



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

December 14, 2021 Government Records Council Meeting

Edwin Sheppard
Complainant

Complaint No. 2018-75

v.

NJ Division of Law and Public Safety,
Division of Law
Custodian of Record

At the December 14, 2021 public meeting, the Government Records Council (“Council”) considered the December 8, 2021 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 Custodian has borne her burden of proof that he lawfully denied access to the Complainant’s OPRA request. Specifically, the Custodian certified in the Statement of Information, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

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 14th Day of December 2021

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: December 16, 2021



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 14, 2021 Council Meeting**

**Edwin Sheppard¹
Complainant**

GRC Complaint No. 2018-75

v.

**N.J. Department of Law and Public Safety,
Division of Law²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of “any and all documents regarding the end of [Deputy Attorney General (“DAG”)] Labinot Berljolli’s employment, including but not limited to his conduct in regards to Homecare Specialists.”

Custodian of Record: Octavia Frias
Request Received by Custodian: November 4, 2017
Response Made by Custodian: November 16, 2017
GRC Complaint Received: April 30, 2018

Background³

Request and Response:

On November 4, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 16, 2017, the seventh (7th) business day after receipt of the OPRA request, the Custodian responded in writing denying the subject OPRA request because DAG Berljolli remained an employee of Division of Law (“DOL”) and no responsive records existed.

On December 27, 2017, the Complainant e-mailed the Custodian stating that he received a response to an OPRA request from the Office of the Governor showing that DAG Berljolli was employed there from November 28, 2016 through June 23, 2017. The Complainant alleged that the Custodian “knowingly lied” in her response to the subject OPRA request about DAG Berljolli’s employment status. The Complainant thus demanded that the Custodian disclose “copies of all records, documents, communications and/or notes regarding the reason for [DAG

¹ No legal representation listed on record.

² Represented by Deputy Attorney General (“DAG”) James A, McGhee. Previously represented by DAG Angela Juneau Bezer.

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.

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Berlajolli's] separation" by December 28, 2017. The Complainant noted that the Custodian's failure to comply would result in a Denial of Access Complaint regarding the "latest in the pattern [of] unacceptable and illegal behavior."

Denial of Access Complaint:

On April 30, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant noted that the subject OPRA request was the result of his understanding that at some point between November 1, 2016 and November 27, 2016, DAG Berlajolli left DOL for the Office of the Governor. The Complainant noted that this move was accompanied by a change in title from DAG to Assistant Counsel and that he ultimately resigned from that position in writing on June 23, 2017.

The Complainant argued that DOL and the Office of the Governor are two (2) separate offices; thus, it belied logic that DAG Berlajolli was "continuously employed" by DOL. The Complainant argued that evidence of DAG Berlajolli's move is found in public meeting minutes from the N.J. Building Authority and Delaware River Port Authority, his own "LinkedIn" account, and the June 23, 2017 resignation letter. The Complainant contended that forgoing thus establishes that DAG Berlajolli started at the Governor's Office on November 28, 2016 and subsequently returned to DOL in July 2017. The Complainant thus contended that he was entitled to any "separation information" under N.J.S.A. 47:1A-10.

The Complainant further argued that DOL has engaged in a pattern of violating OPRA by unlawfully withholding access to disclosable records, failing to identify the individual actually responding to the subject OPRA requests, and failing to provide Vaughn Indexes. The Complainant argued that the Custodian "knowingly misrepresented" DAG Berlajolli's employment status to avoid disclosing responsive records. The Complainant argued that the overwhelming evidence in support of his claim requires the GRC to take "a heavy hand" in punishing DOL for its denial of access.

The Complainant also argued that the identification issue is prevalent here because there was no signature on the "Government Records Request Receipt." The Complainant alleged that in a phone conversation with the Custodian, she insinuated that "someone was giving her orders" regarding OPRA responses and that others were providing records to her. The Complainant asserted that notwithstanding these statements, she responded to the subject OPRA request with "unsigned receipts." The Complainant alleged that DOL violated OPRA by failing to identify these other unknown parties. The Complainant also noted that the Custodian's refusal to "sign" receipts is atypical; prior DOL custodians signed their responses. The Complainant surmised some of the additional parties involved, to include DAG Berlajolli, and argued that the GRC should order identification of them to ascertain their roles in this denial.

The Complainant demanded that the GRC require disclosure of the requested records and that DOL give it communications between the parties relating to all OPRA requests he filed with that agency should. The Complainant also requested that: 1) the GRC find that the Custodian be found to have knowingly and willfully violated OPRA; 2) that the GRC "permanently bar" the Custodian and aforementioned "unknown" parties from serving as DOL's Custodian of Record;

3) the GRC award “renumeration to [the Complainant] for the time” expended on this complaint;⁴ and 4) DOL provide him a “written apology . . . for the conduct of its employees” handling the subject OPRA request and “condemn[ing] the same conduct.”

Statement of Information:

On June 13, 2018, the Custodian filed a Statement of Information (“SOI”) attaching Human Resources Director Mirella Bednar’s legal certification. The Custodian certified that she received the Complainant’s OPRA request on November 4, 2017. The Custodian certified that she responded in writing on November 16, 2017 denying the subject OPRA request because no records existed.

The Custodian argued that this complaint must be dismissed because no responsive records exist. Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). The Custodian certified that DAG Berlajolli has been continuously employed by DOL from 2013 to present. See Bednar Cert. ¶ 2. The Custodian acknowledged that DAG Berlajolli went to the Office of the Governor from November 28, 2016 through June 23, 2017; however, he was there on temporary assignment and remained a DOL employee for the entirety of that time. Bednar Cert. ¶ 3-4. The Custodian thus contended that no denial of access could have occurred because no records existed.

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 Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer, GRC 2005-49. In the instant complaint, the Complainant contended that the Custodian “knowingly” denied access to the subject OPRA request.⁵ The Complainant further argued that he obtained significant evidence proving that DAG Berlajolli transferred to the Office of the Governor and that responsive records existed. In the SOI, the Custodian certified that no records existed because DAG Berlajolli, although on temporary assignment at the Office of the Governor, remained an employee of DOL throughout the transfer. The Custodian thus asserted that no unlawful denial of access occurred.

⁴ The GRC notes that OPRA only supports prevailing party attorney’s fees where a complainant who is represented prevails in OPRA litigation. N.J.S.A. 47:1A-6. OPRA does not provide for general renumeration to a *pro se* party, even if they are a licensed attorney. See Feld v. City of Orange Twp., 2019 N.J. Super. Unpub. LEXIS 903 (App. Div. 2019); Pitts v. N.J. Dep’t of Corr., GRC Complaint No. 2005-71 (April 2006).

⁵ The GRC notes that the request in and of itself could be considered invalid because it sought generic “records” and would have required research in order to locate same. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Donato v. Twp. of Union, GRC Complaint No. 2005-182 (January 2007).

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A review of the evidence of record submitted by the parties here support that no responsive records existed. In response to the complaint, the Custodian certified to the non-existence of records and included a certification from Director Bednar regarding DAG Berlajolli's temporary assignment status. Additionally, the SOI certifications are supported by payroll information publicly available through the State's [YourMoney.NJ.Gov](https://data.nj.gov) website. Specifically, a search for DAG Berlajolli's payroll information reveals that he was employed by DOL from 2013 through 2019 with no breaks in service.⁶ Thus, the evidence of record supports that no records exist and no unlawful denial of access occurred.

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

Finally, the GRC briefly rejects the remaining elements of the Complainant's complaint. Initially, whether a custodian is required to include a Vaughn Index in their response to an OPRA request was previously addressed in Halliwell and Pennant v. Borough of Brooklawn (Camden), GRC Complaint No. 2016-201 (August 2018). Further, the "unsigned receipt" issue is of no moment because not only did the Custodian send her response to the Complainant via e-mail with her signature block, but same was also included on the "Government Records Request Receipt." Finally, the Complainant's "'unknown' parties" allegation appear to take issue with the internal process DOL uses to respond to OPRA requests. However, OPRA does not contain provisions for a standardized internal process for responding to OPRA requests. This fact necessarily provides public agencies with the ability to determine which process will be most efficient to comply with OPRA on a day-to-day basis. Thus, the GRC declines to address these issues with additional analysis.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian has borne her burden of proof that he lawfully denied access to the Complainant's OPRA request. Specifically, the Custodian certified in the Statement of Information, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

Prepared By: Frank F. Caruso
Executive Director

December 8, 2021

⁶ https://data.nj.gov/payroll_results?year_start=&year_end=&lastname=Berlajolli&firstname=Labinot&dept_agency=&title=&erg=&salary_low=&salary_high=&ot= (accessed November 26, 2021).

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