



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

February 26, 2020 Government Records Council Meeting

Patrick Trainor
Complainant

Complaint No. 2018-269

v.

NJ Office of the Governor
Custodian of Record

At the February 26, 2020 public meeting, the Government Records Council (“Council”) considered the February 19, 2020 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not unlawfully deny the Complainant access to the records responsive to his October 30, 2018 OPRA requests because the Custodian certified that the records responsive to the Complainant’s October 15, 2018 request, disclosed to the Complainant on October 30, 2018, were the same records that were responsive to the requests the Complainant filed five (5) hours later on October 30, 2018, which formed the basis of the instant complaint. Moreover, the Custodian certified that after performing a thorough search she did not locate any additional records responsive to the request, and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. Therefore, the Complainant was not denied access to the requested records because he already had in his possession at the time of the requests the records he sought pursuant to OPRA. See Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008).
2. The Complainant’s OPRA requests seeking “all forms of communication including; regular mail, email, text messages, sms messages, and transcripts of voicemails” are invalid because, by lacking a date or range of dates, they fail to seek identifiable government records. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007). See also 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) and Inzelbuch, Esq. (O.B.O. Ctr. for Educ.) v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2015-68 (September 2016). Thus, the Custodian did not unlawfully deny access to the Complainant’s requests for said records. N.J.S.A. 47:1A-6.



Final Decision Rendered by the
Government Records Council
On The 26th Day of February 2020

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: March 3, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 26, 2020 Council Meeting**

**Patrick Trainor¹
Complainant**

GRC Complaint No. 2018-269

v.

**New Jersey Office of the Governor²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

Request dated October 30, 2018 (confirmation no. W138607): “Please provide all communications between Brianna Earle and the American Civil Liberties Union (ACLU), Farrin Anello, and Amol Sinha regarding the New Jersey Bar admission of Parthiv Patel. Please include all forms of communication including; regular mail, email, text messages, sms messages, and transcripts of voicemails.”

Request dated October 30, 2018 (confirmation no. W138608): “Please provide all communications between Jennifer Jusino and the American Civil Liberties Union (ACLU), Farrin Anello, and Amol Sinha regarding the New Jersey Bar admission of Parthiv Patel. Please include all forms of communication including; regular mail, email, text messages, sms messages, and transcripts of voicemails.”

Request dated October 30, 2018 (confirmation no. W138609): “Please provide all communications between Adam Alonso and the American Civil Liberties Union (ACLU), Farrin Anello, and Amol Sinha regarding the New Jersey Bar admission of Parthiv Patel. Please include all forms of communication including; regular mail, email, text messages, sms messages, and transcripts of voicemails.”

Request dated October 30, 2018 (confirmation no. W138610): “Please provide all communications between Mike Delamater and the American Civil Liberties Union (ACLU), Farrin Anello, and Amol Sinha regarding the New Jersey Bar admission of Parthiv Patel. Please include all forms of communication including; regular mail, email, text messages, sms messages, and transcripts of voicemails.”

Request dated October 30, 2018 (confirmation no. W138611): “Please provide all communications between Derek Roseman and the American Civil Liberties Union (ACLU), Farrin Anello, and Amol Sinha regarding the New Jersey Bar admission of Parthiv Patel. Please include all forms of

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Kathryn Duran.

communication including; regular mail, email, text messages, sms messages, and transcripts of voicemails.”

Request dated October 30, 2018 (confirmation no. W138612): “Please provide all communications between Derek Roseman and the American Civil Liberties Union (ACLU), Alexander Shalom, Allison Peltzman regarding the New Jersey Bar admission of Parthiv Patel. Please include all forms of communication including; regular mail, email, text messages, sms messages, and transcripts of voicemails.”

Request dated October 30, 2018 (confirmation no. W138613): “Please provide all communications between Derek Roseman, Mahen Gunaratna, Matt Platkin, Brianna Earle, Jennifer Jusino, Mike Delamater, Adam Alonso and the American Civil Liberties Union (ACLU), Alexander Shalom, Allison Peltzman regarding the New Jersey Bar admission of Parthiv Patel. Please include all forms of communication including; regular mail, email, text messages, sms messages, and transcripts of voicemails.”

Request dated October 30, 2018 (confirmation no. W138614): “Please provide all communications between Mike Delamater, and the Committee on Character and Fitness of the New Jersey Supreme Court regarding the New Jersey Bar admission of Parthiv Patel. Please include all forms of communication including; regular mail, email, text messages, sms messages, and transcripts of voicemails.”

Custodian of Record: Heather Taylor
Requests Received by Custodian: October 31, 2018
Response Made by Custodian: November 13, 2018
GRC Complaint Received: November 16, 2018

Background³

Requests and Response:

On October 30, 2018, the Complainant submitted eight (8) Open Public Records Act (“OPRA”) requests to the Custodian seeking the above-mentioned records. On November 13, 2018, the seventh (7th) business day following receipt of said requests, the Custodian responded in writing.⁴ The Custodian referred the Complainant to her response letter dated October 30, 2018, which addressed request confirmation number W137923 (“request W137923”), and the records attached thereto. The Custodian informed the Complainant that new searches were performed and no new responsive documents were located.⁵

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 Executive Director the submissions necessary and relevant for the adjudication of this complaint.

⁴ The Custodian certified in the Statement of Information that the Complainant’s requests were transmitted at 9:30 p.m. on October 30, 2018, so she did not receive them until October 31, 2018. With a State holiday on November 6 and 12, November 13, 2018 was the seventh business day following receipt.

⁵ The Custodian’s response provided the same explanation for ten (10) referenced OPRA requests. Two (2) of the referenced requests, W138606 and W138616, did not form the basis of the instant complaint, and therefore, are not relevant.

Denial of Access Complaint:

On November 16, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he filed an OPRA request for certain records on October 15, 2018, for which confirmation number W138470 (“request W138470”) was assigned. The Complainant stated that in response to the request the Custodian disclosed a partial record. The Complainant stated that he knew it was a partial record because the record contained references to other communications, copies of which he did not receive. The Complainant stated that he then filed several other requests on October 30, 2018, for records of communications between individual employees of the Governor’s Office and the American Civil Liberties Union.⁶ The Complainant stated that his requests were denied because records, other than those provided in response to his October 15, 2018 request, allegedly do not exist. The Complainant stated that he also requested communications other than emails, but the Custodian did not provide him with copies of letters, phone call logs, transcripts of calls or meetings.

The Complainant further stated that on November 2, 2018, he had a telephone conversation with the Custodian. The Complainant alleged that during the conversation the Custodian informed him that “. . . she would reject future OPRA requests to the governor’s office as duplicate and would eventually have [the Complainant’s] ability to make OPRA requests eliminated . . .”

Statement of Information:

On December 10, 2018, the Custodian filed a Statement of Information (“SOI”). At the outset, the Custodian certified that the Complainant filed approximately twenty-two (22) OPRA requests. The Custodian certified that it is unclear which requests are at issue in the instant complaint because the Complainant made reference to requests in the Detail Summary that are not listed in the Records Denied List. For this reason, the Custodian stated that in the SOI she is addressing all of the Complainant’s requests which predate the complaint.⁷

The Custodian certified that she received OPRA request W137923 from the Complainant on October 15, 2018, which sought the following records:

Please provide me with all communications between the governor’s office and the American Civil Liberties Union regarding the bar admission of DACA recipient Parthiv Patel. Include all communications and methods of communication including email, text messages and written correspondence. Please include the governor’s chief of staff and other staff members who communicated with the ACLU regarding the bar admission.⁸

⁶ Eight (8) of these requests form the basis of the instant complaint.

⁷ The GRC notes that the Complainant listed only eight (8) requests in the Records Denied List. As such, the GRC has determined that only the requests set forth in the Records Denied List, which are listed above as the “Records Relevant to Complaint” formed the basis of the instant complaint.

⁸ This OPRA request did not form the basis of the instant complaint but it is included herein as necessary background information.

The evidence of record reveals that the Custodian requested an extension of time until November 2, 2018, in order to respond to the request. The Custodian certified that it was clear following a preliminary search that the only responsive records would be in the form of e-mails. The Custodian certified that she then had the IT Department conduct an e-mail search for responsive records. The Custodian certified that all responsive records located were redacted to exclude personal telephone numbers and e-mail addresses, and prepared for disclosure to the Complainant. The Custodian certified that on October 28, 2018, the Complainant filed three (3) additional requests, one of which was request W138470 referenced in the complaint. The Custodian certified that the search parameters for request W137923 captured the records responsive to the more narrow terms contained within request W138470; therefore, the records responsive to W137923 were also responsive to W138470. The Custodian certified that on October 30, 2018, she disclosed to the Complainant all records responsive to request W137923. The Custodian further certified that by a separate e-mail dated October 30, 2018, she responded to the Complainant's additional requests dated October 28, 2018. The evidence of record reveals that the Custodian informed the Complainant that the disclosed records responsive to request W137923 were also responsive to request W138470.

The Custodian certified that on the evening of October 30, 2018, five (5) hours after she responded by disclosing the records responsive to request W137923, the Complainant filed several additional OPRA requests which included requests for the records relevant to the instant complaint. The Custodian certified that she had IT conduct further searches using the parameters of the Complainant's October 30, 2018 requests, and no responsive records, other than those disclosed in response to request W137923, were located. The Custodian further certified that she spoke with the Complainant on November 2, 2018, and explained that his October 30, 2018 requests were more narrow forms of his October 15, 2018 request, and that new searches identified the same responsive records. The Custodian further certified that she never told the Complainant that she would have his ability to make OPRA requests taken away. The Custodian certified that she responded to the Complainant's requests on November 13, 2018, informing him that new searches were performed, and no new responsive documents were located.⁹

The Custodian's Counsel stated that the Governor's Office does not have any additional records responsive to the Complainant's October 30, 2018 requests. Counsel asserted that the Custodian certified that she performed a thorough search but did not locate any additional records and the Complainant did not provide any evidence to the contrary. The Custodian's Counsel cited Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005) in support of her assertion that there was no unlawful denial of access because no additional records responsive to the requests exist.

Counsel stated that the Complainant asserted that there must be additional records because the disclosed records made reference to other communications and encompassed only a two-day period. Counsel asserted that all references to other communications reference oral communications and e-mails that were disclosed to the Complainant. Counsel argued that the Complainant's contention that the disclosed records encompassed merely a two-day period, and therefore constitute only a partial response, is not correct. Counsel stated that the time period of the e-mail correspondence determined to be responsive was from January 19, 2018 to January 25,

⁹ The evidence of record reveals that the November 13, 2018 response was in writing.

2018. Counsel argued that, not only was the Complainant incorrect about the time period of the e-mail correspondence, but he offered no argument in support of his allegation that the Custodian's search was incomplete. The Custodian's Counsel stated that the Custodian provided all responsive records to the Complainant, and the Complainant offered no evidence in support of his allegations that the Custodian provided only a partial response.

Analysis

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 Custodian certified that the Complainant filed an OPRA request for certain records on October 15, 2018. The Custodian further certified that she responded to the Complainant's request on October 30, 2018, by disclosing to him all records responsive to the request redacted only to exclude personal telephone numbers and e-mail addresses. The Custodian certified that the Complainant's October 30, 2018 requests, which formed the basis of the instant complaint, were more narrow forms of his October 15, 2018 request, and that new searches identified the same responsive records. As such, the records responsive to the Complainant's October 15, 2018 request, disclosed to him on October 30, 2018, were also responsive to the Complainant's October 30, 2018 requests.

In Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008), the Appellate Division held that a complainant could not have been denied access to a requested record if he already had in his possession at the time of the OPRA request the document he sought pursuant to OPRA. Id. at 617. The Appellate Division noted that requiring a custodian to duplicate another copy of the requested record and send it to the complainant ". . . does not . . . advance the purpose of OPRA, which is to ensure an informed citizenry." Id. (citations omitted).

Here, it is clear from the evidence of record that the Complainant had in his possession at the time of his requests the records he sought pursuant to OPRA. The evidence of record reveals that the Custodian responded to the Complainant's October 15, 2018 request on October 30, 2018, disclosing all records responsive to his request, redacted only to exclude personal telephone numbers and e-mail addresses. The Custodian certified that five (5) hours after she disclosed said records, the Complainant filed the requests that formed the basis of the instant complaint. The Custodian further certified that the records responsive to the October 15, 2018 request and October 30, 2018 requests were the same records, and that after performing a thorough search she did not locate any additional records.

Accordingly, the Custodian did not unlawfully deny the Complainant access to the records responsive to his October 30, 2018 OPRA requests because the Custodian certified that the records responsive to the Complainant's October 15, 2018 request, disclosed to the Complainant on

October 30, 2018, were the same records that were responsive to the requests the Complainant filed five (5) hours later on October 30, 2018, which formed the basis of the instant complaint. Moreover, the Custodian certified that after performing a thorough search she did not locate any additional records responsive to the request, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. Therefore, the Complainant was not denied access to the requested records because he already had in his possession at the time of the requests the records he sought pursuant to OPRA. See Bart, 403 N.J. Super. 609.

The Complainant also alleged that he requested communications other than emails. Specifically, the Complainant stated that the Custodian did not provide him with copies of letters, phone call logs, transcripts of calls or meetings.

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. at 549 (emphasis added). See also Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005);¹⁰ 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).

¹⁰ Affirming Bent v. Stafford Police Dep't, GRC Case No. 2004-78 (October 2004).

With respect to requests for e-mails and correspondence, the GRC established specific criteria deemed necessary under OPRA to request such records in 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 email, (2) the specific date or range of dates during which the email(s) were transmitted, and (3) the identity of the sender and/or the recipient thereof. Id.; see also Sandoval v. N.J. State Parole Bd., GRC Complaint No. 2006-167 (Interim Order dated 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). Further, the Council has previously determined that a request failing to contain all appropriate criteria set forth in Elcavage, GRC 2009-07, was invalid. See e.g. Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-124 (April 2010) (invalid request omitting the “subject and/or content”); Inzelbuch, Esq. (O.B.O. Ctr. for Educ.) v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2015-68 (September 2016) (invalid request omitting “date or range of dates”).

Here, the Complainant’s requests sought “all forms of communication including; regular mail, email, text messages, sms messages, and transcripts of voicemails.” The Complainant alleged in his complaint that he was specifically denied copies of “letters, phone call logs, transcripts of calls or meetings.” The Complainant’s requests included a subject and the sender(s)/recipient(s); however, the requests did not include a date or range of dates. As such, the request failed to satisfy the elements of a valid request for communications under Elcavage, GRC 2009-07 and Armenti, GRC 2009-154.

Therefore, the Complainant’s OPRA requests seeking “all forms of communication including; regular mail, email, text messages, sms messages, and transcripts of voicemails” are invalid because, by lacking a date or range of dates, they fail to seek identifiable government records. MAG, 375 N.J. Super. 534, 546; Bent, 381 N.J. Super. 30, 37; N.J. Builders Ass’n, 390 N.J. Super. 166, 180. See also Elcavage, GRC 2009-07, Armenti, GRC 2009-154 and Inzelbuch, GRC 2015-68. Thus, the Custodian did not unlawfully deny access to the Complainant’s requests for said records. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not unlawfully deny the Complainant access to the records responsive to his October 30, 2018 OPRA requests because the Custodian certified that the records responsive to the Complainant’s October 15, 2018 request, disclosed to the Complainant on October 30, 2018, were the same records that were responsive to the requests the Complainant filed five (5) hours later on October 30, 2018, which formed the basis of the instant complaint. Moreover, the Custodian certified that after performing a thorough search she did not locate any additional records responsive to the request, and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. Therefore, the Complainant was not denied access to the requested records because he already had in his possession at the time of the

requests the records he sought pursuant to OPRA. See Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008).

2. The Complainant's OPRA requests seeking "all forms of communication including; regular mail, email, text messages, sms messages, and transcripts of voicemails" are invalid because, by lacking a date or range of dates, they fail to seek identifiable government records. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007). See also 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) and Inzelbuch, Esq. (O.B.O. Ctr. for Educ.) v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2015-68 (September 2016). Thus, the Custodian did not unlawfully deny access to the Complainant's requests for said records. N.J.S.A. 47:1A-6.

Prepared By: John E. Stewart

February 19, 2020