



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

December 15, 2020 Government Records Council Meeting

Jackson Township Municipal
Supervisors Association
Complainant

Complaint No. 2019-125

v.

Township of Jackson (Ocean)
Custodian of Record

At the December 15, 2020 public meeting, the Government Records Council (“Council”) considered the December 8, 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 bear her burden of proof that she timely responded to the portion of the Complainant’s OPRA request seeking invoices. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time immediately, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See also Cody v. Middletown Twp. Pub. Sch., GRC Complaint No. 2005-98 (December 2005), Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007), and Harris v. N.J. Dep’t of Corr., GRC Complaint No. 2011-65 (August 2012). Additionally, with respect to the non-immediate access portion of the Complainant’s request, although the Custodian timely extended the deadline to respond, she failed to respond within the extended period, resulting in a “deemed” denial of access. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). See also Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). Notwithstanding, the GRC declines to take any further action because the Custodian ultimately responded to the request on June 25, 2019.
2. Notwithstanding the Custodian’s “deemed” denial, the portion of the Complainant’s OPRA request item No. 1 seeking all “documents,” “records,” “filings,” and “analysis” relating to the proposed layoff of Division staff is invalid because it fails to identify a specific record. 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); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Feiler-Jampel v. Somerset Cnty. Prosecutor’s Office,



GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008). Thus, the Custodian lawfully denied access to this portion of the request. N.J.S.A. 47:1A-6.

3. Notwithstanding the Custodian's "deemed" denial, the portion of the Complainant's OPRA request item No. 1 seeking "communications" and "e-mails" is invalid because it fails to include the senders and/or recipients and date range. 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); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); 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). See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-124 (April 2010). Thus, the Custodian lawfully denied access to this portion of the Complainant's request. N.J.S.A. 47:1A-6.
4. Notwithstanding the Custodian's "deemed" denial, she has borne her burden of proof that she lawfully denied access to the portion of the Complainant's OPRA request item No. 1 seeking "reports," "studies," and "invoices." 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 v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
5. The requested layoff plan is exempt from disclosure under the "inter-agency or intra-agency advisory, consultative, or deliberative material" exemption. N.J.S.A. 47:1A-1.1; Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274, 285 (2009); Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83, 90-91 (App. Div. 2018), certif. denied, 233 N.J. 484 (2018). Thus, notwithstanding the Custodian's "deemed" denial, she lawfully denied access to the Complainant's OPRA request item No. 2. N.J.S.A. 47:1A-6.
6. In the matter before the Council, the Custodian failed to timely respond to the Complainant's OPRA request, which included immediate access records. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); and N.J.S.A. 47:1A-5(e). However, the Custodian ultimately responded and lawfully denied access to the requested records. N.J.S.A. 47:1A-6. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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 15th Day of December 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: December 17, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 15, 2020 Council Meeting**

**Jackson Township Municipal
Supervisors Association¹
Complainant**

GRC Complaint No. 2019-125

v.

**Township of Jackson (Ocean)²
Custodial Agency**

Records Relevant to Complaint: Copies of:

1. All reports, studies, documents, records, filings, communications, e-mails, invoices, and analysis of, or related to the proposed layoff of Engineering Division (“Division”) staff.
2. The layoff plan and all supporting documents submitted to the Civil Service Commission (“CSC”).

Custodian of Record: Janice Kristy
Request Received by Custodian: June 7, 2019
Response Made by Custodian: June 25, 2019
GRC Complaint Received: July 2, 2019

Background³

Request and Response:

On June 7, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 17, 2019, the sixth (6th) business day after receipt, the Custodian e-mailed the Complainant stating that an extension of time until June 24, 2019 was needed to respond to the request.

On June 25, 2019, one (1) business day after the extended deadline, the Custodian responded in writing, initially stating that the Township of Jackson (“Township”) did not possess records of “reports,” “studies,” and “invoices” pertaining to the proposed layoffs of Engineering Division staff.

¹ No legal representation listed on record.

² Represented by Robin La Bue, Esq. of Rothstein, Mandell, Strohm, Halm & Cipriani, P.A. (Lakewood, N.J.).

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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The Custodian also stated that the Complainant's requests for "documents," "records," "filings," and "analysis" were invalid as overly broad and failed to identify specific government records pursuant to Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005).

Next, the Custodian stated that the Complainant's request for "communications" and "e-mails" required clarification and requested the time frame and senders and/or recipients of said records pursuant to Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010), and Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011).

Lastly, the Custodian stated that the Complainant's request Item No. 2 sought draft documents that have not been approved by CSC and were therefore exempt under OPRA's exemption for advisory, consultative, and/or deliberative materials. N.J.S.A. 47:1A-1.1. See also Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83, 90-91 (App. Div. 2018) (certif. denied, 233 N.J. 484 (2018)).

Denial of Access Complaint:

On July 2, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that they submitted the OPRA request after being informed by the Township Administrator ("Administrator") that the Division's functions may be outsourced as a cost-savings measure. The Complainant asserted that the Administrator also noted the estimated cost-savings from the memo provided to Division employees. The Complainant also asserted that several meetings were held between the Administrator and Division employees regarding the proposal based upon correspondence attached to the complaint. The Complainant also asserted that on May 31, 2019, the Administrator informed Division employees that a layoff plan had been filed with CSC subject to their review and approval.

The Complainant thus argued that the requested documents existed based upon the Administrator's statements and the meetings. The Complainant argued that the Township had to have conducted an analysis or study to provide the estimated cost-savings, notwithstanding the Custodian's claim that no such records existed. Additionally, the Complainant asserted that the requested layoff plan was finalized at the time of the request since Division employees were informed a week prior that the layoff plan had been filed with CSC.

Lastly, the Complainant asserted that the Custodian untimely responded to the OPRA request, as they did not receive a response until twelve (12) business days after submission.

Statement of Information:⁴

On August 22, 2019, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on June 7, 2019. The Custodian certified that her search included reaching out to the Department of Administration ("Department"), as they maintained the responsive records.

⁴ The complaint was referred to mediation on July 25, 2019. The complaint was referred back from mediation on August 9, 2019.
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The Custodian certified that on June 17, 2019, she sought an extension of time and responded to the Complainant based on the information provided by the Department. The Custodian certified that on June 24, 2019, the Department provided the Custodian with a draft response. The Custodian then certified that the response was not delivered to the Complainant until June 25, 2019 when she discovered that the response was still in her “drafts” folder.

The Custodian asserted the same reasons for denying access to the requested records as stated in her June 25, 2019 response. Regarding the portion seeking e-mails and communications, the Custodian added that the Complainant did not provide the requested clarification and thus those request items were denied.

Additionally, the Custodian asserted that the layoff plan was a draft document at the time of the request and therefore not subject to access. The Complainant argued that under N.J.A.C. 4A:8-1.4(e), a layoff plan is considered a draft document until approved by CSC. The Custodian asserted that once approved, a CSC representative provides the plan to the representatives of those affected.

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Id. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁵ Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).

In Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5th) business day after receipt of the complainant’s March 19, 2007 OPRA request seeking an extension of time until April 20, 2007. However, the custodian responded again on April 20, 2007, stating that the requested records would be provided later in the week. Id. The evidence of record showed that no records were provided until May 31, 2007. Id. The GRC held that:

The Custodian properly requested an extension of time to provide the requested records to the Complainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) . . . however . . . [b]ecause the Custodian failed to provide the Complainant access to the requested records by the extension date anticipated by

⁵ A custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

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the Custodian, the Custodian violated N.J.S.A. 47:1A-5(i) resulting in a “deemed” denial of access to the records.

[Id.]

Likewise, barring extenuating circumstances, a custodian’s failure to respond immediately in writing to a complainant’s OPRA request for immediate access records, either granting access, denying access, seeking clarification, or requesting an extension of time, also results in a “deemed” denial of the request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i).⁶ See Cody v. Middletown Twp. Pub. Sch., GRC Complaint No. 2005-98 (December 2005) and Harris v. N.J. Dep’t of Corr., GRC Complaint No. 2011-65 (August 2012). See also Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007) (holding that the custodian was obligated to notify the complainant immediately as to the status of immediate access records).

Here, the Complainant asserted that the Custodian failed to timely respond to its OPRA request, which included a request for “invoices.” However, the Custodian sought a time extension to respond to the request on June 17, 2019, which was the sixth (6th) business day after the Township received the request. In accordance with Herron, the Custodian had “an obligation to immediately” respond to the Complainant granting access, denying access, seeking clarification, or requesting an extension of time, but failed to do so. See also Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-330 (Interim Order dated February 26, 2013); Kaplan v. Winslow Twp. Bd. of Educ. (Camden), GRC Complaint No. 2011- 237 (Interim Order dated December 18, 2012).

Regarding the non-immediate access portion of the Complainant’s request, the Custodian did not respond to the request until June 25, 2019, which was one (1) day past the extended deadline for response, despite making a timely request for a time extension. Thus, consistent with Kohn, GRC 2007-124, the Custodian’s failure to respond prior to the extension expiration resulted in a “deemed” denial.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the portion of the Complainant’s OPRA request seeking invoices. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time immediately, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See also Cody, GRC 2005-98, Herron, GRC 2006-178, and Harris, GRC 2011-65. Additionally, with respect to the non-immediate access portion of the Complainant’s request, although the Custodian timely extended the deadline to respond, she failed to respond within the extended period, resulting in a “deemed” denial of access. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. See also Kohn, GRC 2007-124. Notwithstanding, the GRC declines to take any further action because the Custodian ultimately responded to the request on June 25, 2019.

⁶ OPRA lists immediate access records as “budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.” N.J.S.A. 47:1A-5(e). The Council has also determined that purchase orders and invoices are immediate access records. See Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2012-03 (April 2013).
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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 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. (emphasis added). Bent, 381 N.J. Super. at 37⁷; 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).

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. at 546; 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).

⁷ Affirming Bent v. Stafford Police Dep’t, GRC Complaint No. 2004-78 (October 2004).
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Regarding generic requests for “records,” the request at issue in MAG sought “all documents or records evidencing that the ABC sought, obtained or ordered revocation of a liquor license for the charge of selling alcoholic beverages to an intoxicated person in which such person, after leaving the licensed premises, was involved in a fatal auto accident” and “all documents or records evidencing that the ABC sought, obtained or ordered suspension of a liquor license exceeding 45 days for charges of lewd or immoral activity.” Id. at 539-40. The court noted that plaintiffs failed to include additional identifiers such as a case name or docket number. See also Steinhauer-Kula v. Twp. of Downe (Cumberland), GRC Complaint No. 2010-198 (March 2012) (holding that the complainant’s request item No. 2 seeking “[p]roof of submission” was invalid); Edwards v. Hous. Auth. of Plainfield (Union), GRC Complaint No. 2008-183 *et seq.* (Final Decision dated April 25, 2012) (accepting the Administrative Law Judge’s finding that a newspaper article attached to a subject OPRA request that was related to the records sought did not cure the deficiencies present in the request) Id. at 12-13.

Moreover, in Feiler-Jampel v. Somerset Cnty. Prosecutor’s Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008), the Council similarly held that a request seeking “[a]ny and all documents and evidence” relating to an investigation being conducted by the Somerset County Prosecutor’s Office was invalid, reasoning that:

[B]ecause the records requested comprise an entire SCPO file, the request is overbroad and of the nature of a blanket request for a class of various documents rather than a request for specific government records. Because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to research the SCPO files to locate records potentially responsive to the Complainant’s request pursuant to the Superior Court’s decisions in [MAG], [Bent] and the Council’s decisions in Asarnow v. Department of Labor and Workforce Development, GRC Complaint No. 2006-24 (May 2006) and Morgano v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2007-190 (February 2008).

[Id. See also Schulz v. N.J. State Police, GRC Complaint No. 2014-390 (Interim Order dated July 28, 2015) (holding that the portion of the request seeking “all documents” was overly broad and thus invalid).]

“Documents,” “Records,” “Filings,” and “Analysis”

Here, a portion of the Complainant’s OPRA request item No. 1 sought all “documents,” “records,” “filings,” and “analysis” relating to the proposed layoff of Division staff. The Custodian denied access to said portion of the request as invalid, and later restated her position in the SOI. MAG and its progeny support that this portion of the request is invalid. Further, as noted in Feiler-Jampel, this portion of the request necessitates research to be conducted to locate potentially responsive records.

Accordingly, notwithstanding the Custodian’s “deemed” denial, the portion of the Complainant’s OPRA request item No. 1 seeking all “documents,” “records,” “filings,” and “analysis” relating to the proposed layoff of Division staff is invalid because it fails to identify a

specific record. 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; Schuler, GRC 2007-151; Feiler-Jampel, GRC 2007-190. Thus, the Custodian lawfully denied access to this portion of the request. N.J.S.A. 47:1A-6.

“Communications” and “E-mails”

Regarding requests for e-mails and correspondence, the GRC has established specific criteria deemed necessary under OPRA to request an e-mail communication. See Elcavage, GRC 2009-07. 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 Elcavage, GRC 2009-07; Sandoval v. N.J. 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, GRC 2009-154.

Further, the Council has previously determined that a request failing to contain all appropriate criteria set forth in Elcavage, GRC 2009-07, was invalid. For example, in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-124 (April 2010), the complainant's OPRA request sought all e-mails to or from a particular e-mail account for a specific time period. The custodian's counsel responded advising the complainant that his OPRA request was invalid because it represented an open-ended search of the Borough's files. The Council held that the complainant's request was invalid under Elcavage, GRC 2009-07 because it did not include a subject or content. Id. at 7.

Here, a portion of the Complainant's OPRA request item No. 1 sought “e-mails” and “communications” relating to the proposed layoff of Division employees and did not contain senders and/or recipients, or a date range. The Custodian, in her June 25, 2019 response, asked the Complainant to provide the missing identifiers and there is no evidence in the record demonstrating that the Complainant provided such information prior to filing the instant complaint. When applied to Elcavage and Verry, the Custodian's response and SOI position that this portion of item No. 1 was invalid is supported by a plain reading of the request. Specifically, the Complainant did not include the senders and/or recipients, or a date range; thus, the Custodian's search for “communications” and “e-mails” would necessarily be open-ended. The GRC is thus satisfied that this portion of item No. 1 was invalid, as the required criteria established under controlling case precedent was clearly omitted from the request.

Accordingly, notwithstanding the Custodian's “deemed” denial, the portion of the Complainant's OPRA request item No. 1 seeking “communications” and “e-mails” is invalid because it fails to include the senders and/or recipients and date range. 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; Schuler, GRC 2007-151; Elcavage, GRC 2009-07; Armenti, GRC 2009-154. See also Verry, GRC 2009-124. Thus, the Custodian lawfully denied access to this portion of the Complainant's request. N.J.S.A. 47:1A-6.

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.

“Reports,” “Studies,” and “Invoices”

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). Here, a portion of the Complainant’s OPRA request item No. 1 sought “reports,” “studies,” and “invoices” pertaining to the proposed layoff of Division employees. The Custodian denied access to the Complainant’s OPRA request, stating that no such records existed within the Township. In the SOI, the Custodian certified to this fact. Although the Complainant asserted that the Administrator estimated how much the Township could save from the proposal, the memo provided by the Complainant states that the proposal “may result in the elimination of 2 permanent positions in the [Division].” The Complainant wishes to draw an inference that the Administrator’s estimate is backed up by responsive records, however such evidence is insufficient to refute the Custodian’s certification.

Accordingly, notwithstanding the Custodian’s “deemed” denial, she has borne her burden of proof that she lawfully denied access to the portion of the Complainant’s OPRA request item No. 1 seeking “reports,” “studies,” and “invoices.” 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.

Layoff Plan

OPRA further provides that the definition of a government record “shall not include inter-agency or intra-agency [(“ACD”)] material.” When the exception is invoked, a governmental entity may “withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated.” Educ. Law Ctr. v. N.J. Dep’t of Educ., 198 N.J. 274, 285 (2009) (citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975)). The New Jersey Supreme Court has also ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Educ. Law Ctr., 198 N.J. at 299.

In Libertarians, 453 N.J. Super. at 89-90, the Appellate Division discussed the deliberative process privilege at length regarding a request for draft meeting minutes, stating:

The applicability of the deliberative process privilege is government by a two-prong test. The judge must determine both that a document is (1) “pre-decisional,”

meaning it was “generated before the adoption of an agency’s policy or decision;” and (2) deliberative, in that it “contain[s] opinions, recommendations, or advice about agency policies.” [Educ. Law Ctr., 198 N.J. at 286 (quoting [In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 84-85 (2000)]). If a document stratifies both prongs, it is exempt from disclosure under OPRA pursuant to the deliberative process privilege.

Regarding the first prong, the court stated that “a draft is not a final document. It has been prepared for another person or persons’ editing and eventual approval.” Id. at 90. Therefore, the court held that draft meeting minutes are pre-decisional since they are subject to revision and not yet approved for public release. Id. at 90-91.

Regarding the second prong, the court held that “the document must be shown to be closely related to the formulation or exercise of . . . policy-oriented judgment or [to] the process by which policy is formulated.” Id. at 91 (quoting Ciesla v. N.J. Dep’t of Health & Sr. Servs., 429 N.J. Super. 127, 138 (App. Div. 2012) (internal quotations omitted))⁸. The court found that the requested draft minutes, as compiled by the writer in attendance at the meeting, were subject to additions, suggestions, and other edits from the members of the public body. Id. Thus, the draft minutes satisfied the second prong of the test. Id. at 92.

In the current matter, the Custodian denied access to the requested layoff plan because it had not been approved by CSC at the time as required under N.J.A.C. 4A:8-1.4(e). The Complainant asserted that the fact that the layoff plan was submitted to the CSC demonstrated that the Township finalized the plan after deliberation and therefore it was not protected by the privilege.

Upon review of the facts, the GRC finds that the Custodian lawfully denied access to the layoff plan under OPRA as a draft document exempt under the deliberative process privilege. Although the layoff plan’s filing at CSC suggests that the intra-agency deliberations with the Township had concluded, the review and final approval process had not been completed. N.J.A.C. 4A:8-1.4(d) states:

Upon review of the information required to be submitted in (a) and (b) above, or in the absence of timely submission of such information, the Chairperson or designee may take appropriate remedial action, including:

1. Requiring submission of additional or corrected information;
2. Providing needed assistance to the appointing authority;
3. Directing implementation of appropriate alternative or pre-layoff measures; or
4. Directing necessary changes in the layoff notice, which may include the effective date of the layoff.

⁸ Affirming Ciesla v. N.J. Dep’t of Health and Senior Serv., GRC Complaint No. 2010-38 (May 2011).
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The regulation demonstrates that the submitted layoff plan was still subject to additions, amendments, and revisions upon review by the CSC, suggesting that the layoff plan was not a final document.

Additionally, as noted by the Custodian, the Township could not adopt its decision to reorganize the Division via the layoff plan without CSC approval. See N.J.A.C. 4A:8-1.4(e). Thus, the layoff plan was pre-decisional at the time of the OPRA request filing. Furthermore, based upon the content requirements under N.J.A.C. 4A:8-1.4(a), the layoff plan contained the reasons for the layoffs, explanations of any alternatives considered and why they were not applicable, and summaries of discussions with affected negotiations representatives. Therefore, the layoff plan met both prongs of the test as outlined in Educ. Law Ctr. and prevailing case law.

Accordingly, the requested layoff plan is exempt from disclosure under the ACD exemption. N.J.S.A. 47:1A-1.1; Educ. Law Ctr., 198 N.J. 274; Libertarians, 429 N.J. Super. 127. Thus, notwithstanding the Custodian's "deemed" denial, she lawfully denied access to the Complainant's OPRA request item No. 2. N.J.S.A. 47:1A-6.

Knowing & Willful

OPRA states that "[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . ." N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states ". . . [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . ." N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

In the matter before the Council, the Custodian failed to timely respond to the Complainant's OPRA request, which included immediate access records. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); and N.J.S.A. 47:1A-5(e). However, the Custodian ultimately responded and lawfully denied access to the requested records. N.J.S.A. 47:1A-6. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of

conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to the portion of the Complainant's OPRA request seeking invoices. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time immediately, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See also Cody v. Middletown Twp. Pub. Sch., GRC Complaint No. 2005-98 (December 2005), Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007), and Harris v. N.J. Dep't of Corr., GRC Complaint No. 2011-65 (August 2012). Additionally, with respect to the non-immediate access portion of the Complainant's request, although the Custodian timely extended the deadline to respond, she failed to respond within the extended period, resulting in a "deemed" denial of access. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). See also Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). Notwithstanding, the GRC declines to take any further action because the Custodian ultimately responded to the request on June 25, 2019.
2. Notwithstanding the Custodian's "deemed" denial, the portion of the Complainant's OPRA request item No. 1 seeking all "documents," "records," "filings," and "analysis" relating to the proposed layoff of Division staff is invalid because it fails to identify a specific record. 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); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Feiler-Jampel v. Somerset Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008). Thus, the Custodian lawfully denied access to this portion of the request. N.J.S.A. 47:1A-6.
3. Notwithstanding the Custodian's "deemed" denial, the portion of the Complainant's OPRA request item No. 1 seeking "communications" and "e-mails" is invalid because it fails to include the senders and/or recipients and date range. 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); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); 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). See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-124 (April 2010). Thus, the Custodian lawfully denied access to this portion of the Complainant’s request. N.J.S.A. 47:1A-6.

4. Notwithstanding the Custodian’s “deemed” denial, she has borne her burden of proof that she lawfully denied access to the portion of the Complainant’s OPRA request item No. 1 seeking “reports,” “studies,” and “invoices.” 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 v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
5. The requested layoff plan is exempt from disclosure under the “inter-agency or intra-agency advisory, consultative, or deliberative material” exemption. N.J.S.A. 47:1A-1.1; Educ. Law Ctr. v. N.J. Dep’t of Educ., 198 N.J. 274, 285 (2009); Libertarians for Transparent Gov’t v. Gov’t Records Council, 453 N.J. Super. 83, 90-91 (App. Div. 2018), certif. denied, 233 N.J. 484 (2018). Thus, notwithstanding the Custodian’s “deemed” denial, she lawfully denied access to the Complainant’s OPRA request item No. 2. N.J.S.A. 47:1A-6.
6. In the matter before the Council, the Custodian failed to timely respond to the Complainant’s OPRA request, which included immediate access records. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); and N.J.S.A. 47:1A-5(e). However, the Custodian ultimately responded and lawfully denied access to the requested records. N.J.S.A. 47:1A-6. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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