



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

March 29, 2022 Government Records Council Meeting

Elizabeth M. Konkle
Complainant

Complaint No. 2020-100

v.

Clinton Township Sewerage Authority (Hunterdon)
Custodian of Record

At the March 29, 2022 public meeting, the Government Records Council (“Council”) considered the March 22, 2022 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. Because the Custodian worked under adverse conditions to fulfill the Complainant’s OPRA request, the GRC is satisfied that the Custodian made a reasonable effort, as the circumstances permitted, to respond to the request within seven business days or as soon as possible thereafter. N.J.S.A. 47:1A-5; P.L. 2020, c.10.
2. The Custodian did not unlawfully deny access to request item number 1 (partial), number 4 and number 5 because the Custodian certified that said records were provided to the Complainant within the statutorily mandated response time, as enlarged by P.L. 2020, c.10. N.J.S.A. 47:1A-5(g). Additionally, the Complainant failed to provide any evidence to contradict the Custodian’s certification.
3. The Custodian did not unlawfully deny access to request item number 1 (partial), number 2 and number 3 because the Custodian certified that such records do not exist, and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
4. Notwithstanding the Custodian’s disclosure of the records responsive to request item number 7, the Custodian was not obligated to respond to request items number 6 and number 7. Said request items are invalid because they require the Custodian to read through a voluminous quantity of records to determine which of those records are responsive to the request; to wit, to conduct research. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30 (App. Div. 2005). See also Verry v. Borough of S. Bound Brook (Somerset), GRC Complaint Nos. 2013-43 and 2013-53 (Interim Order dated September 24, 2013).



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 29th Day of March 2022

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, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 29, 2022 Council Meeting**

**Elizabeth M. Konkle ¹
Complainant**

GRC Complaint No. 2020-100

v.

**Clinton Township Sewerage Authority (Hunterdon)²
Custodial Agency**

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

1. All timesheets for all employees including salaried and hourly dated January 1, 2019 through April 3, 2020.
2. All e-mail logs for all employees including administrator, all board members and lawyer for Authority dated January 1, 2019 through April 3, 2020.
3. All phone logs via telephone (land line and cell phone) and fax machine for Authority including administrator, all board members dated January 1, 2019 through April 3, 2020.
4. All change logs for the software of Gov Collect. Specifically, but not limited to, all changes made to customer accounts, enter and receiving payments received and when errors are made and corrected in the system dated January 1, 2019 through April 3, 2020. Reversing payments when payment is posted to the wrong account, changes made to check, number, payment, amount, etc.
5. Daily log sheets for monies received and entered by the Authority via GOV collected dated January 1, 2019 through April 3, 2020, including the corresponding Excel spreadsheet, QuickBooks register.
6. Resolutions for all stipends and bonuses for all employees for the last 20 years dated 2000 through [April 5] 2020.
7. All approved budgets for all stipends and bonuses paid for the last 20 years dated 2000 through [April 5] 2020.

Custodian of Record: Meliss Paulus

Request Received by Custodian: April 6, 2020

Response Made by Custodian: April 16, 2020

GRC Complaint Received: May 18, 2020

¹ No legal representation listed on record.

² Represented by C. Gregory Watts, Esq., of Watts Tice & Skowronek (Flemington, NJ).

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Background³

Request and Response:

On April 5, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. The request was received by the Custodian on April 6, 2020.⁴ On April 16, 2020, the seventh (7th) business day following receipt of said request, the Custodian’s Counsel, on behalf of the Custodian, responded in writing informing the Complainant that P.L. 2020, c.10, was enacted on March 20, 2020, amending N.J.S.A. 47:1A-5, such that the deadlines to respond to a request do not apply, provided the Custodian makes a reasonable effort, as the circumstances permit, to respond to the request within seven business days or as soon as possible thereafter. Counsel further stated that due to the COVID-19 pandemic and the fact that the Custodian is only in the office on a sporadic basis, the Clinton Township Sewerage Authority (“Authority”) will respond to the request within a reasonable period of time.

Denial of Access Complaint:

On May 18, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that she submitted her OPRA request to the Custodian on April 5, 2020, and the Custodian’s Counsel responded to the request on April 16, 2020. The Complainant stated, “see attached e-mails and letters from attorney.” The Complainant did not attach any e-mails and/or letters from an attorney that the GRC found to be of value. The Complainant attached only one (1) e-mail from the Custodian’s Counsel to her dated April 16, 2020, which read, “[y]our message is ready to be sent with the following file or link: doc13741120200416113544.”

Statement of Information:

On June 5, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on April 6, 2020. The Custodian certified that at the time the request was received, she was the sole employee of the agency and was working no more than three (3) days per week. The Custodian further certified that she is solely responsible for all administrative duties involved in the operation of the agency. The Custodian certified that notwithstanding the voluminous nature of the request, she made a reasonable effort to respond to it.

The Custodian certified that she conducted a “diligent search” for records responsive to the request. The Custodian certified that the records responsive to request item number 1, through March 16, 2020, and the records responsive to request item number 4, were disclosed to the Complainant on May 18, 2020. The Custodian further certified that the records responsive to

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.

⁴ April 5, 2020 was a Sunday and the Authority was not open for business.

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request item number 5 were disclosed to the Complainant on May 3, 2020. The Custodian certified that timesheets for the period March 17, 2020 through April 3, 2020, as well as records responsive to request items number 2 and number 3 do not exist, and consequently could not be provided. The Custodian also certified that on May 18, 2020, she responded to request items number 6 and number 7 by informing the Complainant that she needed additional time to search for responsive records. The Custodian certified that on June 4, 2020, she disclosed the records requested in item number 7. The Custodian certified that she did not have any knowledge that the Complainant filed a Denial of Access Complaint until June 2, 2020.

The Custodian's Counsel stated that the Custodian is the Authority's sole employee. Counsel stated that the Custodian carries out all of the administrative functions of the Authority, including office management, processing of payments, and satisfying compliance issues in addition to her duties as records custodian. Counsel further stated that at the time the request forming the basis of this complaint was filed, the Custodian was working on a reduced schedule of not more than three (3) days per week. Counsel stated that as such, the Custodian was working under "great strain in order to fulfill all of her duties[.]" Counsel stated that a response was provided to the Complainant within the statutorily mandated seven (7) day period; however, due to the COVID-19 pandemic the request could not be fulfilled at that time. Counsel further stated that because of the pandemic and short staffing of the Authority, no firm date could be given to the Complainant as to when the requested records would be made available, but the Custodian was continuing to provide the records within a reasonable amount of time.

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).⁵ Thus, a custodian's failure to respond in writing to a complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Likewise, barring extenuating circumstances, a custodian's failure to respond immediately in writing to a complainant's OPRA request for immediate access records, either granting access, denying access, seeking clarification, or requesting an extension of time, also results in a "deemed" denial of the request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i).⁶ See Cody v. Middletown Twp. Public Schools, GRC Complaint No. 2005-98 (December

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

⁶ OPRA lists immediate access records as "budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information." N.J.S.A. Elizabeth Konkle v. Clinton Township Sewerage Authority (Hunterdon), 2020-100 – Findings and Recommendations of the Executive Director

2005) and Harris v. N.J. Dep't of Corr., GRC Complaint No. 2011-65 (August 2012). See also Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007), holding that the custodian was obligated to immediately notify the complainant as to the status of immediate access records.

P.L. 2020, c.10, was enacted on March 20, 2020, amending N.J.S.A. 47:1A-5 as follows:

During a period declared pursuant to the laws of this State as a state of emergency, public health emergency, or state of local disaster emergency, the deadlines by which to respond to a request for, or grant or deny access to, a government record under paragraph (1) of this subsection or subsection e. of this section shall not apply, provided, however, that the custodian of a government record shall make a reasonable effort, as the circumstances permit, to respond to a request for access to a government record within seven business days or as soon as possible thereafter.

[Id.]⁷

Throughout the period of the request and response forming the basis of the instant complaint the State was experiencing a public health emergency due to the COVID-19 pandemic, which shuttered many businesses, including government entities. As such, the provisions of P.L. 2020, c.10 were applicable to relax the time constraints of N.J.S.A. 47:1A-5. However, the Custodian was still required to respond within seven business days or as soon as possible thereafter. The GRC must therefore examine the factors impacting the Custodian's ability to respond in a timely manner to the Complainant's request.

The Custodian certified that when she received the Complainant's request, she was the Authority's sole employee and responsible for addressing all administrative operations of the Authority. The Custodian further certified that, due to the COVID-19 pandemic, she was working no more than three (3) days per week. The Custodian certified that the request sought a voluminous quantity of records, but that she was making an effort to respond in a reasonable period of time to search for and disclose all responsive records. Further, the Custodian's Counsel stated that the Custodian was working under "great strain" to fulfill all her duties, which included responding to OPRA requests.

Therefore, because the Custodian worked under adverse conditions to fulfill the Complainant's OPRA request, the GRC is satisfied that the Custodian made a reasonable effort, as the circumstances permitted, to respond to the request within seven business days or as soon as possible thereafter. N.J.S.A. 47:1A-5; P.L. 2020, c.10.

47:1A-5(e). The Council has also determined that purchase orders and invoices are "immediate access" records. See Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2012-03 (April 2013).

⁷ The GRC notes that "paragraph (1) of this subsection" pertains to N.J.S.A. 47:1A-5(i) and "subsection e. of this section" pertains to N.J.S.A. 47:1A-5(e). As such, a custodian is not obligated to grant or deny access to requested records within seven (7) business days from receipt of the request pursuant to N.J.S.A. 47:1A-5(i) or respond immediately to a request for immediate access records pursuant to N.J.S.A. 47:1A-5(e). A custodian is, however, required to do so as soon as possible.

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

Request items number 1 (partial), number 4 and number 5

The Custodian certified that the records partially responsive to request item number 1, time sheets for all employees through March 16, 2020, were disclosed to the Complainant on May 18, 2020. The Custodian also certified that the records responsive to request item number 4, change logs for the software of GovCollect, including the requested transactions, were disclosed to the Complainant on May 18, 2020. The Custodian further certified that the records responsive to request item number 5, log sheets for monies received and entered by the Authority via GovCollect and Quickbooks, were disclosed to the Complainant on May 3, 2020.

Accordingly, the Custodian did not unlawfully deny access to request item number 1 (partial), number 4 and number 5 because the Custodian certified that said records were provided to the Complainant within the statutorily mandated response time, as enlarged by P.L. 2020, c.10. N.J.S.A. 47:1A-5(g). Additionally, the Complainant failed to provide any evidence to contradict the Custodian’s certification.

Request items number 1 (partial), number 2 and number 3

In Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005), the custodian certified that no records responsive to the complainant’s request for billing records existed and the complainant submitted no evidence to refute the custodian’s certification regarding said records. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian’s certification, there was no unlawful denial of access to the requested records.

The Custodian certified that the records partially responsive to request item number 1, time sheets for all employees during the period March 17, 2020 to April 3, 2020, do not exist. The Custodian further certified that there are no records responsive to the Complainant’s request items number 2 and number 3, e-mail logs and phone and/or fax machine logs, respectively.

As such, the Custodian did not unlawfully deny access to request item number 1 (partial), number 2 and number 3 because the Custodian certified that such records do not exist, and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. See Pusterhofer, GRC 2005-49.

Request items number 6 and 7

The Custodian certified that on May 18, 2020, she informed the Complainant that she would need more time to respond to the Complainant's request for item number 6 (resolutions for the last 20 years) and request item number 7 (budgets for the last 20 years). The Custodian further certified that on June 4, 2020, she disclosed the records responsive to request item number 7.

However, notwithstanding the Custodian's disclosure of the records responsive to request item number 7, the Custodian need not have searched for records responsive to request items number 6 and 7 because the request for those items was not valid.

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). See also Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005);⁸ NJ Builders Ass'n v. NJ 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).

⁸ Affirming Bent v. Stafford Police Dep't, GRC Case No. 2004-78 (October 2004).

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With respect to requests requiring research, the distinction between search and research is fact sensitive. That is, there are instances where the very specificity of a request requires only a search. As the Council determined in Verry v. Borough of S. Bound Brook (Somerset), GRC Complaint Nos. 2013-43 and 2013-53 (Interim Order dated September 24, 2013), “. . . a valid OPRA request requires a search, not research . . . what will be sufficient to determine a proper search will depend on how detailed the OPRA 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 [records] to determine if same is responsive: in other words, conduct research.”

Here, the Complainant’s request items number 6 and number 7 sought records for a twenty (20) year period. Request item number 6 sought resolutions for all stipends and bonuses for all employees, and request item number 7 sought approved budgets for all stipends and bonuses paid. Such requests require the Custodian to conduct research by searching through twenty years’ worth of records and extracting/disclosing only those resolutions and budgets that address “stipends and bonuses.”

Therefore, notwithstanding the Custodian’s disclosure of the records responsive to request item number 7, the Custodian was not obligated to respond to request items number 6 and number 7. Said request items are invalid because they require the Custodian to read through a voluminous quantity of records to determine which of those records are responsive to the request; to wit, to conduct research. MAG, 375 N.J. Super. 534; Bent, 381 N.J. Super. 30. See also Verry, GRC 2013-43 and 2013-53.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian worked under adverse conditions to fulfill the Complainant’s OPRA request, the GRC is satisfied that the Custodian made a reasonable effort, as the circumstances permitted, to respond to the request within seven business days or as soon as possible thereafter. N.J.S.A. 47:1A-5; P.L. 2020, c.10.
2. The Custodian did not unlawfully deny access to request item number 1 (partial), number 4 and number 5 because the Custodian certified that said records were provided to the Complainant within the statutorily mandated response time, as enlarged by P.L. 2020, c.10. N.J.S.A. 47:1A-5(g). Additionally, the Complainant failed to provide any evidence to contradict the Custodian’s certification.
3. The Custodian did not unlawfully deny access to request item number 1 (partial), number 2 and number 3 because the Custodian certified that such records do not exist, and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
4. Notwithstanding the Custodian’s disclosure of the records responsive to request item number 7, the Custodian was not obligated to respond to request items number 6 and

number 7. Said request items are invalid because they require the Custodian to read through a voluminous quantity of records to determine which of those records are responsive to the request; to wit, to conduct research. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30 (App. Div. 2005). See also Verry v. Borough of S. Bound Brook (Somerset), GRC Complaint Nos. 2013-43 and 2013-53 (Interim Order dated September 24, 2013).

Prepared By: John E. Stewart
Staff Attorney

March 22, 2022