



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

March 30, 2021 Government Records Council Meeting

Kevin Alexander
Complainant

Complaint No. 2019-214

v.

County of Union
Custodian of Record

At the March 30, 2021 public meeting, the Government Records Council (“Council”) considered the March 23, 2021 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian has borne her burden of proof that no “deemed” denial of access occurred regarding the Complainant’s September 11, 2019 OPRA request. Specifically, the Custodian timely requested clarification of the request in writing, and the Complainant failed to provide such clarification. N.J.S.A. 47:1A-6. See Schilling v. Twp. of Little Egg Harbor (Ocean), GRC Complaint No. 2013-293 (Interim Order dated March 22, 2013); Herron v. New Jersey Dep’t of Educ., GRC Complaint No. 2011-363 (December 2012); Moore v. Twp. of Old Bridge, GRC Complaint No. 2005-80 (August 2005).
2. Although the Custodian provided records “loosely responsive” to the Complainant’s September 11, 2019 OPRA request, said request is invalid under OPRA since it asks questions regarding an employee’s functions and an agency’s policy plans rather than specific government records. See Watt v. Borough of North Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009); Dunleavy v. Jefferson Twp. Bd. Educ. (Morris), GRC Complaint No. 2014-372 (Interim Order dated June 30, 2015).

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 30th Day of March 2021

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: April 1, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 30, 2021 Council Meeting**

**Kevin Alexander¹
Complainant**

GRC Complaint No. 2019-214

v.

**County of Union²
Custodial Agency**

Records Relevant to Complaint: Copies via U.S. mail of:

1. “[W]hat is the “In Place Legal Plan” for the male population here at the Union County Jail [(“UCJ”)] versus the “In Place Legal Plan” for the female population that’s being held temporarily at the Essex County Jail?”
2. “What is the function of the Librarian here at the [UCJ]?”

Custodian of Record: Marlena Russo

Request Received by Custodian: September 16, 2019

Response Made by Custodian: October 1, 2019

GRC Complaint Received: October 18, 2019

Background³

Request:

On September 11, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the City of Elizabeth, seeking the above-mentioned records. On or around September 16, 2019, the request was forwarded to the Custodian. That same day, the Custodian responded in writing stating that the Complainant’s handwriting was illegible, and requested the Complainant resubmit his OPRA request “in a more legible format-e.g., plain block letters.”

Additional Correspondence:

On September 18, 2019, the Custodian received another OPRA request from Elizabeth Police Department (“EPD”) authored by the Complainant. The request sought an “interim report and cost savings regarding the dismantling of the law library at the [UCJ].”

¹ No legal representation listed on record.

² Represented by April C. Bauknight, Esq., Assistant County Counsel for the County of Union (Elizabeth, 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.

Response:

On September 23, 2019, the Complainant responded to the Custodian stating that he would not rewrite his request. On October 1, 2019, the Custodian responded in writing advising the Complainant that no responsive records exist to the Complainant's September 18, 2018 OPRA request.

Denial of Access Complaint:

On October 18, 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 September 11, 2019 OPRA request.

Supplemental Response:

On October 25, 2019, the Custodian submitted a response to the Complainant regarding a separate OPRA request.⁴ Additionally, the Custodian stated that:

After further examination in the context of the other correspondence you have sent this office through September and October, a re-reading of your letter received on September 16, 2019 appears to indicate an OPRA request for the in-place legal plan for the male population at [UCJ] v. the in-place legal plan for the female population being held temporarily at Essex County Jail, and the function of the librarian at the [UCJ], "since the abolishment of the entire law library program here."

[Custodian's Statement of Information ("SOI"), Exhibit G.]

In response, the Custodian stated that there was no "in-place legal plan," as the UCJ law library was not abolished. However, the Custodian stated that UCJ's "law library policy is loosely responsive" to the request and contained the job description for the law librarian. The Custodian stated that a copy of said policy was included with the correspondence.

Statement of Information:

On November 27, 2019, the Custodian filed a SOI.⁵ The Custodian certified that she received the Complainant's OPRA request on September 16, 2019. The Custodian certified that she responded in writing that same day requesting the Complainant resubmit his request because the initial submission was not legible. The Custodian certified that on September 18, 2019, EPD forwarded an OPRA request they received from the Complainant.

The Custodian certified that on September 23, 2019, the Complainant responded to her request for clarification stating that he would not resubmit the OPRA request at issue. The

⁴ The request was the subject of Alexander v. Cnty. of Union, GRC Complaint No. 2019-219 (June 2020).

⁵ The GRC returned the SOI on December 12, 2019 because the Custodian's response was comingled with responses to three (3) other Denial of Access Complaints. The Custodian subsequently resubmitted the SOI clearly identifying their recitation of the facts and legal arguments of each individual complaint.

Custodian certified that she responded to the Complainant in writing on October 1, 2019, stating that no responsive records exist based on the records sought from the September 18, 2019 OPRA request.

The Custodian asserted that the September 18, 2019 OPRA request she received from EPD was “identical” to the request at issue and maintained that no responsive records exist.⁶

Additional Submissions:

On December 2, 2019, the Complainant submitted a letter in response to the Custodian’s SOI.⁷ The Complainant alleged that the Custodian and the County Counsel were “engaging in stall tactics” by referencing the September 18, 2019 OPRA request. The Complainant argued that the cost effect of destroying the law library could be easily gleaned from viewing the “budget debt” documentation prior to its dismantling.

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).⁸ 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 Schilling v. Twp. of Little Egg Harbor (Ocean), GRC Complaint No. 2013-293 (Interim Order dated March 22, 2013), the Council determined that the custodian bore her burden of proving a lawful denial of access to the requested records because she sought clarification of the complainant’s request and the complainant provided no clarification. See also Herron v. New Jersey Dep’t of Educ., GRC Complaint No. 2011-363 (December 2012); Moore v. Twp. of Old Bridge, GRC Complaint No. 2005-80 (August 2005).

In the instant matter, although the Custodian requested a resubmission of the OPRA request, the GRC will treat the Custodian’s request as seeking clarification. The Custodian certified that she received the Complainant’s OPRA request on September 16, 2019 and responded that same day requesting the Complainant resubmit his OPRA request in a more legible format.

⁶ The Custodian did not refer to the October 25, 2019 correspondence regarding the instant matter.

⁷ The Complainant included in his letter discussion of the County’s responses to other OPRA requests not at issue in the instant complaint.

⁸ 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.

However, the Complainant refused to provide clarification, and continued to submit correspondence and additional OPRA requests to the Custodian using the same handwriting style.

Thereafter, while responding to a separate OPRA request on October 25, 2019, the Custodian stated that the context provided by the subsequent communications allowed her to discern the records sought from the request at issue upon a new reading. The GRC interprets this as the Custodian becoming acclimated to the Complainant's handwriting and was able to comprehend the September 11, 2019 OPRA request and respond accordingly.

In reviewing the submissions, the GRC agrees with the Custodian's assessment that the Complainant's italicized-script handwriting style is difficult to understand. Individual letters are often not fully fleshed out or merged amongst each other, and thus words could not be readily understood upon an initial reading. During the adjudication process, GRC staff needed to re-read the Complainant's September 11, 2019 OPRA request and Denial of Access Complaint multiple times to fully comprehend the submissions. Thus, it was not unreasonable for the Custodian to request clarification by resubmitting the OPRA request in a more legible format.

Accordingly, the Custodian has borne her burden of proof that no "deemed" denial of access occurred regarding the Complainant's September 11, 2019 OPRA request. Specifically, the Custodian timely requested clarification of the request in writing, and the Complainant failed to provide such clarification. N.J.S.A. 47:1A-6. See Schilling, GRC 2013-293; Herron, GRC 2011-363; Moore, GRC 2005-80.

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 ABC, 375 N.J. Super. 534, 546 (App. Div. 2005) (emphasis added).]

The Court reasoned that:

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

required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

[Id. at 549 (emphasis added).]

The Court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt In short, OPRA does not countenance open-ended searches of an agency’s files.” Id. at 549 (emphasis added). Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005);⁹ 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).

Regarding requests seeking information or asking questions, there are instances in OPRA specifically identifies pieces of information as a “government record” under OPRA. By way of example, in Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156 *et seq.* (Interim Order dated June 29, 2010), the Council determined that “name, title, position, salary, payroll record and length of service” was information specifically considered to be a “government record” under N.J.S.A. 47:1A-10. The Council thus held that the complainant’s March 25, 2009, request for “[t]he name, position, salary, payroll record and length of service for every Board/District employee who was employed in whole or part from January 1, 2008, to March 24, 2009” was a valid request pursuant to OPRA. Id. at 5.

Notwithstanding the foregoing, in Watt v. Borough of North Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009), the Council held that the complainant’s September 13, 2007, request seeking answers to five (5) questions regarding a property named the Villa Maria was invalid. See also Ohlson v. Twp. of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009); Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012). To this end, in Dunleavy v. Jefferson Twp. Bd. Educ. (Morris), GRC Complaint No. 2014-372 (Interim Order dated June 30, 2015), the complainant’s June 30, 2014 OPRA request sought five items:

1. The type of license and qualifications of the individual hired to replace Mr. Bryant N. Annett.
2. Résumé of the hired individual.
3. The name of the hired individual.
4. Is the particular individual still employed?
5. The salary of the hired individual. If no longer employed, the total amount paid during time of employee

The custodian denied access, and later argued in the SOI, that item Nos. 1, 3, 4, and 5 were invalid. The Council disagreed in part, finding that item Nos. 1, 3, and 5 sought information otherwise identified as a “government record” under OPRA. However, the Council held that item No. 4, a question pertaining to an individual’s employment status, was invalid. Id. at 7 (citing Ohlson, GRC 2007-233 and Rummel, GRC 2011-168).

⁹ Affirming Bent v. Stafford Police Dep’t, GRC Complaint No. 2004-78 (October 2004).

In the instant complaint, the Complainant's September 11, 2019 OPRA request asked two (2) questions: 1) what the "in-place legal plan" for male and female inmates stemming from the abolishment of the UCJ law library; and 2) what the functions were for the UCJ law librarian. However, because the Complainant refused to provide clarification the Custodian certified in the SOI that she responded on October 1, 2019, relying on the determination that the September 18, 2019 OPRA request sought the same records as those at issue. It was not until October 25, 2019 that the Custodian understood what the Complainant sought in the instant request and provided a copy of UCJ's law library policy as "loosely responsive" to the request.

Although the Custodian did not argue in the SOI that said questions represented an invalid request, the Council is permitted to raise additional defenses regarding the disclosure of records. Paff v. Twp. of Plainsboro, 2007 N.J. Super. Unpub. LEXIS 2135 (App. Div. 2007) (certif. denied, 193 N.J. 292 (2007)).¹⁰ In this instance, the questions posed by the Complainant in his September 11, 2019 OPRA request were invalid. As was the case in Watt and Dunleavy, OPRA did not require the Custodian to answer questions regarding UCJ's plans resulting from a policy decision or describe the job duties of an employee.

Accordingly, although the Custodian provided records "loosely responsive" to the Complainant's September 11, 2019 OPRA request, said request is invalid under OPRA since it asks questions regarding an employee's functions and an agency's policy plans rather than specific government records. See Watt, GRC 2007-246; Dunleavy, GRC 2014-372.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has borne her burden of proof that no "deemed" denial of access occurred regarding the Complainant's September 11, 2019 OPRA request. Specifically, the Custodian timely requested clarification of the request in writing, and the Complainant failed to provide such clarification. N.J.S.A. 47:1A-6. See Schilling v. Twp. of Little Egg Harbor (Ocean), GRC Complaint No. 2013-293 (Interim Order dated March 22, 2013); Herron v. New Jersey Dep't of Educ., GRC Complaint No. 2011-363 (December 2012); Moore v. Twp. of Old Bridge, GRC Complaint No. 2005-80 (August 2005).
2. Although the Custodian provided records "loosely responsive" to the Complainant's September 11, 2019 OPRA request, said request is invalid under OPRA since it asks questions regarding an employee's functions and an agency's policy plans rather than specific government records. See Watt v. Borough of North Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009); Dunleavy v. Jefferson Twp. Bd. Educ. (Morris), GRC Complaint No. 2014-372 (Interim Order dated June 30, 2015).

Prepared By: Samuel A. Rosado
Staff Attorney

March 23, 2021

¹⁰ On appeal from Paff v. Twp. of Plainsboro, GRC Complaint No. 2005-29 (March 2006).