



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

June 28, 2022 Government Records Council Meeting

Harvey Roseff
Complainant

Complaint No. 2019-110

v.

County of Sussex
Custodian of Record

At the June 28, 2022 public meeting, the Government Records Council (“Council”) considered the June 21, 2022 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. Although the Custodian responded in writing to the Complainant’s OPRA request within statutorily mandated time frame to respond, said written response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Papiez v. Cnty. of Mercer, Office of Cnty. Counsel, GRC Complaint No. 2012-59 (March 2013) because she failed to provide a date certain upon which he would respond to the Complainant providing any responsive records. See also Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011).
2. The Complainant’s OPRA request seeking “all communication records” between multiple individuals and companies related to the Program and “tax equity” deals with Firststar Development from January 1, 2012 through September 22, 2018 is valid and requires only a search, as opposed to research. Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint Nos. 2013-43 and 2013-53 (Interim Order dated September 24, 2013). Thus, the Custodian unlawfully denied access to the OPRA request bases on the assertion that same was invalid. N.J.S.A. 47:1A-6. However, the GRC declines to order any additional searches because the evidence of record supports that same occurred and responsive records were located.
3. The GRC must conduct an *in camera* review of those e-mails responsive to the Complainant’s OPRA request that were withheld either in their entirety or disclosed with redactions to determine the validity of the Custodian’s purported assertion same were exempt under the attorney-client privilege exemption. N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005). In order to effectuate the *in camera* review, the Custodian shall include a Vaugh Index (see the GRC’s SOI form) identifying each e-mail and applicable attachment wherein

the asserted exemption was applied and whether same was withheld in its entirety or redacted.

4. **The Custodian shall deliver¹ to the Council in a sealed envelope nine (9) copies of the responsive unredacted e-mails, both withheld in their entirety and redacted (see conclusion No. 3 above), nine (9) copies of those e-mails disclosed with redactions, a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,³ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
5. 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.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 28th Day of June 2022

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: June 29, 2022

¹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

² The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

³ "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."

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 28, 2022 Council Meeting**

**Harvey Roseff¹
Complainant**

GRC Complaint No. 2019-110

v.

**County of Sussex²
Custodial Agency**

Records Relevant to Complaint: Electronic records via e-mail of “all communication records” between the County of Sussex (“County”), Administrator, Chief Financial Officer (“CFO”), Counsel, Mercer County Improvement Authority’s (“MCIA”) representing law firm, NW Financial, Sunlight General, and Matthew D. Jessup regarding the Sussex Solar Program (“Program”) and “tax equity” deals with Firststar Development from January 1, 2012 through September 22, 2018.³

Custodian of Record: Teresa Lyons

Request Received by Custodian: September 27, 2018

Response Made by Custodian: October 2, 2018

GRC Complaint Received: June 10, 2019

Background⁴

Request and Response:

On September 26, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On October 2, 2018, the second (2nd) business day after receipt of the OPRA request, the Custodian stated that an extension of time was required because of the voluminous nature of the request, the absence of the County Treasurer, and a pending meeting with County Counsel for assistance. The Custodian noted that she would have a “better understanding for this extension timetable” after the meeting.

On October 25, 2018, the Custodian responded in writing stating that she searched for responsive records through an electronic filing system and at off-site archives “in an effort to respond to this OPRA request.” The Custodian noted that the Complainant previously filed similar

¹ No legal representation listed on record. Previously represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Clinton, NJ).

² Represented by James Moscagiuri, Esq. of Lavery, Selvaggi, Abromitis & Cohen, P.C. (Hackettstown, NJ).

³ The Complainant sought additional records that are not at issue in this complaint.

⁴ 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.

OPRA requests in 2015 and 2016, but she could not locate those records disclosed to the Complainant. The Custodian stated that she subsequently contacted Information Technology to perform a search for records of four (4) former employees' accounts. The Custodian stated that this search yielded 551 e-mails that she would need to review. The Custodian stated that she would update the Complainant about her review "next week." The Custodian finally noted that County Counsel also advised her that she should direct the Complainant to MCIA for records sought in the additional items not at issue here. On the same day, the Complainant responded asking if he could have access to the identified e-mails in a searchable .pdf format.

On October 26, 2018, the Custodian responded declining to disclose the e-mails until after she could review them for potential exemptions. On October 30, 2018, the Custodian responded advising that her review of the e-mails continued. On November 1, 2018, the Custodian again e-mailed the Complainant advising that she was still reviewing the e-mails and hoped to complete said review by the following week.⁵

On November 15, 2018, the Complainant e-mailed the Custodian seeking an update on his pending OPRA request. On November 19, 2018, the Custodian responded noting that she previously advised that responsive files were off-site and that she continued to review e-mails while others review records at that other site. The Custodian further noted that some of the e-mails she reviewed were exempt under the "inter-agency or intra agency advisory, consultative, or deliberative [("ACD")] material" or attorney-client privilege exemptions. N.J.S.A. 47:1A-1.1. The Custodian stated that she would provide him additional updates the following week after the Thanksgiving holiday.

On December 20, 2018, County Counsel Kevin D. Kelly, Esq., responded in writing on behalf of the Custodian denying the subject request as invalid. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007). Mr. Kelly stated that the request sought "all communications" for a six-and-a-half-year period that assumes "unproven facts" and required the Custodian to investigate "the history and intricacies" of the County Solar Project. Mr. Kelly contended that the request was "complicated, multi-faceted [and] so far removed" from a normal OPRA request that statutory response provisions did not apply. Mr. Kelly also stated that OPRA did not require a custodian to conduct research or create a record. Paff v. Galloway Twp., 229 N.J. 340 (2017). Mr. Kelly noted that the County could have charged a special service charge for what was "arguably the most complicated undertaking in [County] history from a [Custodian] who was not employed . . . at the time of the events in question." Fisher v. Div. of Law, 400 N.J. Super. 61 (App. Div. 2008). Mr. Kelly finally advised that the County was never a party to any tax equity contracts between Firststar, Sunlight General, or MCIA; thus, the records requested were more appropriately sought from those entities.

Denial of Access Complaint:

On June 10, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant first contended that the Custodian's

⁵ Several additional communications between the parties related to OPRA request items not at issue here occurred during the time frame between October 25, 2018 and November 19, 2018.

failure to disclose those records or provide a specific lawful basis for denial after identifying them on October 25, 2018 resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(i).

The Complainant also disputed the County’s denial of his OPRA request, arguing that his request was proper and that the Custodian located 551 pages of responsive records. The Complainant further argued that Mr. Kelly’s invalid request response is contrary to the fact that responsive records have been identified without the asserted research or investigation. The Complainant contended that the facts here are contrary to those explored in Rogers v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2011-23 (January 2013) (holding that that no unlawful denial of access occurred because the complainant failed to include correct information in his OPRA request). The Complainant thus requested that the Council order disclosure of the responsive records and determine that the Complainant is a prevailing party entitled to an award of attorney’s fees and costs.

Statement of Information:⁶

On November 19, 2020, the Custodian filed a Statement of Information (“SOF”). The Custodian certified that she received the Complainant’s OPRA request on September 27, 2018. The Custodian certified that her search included trying to determine the potential locations for any responsive records. The Custodian noted that those records were not centrally located and could number in the thousands. The Custodian certified that she thus initially responded in writing on October 2, 2018 seeking an extension to address the subject OPRA request. The Custodian certified that she subsequently responded in writing on October 25, 2018 identifying 551 potentially responsive e-mails requiring review. The Custodian certified that after multiple additional correspondence between the parties, Mr. Kelly responded in writing on her behalf on December 20, 2018 denying the subject request as invalid. The Custodian also certified that following the filing of this complaint, on July 23, 2019, Mr. Kelly disclosed to former Complainant’s Counsel the 551 pages of e-mails with a document index identified e-mails and e-mails bodies redacted or withheld under the attorney-client privilege.

The Custodian contended that, through Mr. Kelly, she properly denied access to the subject OPRA request as invalid because it sought several categories of documents covering approximately seven (7) years. The Custodian argued that the inclusion of “long recitations of various other documents and Complainant’s contentions and thoughts” only further confused the nature of the request. The Custodian contended that the request itself was invalid in size, breadth, and complexity to the point of research and would have been “extraordinarily time-consuming” to fulfill. The Custodian further contended that the Complainant’s failure to identify specific records only further support the requirement for research. The Custodian also noted that many of the County’s current employees were not employed at the time of the complex transactions that occurred during the program.

The Custodian alleged that the Complainant’s various OPRA requests has caused a substantial disruption of agency operations. The Custodian asserted that the County has “gone to great lengths to stop the onslaught” of nearly identical OPRA requests at great time and cost. The

⁶ On July 16, 2019, this complaint was referred to mediation. On October 21, 2020, this complaint was referred back to the GRC for adjudication.

Custodian averred that one of those requests was the subject of Roseff v. Cnty. of Sussex, Docket No. SSX-L-75-19, which was dismissed. The Custodian thus requested that the Council “bring an end to this situation” and dismiss the instant complaint.

Mr. Kelly also submitted a legal certification, wherein he described his familiarity with the Complainant, who at the time of the OPRA request was an elected official in the Township of Byram. Mr. Kelly averred that the OPRA request appeared to be based on the Complainant’s errant belief that the County procured “more than \$1,000,000 of tax equity contract funds;” the County never received such funds. Mr. Kelly affirmed that instead, the Program settlement resulted in funds generated by third parties being paid to other third parties not controlled by the County. Mr. Kelly noted that as part of his search discussed below, the County was able to locate a bank statement for MCIA reflecting the monies went there.

Mr. Kelly noted that the OPRA request identifies multiple parties who either are no longer with the County or who were adversarial during the Program. Mr. Kelly noted that the Program was so complicated that the County hired a separate law firm for \$500,000 to release an independent public report. Mr. Kelly stated that although the subject OPRA request could have been denied for multiple reasons, he determined to not do so because of the Complainant’s litigious history and propensity for filing copious OPRA requests (many duplicative or repetitive) in addition to the 109 filed so far. Mr. Kelly certified that rather than relying on a special service charge, he chose to perform the searches and investigations at the County’s cost, which became significant. Mr. Kelly noted that this same OPRA request had previously been submitted in whole or as part of other OPRA requests to both the County and other agencies. Mr. Kelly affirmed that due to this request, he contacted two (2) attorney firms, which resulted in provision of a box of records from one firm at the cost of \$3,190.00 and a finding that no records existed at the other firm. Mr. Kelly certified that the entire contents of that box were disclosed to the Complainant as part of his December 20, 2018 response; notwithstanding, the Complainant filed a renewed request for the same records shortly thereafter. Mr. Kelly also noted that he believed this matter was settled as of July 9, 2019 based on additional resolution discussions and cannot understand why same is proceeding with adjudication.

Additional Submissions:

On December 4, 2020, the Complainant submitted a letter brief responding to the SOI. The Complainant contended that after years of attempting to obtain records related to the Program, the instant Denial of Access Complaint finally yielded “hundreds of pages of clearly pertinent e-mails.” The Complainant thus alleged that the County erroneously advanced its validity argument when it knew it could easily comply with the subject OPRA request.

The Complainant argued that notwithstanding this disclosure, he remains convinced that the County is hiding “contracts and records” regarding the Program. The Complainant argued that the public has a right to obtain information on a program that is allegedly generating year-over-year losses of taxpayer funds. The Complainant thus demanded the full disclosure of 98 e-mails without redactions. The Complainant asserted that the forgoing denial is contrary to the County’s practice of disclosing to him draft and deliberative documents, only to change course due to inclusion of the term “tax equity deal.”

The Complainant also identified three (3) e-mails that he asserted indicates other e-mails responsive to the subject OPRA request would have followed but were not disclosed, inclusive of a “tax equity contract.” The Complainant bases his stance on the fact that the sender of one e-mail participated in a closed session where the County acted by executing multiple addendums. The Custodian further asked that the GRC review the third e-mail between David Karian and Stephen B. Pearlman to determine what portion of the e-mail should be redacted. The Complainant argued that the “tax equity contract” existed and should have been provided in response to the subject OPRA request.

The Complainant surmised curiosity in the fact that the County argued that he previously submitted similar OPRA requests for the same or similar records but that it was not until now, under a different custodian, that 551 e-mails were located and disclosed. The Complainant contended that the 551 e-mails provided do not document the “\$1,010,281.71” transaction and that no contract was provided. The Complainant again contended that he had a right to the contract to understand the full universe of the County’s losses resulting from the Program. The Complainant also contended that he believes there “are more records that these missing records, inclusive of the original contract, do exist.”

The Complainant finally argued that the Council should award prevailing party attorney’s fees because former Complainant’s Counsel initiated the instant complaint and disclosures resulted from said filing.

Analysis

Sufficiency of Response

OPRA provides that a custodian may have an extension of time to respond to a complainant’s OPRA request, but the custodian must provide a date certain. N.J.S.A. 47:1A-5(i). OPRA further provides that should the custodian fail to provide a response on that specific date, “access shall be deemed denied.” N.J.S.A. 47:1A-5(i).

In Papiez v. Cnty. of Mercer, Office of Cnty. Counsel, GRC Complaint No. 2012-59 (March 2013), the custodian responded in a timely manner seeking an extension of time; however, she failed to identify a date certain on which she would respond. The Council determined that, although the custodian timely sought an extension of time, she failed to provide a date certain on which she would respond. N.J.S.A. 47:1A-5(i). Citing Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008).

Here, upon the Complainant’s submission of the original OPRA request, the Custodian responded in writing on October 2, 2018, the second (2nd) business day after receipt of same, stating that she was set to meet with County Counsel and would have a “better understanding for this extension timetable” after the meeting. However, the Custodian did not provide a date certain on which she would respond at that time. Further, the Custodian did not respond again until October 25, 2018, well outside of the seven (7) business day time frame.

In reviewing the evidence of record here, the Custodian's October 2, 2018 response was insufficient. Specifically, OPRA requires that a custodian seeking an extension of time to respond to an OPRA request provide date certain and said failure to do so has routinely resulted in an insufficient response finding. N.J.S.A. 47:1A-5(i); Papiez, GRC 2012-59. See also Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011); Percella v. City of Bayonne (Hudson), GRC Complaint No. 2020-73 (May 2021). Thus, a similar holding that an insufficient response occurred here is appropriate.

Therefore, although the Custodian responded in writing to the Complainant's OPRA request within statutorily mandated time frame to respond, said written response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Papiez, GRC 2012-59 because she failed to provide a date certain upon which he would respond to the Complainant providing any responsive records. See also Bentz, GRC 2008-89.

Validity of Request

The New Jersey Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records "readily accessible for inspection, copying, or examination."* N.J.S.A. 47:1A-1.

[MAG, 375 N.J. Super. at 546 (emphasis added).]

The court reasoned that:

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

[Id. at 549 (emphasis added).]

The court further held that "[u]nder OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt . . . In short, OPRA does not countenance open-ended searches of an agency's files." Id. (emphasis added). Bent v. Stafford Police Dep't,

381 N.J. Super. 30, 37 (App. Div. 2005);⁷ N.J. Builders, 390 N.J. Super. at 180; Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

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

Regarding requests for communications, including e-mails, text messages, and written correspondence, the GRC has established criteria deemed necessary under OPRA to request them. 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 e-mail, (2) the specific date or range of dates during which the e-mail(s) were transmitted, and (3) the identity of the sender and/or the recipient thereof. See also Sandoval v. NJ State Parole Bd., GRC Complaint No. 2006-167 (Interim Order March 28, 2007). The Council has also applied the criteria set forth in Elcavage to other forms of correspondence, such as letters. See Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011). The Council has also found that an OPRA request not containing a sender and/or recipient is invalid. See Caggiano v. N.J. Office of the Governor, GRC Complaint No. 2015-276 (Final Decision dated November 13, 2018).

Also, the Council has provided guidance on how requests containing the Elcavage criteria do not require research:

[A] valid OPRA request requires a search, not research. An OPRA request is thus only valid if the subject of the request can be readily identifiable based on the request. Whether a subject can be readily identifiable will need to be made on a case-by-case basis. When it comes to e-mails or documents stored on a computer, a simple keyword search may be sufficient to identify any records that may be responsive to a request. As to correspondence, a custodian may be required to search an appropriate file relevant to the subject. In both cases, e-mails and correspondence, a completed “subject” or “regarding” line may be sufficient to determine whether the record relates to the described subject. Again, what will be sufficient to determine a proper search will depend on how detailed the OPRA request is, and will differ on a case-by-case basis. What a custodian is not required to do, however, is to actually read through numerous e-mails and correspondence to determine if same is responsive: in other words, conduct research.

[Verry v. Borough of South Bound Brook (Somerset), GRC Complaint Nos. 2013-43 and 2013-53 (Interim Order dated September 24, 2013).]

⁷ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

Additionally, 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 communications regarding 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.

Here, the Complainant’s September 26, 2018 request sought “all communication records” between multiple individuals and companies related to the Program and “tax equity” deals with Firststar Development from January 1, 2012 through September 22, 2018. The Custodian initially responded extending the time frame without a date certain. She subsequently responded on October 5, 2018 identifying the existence of 551 responsive e-mails that would require review and potential redaction. Following several updates on the progress of the review, Mr. Kelly responded in writing on the Custodian behalf on December 20, 2018 denying the subject OPRA request as invalid for several reasons.

The Complainant subsequently filed this complaint, wherein he argued that the subject OPRA request was valid based on the County’s ability to locate a substantive number of responsive records absent the asserted research. In the SOI, the Custodian maintained that the subject OPRA request was invalid and detailed the amount of time and work necessary to attempt to respond to same. The Custodian certified that ultimately, on July 23, 2019, Mr. Kelly disclosed those e-mails to former Complainant’s Counsel along with a document index identifying any withheld/redacted. Mr. Kelly also submitted a detailed certification as to his “investigation” of potentially responsive records. Mr. Kelly noted that he believed a special service charge could have applied here, but that he chose not to charge same. In response to the SOI, the Complainant argued that he was including a list of e-mails that should be disclosed without redactions numbering 98 in total. The Complainant also identified three (3) e-mails he alleged proved that additional communications existed.

Upon review of the subject OPRA request, the GRC is persuaded that same was, in fact, valid and only required search and not research. Initially, the OPRA request contained all three (3) factors necessary for a request seeking communications to be valid. Burke, 429 N.J. Super. 169; Elcavage, GRC 2009-07. Further, it is obvious from the County’s ability to almost immediately identify 551 e-mails that the search discussion set forth in Verry, GRC 2013-43, *et seq.* applied to the subject request. Additionally, the fact that the OPRA request sought communications for an extensive time period among several senders/recipients that would result in voluminous responsive records is not always synonymous with an invalid request. In fact, OPRA affords custodians faced with responding to a valid OPRA request resulting in voluminous responsive records options for addressing such an issue. Among them are extensions, which the Custodian utilized here, and the imposition of special service charges. That Mr. Kelly readily acknowledged in his certification and to former Complainant’s Counsel that the County believed it could impose a special service charge but decided not to do so does not equate to an invalid OPRA request.

Also, whether the SCPO would encounter difficulty searching for responsive records based on familiarity with their location does not equate to research. The Council has previously addressed this issue by stating that “the [c]ustodian’s assertion that responsive releases could not be easily located . . . does not absolve him of at least performing a search.” Dalal v. N.J. Office of Homeland Sec & Preparedness, GRC Complaint No. 2016-169 (Interim Order dated January 31, 2019) at 5 (holding that the custodian was required to search for and disclose press releases for 2012 and 2013).

Accordingly, the Complainant’s OPRA request seeking “all communication records” between multiple individuals and companies related to the Program and “tax equity” deals with Firstar Development from January 1, 2012 through September 22, 2018 is valid and requires only a search, as opposed to research. Burke, 429 N.J. Super. 169; Elcavage, GRC 2009-07; Verry, GRC 2013-43, *et seq.* Thus, the Custodian unlawfully denied access to the OPRA request bases on the assertion that same was invalid. N.J.S.A. 47:1A-6. However, the GRC declines to order any additional searches because the evidence of record supports that same occurred and responsive records were located.

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.

In Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council⁸ that accepted the custodian’s legal conclusion for the denial of access without further review. The Appellate Division noted that “OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.” Id. The court stated that:

[OPRA] also contemplates the GRC’s *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

[Id. at 355.]

Further, the court found that:

⁸ Paff v. N.J. Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal . . . There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC's obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

[Id.]

Here, the Custodian initially identified 551 e-mails responsive to the subject OPRA request. The evidence further indicates that Mr. Kelly produced those records to former Complainant's Counsel on July 23, 2019. However, within the response letter, Mr. Kelly noted that multiple documents not provided due to the attorney-client privilege exemption were listed in an attached document index. N.J.S.A. 47:1A-1.1. The Custodian subsequently certified to the disclosure in the SOI, but the 109 page document index contained therein only lists all e-mails; it does not indicate which were either redacted or withheld. The Complainant filed an SOI response in which he also attaches a document index identifying 98 individual e-mails for which he alleged an unlawful denial of access occurred. However, the Complainant also argues that he is seeking unredacted copies of various e-mails and their attachments.

Upon review of the evidence of record here, the GRC cannot determine: 1) how many of the responsive e-mails/attachments were withheld, either in part or whole; and 2) whether the exemptions applied to those withheld or redacted e-mails. The GRC bases this position on the fact that none of the document indexes filed by the parties provide a clear and concise identification of those e-mails for which the County has asserted are exempt from disclosure. Thus, the GRC must require the Custodian to specifically identify the universe of e-mails (and attachments) withheld from the Complainant and provide same for an *in camera* review to determine the full applicability of the attorney-client privilege exemption. Such an action is common, as the GRC will routinely perform an *in camera* review in similar circumstances. See e.g. Pouliot v. N.J. Dep't of Educ., GRC Complaint No. 2015-281 (Interim Order dated January 31, 2017).

Therefore, the GRC must conduct an *in camera* review of those e-mails responsive to the Complainant's OPRA request that were withheld either in their entirety or disclosed with redactions to determine the validity of the Custodian's purported assertion same were exempt under the attorney-client privilege exemption. N.J.S.A. 47:1A-1.1. See Paff, 379 N.J. Super. at 346. In order to effectuate the *in camera* review, the Custodian shall include a Vaugh Index (see the GRC's SOI form) identifying each e-mail and applicable attachment wherein the asserted exemption was applied and whether same was withheld in its entirety or redacted.

In closing, the GRC notes that the Complainant, in his response to the SOI, makes several allegations that there existed a "tax equity contract" and that the County failed to provide same. While the Complainant's original OPRA request does contain an item seeking "the tax equity

contracts with Firststar Development,”⁹ the Complainant does not present any claim regarding this item in the original Denial of Access Complaint. Additionally, neither the Complainant nor former Counsel submitted an Amended Denial of Access Complaint appending the item thereto. For this reason, the potential unlawful denial of access to any “tax equity contract,” separate from such a record’s inclusion as an attachment to the responsive e-mails at issue here, is not properly before the Council and will not be addressed.

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.

Prevailing Party Attorney’s Fees

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian responded in writing to the Complainant’s OPRA request within statutorily mandated time frame to respond, said written response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Papiez v. Cnty. of Mercer, Office of Cnty. Counsel, GRC Complaint No. 2012-59 (March 2013) because she failed to provide a date certain upon which he would respond to the Complainant providing any responsive records. See also Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011).
2. The Complainant’s OPRA request seeking “all communication records” between multiple individuals and companies related to the Program and “tax equity” deals with Firststar Development from January 1, 2012 through September 22, 2018 is valid and requires only a search, as opposed to research. Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint Nos. 2013-43 and 2013-53 (Interim Order dated September 24, 2013). Thus, the Custodian unlawfully denied access to the OPRA request bases on the assertion that same was invalid. N.J.S.A. 47:1A-6. However, the GRC declines to order any additional searches because the evidence of record supports that same occurred and responsive records were located.

⁹ The Custodian responded to that item on October 25, 2018 that the Complainant should submit an OPRA request to MCIA for this record. Mr. Kelly further confirmed in his December 20, 2018 response that “[the] County *was not* a party to the requested contract documents.” (Emphasis in original).

3. The GRC must conduct an *in camera* review of those e-mails responsive to the Complainant's OPRA request that were withheld either in their entirety or disclosed with redactions to determine the validity of the Custodian's purported assertion same were exempt under the attorney-client privilege exemption. N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005). In order to effectuate the *in camera* review, the Custodian shall include a Vaugh Index (see the GRC's SOI form) identifying each e-mail and applicable attachment wherein the asserted exemption was applied and whether same was withheld in its entirety or redacted.
4. **The Custodian shall deliver¹⁰ to the Council in a sealed envelope nine (9) copies of the responsive unredacted e-mails, both withheld in their entirety and redacted (see conclusion No. 3 above), nine (9) copies of those e-mails disclosed with redactions, a document or redaction index¹¹, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,¹² that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
5. 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.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Executive Director

June 21, 2022

¹⁰ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

¹¹ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

¹² "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."