



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

Frank J. Festa, Jr.
Complainant

Complaint No. 2019-173

v.

Township of Marlboro (Monmouth)
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 has borne her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, no “deemed” denial of access occurred here. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i).
2. The portion of the Complainant’s request seeking “any and all records” is invalid because it failed to identify a specific record and required research. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Lagerkvist v. Office of the Governor, 443 N.J. Super. 230, 236-237 (App. Div. 2015); 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); Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2011-147, *et seq.* (July 2012). Moreover, the portion of the Complainant’s request seeking “correspondence” relating to himself or a particular property between multiple parties was invalid because it failed to include a date or range of dates. Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Tracey-Coll v. Elmwood Park Bd. of Educ. (Bergen), GRC Complaint No. 2009-206 (June 2010); Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2013-118 (January 2014). Thus, the Custodian lawfully denied access to the Complainant’s request because it was invalid in its totality. N.J.S.A. 47:1A-6.

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**

**Frank J. Festa, Jr.¹
Complainant**

GRC Complaint No. 2019-173

v.

**Township of Marlboro (Monmouth)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of “[a]ny and all records” referencing Block 294, Lot 4, the Complainant’s “request for information regarding stormwater relating to” the property, and the Complainant’s “request for access to records in any way related to” the property including but not limited to all “inter[-]office correspondence in any way related to [the Complainant] and [the property], and . . . to anyone outside the [Township of Marlboro (“Township”)] *i.e.* engineer’s; consulting firms; outside legal counsel and the like.”

Custodian of Record: Suzanne Branagan
Request Received by Custodian: July 22, 2019
Response Made by Custodian: July 22, 2019
GRC Complaint Received: August 21, 2019

Background³

Request and Response:

On July 17, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On the same day, the Custodian responded in writing advising that the subject OPRA request was invalid because it failed to identify specific records. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders 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). On July 29, 2019, the Custodian e-mailed the Complainant a copy of the subject OPRA request and sought clarification of it. On August 4, 2019, the Custodian e-mailed the Complainant stating that after several failed attempts to obtain clarification without success, she was reasserting her denial because the subject OPRA request was invalid.

¹ No legal representation listed on record.

² Represented by Brian P. Trelease, Esq., of Rainone, Coughlin, Minchello, LLC (Iselin, NJ).

³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Denial of Access Complaint:

On August 21, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian failed to respond to his OPRA requests.

Statement of Information:

On October 22, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on July 22, 2019. The Custodian certified that she responded in writing on July 22, July 24,⁴ July 29, and August 4, 2019 advising that the subject OPRA request was invalid. The Custodian further certified that she e-mailed the Complainant on several occasions seeking clarification of the request but the Complainant did not respond.

The Custodian stated that OPRA “only allows requests for records, not requests for information.” MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37. The Custodian further contended that the OPRA response time frame did not apply where requests failed to identify specific records. N.J. Builders, 390 N.J. Super. at 180. The Custodian contended that the evidence of record is clear that she timely responded to the subject OPRA request at issue here. The Custodian further asserted that the request was ultimately invalid because it would have necessitated an open-ended search of the Township’s records.

The Custodian argued that notwithstanding her timely response, she has been again forced to defend her actions in a Denial of Access Complaint. The Custodian contended that the Complainant was “fully aware” of the Township’s responses and pursued this action with intent to harass the Township. The Custodian thus contended that this complaint was frivolous and must be dismissed.

Additional Submissions:

On October 28, 2019, the Complainant e-mailed the GRC alleging several communication issues with the Township. The Complainant asserted that the Township was not assisting him to locate specific records and instead denied his OPRA requests as invalid.⁵

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

⁴ The Custodian did not include a copy of her correspondence with the Complainant on July 24, 2019 in the SOI.

⁵ The Complainant’s e-mail was sent in relation to each of his ten (10) complaints being concurrently adjudicated.

N.J.S.A. 47:1A-5(g).⁶ 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 October 31, 2007).

In the matter before the Council, the Complainant contended that the Custodian failed to respond to his July 17, 2019 OPRA request. In the SOI, the Custodian certified that she responded to the Complainant's OPRA request on multiple occasions denying the request as invalid and seeking clarification. The Custodian attached as part of the SOI her written responses sent to the Complainant via e-mail on those dates.

The Complainant's contention in the instant complaint is that he received no response to the subject OPRA request. However, the Custodian provided sufficient evidence in the SOI to show that she responded in writing to the OPRA request. The Custodian's evidence is persuasive that she reasonably refuted the Complainant's allegations. Based on this, no "deemed" denial of access occurred here.

Therefore, the Custodian has borne her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, no "deemed" denial of access occurred here. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i).

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.

⁶ 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.

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 37;⁷ N.J. Builders, 390 N.J. Super. at 180; Schuler, GRC 2007-151.

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 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 539-540. 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

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

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).]

Further, there are instances where a request can be specific enough to induce research, thus rendering it invalid. For instance, in Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2011-147, *et seq.* (July 2012), the complainant submitted four (4) OPRA requests seeking copies of meeting minutes containing motions to approve other minutes. The Council, citing Taylor v. Cherry Hill Bd. of Educ. (Camden), GRC Complaint No. 2008-258 (August 2009) and Ray v. Freedom Academy Charter Sch. (Camden), GRC Complaint No. 2009-185 (August 2010), determined that the requests were overly broad:

[S]aid requests do not specify the date or time frame of the minutes sought. Rather, the requests seek those minutes at which the UCBOE motioned to approve meeting minutes for four (4) other meetings. Similar to the facts of both Taylor and Ray, the requests herein *seek minutes that refer to a topic and would require the Custodian to research the UCBOE's meeting minutes in order to locate the particular sets of minutes that are responsive to the Complainant's requests . . .* because the Complainant's four (4) requests for minutes "that include a motion made by the Union City Board of Education to approve the minutes" from other meetings fail to identify the specific dates of the minutes sought and would require the Custodian to conduct research in order to locate the responsive records, the Complainant's requests are invalid under OPRA.

[Valdes, GRC 2011-147, *et seq.* (emphasis added) (citing N.J. Builders, 390 N.J. Super. at 180; Bent, 381 N.J. Super. 30 (App. Div. 2005); MAG, 375 N.J. Super. at 546; Schuler, GRC 2007-151; Donato, GRC 2005-182. See also Valdes v. Gov't Records Council, GRC Complaint No. 2013-278 (September 2014)).]

In Lagerkvist v. Office of the Governor, 443 N.J. Super. 230, 236-237 (App. Div. 2015), the court's rationale of what amounted to research supports the Council's decision in Valdes. There, the court reasoned that the plaintiff's request:

. . . would have had to make a preliminary determination as to which travel records correlated to the governor and to his senior officials, past and present, over a span of years. The custodian would then have had to attempt to single out those which were third-party funded events. Next, he would have had to collect all documents corresponding to those events and search to ensure he had accumulated everything, including both paper and electronic correspondence. OPRA does not convert a custodian into a researcher,

[Id. at 237. See also Carter v. N.J. Dep't of Cmty. Affairs, Div. of Local Gov't Serv., 2019 N.J. Super. Unpub LEXIS 2510 (App. Div. Dec. 10, 2019) (affirming Carter, GRC Complaint No. 2016-262 (August 2018)).]

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 GRC notes that the Council has determined that requests seeking correspondence but omitting the specific date or range of dates are invalid. See Tracey-Coll v. Elmwood Park Bd. of Educ. (Bergen), GRC Complaint No. 2009-206 (June 2010); Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2013-118 (January 2014).

Here, one portion of the Complainant's request sought "any and all records" of a particular property and his various requests for information on that property. The other portion of the Complainant's request sought correspondence "in any way related to" him and the property including those with "anyone outside" the Township. The Custodian timely responded to the request, denying it as "invalid" after she made four (4) separate attempts to obtain clarification from the Complainant which were unsuccessful. The Custodian's response is in sharp contrast to the Complainant's claim in the Denial of Access Complaint that the Custodian failed to respond to the request.

Upon review of the subject request compared to MAG and its progeny, the GRC is persuaded that the Custodian lawfully denied access on the basis that the request was invalid. The "any and all records" portion of the request fails to identify a specific record and would have required the Custodian to review every record maintained by the Township to determine whether it pertained to the Complainant or the identified property. Such actions clearly constitute research; the Custodian was not obligated to conduct same to satisfy the request. See Lagerkvist, 443 N.J. Super. at 236-237; Feiler-Jampel, GRC 2007-190; Valdes, GRC 2011-147, *et seq.* Further, the portion of the request seeking correspondence fails to include all criteria necessary to be considered valid under Elcavage, GRC 2009-07. Specifically, the Complainant failed to include a date or range of dates. See also Tracey-Coll, GRC 2009-206; Kohn, GRC 2013-118.

Accordingly, the portion of the Complainant's request seeking "any and all records" is invalid because it failed to identify a specific record and required research. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; N.J. Builders, 390 N.J. Super. at 180; Lagerkvist, 443 N.J. Super. at 236-237; Schuler, GRC 2007-151; Feiler-Jampel, GRC 2007-190; Valdes, GRC 2011-147, *et seq.* Moreover, the portion of the Complainant's request seeking "correspondence" relating to himself or a particular property between multiple parties was invalid because it failed to include a date or range of dates. Elcavage, GRC 2009-07; Tracey-Coll, GRC 2009-206; Kohn, GRC 2013-

118. Thus, the Custodian lawfully denied access to the Complainant's request because it was invalid in its totality. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has borne her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, no "deemed" denial of access occurred here. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i).
2. The portion of the Complainant's request seeking "any and all records" is invalid because it failed to identify a specific record and required research. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Lagerkvist v. Office of the Governor, 443 N.J. Super. 230, 236-237 (App. Div. 2015); 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); Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2011-147, *et seq.* (July 2012). Moreover, the portion of the Complainant's request seeking "correspondence" relating to himself or a particular property between multiple parties was invalid because it failed to include a date or range of dates. Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Tracey-Coll v. Elmwood Park Bd. of Educ. (Bergen), GRC Complaint No. 2009-206 (June 2010); Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2013-118 (January 2014). Thus, the Custodian lawfully denied access to the Complainant's request because it was invalid in its totality. N.J.S.A. 47:1A-6.

Prepared By: Frank F. Caruso
Executive Director

December 8, 2020