainant a copy of the request for a stay.

By e-mail dated September 10, 2018, the GRC forwarded to the Custodian's newly appointed Counsel copies of the two e-mails that the GRC transmitted to the City on September 5, 2018. The GRC also provided the Custodian's Counsel with a link to the Request for Reconsideration form on the GRC's website.

On September 10, 2018, the GRC notified all parties that the GRC received a request for a stay of the Council's August 28, 2018 Interim Order within the extended time period for compliance. The GRC informed the parties that the GRC granted the request for a stay and that the Custodian's compliance deadline was therefore extended to the date of the next Council meeting, which is September 25, 2018. The GRC stated that any opposition to the request for a stay must be received by the GRC within ten (10) business days.

On September 12, 2018, the GRC received a request for reconsideration of the Council's August 28, 2018 Interim Order from the Complainant based on mistake and extraordinary circumstances. The Complainant stated that the reasons for reconsideration are applicable to this complaint because:

"I neglected to indicate the date of the emails desire (sic) for two reason (sic) (1) I do not have all of the names of the individuals who interviewed me- (2) I am requesting all e-mails regarding only me Duggan L. Salley, or where I am listed in the subject or base of the email- from Nicole Rondon and Tanya Delgada-Bonet from January 12, 2018-August 1, 2018. These records are public records and records maintained by your agency. These records are now identifiable by date and name and are public records."

On September 12, 2018, the GRC forwarded a copy of the Complainant's request for reconsideration to the Custodian's Counsel because it was unclear if the Complainant served all parties with the submission. The GRC informed the Custodian's Counsel that pursuant to N.J.A.C. 5-105-2.10(d), any objection to the request for reconsideration must be filed within ten (10) business days.

On September 26, 2018, the Custodian's Counsel filed an objection to the Complainant's request for reconsideration of the Council's Interim Order. Counsel asserted that the GRC should deny the Complainant's request for reconsideration because (1) the Complainant advanced no legal arguments or provided any facts in support of his request for reconsideration; (2) the Complainant did not specify the relief he sought which leads to speculation as to whether the Complainant seeks reconsideration of the entirety of the Order or reconsideration of the Order's specific findings; and (3) the Complainant did not point to any errors in analysis on the part of the GRC, extraordinary circumstances, or newly uncovered facts of which the GRC was not aware when it issued the Order that would change its decision. The balance of Counsel's objection to the Complainant's request

for reconsideration asserted facts which should have been presented in the SOI, and addressed the City's willingness to comply with the Council's Interim Order. The Custodian's Counsel on twelve (12) occasions referenced Exhibits A through E; however, no exhibits were attached to the submission.

On September 26, 2018, the GRC e-mailed the Custodian's Counsel to inform him that, although he made reference to Exhibits A through E, no exhibits were attached to the submission. The GRC asked Counsel if the exhibits were being sent separately. Counsel never replied to the GRC's inquiry. As such, the Custodian's objection to the Complainant's request for reconsideration remains incomplete.

Analysis

Compliance

On August 28, 2018, the Council ordered the above-referenced compliance. On August 29, 2018, the Council distributed its Interim Order to the parties.

On September 5, 2018, the GRC learned in a telephone conversation with the Newark OPRA Unit Manager that neither the City Clerk nor the OPRA Unit received the request for the SOI because the request was sent to an ex-employee. Subsequently, on September 5, 2018, the GRC e-mailed the OPRA Unit Manager, confirming that Kenneth Louis was the Custodian and granting a five (5) business day extension of time for the City to respond to the Council's Interim Order, making the response due on September 13, 2018. On September 5, 2018, the GRC e-mailed the Custodian, informing him that he should submit a request for a stay and a request for reconsideration of the Council's Interim Order, including a document index containing the legal explanation and statutory citation for denial of any requested records.

On September 10, 2018, the GRC received an e-mail from the Custodian's Counsel transmitting a request for a stay of the enforcement of the Council's August 28, 2018 Interim Order pending a motion for reconsideration. On September 10, 2018, the GRC e-mailed all parties to inform them that the GRC granted the request for a stay and that the Custodian's compliance deadline was extended to September 25, 2018.

N.J.A.C. 5:105-2.12(e) provides that "[t]he Executive Director may grant a stay of an interim order for the period of time requested, but in no event for a period of time longer than the date of the next regularly scheduled meeting of the Council." The Custodian's request for a stay did not seek a specific period of time for the stay, so the GRC allowed the maximum period of time, which was the date of the next regularly scheduled Council meeting—September 25, 2018. Therefore, the Custodian was required to either comply with the terms of the Council's August 28, 2018 Interim Order or file a request for reconsideration of the Order by September 25, 2018. By not doing so, the Custodian failed to comply with the terms of the Council's August 28, 2018 Interim Order.

Accordingly, the Custodian has not complied with the Council's August 28, 2018 Interim Order because he failed to comply with the terms of said Order or file a request for reconsideration of the Order by September 25, 2018.

Council's August 28, 2018 Interim Order is Enforceable

"The Council shall, pursuant to New Jersey Rules Governing the Courts, R. 4:67-6, have the authority to enforce compliance with the orders and decisions issued by the Council." N.J.A.C. 5:105-2.9(c). The Council's August 28, 2018 Interim Order to disclose the relevant records is enforceable in the Superior Court if the Complainant decides to exercise that option. R. 4:67-6.

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)); and 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, although the Custodian failed to respond in writing to the Complainant's OPRA request within the statutorily mandated time period, failed to bear his burden of proving that the denial of access to request item numbers 3 and 6 was authorized by law, and failed to comply with the terms of the Council's August 28, 2018 Interim Order in a timely manner, the Custodian did express his intention to comply with the terms of said Order. Furthermore, there is evidence in the record that the Complainant's OPRA request and the GRC's Statement of Information request may have been transmitted to an ex-employee, and that neither the City Clerk nor the OPRA Unit Manager was aware of the circumstances so as to take corrective action. Moreover, the evidence of record indicates that, although the Custodian was less than diligent in addressing this complaint, it does not appear under the totality of the circumstances that the Custodian's actions were intentional and deliberate. Therefore, the Custodian's actions did not rise to the level of a knowing

and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Complainant's Reconsideration Request

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, the Complainant filed the request for reconsideration of the Council's August 28, 2018 Interim Order on September 12, 2018, nine (9) business days following receipt of the Council's decision.

Applicable case law holds that:

"A party should not seek reconsideration merely based upon dissatisfaction with a decision." D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, . . . 242 N.J. Super. at 401. "Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement." *Ibid.*

[In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).]

On September 12, 2018, the Complainant requested reconsideration of the Council's Interim Order based on mistake and extraordinary circumstances. The Complainant claims that there is a mistake on *his* part because he states "I neglected to indicate the date of the [requested] emails . . ." The Complainant also states that ". . . I am requesting all e-mails regarding only me Duggan L. Salley, or where I am listed in the subject or base of the email- from Nicole Rondon and Tanya Delgada-Bonet from January 12, 2018-August 1, 2018."

It appears that the Complainant, on reconsideration, is seeking disclosure of e-mails sought in item numbers 1, 2, 4 and 7 of his OPRA request. The Council in its Interim Order found that the Custodian properly denied the requests because they failed to identify the specific date or date ranges sought and the sender and/or recipient information. As legal authority for upholding the

Custodian's denial, the Council cited 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).

Here, the Complainant admits that he neglected to include a date or range of dates for the requested e-mails. He then attempts to retroactively amend his request by providing a date range in the request for reconsideration. Moreover, the end date of the range he submitted is almost two months after the date of the request which formed the basis of this complaint. The Complainant also provided the names of the senders and recipient of the e-mails for the first time in the request for reconsideration. The mistake, therefore, was made by the Complainant when drafting the OPRA request, which he tried to correct after the Council rendered its Interim Order. The mistake was not made by the Council.

The Complainant also asserted "extraordinary circumstances" as grounds for reconsideration. However, nowhere in the request for reconsideration did the Complainant prove there existed extraordinary circumstances sufficient to warrant reconsideration of the Council's August 28, 2018 Interim Order.

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings, 295 N.J. Super. at 384. The Custodian failed to establish that the complaint should be reconsidered based on a mistake or extraordinary circumstances. The Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. See D'Atria, 242 N.J. Super. at 401. Specifically, in its August 28, 2018 Interim Order, the Council relied upon sound legal authority in reaching its decision that the Complainant's request for e-mails was invalid. Thus, the Complainant's request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Custodian has not complied with the Council's August 28, 2018 Interim Order because he failed to comply with the terms of said Order or file a request for reconsideration of the Order by September 25, 2018.
2. "The Council shall, pursuant to New Jersey Rules Governing the Courts, R. 4:67-6, have the authority to enforce compliance with the orders and decisions issued by the Council." N.J.A.C. 5:105-2.9(c). The Council's August 28, 2018 Interim Order to disclose the relevant records is enforceable in the Superior Court if the Complainant decides to exercise that option. R. 4:67-6.

3. Although the Custodian failed to respond in writing to the Complainant's OPRA request within the statutorily mandated time period, failed to bear his burden of proving that the denial of access to request item numbers 3 and 6 was authorized by law, and failed to comply with the terms of the Council's August 28, 2018 Interim Order in a timely manner, the Custodian did express his intention to comply with the terms of said Order. Furthermore, there is evidence in the record that the Complainant's OPRA request and the GRC's Statement of Information request may have been transmitted to an ex-employee, and that neither the City Clerk nor the OPRA Unit Manager was aware of the circumstances so as to take corrective action. Moreover, the evidence of record indicates that, although the Custodian was less than diligent in addressing this complaint, it does not appear under the totality of the circumstances that the Custodian's actions were intentional and deliberate. Therefore, the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

4. With respect to the Complainant's request for reconsideration, as the moving party the Complainant was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The Custodian failed to establish that the complaint should be reconsidered based on a mistake or extraordinary circumstances. The Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. See D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Specifically, in its August 28, 2018 Interim Order, the Council relied upon sound legal authority in reaching its decision that the Complainant's request for e-mails was invalid. Thus, the Complainant's request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Prepared By: John E. Stewart

December 11, 2018⁴

⁴ This complaint was prepared for adjudication at the Council's December 18, 2018 meeting, but could not be adjudicated due to lack of quorum.



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INTERIM ORDER

August 28, 2018 Government Records Council Meeting

Duggan L. Salley
Complainant

Complaint No. 2018-158

v.

City of Newark (Essex)
Custodian of Record

At the August 28, 2018 public meeting, the Government Records Council (“Council”) considered the August 28, 2018 Findings and Recommendations of the Council Staff 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’s failure to respond in writing to the 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).
2. With respect to correspondence and e-mails, the Complainant’s request item numbers 1, 2, 4, 5 and 7 are 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). With respect to the meeting notes and/or interview notes sought in request item numbers 1, 2 and 7, such notes serve as a memory aid to assist in subsequently preparing a more formal record. As such, they are exempt from access. O’Shea v. West Milford Bd. of Educ., 391 N.J. Super. 534 (App. Div. 2007).
3. Because Executive Order No. 26 (Gov. McGreevey, 2002) provides that the résumés of successful candidates shall be disclosed once the successful candidate has been hired, and because the Complainant asserted in his OPRA request that the Emergency Management Coordinator position is closed and filled and the Custodian did not dispute such assertion, the Custodian unlawfully denied access to request item number 3. N.J.S.A. 47:1A-6. Therefore, the Custodian must disclose to the Complainant the



responsive résumé. *See Fallstick v. Haddon Twp. (Camden)*, GRC Complaint No. 2008-156 (Interim Order August 11, 2009).

4. **The Custodian shall comply with paragraph #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, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Council Staff.²**
5. The Complainant's request for item number 6, which is a record containing the salary range for the position of Emergency Management Coordinator for the City of Newark, was valid. *Burke v. Brandes*, 429 N.J. Super. 169 (App. Div. 2012). The Custodian thus failed to bear her burden of proof that the denial of access to said record was lawful and, as such, must disclose it. *N.J.S.A.* 47:1A-6.
6. **The Custodian shall comply with paragraph #5 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Council Staff.**
7. 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 28th Day of August, 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: August 29, 2018

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of *N.J.S.A.* 47:1A-5.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
August 28, 2018 Council Meeting**

**Duggan L. Salley ¹
Complainant**

GRC Complaint No. 2018-158

v.

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

Records Relevant to Complaint: Copies of the following records related to the position for Emergency Management Coordinator with the City of Newark, Newark Health Department:

1. All correspondence, emails, meeting notes, interview notes, regarding the vacancy.
2. All correspondence, emails, meeting notes, interview notes, regarding my interview on February 22, 2018.
3. Résumés with redacted privacy information on all applicants.
4. All correspondence, emails, regarding Dug Salley, Duggan L. Salley, Dug L. Salley.
5. Any or all correspondence regarding other applicants, selection, offer to any applicants.
6. Salary range of published position.
7. Meeting notes, emails, or any correspondence from team members who participated in the interview.

The Complainant contends the City of Newark Emergency Management Coordinator position is closed and filled.

Custodian of Record: Nicole Rondon

Request Received by Custodian: June 12, 2018

Response Made by Custodian: June 19, 2018, July 13, 2018 and July 16, 2018

GRC Complaint Received: August 1, 2018

Background³

Request and Response:

On June 12, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 19, 2018, the fifth (5th)

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Council Staff the submissions necessary and relevant for the adjudication of this complaint.

business day following receipt of said request, Lara Soraida of the City OPRA Staff responded in writing via e-mail on behalf of the Custodian, informing the Complainant that OPRA Manager Ana Golinski will contact him with information. On July 13, 2018, Ms. Soraida e-mailed the Complainant and stated, “I trust an OPRA Staff or Ms. Golinski has already contacted you. Let me know if not by Monday ...” On July 16, 2018, Ms. Soraida e-mailed the Complainant to inform him that her e-mail to Ms. Golinski was deleted, but that Ms. Golinski will contact him.

Denial of Access Complaint:

On August 1, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that he submitted his OPRA request on June 12, 2018, and although he received some e-mails from the municipality, as of July 30, 2018, he never received any records or information regarding his request.⁴

Statement of Information:

On August 3, 2018, the GRC sent the Custodian a request for the Statement of Information (“SOI”). The Custodian failed to submit the SOI to the GRC.

Additional Submissions:

On August 13, 2018, the GRC sent the Custodian a notice that if the GRC did not receive the SOI within three (3) business days, the complaint would proceed to adjudication based only upon the information contained within the complaint. The Custodian failed to submit the SOI or otherwise respond to the GRC’s notice.

Analysis

Timeliness

Unless a shorter time period is otherwise provided, a custodian must 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 accordingly results in a “deemed” denial. Id. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁵ 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).

⁴ The Complainant attached several e-mails to the Complainant. The GRC summarized the municipality’s e-mails under the Request and Response subheading.

⁵ 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.

Here, on the fifth (5th) business day following receipt of the request, Lara Soraida of the City OPRA Staff responded to the Complainant, informing him that OPRA Manager Ana Golinski would contact him with information. Thereafter, Ms. Soraida e-mailed the Complainant on July 13, 2018, and again on July 16, 2018, to inform him that Ms. Golinski would be in contact with him. The evidence of record reveals that no one from the City contacted the Complainant with information or disclosed any of the requested records.

Therefore, the Custodian's failure to respond in writing to the 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, GRC 2007-11.

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.

The New Jersey Appellate Division has held that OPRA "*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.*" MAG Entm't, LLC v. Div. Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) (citing N.J.S.A. 47:1A-1) (quotations omitted).

The Court reasoned that:

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 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.]

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; Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005);⁶ N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super.

⁶ Affirming Bent v. Stafford Police Dep't, GRC Complaint No. 2004-78 (October 2004).

166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

In contrast, the court in Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010), evaluated a request for “[a]ny and all settlements, releases or similar documents entered into, approved or accepted from 1/1/2006 to present.” Id. at 508. The Appellate Division determined that the request was not overly broad because it sought a specific type of document, despite failing to specify a particular case to which such document pertained. Id. at 515-16. Likewise, the court in Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012), found a request for the E-Z Pass benefits of Port Authority retirees to be valid because it was confined to a specific subject matter that was clearly and reasonably described with sufficient identifying information. Id. at 176.

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 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).

Request Item No. 1 - All correspondence, emails, meeting notes, interview notes, regarding the vacancy.

Request Item No. 2 - All correspondence, emails, meeting notes, interview notes, regarding my interview on February 22, 2018.

Request Item No. 4 - All correspondence, emails, regarding Dug Salley, Duggan L. Salley, Dug L. Salley.

Request Item No. 5 - Any or all correspondence regarding other applicants, selection, offer to any applicants.

Request Item No. 7 - Meeting notes, emails, or any correspondence from team members who participated in the interview.

With respect to correspondence and e-mails, the above five request items do identify the subject matter because the Complainant stated that all requested records are related to the position of Emergency Management Coordinator. However, the request items fail to identify the specific date or range of dates during which the correspondence and/or e-mails were transmitted. The request items also fail to identify the sender and/or the recipient of the correspondence and/or e-mails.⁷

⁷ In request item number 7, “team members who participated in the interview” does not sufficiently identify the sender(s).

Regarding the meeting notes and interview notes sought in request item numbers 1 and 2, such notes are typically made during a meeting or interview as a memory aid. In O’Shea v. West Milford Bd. of Educ., 391 N.J. Super. 534 (App. Div. 2007), where the complainant requested handwritten notes of an executive session meeting, the court stated, “[w]e reject O’Shea’s contention that the Secretary’s handwritten notes, jotted down as a memory aid to assist in preparing the formal minutes, are public records merely because they were ‘made’ by a government official.” Id. at 538. Accordingly, such notes are exempt from access.

Therefore, with respect to correspondence and e-mails, the Complainant’s request item numbers 1, 2, 4, 5 and 7 are invalid because they fail 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. With respect to the meeting notes and/or interview notes sought in request item numbers 1, 2 and 7, such notes serve as a memory aid to assist in subsequently preparing a more formal record. As such, they are exempt from access. O’Shea, 391 N.J. Super. 534.

Request Item No. 3 – Résumés with redacted privacy information on all applicants.

Executive Order No. 26 (Gov. McGreevey, 2002) provides that:

No public agency shall disclose the résumés, applications for employment or other information concerning job applicants while a recruitment search is ongoing. The résumés of successful candidates shall be disclosed once the successful candidate is hired. The résumés of unsuccessful candidates may be disclosed after the search has been concluded and the position has been filled, but only where the unsuccessful candidate has consented to such disclosure.

[Id.]

In Fallstick v. Haddon Twp. (Camden), GRC Complaint No. 2008-156 (Interim Order August 11, 2009), the custodian initially denied access to a request seeking a current employee’s résumé. Although, the custodian later disclosed a redacted copy of the résumé, the Council determined that she unlawfully denied access to same, reasoning that the résumé was “. . . disclosable pursuant to N.J.S.A. 47:1A-10, N.J.S.A. 47:1A-9(b), [EO 26].” (*citing* Mendes v. Tinton Falls Bd. of Educ., GRC Complaint No. 2006-201 (March 2007)).

Here, the Complainant is seeking copies of the résumés for all applicants for the Emergency Management Coordinator position. There is nothing in the evidence of record to indicate that the unsuccessful candidates consented to disclosure of their résumés; therefore, résumés of the unsuccessful candidates are not subject to disclosure. However, the Complainant asserted in his OPRA request that the Emergency Management Coordinator position is closed and filled, and the Custodian did not dispute the Complainant’s assertion.

Accordingly, because Executive Order No. 26 provides that the résumés of successful candidates shall be disclosed once the successful candidate has been hired, and because the Complainant asserted in his OPRA request that the Emergency Management Coordinator position

is closed and filled and the Custodian did not dispute such assertion, the Custodian unlawfully denied access to request item number 3. N.J.S.A. 47:1A-6. Therefore, the Custodian must disclose to the Complainant the responsive résumé. *See* Fallstick, GRC 2008-156.

Request Item No. 6 - Salary range of published position.

The Complainant references a *published* position, which therefore contemplates a record related to the position of Emergency Management Coordinator for the City of Newark. The Complainant more specifically identifies the record as containing the salary range for the position. As such, the Complainant's request is valid because it is confined to a specific subject matter that clearly and reasonably describes the record sought with sufficient identifying information. *See* Burke, 429 N.J. Super. 169. The Custodian denied the Complainant access to the requested record, but failed to provide any legal explanation or statutory citation for doing so.

Therefore, the Complainant's request for item number 6, which is a record containing the salary range for the position of Emergency Management Coordinator for the City of Newark, was valid. Burke, 429 N.J. Super. 169. The Custodian thus failed to bear her burden of proof that the denial of access to said record was lawful and, as such, must disclose it. N.J.S.A. 47:1A-6.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Custodian's failure to respond in writing to the 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).
2. With respect to correspondence and e-mails, the Complainant's request item numbers 1, 2, 4, 5 and 7 are 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). With respect to the meeting notes and/or interview notes sought in request item numbers 1, 2 and 7, such notes serve as a memory aid to assist in subsequently preparing a more formal record. As such, they

are exempt from access. O'Shea v. West Milford Bd. of Educ., 391 N.J. Super. 534 (App. Div. 2007).

3. Because Executive Order No. 26 (Gov. McGreevey, 2002) provides that the résumés of successful candidates shall be disclosed once the successful candidate has been hired, and because the Complainant asserted in his OPRA request that the Emergency Management Coordinator position is closed and filled and the Custodian did not dispute such assertion, the Custodian unlawfully denied access to request item number 3. N.J.S.A. 47:1A-6. Therefore, the Custodian must disclose to the Complainant the responsive résumé. See Fallstick v. Haddon Twp. (Camden), GRC Complaint No. 2008-156 (Interim Order August 11, 2009).
4. **The Custodian shall comply with paragraph #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, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁸ to the Council Staff.⁹**
5. The Complainant's request for item number 6, which is a record containing the salary range for the position of Emergency Management Coordinator for the City of Newark, was valid. Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012). The Custodian thus failed to bear her burden of proof that the denial of access to said record was lawful and, as such, must disclose it. N.J.S.A. 47:1A-6.
6. **The Custodian shall comply with paragraph #5 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Council Staff.**
7. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: John E. Stewart

August 28, 2018

⁸ "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."

⁹ 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.