



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

February 23, 2021 Government Records Council Meeting

Shane P. Walsh
Complainant

Complaint No. 2019-26

v.

NJ Office of the Governor
Custodian of Record

At the February 23, 2021 public meeting, the Government Records Council (“Council”) considered the February 16, 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 OPRA request is invalid because it fails to seek identifiable government records. 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); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-124 (April 2010). Thus, the Custodian lawfully denied access to the Complainant’s request. N.J.S.A. 47:1A-6.
3. Although the Custodian failed to respond to the Complainant’s request in the statutorily-mandated time period, thereby violating N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), 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 an 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 23rd Day of February 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: February 25, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 23, 2021 Council Meeting**

**Shane P. Walsh¹
Complainant**

GRC Complaint Nos. 2019-26

v.

**New Jersey Office of the Governor²
Custodial Agency**

Records Relevant to Complaint: Copies via e-mail of:

1. Scanned copies of all emails and text messages between Deborah Cornavaca and Ginger Gold-Schnitzer from the date of hire for Ms. Cornavaca to [December 26, 2018], regarding executive branch staff resume referrals, hiring practices, and staffing decisions;
2. Scanned copies of all emails and text messages between Deborah Cornavaca and Governor Phil Murphy from January 16, 2018 to [December 26, 2018];
3. Scanned copies of all emails and text messages between Deborah Cornavaca and Tammy Murphy from January 16, 2018 to [December 26, 2018];
4. Scanned copies of all emails and text messages between Deborah Cornavaca and Michael DeLamater from January 16, 2018 to [December 26, 2018];
5. Scanned copies of all emails and text messages between Deborah Cornavaca and Marie Blistan from January 16, 2018 to [December 26, 2018];
6. Scanned copies of all emails and text messages between Deborah Cornavaca and Sean Spiller from January 16, 2018 to [December 26, 2018];
7. Scanned copies of all emails and text messages between Deborah Cornavaca and Analilia Mejia from January 16, 2018 to [December 26, 2018].³

Custodian of Record: Heather Taylor

Request Received by Custodian: December 26, 2018

Response Made by Custodian: January 14, 2019

GRC Complaint Received: February 6, 2019

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Kerry Soranno. Previously represented by DAG Kathryn E. Duran.

³ There were other records requested that are not relevant to this complaint.

Background⁴

Request and Response:

On December 26, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 14, 2019, the twelfth (12th) business day following receipt of said request, the Custodian responded in writing informing the Complainant that the request was overbroad and invalid under OPRA.

Denial of Access Complaint:

On February 6, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant recited the first five (5) paragraphs of Question #28 in the Frequently Asked Questions (“FAQ”) section on the GRC’s website.⁵ Thereafter, the Complainant asserted that his request complied with the example provided in the FAQ section because he identified the type of record sought, the individuals who wrote and received the e-mails and texts, the subject matter of the e-mails and texts, and the time period that the e-mails and texts were sent and received. The Complainant stated that the only reason given by the Custodian for denial of access is that the request was overbroad and thus invalid under OPRA.

Statement of Information:

On March 5, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on December 26, 2018, and responded in writing on January 14, 2019. The Custodian certified that the Complainant’s request was overbroad because the request, seeking scanned copies of e-mails and text messages, failed to identify the subject matter. As such, the Custodian certified that the request was invalid under OPRA.

The Custodian cited Burke v. Brandes, 429 N.J. Super. 169, 176-78 (App. Div. 2012) as providing that requests for correspondence must identify the individuals or accounts to be searched and be confined to a discrete and limited subject matter. Otherwise, the Custodian certified, the request is overly broad under MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 549 (App. Div. 2005); Gannett N.J. Partners, LP v. Cty. of Middlesex, 379 N.J. Super. 205, 212 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 36-37 (App. Div. 2005); and N.J. Builders Ass’n. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 178-79 (App. Div. 2007).

The Custodian certified that the GRC previously held that a valid OPRA request for e-mail correspondence, in accord with MAG, 375 N.J. Super. 53, requires that the request contain (1) the content and/or subject of the e-mail, (2) the specific date or range of dates during which

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.

⁵ See <https://www.nj.gov/grc/public/faqs/#28>.

the e-mail or e-mails were transmitted, and (3) the identity of the sender and/or the recipient thereof. The Custodian certified that in the Complainant's request for e-mails and text messages, he included a sender, recipient, and timeframe but failed to identify a subject area. The Custodian certified that, as such, the Complainant's request is overbroad and invalid under OPRA.

Analysis

Timeliness

Unless a shorter time period is otherwise provided, a custodian must 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 accordingly 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).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).

Here, the Custodian certified that she received the Complainant's OPRA request on December 26, 2018, and responded to the request on January 14, 2019, which was the twelfth (12th) business day following receipt of said request.

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

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.

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*

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.

information. Rather, OPRA simply operates to make identifiable government records “readily accessible for inspection, copying, or examination.” N.J.S.A. 47:1A-1.

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

The Court reasoned that:

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

[Id. at 549 (emphasis added).]

The Court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files.” Id. at 549 (emphasis added). See also Bent, 381 N.J. Super. at 37;⁷ N.J. Builders Ass'n, 390 N.J. Super. at 180; Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Moreover, in Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 8, 2010), the Council established criteria deemed necessary under OPRA to request an e-mail communication. For such requests to be valid, they must contain: (1) the content and/or subject of the e-mail(s), (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 dated 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 dated May 24, 2011).

Similar to the instant complaint, 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 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 the Complainant asserted that he complied with all of the necessary criteria for a valid request of e-mail and text message communications, including “the subject matter of the e-

⁷ Affirming Bent v. Stafford Police Dep't, GRC Case No. 2004-78 (October 2004).

mails and texts.” However, contrary to the Complainant’s assertion, he did not identify the subject matter of the e-mails and texts. As such, the Complainant’s OPRA request failed to specifically identify a government record and is overly broad and invalid under MAG, 375 N.J. Super. 534, and its progeny.

Accordingly, the Complainant’s OPRA request is invalid because it fails to seek identifiable government records. MAG, 375 N.J. Super. 534 at 546; Bent, 381 N.J. Super. 30 at 37; N.J. Builders Ass’n, 390 N.J. Super. 166 at 180; Armenti, GRC 2009-154; Schuler, GRC 2007-151. See also Verry, GRC 2009-124. Thus, the Custodian lawfully denied access to the Complainant’s request. 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)).

Although the Custodian failed to respond to the Complainant’s request in the statutorily-mandated time period, thereby violating N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), 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 an 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 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 OPRA request is invalid because it fails to seek identifiable government records. 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); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-124 (April 2010). Thus, the Custodian lawfully denied access to the Complainant's request. N.J.S.A. 47:1A-6.
3. Although the Custodian failed to respond to the Complainant's request in the statutorily-mandated time period, thereby violating N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), 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 an unreasonable denial of access under the totality of the circumstances.

Prepared By: John E. Stewart
Staff Attorney

February 16, 2021