



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

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

**June 28, 2022 Government Records Council Meeting**

Brian McBride  
Complainant

Complaint No. 2020-250

v.

NJ Office of Homeland Security & Preparedness  
Custodian of Record

At the June 28, 2022 public meeting, the Government Records Council (“Council”) considered the June 21, 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. The Custodian lawfully denied access to the Complainant’s OPRA request item No. 1 seeking records showing Office of Homeland Security & Preparedness intelligence analyst Gerard Joseph Martin’s personal use of the internet to access Facebook and Google from May 2018 to present. N.J.S.A. 47:1A-6. Such records are exempt from disclosure under OPRA’s security information exemption, as well as information, which, if disclosed, would substantially interfere with the State’s ability to defend the State and its citizens against acts of sabotage and terrorism, or which, if disclosed, would materially increase the risk or consequences of potential acts of terrorism or sabotage. See N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(a); N.J.A.C. 13:1E-3.2(a)(2) and (5); and Kasko v. Town of Westfield (Union), GRC Complaint No. 2014-389 (Interim Order dated June 28, 2016).
2. The Custodian has borne his burden of proof that he did not unlawfully deny access to the Complainant’s request item Nos. 2 since the Custodian and Laurie Doran certified that no responsive records exist, and the Complainant did not provide any contrary evidence. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

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 28<sup>th</sup> Day of June 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: June 30, 2022**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
June 28, 2022 Council Meeting**

**Brian McBride<sup>1</sup>  
Complainant**

**GRC Complaint No. 2020-250**

v.

**N.J. Office of Homeland Security & Preparedness<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via of:

1. Records showing Gerard Joseph Martin's personal use of the internet, limited to [www.facebook.com](http://www.facebook.com) and/or [www.google.com](http://www.google.com) and all its subsites from May 2018 to the present, for posting business reviews.
2. Timecard records for Mr. Martin showing clock-in time for start of shift, start of break, end of break, and end of shift from May 2018 to the present.

**Custodian of Record:** Randall A. Richardson  
**Request Received by Custodian:** December 29, 2020  
**Response Made by Custodian:** December 30, 2020  
**GRC Complaint Received:** December 30, 2020

**Background<sup>3</sup>**

**Request and Response:**

On December 29, 2020, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On December 30, 2020, the Custodian responded in writing stating that the Office of Homeland Security and Preparedness ("OHSP") did not maintain records regarding an employee's personal use of a state-owned computer. The Custodian stated that there is no record that makes a distinction between personal or business use. The Custodian further stated that intelligence analysts like Mr. Martin utilize both identified websites for data collection and research, and that OHSP policy permitted the incidental personal use of the Internet from OHSP-issued computers. The Custodian also stated that if the Complainant provided a date and specific review period, it may be possible to determine if a state-owned computer was used in making the review.

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Deputy Attorney General Chanell Branch.

<sup>3</sup> 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.

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Regarding request item No. 2, the Custodian stated that no responsive records exist, as OHSP employees were not required to record daily start, end, or break times.

Denial of Access Complaint:

On December 30, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that Mr. Martin is an analyst working for OHSP and was improperly using state-owned computers for personal use. The Complainant asserted that Mr. Martin issued 143 negative reviews against certain business, including the Complainant, while on-duty with OHSP. The Complainant contended that he was told by telephone from the Custodian that the request was denied under the homeland security exemption.

The Complainant also stated that his request for timecards was improperly denied as he needed the records to match whether Mr. Martin issued those reviews while on-duty.

Statement of Information:

On February 8, 2021, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on December 29, 2020. The Custodian certified that his search included contacting the supervising IT manager and the Director for the OHSP’s Division of Intelligence and Operations. The Custodian certified that because Mr. Martin was an analyst it would be extremely burdensome to distinguish between the personal and work use of Mr. Martin’s browsing history. The Custodian certified that he responded in writing on December 30, 2020, stating that no records exist.

The Custodian initially asserted that request item No. 1 sought records exempt under Executive Order No. 21 (Gov. McGreevey 2002) (“EO 21”). The Custodian argued that EO 21 exempts records from disclosure “where the inspection, examination or compilation of that record would substantially interfere with the State’s ability to defend the State and its citizens against acts of sabotage and terrorism.” See also N.J.S.A. 47:1A-1.1; N.J.A.C. 13:1E-3.2(a)(2); N.J.A.C. 13:1A-3.2(a)(5).

The Custodian next argued that request item No. 1 was overbroad and improper, relying on Gannett N.J. Partners, LP v. Cnty. of Middlesex, 379 N.J. Super. 205, 212 (App. Div. 2005). See also MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Twp. Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); Burke v. Brandes, 329 N.J. Super. 169, 177 (App. Div. 2012); Spectraserv, Inc. v. Middlesex Cty. Utilities Auth., 416 N.J. Super. 565, 576 (App. Div. 2010); N.J. Builders Ass’n v. New Jersey Council on Affordable Hous., 390 N.J. Super. 166 (App. Div. 2007); and Lagerkvist v. Office of the Governor, 443 N.J. Super. 230, 236-37 (App. Div. 2015). The Custodian asserted that as an analyst for OHSP, he was required to visit a variety of websites and social media platforms to research homeland security interests. The Custodian further asserted that OHSP permits their employees to use their OHSP-issued computers for limited incidental personal use.

The Custodian asserted that OHSP could not provide the Complainant with Mr. Martin’s

entire browsing history since it could reveal security-sensitive information exempt from disclosure. The Custodian thus asserted that OHSP personnel would have to visit each website Mr. Martin visited from May 2018 to present to determine his reason for visiting. The Custodian therefore argued that distinguishing between Mr. Martin's work-related searches from any personal searches would require research and analysis to determine if any websites accessed pertained to Mr. Martin's work assignments or personal interests. The Custodian argued that processing this request item would go beyond his obligations under OPRA. See Lagerkvist.

As to request item No. 2, the Custodian maintained that no responsive records exist. The Custodian asserted that Mr. Martin was a salaried employee and was not required to punch a timecard when he enters and leaves the office building or when he takes breaks during the day. The Custodian asserted that the Complainant failed to provide contrary evidence and therefore properly responded to the request item. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

The Custodian also provided a certification from Laurie Doran, the Division Director for OHSP's Intelligence & Operations. Ms. Doran certified that Mr. Martin is an intelligence analyst within OHSP and is tasked with identifying homeland security interests by researching publicly available data over the Internet. Ms. Doran further certified that analysts such as Mr. Martin visit various platforms such as Twitter and Facebook to conduct research, and that it would be overly burdensome to distinguish between personal usage versus work-related research. Ms. Doran further certified that salaried employees at OHSP do not punch in timecards, nor are they required to record daily start, end, or break times.

The Custodian also provided a certification from Ron Niehaus, the Supervising IT Manager for OHSP. Mr. Niehaus certified that considering the time frame of the request, there were likely millions of lines of information comprising Mr. Martin's browsing history. Mr. Niehaus certified that reviewing that information would be overly burdensome as it would require visiting each website and investigating to determine the reason why Mr. Martin visited the site.

#### Additional Submissions:

On February 9, 2021, the Complainant submitted a response to the Custodian's SOI. The Complainant asserted that he was not seeking the totality of Mr. Martin's search history, but information on 143 reviews posted by him to Google. Thus, the Complainant asserted that the request was not a "blanket" request and invalid. The Complainant further asserted that the Custodian failed to provide any accommodation prior to asserting that fulfilling the request would impose an undue burden on the agency.

The Complainant further argued that OPRA's privacy exemption would not exempt an entire category of records, and that he should not be required to pay to process and redact the records should the GRC order disclosure. The Complainant also asserted that Mr. Martin has since deleted the 143 reviews and should therefore be held responsible for the knowing and willful destruction of records.

On February 23, 2021, the Custodian submitted a sur-reply to the GRC. The Custodian asserted that the Complainant submitted knowingly false information to the GRC, as the December 30, 2020 response provided the Complainant with the actual basis for denial.

### Analysis

#### 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 Item No. 1

OPRA also provides that “security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software” are not government records subject to access. N.J.S.A. 47:1A-1.1.

OPRA further provides that:

The provisions of this act . . . shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA] . . . any other statute; resolution of either or both Houses of the Legislature; *regulation* promulgated under the authority of any statute or Executive Order of the Governor; *Executive Order of the Governor*; Rules of Court; any federal law; federal regulation; or federal order.

[N.J.S.A. 47:1A-9(a) (emphasis added).]

EO 21 provides that “any government record where the inspection, examination, or compilation of that record would substantially interfere with the State’s ability to defend the State and its citizens against acts of sabotage and terrorism . . .” is exempt from disclosure. Furthermore, N.J.A.C. 13:1E-3.2(a)(2) exempts:

[R]ecords . . . that may reveal: the identity of a confidential informant, a confident source, a citizen informant, or undercover personnel; or an agency’s surveillance, security, tactical, investigative, or operational techniques, measures, or procedures, which, if disclosed, would create a risk to the safety of persons, property, electronic data, or software, or compromise an agency’s ability to effectively conduct investigations[.]

N.J.A.C. 13:1E-3.2(a)(5) also exempts records “which, if disclosed, would substantially interfere with the State’s ability to defend the State and its citizens against acts of sabotage and

terrorism, or which, if disclosed, would materially increase the risk or consequences of potential acts of terrorism or sabotage.”

In Kasko v. Town of Westfield (Union), GRC Complaint No. 2014-389 (Interim Order dated June 28, 2016), the complainant requested a copy of the police department’s mobile command center specifications provided to bidders prior to the Town of Westfield’s (“Town”) purchase. The custodian provided a copy of a proposal received by a bidder, but redacted the technical specifications contained therein. The Town’s Chief of Police, David Wayman, certified that the technical details of the mobile command center should not be made public as its purpose was not just responding to criminal activities and terroristic events but also detecting and deterring same. Chief Wayman further certified that should the command center’s capabilities and limitations be publicized, its ability to deter threats to the public would be negatively affected. The GRC held that all but two (2) items under the “General” category of the command center’s specifications were exempt under N.J.S.A. 47:1A-1.1. The other categories which were fully exempt included “Communications”, “Computing”, “Server”, and “Transfer Switch”.

In the instant matter, the Complainant requested records showing Mr. Martin’s personal use of the Internet to access Facebook and Google, along with their subsites from May 2018 to the present. The Custodian denied access, stating that the internet browsing history of an OHSP employee is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1, EO 21, and N.J.A.C. 13:1E-3.2(a)(2) and (5). The Complainant asserted that the records should be disclosed with redactions for security-related activity and that he only requested the records demonstrating Mr. Martin created 143 reviews of businesses on Google while on personal time.

Upon review, the GRC finds that the Complainant’s request item No. 1 is exempt from disclosure. The certifications of Ms. Doran and Mr. Niehaus demonstrate that Mr. Martin’s duties as an intelligence analyst primarily involve utilizing platforms such as Google and Facebook for the purposes of monitoring and researching homeland security-related activities. Moreover, Ms. Doran certified that incidental personal use was permitted on their OHSP-issued computers, and therefore any personal access to these platforms would be intermingled with work-related access. Accordingly, like the mobile command center’s specifications in Kasko, disclosing Mr. Martin’s internet browsing history would provide insight into OHSP’s investigative and surveillance techniques while accessing these platforms, and individuals can thus devise ways of thwarting detection and scrutiny.

Therefore, the Custodian lawfully denied access to the Complainant’s OPRA request item No. 1 seeking records showing OHSP intelligence analyst Mr. Martin’s personal use of the internet to access Facebook and Google from May 2018 to present. N.J.S.A. 47:1A-6. Such records are exempt from disclosure under OPRA’s security information exemption, as well as information, which, if disclosed, would substantially interfere with the State’s ability to defend the State and its citizens against acts of sabotage and terrorism, or which, if disclosed, would materially increase the risk or consequences of potential acts of terrorism or sabotage. See N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(a); N.J.A.C. 13:1E-3.2(a)(2) and (5); and Kasko, GRC 2014-389.

The GRC also notes that the Complainant asserted that Mr. Martin deleted the reviews allegedly posted using an OHSP-issued computer. The Complainant asserted that Mr. Martin

should therefore be sanctioned for violating the State's retention schedules. However, N.J.S.A. 47:1A-7(b) delineates the Council's powers and duties. Such powers and duties do not include authority over a record's accuracy or whether a record was filed in accordance with existing guidelines. See LoBosco v. N.J. Dep't of Health & Human Servs., GRC Complaint No. 2010-64 (October 2010). In Kwanzaa v. Department of Corrections, GRC Complaint No. 2004-167 (March 2005), the Council held that it "does not oversee the content of documentation" but "does oversee the disclosure and non-disclosure of documents." Thus, even if Mr. Martin in fact deleted the reviews, the GRC has no authority to determine whether Mr. Martin violated the state's retention schedules.

### Request Item No. 2

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). In the instant matter, the Custodian responded to the Complainant stating that no responsive records exist since OHSP employees were not required to record daily start, end, or break times. In the SOI, the Custodian and Ms. Doran certified that salaried employees at OHSP were not required to punch in timecards or record their daily start, end, or break times. Additionally, the Complainant failed to provide any evidence to contradict the certifications.

Accordingly, the Custodian has borne his burden of proof that he did not unlawfully deny access to the Complainant's request item Nos. 2 since the Custodian and Ms. Doran certified that no responsive records exist, and the Complainant did not provide any contrary evidence. N.J.S.A. 47:1A-6; Pusterhofer, GRC 2005-49.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian lawfully denied access to the Complainant's OPRA request item No. 1 seeking records showing Office of Homeland Security & Preparedness intelligence analyst Gerard Joseph Martin's personal use of the internet to access Facebook and Google from May 2018 to present. N.J.S.A. 47:1A-6. Such records are exempt from disclosure under OPRA's security information exemption, as well as information, which, if disclosed, would substantially interfere with the State's ability to defend the State and its citizens against acts of sabotage and terrorism, or which, if disclosed, would materially increase the risk or consequences of potential acts of terrorism or sabotage. See N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(a); N.J.A.C. 13:1E-3.2(a)(2) and (5); and Kasko v. Town of Westfield (Union), GRC Complaint No. 2014-389 (Interim Order dated June 28, 2016).
2. The Custodian has borne his burden of proof that he did not unlawfully deny access to the Complainant's request item Nos. 2 since the Custodian and Laurie Doran certified that no responsive records exist, and the Complainant did not provide any contrary



evidence. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

Prepared By: Samuel A. Rosado  
Staff Attorney

June 21, 2022