



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

September 29, 2020 Government Records Council Meeting

Patrick Trainor
Complainant

Complaint No. 2018-304

v.

NJ Office of the Governor
Custodian of Record

At the September 29, 2020 public meeting, the Government Records Council (“Council”) considered the September 22, 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 the Complainant’s OPRA requests seeking “all communication records in all forms including, email, regular mail, transcripts of telephone calls, transcripts of voicemail messages, and text messages” are invalid because, by lacking a subject matter or content, they fail to seek identifiable government records. MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 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 Ass’n 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 dated May 24, 2011); Alt v. City of Vineland, GRC Complaint No. 2013-205 (June 2014), and Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-124 (April 2010). See also Trainor v. N.J. Office of the Gov., GRC Complaint No. 2018-269 (February 2020). Thus, the Custodian did not unlawfully deny access to the Complainant’s requests for said records. N.J.S.A. 47:1A-6. Additionally, because the requests were invalid, the Council need not address the defenses raised by the Custodian.

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 29th Day of September 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: October 1, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 29, 2020 Council Meeting**

**Patrick Trainor¹
Complainant**

GRC Complaint No. 2018-304

v.

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

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

OPRA request No. 1 (confirmation no. W138823): “Please provide all communication records in all forms including, email, regular mail, transcripts of telephone calls, transcripts of voicemail messages, and text messages between Johanne Calle transition team member of the Law and Justice, Immigration Subcommittee, of Governor Phil Murphy’s gubernatorial transition team and Alexander Shalom of the American Civil Liberties Union (ACLU). Please provide the records or the period of November 10, 2017 through January 27, 2018.”

OPRA request No. 2 (confirmation no. W138824): “Please provide all communication records in all forms including, email, regular mail, transcripts of telephone calls, transcripts of voicemail messages, and text messages between Sara Cullinane transition team member of the Law and Justice, Immigration Subcommittee, of Governor Phil Murphy’s gubernatorial transition team and Alexander Shalom of the American Civil Liberties Union (ACLU). Please provide the records or the period of November 10, 2017 through January 27, 2018.”

OPRA request No. 3 (confirmation no. W138825): “Please provide all communication records in all forms including, email, regular mail, transcripts of telephone calls, transcripts of voicemail messages, and text messages between Eshan F. Chowdry transition team member of the Law and Justice, Social Justice Subcommittee, of Governor Phil Murphy’s gubernatorial transition team and Alexander Shalom of the American Civil Liberties Union (ACLU). Please provide the records or the period of November 10, 2017 through January 27, 2018.”

OPRA request No. 4 (confirmation no. W138826): “Please provide all communication records in all forms including, email, regular mail, transcripts of telephone calls, transcripts of voicemail messages, and text messages between Ryan Haygood transition team member of the Law and Justice, Social Justice Subcommittee, of Governor Phil Murphy’s gubernatorial transition team and Alexander Shalom of the American Civil Liberties Union (ACLU). Please provide the records or the period of November 10, 2017 through January 27, 2018.”

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Kerry Soranno. Previously represented by Deputy Attorney General Kathryn Duran.

OPRA request No. 5 (confirmation no. W138827): “Please provide all communication records in all forms including, email, regular mail, transcripts of telephone calls, transcripts of voicemail messages, and text messages between Ehsan F. Chowdhry transition team member of the Law and Justice, Social Justice Subcommittee, of Governor Phil Murphy’s gubernatorial transition team and Amol Sinha of the American Civil Liberties Union (ACLU). Please provide the records or the period of November 10, 2017 through January 27, 2018.”

OPRA request No. 6 (confirmation no. W138826): “Please provide all communication records in all forms including, email, regular mail, transcripts of telephone calls, transcripts of voicemail messages, and text messages between Ryan Haygood transition team member of the Law and Justice, Social Justice Subcommittee, of Governor Phil Murphy’s gubernatorial transition team and Amol Sinha of the American Civil Liberties Union (ACLU). Please provide the records or the period of November 10, 2017 through January 27, 2018.”

OPRA request No. 7 (confirmation no. W138829): “Please provide all communication records in all forms including, email, regular mail, transcripts of telephone calls, transcripts of voicemail messages, and text messages between Johanna Calle transition team member of the Law and Justice, Immigration Subcommittee, of Governor Phil Murphy’s gubernatorial transition team and Amol Sinha of the American Civil Liberties Union (ACLU). Please provide the records or the period of November 10, 2017 through January 27, 2018.”

OPRA request No. 8 (confirmation no. W138830): “Please provide all communication records in all forms including, email, regular mail, transcripts of telephone calls, transcripts of voicemail messages, and text messages between Sara Cullinane transition team member of the Law and Justice, Immigration Subcommittee, of Governor Phil Murphy’s gubernatorial transition team and Amol Sinha of the American Civil Liberties Union (ACLU). Please provide the records or the period of November 10, 2017 through January 27, 2018.”

Custodian of Record: Heather Taylor
Request Received by Custodian: November 5, 2018
Response Made by Custodian: November 16, 2018
GRC Complaint Received: December 3, 2018

Background³

Request and Response:

On November 3, 2018, the Complainant submitted eight (8) Open Public Records Act (“OPRA”) requests to the Custodian seeking the above-mentioned records. On November 16, 2018, the Custodian responded in writing stating that the four (4) volunteers (collectively, “Volunteers”) working for the transition team were not State employees subject to OPRA. The Custodian stated that the Office of the Governor (“the Office”) did not have access to their records.

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.

Denial of Access Complaint:

On December 3, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the gubernatorial transition team was created by the New Jersey Legislature and governed under the Gubernatorial Transition Act (“the Act”), N.J.S.A. 52:15A-1 to -5.

The Complainant asserted that a public agency was an organization that provided some service, a body having the authority to represent another or others, a government bureau or administrative division, or the place of business of the same. N.J.A.C. 15:3-1.2. The Complainant also asserted that a public agency included the Office and any division, board, bureau, office, commission, institution, or other instrumentality within or created by same. N.J.A.C. 15:3-1.2. The Complainant also asserted that public funds were appropriated in the final year of an outgoing administration to ensure the provisions of the Act were carried out. The Complainant therefore argued that the transition team was a public agency, and in turn the records of the Volunteers were subject to OPRA.

The Complainant also asserted that public agencies were subject to New Jersey’s records retention requirements under N.J.A.C. 15:3-1 to -9.13. The Complainant argued that, as a public agency, the transition team’s records were required to be preserved in accordance with the retention schedules.

The Complainant asserted that despite the statutory requirements and New Jersey Supreme Court precedent, the Custodian denied access to his OPRA request.

Statement of Information:

On January 11, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on November 5, 2018. The Custodian certified that she responded in writing on November 16, 2018, stating that the Office did not have access to the requested records.

The Custodian, through Counsel, asserted that while OPRA granted the public access to government records, it did not grant access to records of a private individual or business. The Custodian asserted that the Complainant requested correspondence between the Volunteers serving on two (2) of Governor-Elect Phil Murphy’s Transition Advisory Committees (“TAC”) and members of the ACLU. The Custodian asserted that none of the parties were State employees, and therefore any communications between them were not government records subject to OPRA.

The Custodian asserted that the purpose of the Act was to provide resources for the incoming governor to “assure continuity in the conduct of the affairs of State government . . . and minimize any disruption.” N.J.S.A. 52:15A-1. The Complainant asserted that under the Act, the Governor-Elect was provided with office space and funds for expenses such as compensation for staff and travel. N.J.S.A. 52:15A-3(a)(1), (2), and (4). The Custodian also asserted that N.J.S.A. 52:15A-3(a)(2) explicitly stated that the Governor-Elect’s office staff were not State employees.

The Custodian asserted that Governor-Elect Murphy formed 14 TACs, based upon a certification from Dennis Zeveloff, a Policy Advisor with the Office. Therein, Mr. Zeveloff certified that the purpose of the TACs were to help Governor-Elect Murphy facilitate various priorities as Governor. Mr. Zeveloff also certified that none of the TAC members were compensated for their work, nor did any paid member of the Governor-Elect's staff or State employees serve on a TAC. Mr. Zeveloff certified that TAC members were not given State or transition team e-mail accounts or space to store notes, communications, or any other records they might possess regarding their volunteer participation. Mr. Zeveloff certified that by comparison, the Governor-Elect's office staff were compensated for their work and given government e-mail accounts, training, and office space.

The Custodian argued that a government record is defined as a record that is: 1) made maintained, kept on file or received; 2) in the course of official business; and 3) by any officer or commission, agency or authority of the State or political subdivision. N.J.S.A. 47:1A-1.1. The Custodian asserted that the requested records were not made, maintained, or kept on file since they were in the Volunteers' personal possession. The Custodian argued that because the Volunteers did not use office space, use State-issued e-mail accounts, or receive compensation from the State, any records they produced in connection with their TAC membership were not government records.

The Custodian also argued that the Volunteers' work could not be considered "official business." The Custodian argued that if paid members of the Governor-Elect's transition team were not considered State employees, then neither would the Volunteers. The Custodian asserted that TAC members volunteered for a total of 4-15 hours, and their finalized works were purely advisory. The Custodian also asserted that TACs were not an "officer or commission, agency or authority of the State or political subdivision," as their advisory reports were publicly available.

The Custodian therefore requested that the Council find there was no denial of access to government records, and that the Custodian's response conformed to OPRA's requirements.

Analysis

Validity of Request

The Council is permitted to raise additional defenses regarding the disclosure of records pursuant to Paff v. Twp. of Plainsboro, 2007 N.J. Super. Unpub. LEXIS 2135 (App. Div.), certif. denied, 193 N.J. 292 (2007).⁴ In Paff, the complainant challenged the GRC's authority to uphold a denial of access for reasons never raised by the custodian. Specifically, the Council did not uphold the basis for the redactions cited by the custodian. The Council, on its own initiative, determined that the Open Public Meetings Act prohibited the disclosure of the redacted portions to the requested executive session minutes. The Council affirmed the custodian's denial to portions of the executive session minutes but for reasons other than those cited by the custodian. The complainant argued that the GRC did not have the authority to do anything other than determine whether the custodian's cited basis for denial was lawful. The court held that:

⁴ On appeal from Paff v. Twp. of Plainsboro, GRC Complaint No. 2005-29 (March 2006).

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

The court further stated that:

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

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 Alcoholic Beverage Control*, 375 N.J. Super. 534, 546 (App. Div. 2005) (emphasis added).]

The court reasoned that:

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

[*Id.* at 549 (emphasis added).]

The court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt . . . In short, OPRA does not countenance open-ended searches of an agency’s files.” Id. at 549 (emphasis added). See also Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005);⁵ N.J. Builders Ass’n 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).

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 and text messages. See e.g. Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011); Alt v. City of Vineland, GRC Complaint No. 2013-205 (June 2014).

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”).

Similar to the instant complaint, in Trainor v. N.J. Office of the Gov., GRC Complaint No. 2018-269 (February 2020), the custodian responded to the complainant’s eight (8) requests seeking correspondence disclosing records. The complainant filed a Denial of Access Complaint contending that the custodian failed to disclose all records sought. However, as part of its determination, the Council held that the complainant’s eight (8) requests invalid because they failed to contain the date or range of dates pursuant to Elcavage, GRC 2009-07.

Here, each of the Complainant’s OPRA requests sought “all communication records in all forms including, email, regular mail, transcripts of telephone calls, transcripts of voicemail messages, and text messages.” Although the Complainant’s requests included the sender(s)/recipients(s) and a range of dates, they did not include a subject matter or content. As such, Trainor is instructive here in determining that the requests failed to satisfy the elements of a valid request for communications because they lacked the subject matter or content required under Elcavage, GRC 2009-07, Armenti, GRC 2009-154, and Alt, GRC 2013-205.

Therefore, the Complainant’s OPRA requests seeking “all communication records in all forms including, email, regular mail, transcripts of telephone calls, transcripts of voicemail messages, and text messages” are invalid because, by lacking a subject matter or content, they fail to seek identifiable government records. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; N.J. Builders Ass’n, 390 N.J. Super. at 180. See also Elcavage, GRC 2009-07, Armenti, GRC

⁵ Affirming Bent v. Stafford Police Dep’t, GRC Complaint No. 2004-78 (October 2004).

2009-154, Alt, GRC 2013-205, and Verry, GRC 2009-124. See also Trainor, GRC 2018-269. Thus, the Custodian did not unlawfully deny access to the Complainant's requests for said records. N.J.S.A. 47:1A-6. Additionally, because the requests were invalid, the Council need not address the defenses raised by the Custodian.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Complainant's OPRA requests seeking "all communication records in all forms including, email, regular mail, transcripts of telephone calls, transcripts of voicemail messages, and text messages" are invalid because, by lacking a subject matter or content, they fail to seek identifiable government records. MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 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 Ass'n 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 dated May 24, 2011); Alt v. City of Vineland, GRC Complaint No. 2013-205 (June 2014), and Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-124 (April 2010). See also Trainor v. N.J. Office of the Gov., GRC Complaint No. 2018-269 (February 2020). Thus, the Custodian did not unlawfully deny access to the Complainant's requests for said records. N.J.S.A. 47:1A-6. Additionally, because the requests were invalid, the Council need not address the defenses raised by the Custodian.

Prepared By: Samuel A. Rosado
Staff Attorney

August 18, 2020⁶

⁶ The complaint was prepared for adjudication at the Council's August 25, 2020 meeting, but was tabled for additional review.