



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

April 27, 2021 Government Records Council Meeting

Tyshammie L. Cooper
Complainant

Complaint No. 2019-223

v.

City of Orange Township (Essex)
Custodian of Record

At the April 27, 2021 public meeting, the Government Records Council (“Council”) considered the April 20, 2021 Supplemental 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 fully comply with the Council’s March 30, 2021 Interim Order. Specifically, the Custodian responded within the prescribed time frame; however, she did not include all certifications required to be submitted by the individuals that conducted searches. Notwithstanding, the Custodian cured this deficiency through Counsel on April 19, 2021 and the evidence of record supports that no responsive records exist.
2. The Custodian’s failure to timely respond resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, although the Complainant’s original request was invalid, the amended OPRA was valid and required a proper response from the Custodian. Ultimately, notwithstanding that the Custodian did not fully comply with the Council’s Order, the evidence of record supports that no responsive records exist. Additionally, the evidence of record does not indicate that the Custodian’s violations 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 27th Day of April 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 29, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
April 27, 2021 Council Meeting**

**Tyshammie L. Cooper¹
Complainant**

GRC Complaint No. 2019-223

v.

**City of Orange Township (Essex)²
Custodial Agency**

Records Relevant to Complaint: Hardcopy via pick-up of “any and all e-mails, letters, correspondence, and text messages” between Attorney Dan Smith, Mayor Dwayne Warren, and Business Administrator Chris Hartwyk related to the Orange Public Library (“Library”), “appointing and remaining board members,” or hiring and retaining Sarah Riggins as an employee [between January 1, 2018 and present].³

Custodian of Record: Joyce L. Lanier

Request Received by Custodian: July 29, 2019

Response Made by Custodian: August 15, 2019

GRC Complaint Received: November 7, 2019

Background

March 30, 2021 Council Meeting:

At its March 30, 2021 public meeting, the 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, found that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. 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 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).

¹ No legal representation listed on record.

² Represented by Joseph A. Garcia, Esq., of Cleary, Giacobbe, Alfieri, Jacobs, LLC. (Oakland, NJ).

³ The time frame was not included in the original OPRA request but appeared to be handwritten onto the request by a City employee. This addition could have been the result of discussions between the Complainant and City in relation to Cooper v. City of Orange Twp. (Essex), GRC Complaint No. 2019-177 (September 2019).

2. The Complainant's original OPRA request was invalid because it failed to contain 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). Notwithstanding, the subsequent inclusion of the missing criteria converted the resulting amended OPRA request to a valid one. Id.; see also Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012). Thus, the Custodian unlawfully denied access to the Complainant's amended OPRA request because it was valid. N.J.S.A. 47:1A-6. Accordingly, the Custodian must perform a reasonable search to obtain responsive records. Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2013-43 *et seq.* (Interim Order dated September 24, 2013). Should any records located be considered exempt from disclosure, the Custodian shall provide a "document index" reflecting all responsive records and the lawful basis for denying access to them. However, should the Custodian and/or identified individuals not locate any responsive records, each must certify to this fact inclusive of a detailed explanation on the search conducted

3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver⁴ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁵ to the Executive Director.⁶**

4. The Council defers analysis of whether the Custodian or individuals identified in the subject OPRA request 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.

Procedural History:

On March 31, 2021, the Council distributed its Interim Order to all parties. On April 8, 2021, the Custodian responded to the Council's Interim Order. The Custodian certified that upon receipt of the Council's Order, she e-mailed Mayor Warren and Mr. Hartwyk advising that she needed a response as to potentially responsive records by April 5, 2021. The Custodian affirmed that Mr. Hartwyk responded on March 31, 2021 advising that both he and Mayor Warren's "correspondence, letters, e-mail, and text messages" were searched at the time of the subject OPRA

⁴ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁵ "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."

⁶ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

request and none were found. The Custodian further affirmed that Mr. Hartwyk confirmed that a second search yielded the same result: no records existed.

The Custodian certified that because Mr. Smith was no longer employed by the City of Orange Township (“City”), she contacted Kim Fisher, Jr. in Information Technology (“IT”) on April 6, 2021 and initiated a search for responsive records. The Custodian noted that the keywords used for that search were “Orange Public Library,” “Library,” “appointing board members,” and “Sarah Higgins” with a date range of January 1, 2018 to the search date. The Custodian affirmed that Mr. Fisher advised her on April 7, 2021 that no records were located. The Custodian thus certified that, to the best of her knowledge, no responsive records existed.

On April 14, 2021, the Government Records Council (“GRC”) e-mailed the Custodian stating that the Council’s Order required certifications from those that performed the search in the instance that no records were located. The GRC noted, however, that the Custodian’s response to the Order did not include those certifications. The GRC thus requested that the Custodian cure the deficiency by submitting the required certifications by close of business on April 19, 2021. On April 19, 2021, the Custodian’s Counsel responded submitting legal certifications from Mayor Warren, Mr. Hartwyk, and Mr. Kim as follows:

- Mayor Warren certified that, due to his limited computer skills, Mr. Hartwyk and Mr. Kim twice performed searches of his cell phone, computer drives, network, and cloud documents, which yielded no responsive records.
- Mr. Hartwyk certified that he twice conducted a search of his own computer and cell phone records using several relevant keywords and did not locate any responsive records.
- Mr. Kim certified that he conducted a search for responsive records in e-mail accounts for Mayor Warren, Mr. Hartwyk, and Mr. Smith, as well as City-owned cell phones for Mayor Warren and Mr. Hartwyk using multiple keywords, which yielded no responsive records.

Analysis

Compliance

At its March 30, 2021 meeting, the Council ordered the Custodian to conduct a reasonable search for responsive records, providing a specific lawful basis for denial where applicable. The Council further ordered that should no responsive records exist, the Custodian and/or identified individuals that performed the search must “each certify to this inclusive of a detailed explanation of the search conducted.” Finally, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule, R. 1:4-4, to the Executive Director. On March 31, 2021, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian’s response was due by close of business on April 8, 2021.

On April 8, 2021, the fifth (5th) business day after receipt of the Council’s Order, the Custodian responded to the Council’s Order certifying that no responsive records existed. The Custodian certified that she communicated with Mr. Hartwyk, who advised her in writing that he conducted a search upon receipt of both the subject OPRA request and Council’s Order, which

yielded no responsive records in his or Mayor Warren’s possession. The Custodian also certified that Mr. Kim similarly advised that multiple searches did not yield any responsive records from any of the identified individual accounts. Upon reviewing the Custodian’s response, the GRC determined that the Custodian did not include individual certifications from Mayor Warren, Mr. Hartwyk, or Mr. Kim, as was required by the Order. Thus, the GRC requested them from the Custodian; she cured this deficiency on April 19, 2021.

Upon review of the certifications submitted, the evidence of record now supports that no responsive records exist. However, the Custodian ultimately did not fully comply with the Council’s Order because she did not submit all the required certifications.

Therefore, the Custodian did not fully comply with the Council’s March 30, 2021 Interim Order. Specifically, the Custodian responded within the prescribed time frame; however, she did not include all certifications required to be submitted by the individuals that conducted searches. Notwithstanding, the Custodian cured this deficiency through Counsel on April 19, 2021 and the evidence of record supports that no responsive records exist.

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’s failure to timely respond resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, although the Complainant’s original request was invalid, the amended OPRA was valid and required a proper response from the Custodian. Ultimately, notwithstanding that the Custodian did not fully comply with the Council’s Order, the evidence of record supports that no responsive records exist.

Additionally, the evidence of record does not indicate that the Custodian's violations 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 fully comply with the Council's March 30, 2021 Interim Order. Specifically, the Custodian responded within the prescribed time frame; however, she did not include all certifications required to be submitted by the individuals that conducted searches. Notwithstanding, the Custodian cured this deficiency through Counsel on April 19, 2021 and the evidence of record supports that no responsive records exist.

2. The Custodian's failure to timely respond resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, although the Complainant's original request was invalid, the amended OPRA was valid and required a proper response from the Custodian. Ultimately, notwithstanding that the Custodian did not fully comply with the Council's Order, the evidence of record supports that no responsive records exist. Additionally, the evidence of record does not indicate that the Custodian's violations 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.

Prepared By: Frank F. Caruso
Executive Director

April 20, 2021



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

March 30, 2021 Government Records Council Meeting

Tyshammie L. Cooper
Complainant

Complaint No. 2019-223

v.

City of Orange Township (Essex)
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 did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. 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 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).
2. The Complainant’s original OPRA request was invalid because it failed to contain 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). Notwithstanding, the subsequent inclusion of the missing criteria converted the resulting amended OPRA request to a valid one. Id.; see also Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012). Thus, the Custodian unlawfully denied access to the Complainant’s amended OPRA request because it was valid. N.J.S.A. 47:1A-6. Accordingly, the Custodian must perform a reasonable search to obtain responsive records. Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2013-43 *et seq.* (Interim Order dated September 24, 2013). Should any records located be considered exempt from disclosure, the Custodian shall provide a “document index” reflecting all responsive records and the lawful basis for denying access to them. However, should the Custodian and/or identified individuals not locate any responsive records, each must certify to this fact inclusive of a detailed explanation on the search conducted
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions,**

including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³

4. The Council defers analysis of whether the Custodian or individuals identified in the subject OPRA request 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.

Interim Order 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: March 31, 2021

¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

² "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."

³ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Tyshammie L. Cooper¹
Complainant**

GRC Complaint No. 2019-223

v.

**City of Orange Township (Essex)²
Custodial Agency**

Records Relevant to Complaint: Hardcopy via pick-up of “any and all e-mails, letters, correspondence, and text messages” between Attorney Dan Smith, Mayor Dwayne Warren, and Business Administrator Chris Hartwyk related to the Orange Public Library (“Library”), “appointing and remaining board members,” or hiring and retaining Sarah Riggins as an employee [between January 1, 2018 and present].³

Custodian of Record: Joyce L. Lanier

Request Received by Custodian: July 29, 2019

Response Made by Custodian: August 15, 2019

GRC Complaint Received: November 7, 2019

Background⁴

Request and Response:

On July 16, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 29, 2019, Senior Clerk Quinn Fields e-mailed the individuals identified in the OPRA request seeking access to any records responsive to the subject OPRA request. On August 7, 2019, Ms. Fields resent her e-mail to the individuals noting that the seventh (7th) business day expired a day prior, but that they failed to advise whether any records existed. Ms. Fields thus sought a date certain on which the individuals would advise if they located responsive records. On August 15, 2019, Ms. Fields resent her e-mail to the individuals a third time advising that they failed to advise whether any records existed. Ms. Fields again asked the individuals whether any responsive records existed.

¹ No legal representation listed on record.

² Represented by Joseph A. Garcia, Esq., of Cleary, Giacobbe, Alfieri, Jacobs, LLC. (Oakland, NJ).

³ The time frame was not included in the original OPRA request but appeared to be handwritten onto the request by a City employee. This addition could have been the result of discussions between the Complainant and City in relation to Cooper v. City of Orange Twp. (Essex), GRC Complaint No. 2019-177 (September 2019).

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.

Denial of Access Complaint:

On November 7, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that she previously filed a complaint against the City of Orange Township (“City”)⁵ regarding this request but agreed to withdraw it after reaching an agreement with the City’s attorney. The Complainant stated that to date, the City still failed to respond to her OPRA request.

Statement of Information:

On December 9, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on July 29, 2019. The Custodian certified that her search included sending the OPRA request to the identified individuals. See Fields Cert. ¶ 5-10. The Custodian alleged that she responded in writing on August 15, 2019.⁶ The Custodian affirmed that to date, none of the individuals have advised if they are maintaining any responsive records. See Fields Cert. ¶ 11.

The Custodian argued that she could not provide the records sought and thus could not have unlawfully denied access to them. The Custodian however argued that to the extent that she had access to responsive records, they would have been clearly exempt under OPRA.

The Custodian first argued that the Complainant’s OPRA request was invalid because it required research based on the topics included in said request. See MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 549 (App. Div. 2005); Lagerkvist v. Office of the Governor, 443 N.J. Super. 230, 237 (App. Div. 2015). The Custodian argued that such research was clearly beyond her defined responsibilities under OPRA. The Custodian further argued that the Complainant failed to identify the “particular government records sought.”

The Custodian next argued that notwithstanding that no records existed, the Complainant was not entitled to such communications due to multiple exemptions. The Custodian argued that a Mr. Smith’s inclusion as a recipient in the subject OPRA request supports that any responsive records would have fallen under the attorney-client privilege exemption. N.J.S.A. 47:1A-1.1; State v. Schubert, 235 N.J. Super. 212, 221 (App. Div. 1989). The Custodian noted that Mr. Smith is employed by the City Law Department and handles all legal matters involving the Library. The Custodian also contended that any personnel related communications are exempt under OPRA’s personnel exemption. See Toscano v. N.J. Dep’t of Human Serv., Div. of Mental Health Serv., GRC Complaint No. 2010-147 (May 2011). The Custodian finally argued that any communications between the individuals in the subject OPRA request are exempt as “inter-agency, or intra-agency advisory, consultative, or deliberative material.” N.J.S.A. 47:1A-1.1; O’Shea v. West Milford Bd. of Educ., GRC Complaint No. 2004-93 (April 2006).⁷

⁵ See Cooper, GRC 2019-177.

⁶ Neither the Complainant nor Custodian included a copy of the alleged response. However, the Custodian’s statement may actually reference Ms. Field’s second attempt to obtain records from the individuals identified in the OPRA request, which was sent on August 15, 2019.

⁷ Affirmed on appeal in O’Shea v. West Milford Bd. of Educ., 391 N.J. Super. 534 (App. Div. 2007).

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 October 31, 2007).

Here, the Custodian received the Complainant's OPRA request on July 29, 2019. Ms. Fields disseminated the request to all individuals identified therein seeking review a response on the existence of responsive records. However, the seven (7) business day time frame passed in the midst of Ms. Fields' multiple attempts to obtain records. Notwithstanding, and having not received a response from the individuals identified in the subject OPRA request, the Custodian failed to respond in writing either denying access or obtaining an extension of time to respond prior to the expiration of the statutory time frame. While the GRC acknowledges that the Custodian's response may have been reliant on other City officials, the evidence of record provides that the Custodian, through Ms Fields, was cognizant of her responsibility to respond by August 7, 2019, but failed to do so. Thus, a "deemed" denial of access occurred here.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. 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 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, GRC 2007-11.

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).]

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.

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);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).

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. 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 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).

⁹ Affirmed on appeal regarding Bent v. Stafford Police Dep’t, GRC Case No. 2004-78 (October 2004).

Here, the Complainant's request sought "letters, correspondence, and text messages" between several individuals regarding a specific topic. Absent from the original OPRA request was a date or range of dates. However, the time frame "Jan 1, 2018 to present" was added to the OPRA request following the City's receipt of the subject OPRA request. After the filing of this complaint alleging a failure to respond, the Custodian argued in the SOI argued that the request was invalid because the subject/content required her to conduct research. Lagerkvist, 443 N.J. Super. 230.

In reviewing the Complainant's OPRA request, as originally submitted, the GRC is persuaded that it was invalid, but not for the reasons advanced by the Custodian. Specifically, while the original request identified senders and recipients, as well as the subject and/or content, it did not include a date or range of dates as required by Elcavage. See also Tracey-Coll, GRC 2009-206; Kohn, GRC 2013-118.

However, the subsequent inclusion of a date or range of dates changes the analysis. This amendment was made at some point during the consideration of the subject OPRA request, whether as part of discussions related to a previous complaint or unilaterally by a City employee. It appears from the submissions on the record that the City proceeded to perform a search for responsive records based on the amended OPRA request, but that the identified individuals simply failed to respond to the Custodian or Ms. Fields.¹⁰

Additionally, the GRC does not agree that Lagerkvist applies to this amended OPRA request. First, the GRC has already set the criteria necessary to make a proper request for correspondence under OPRA. See Elcavage. The New Jersey Superior Court has also favorably reported on criteria mirroring Elcavage. See Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012). Second, the subject OPRA request contains sufficient identifiers to locate correspondence, whereas the Lagerkvist request sought, among other generic "documentation," "emails and correspondence from '2012 to present' for an unknown number of persons for an unknown number of events." Id. at 236-237. In fact, the Council's decision in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2013-43 *et seq.* (Interim Order dated September 24, 2013), offers clarifying guidance on a custodian's obligation to search for correspondence when the Elcavage criteria is present in an OPRA request:

[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, emails 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

¹⁰ The GRC has previously shifted the knowing and willful analysis to another individual when there was sufficient evidence to determine that a custodian made reasonable efforts to obtain a response from them. See Johnson v. Borough of Oceanport (Monmouth), GRC Complaint No. 2007-107 (Interim Order dated July 25, 2007).

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.

[Id. at 5-6.]

Based on the forgoing precedential case law, it is reasonable that the Custodian and the individuals identified in the subject OPRA request could have located responsive records based on a practical search.

Accordingly, the Complainant's original OPRA request was invalid because it failed to contain a date or range of dates. Elcavage, GRC 2009-07; Tracey-Coll, GRC 2009-206; Kohn, GRC 2013-118. Notwithstanding, the subsequent inclusion of the missing criteria converted the resulting amended OPRA request to a valid one. Id.; see also Burke 429 N.J. Super. 169. Thus, the Custodian unlawfully denied access to the Complainant's amended OPRA request because it was valid. N.J.S.A. 47:1A-6. Accordingly, the Custodian must perform a reasonable search to obtain responsive records. Verry, GRC 2013-43 *et seq.* Should any records located be considered exempt from disclosure, the Custodian shall provide a "document index" reflecting all responsive records and the lawful basis for denying access to them. However, should the Custodian and/or identified individuals not locate any responsive records, each shall certify to this fact inclusive of a detailed explanation on the search conducted.

Knowing & Willful

The Council defers analysis of whether the Custodian or individuals identified in the subject OPRA request 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.

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 Complainant's OPRA request. 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 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).
2. The Complainant's original OPRA request was invalid because it failed to contain 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). Notwithstanding, the subsequent inclusion of

the missing criteria converted the resulting amended OPRA request to a valid one. Id.; see also Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012). Thus, the Custodian unlawfully denied access to the Complainant's amended OPRA request because it was valid. N.J.S.A. 47:1A-6. Accordingly, the Custodian must perform a reasonable search to obtain responsive records. Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2013-43 *et seq.* (Interim Order dated September 24, 2013). Should any records located be considered exempt from disclosure, the Custodian shall provide a "document index" reflecting all responsive records and the lawful basis for denying access to them. However, should the Custodian and/or identified individuals not locate any responsive records, each must certify to this fact inclusive of a detailed explanation on the search conducted

3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver¹¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,¹² to the Executive Director.¹³**
4. The Council defers analysis of whether the Custodian or individuals identified in the subject OPRA request 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.

Prepared By: Frank F. Caruso
Executive Director

March 23, 2021

¹¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

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."

¹³ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.