



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

December 13, 2022 Government Records Council Meeting

Jennifer Grana
Complainant

Complaint No. 2021-261

v.

Sparta Township School District (Sussex)
Custodian of Record

At the December 13, 2022 public meeting, the Government Records Council (“Council”) considered the December 6, 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 unlawfully redacted the e-mail at issue in this complaint under the basis that it was not responsive to the subject OPRA request. N.J.S.A. 47:1A-6; ACLU v. N.J. Div. of Criminal Justice, 435 N.J. Super. 533 (App. Div. 2014). Specifically, OPRA does not contain an exemption allowing custodians to redact information from a record that it not otherwise responsive to an OPRA request. Id. at 536. Thus, the Custodian shall disclose the relevant e-mail without redaction.
2. **The Custodian shall comply with conclusion No. 1 above within ten (10) business days from receipt of the Council’s Final Decision. In the circumstance where the records ordered for disclosure are not provided to the Complainant, the Council’s Final Decision may be enforced in the Superior Court of New Jersey. N.J. Court Rules, R. 4:67-6; N.J.A.C. 5:105-2.9(c).**

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 13th Day of December 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: December 15, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 13, 2022 Council Meeting**

**Jennifer Grana¹
Complainant**

GRC Complaint No. 2021-261

v.

**Sparta Township School District (Sussex)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of all communications, either e-mails or in hardcopy, to or from Matthew Beck, Patrick McQueeney, and Mary Hassenplug regarding the book title “Ghost Boys” from April 1, 2021 through July 15, 2021.

Custodian of Record: H. Ronald Smith

Request Received by Custodian: September 14, 2021

Response Made by Custodian: September 28, 2021

GRC Complaint Received: November 3, 2021

Background³

Request and Response:

On September 14, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 24, 2021, Secretary Ann Warhol responded in writing on behalf of the Custodian obtaining an extension of five (5) business days to respond to the subject OPRA request. On September 28, 2021, Ms. Warhol responded in writing on behalf of the Custodian disclosing 58 pages of e-mails. On the same day, the Complainant e-mailed Ms. Warhol and asked for an explanation for why one (1) e-mail was redacted.

On September 29, 2021, Ms. Warhol responded stating that the e-mail was redacted based on “advice of our attorney.” On the same day, the Complainant responded disputing the redactions and noting that none of OPRA’s exemptions allowed for the entire e-mail to be withheld. The Complainant asked that Ms. Warhol forward her concerns the Sparta Township School District’s (“STSD”) attorney for reconsideration. The Complainant also noted that she would file a complaint if she does not receive the e-mail without redactions. On October 12, 2021, Ms. Warhol e-mailed

¹ No legal representation listed on record.

² Represented by Marc H. Zitomer, Esq., of Schenck, Price, Smith & King, LLP. (Florham Park, NJ).

³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

the Complainant advising that her e-mail was forwarded to the STSD attorney. Ms. Warhol noted that the e-mail was redacted in its entirety because “it was completely unrelated to [the Complainant’s] request.”

Denial of Access Complaint:

On November 3, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant disputed the nondisclosure of one (1) e-mail redacted in its entirety.

The Complainant contended that STSD’s response was unlawful for two (2) reasons. The Complainant first argued that the STSD failed to identify a valid specific lawful basis for redacting the disputed e-mail. The Complainant also contended that even if non-responsiveness was a valid reason for redaction, the STSD still over-redacted the e-mail to omit senders, recipients, and the subject. The Complainant argued that providing this information would have allowed her to assess whether the justification applied thereto. The Complainant next argued that it seemed unlikely that the e-mail, which was part of a disclosed thread, is somehow not responsive to the subject OPRA request. The Complainant contended that if the forgoing was true, the e-mail should have been removed from the universe of disclosable records. The Complainant thus requested that the GRC order disclosure of the e-mail at issue.

Statement of Information:

On December 2, 2021, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on September 14, 2021. The Custodian certified that he worked with STSD’s Information Technology (“IT”) Department to search for and locate potentially responsive records. The Custodian certified that following an extension of time, Ms. Warhol responded in writing on his behalf disclosing 58 pages of records; one (1) e-mail was redacted in its entirety because it was not responsive to the subject OPRA request.

The Custodian contended this complaint should be dismissed because no unlawful denial of access occurred; STSD properly redacted the e-mail in question. The Custodian acknowledged that OPRA required him to provide a specific lawful basis for redactions, but only when the underlying content is responsive to the subject OPRA request. N.J.S.A. 47:1A-1.1. The Custodian argued that here, the redacted e-mail was not responsive; thus, the redactions absent a specific lawful basis for denial was appropriate. Lagerkvist v. N.J. Dep’t of Env’tl. Prot., 2011 N.J. Super. Unpub LEXIS 1912, 83 (July 12, 2011) (holding that an e-mail thread was not responsive to the subject OPRA request and was not disclosable). The Custodian argued that the entirety of the redacted e-mail did not pertain to the subject or content identified by the Complainant and was thus withheld. The Custodian contended that the only reason the e-mail was included in the responsive records was because of the prior e-mail between the same sender and recipient that was responsive. The Custodian noted that it was likely more appropriate to consider the non-responsive e-mail as “deleted” rather than “redacted.”

The Custodian further contended that no knowing and willful violation occurred because his response was consistent with OPRA and relevant “public policy.” The Custodian thus argued that no violation of OPRA occurred and none of his actions could be considered knowing and willful in nature.

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.

OPRA explicitly states that a “public agency shall have the burden of proving that [a] denial of access is authorized by law” (emphasis added). N.J.S.A. 47:1A-6. Specifically, OPRA contains no exemption for information “not responsive to” an OPRA request. ACLU v. N.J. Div. of Criminal Justice, 435 N.J. Super. 533 (App. Div. 2014). See also Hyland v. Twp. of Lebanon (Hunterdon) & Twp. of Tewksbury (Hunterdon), 2012-227 & 2012-228 (Interim Order dated June 24, 2014). In Sauter v. Twp. of Colts Neck (Monmouth), GRC Complaint No. 2016-190 (Interim Order dated January 31, 2019), the custodian denied access to redacted portions of attorney billing records because, among other reasons, the excerpts were not responsive to the complainant’s OPRA request. The Council conducted an *in camera* review and, considering ACLU, determined that the custodian unlawfully denied access to the applicable redactions. The Council accordingly ordered disclosure of the billing records without redactions for those excerpts. Id. at 17.

Here, the Complainant sought access to e-mails between specific senders and recipients regarding the book “Ghost Boys” in a specific time frame. Following an extension of time, STSD disclosed 58 pages of e-mails to the Complainant; one (1) e-mail was redacted in its entirety. In response to the Complainant’s dispute over the redaction, Ms. Warhol advised the Complainant that STSD’s the e-mail was redacted because it was not responsive to the subject OPRA request. This Denial of Access Complaint ensued, wherein the Complainant argued that the Custodian failed to provide a specific lawful basis for redacting the e-mail. The Complainant further argued that it seemed unlikely that the e-mail, which was part of a responsive thread, was somehow unresponsive to the subject OPRA request. In the SOI, the Custodian maintained his position that he lawfully redacted the e-mail as not responsive and cited Lagerkvist, 2011 N.J. Super. Unpub LEXIS at 83 to justify the denial.

Factually, the Custodian has not argued that the e-mail in question is not a “government record” under OPRA; rather, the Custodian has maintained that same was simply not responsive to the OPRA request. However, the GRC concludes that the Custodian unlawfully denied access to the redacted e-mail. Such a finding is consistent with the Appellate Division’s ACLU holding that redacting information as not responsive to an OPRA request “is not grounded on any of the statutorily recognized exemptions to disclosure in OPRA, N.J.S.A. 47:1A-1.1. . . .” Id. at 536. Further, STSD’s reliance on Lagerkvist is misplaced: the entire thread at issue there was

determined to be not responsive at all. Further, even if the Lagerkvist court allowed the defendant to remove a record as non-responsive, ACLU nonetheless supersedes Lagerkvist as a published and more recent decision. Here, the thread was obviously responsive to the OPRA request because the Custodian disclosed a portion of it without redactions. Thus, ACLU controls and the Custodian unlawfully denied access to the redacted e-mail.

Therefore, the Custodian unlawfully redacted the e-mail at issue in this complaint under the basis that it was not responsive to the subject OPRA request. N.J.S.A. 47:1A-6; ACLU, 435 N.J. 533. Specifically, OPRA does not contain an exemption allowing custodians to redact information from a record that it not otherwise responsive to an OPRA request. Id. at 536. Thus, the Custodian shall disclose the relevant e-mail without redaction.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian unlawfully redacted the e-mail at issue in this complaint under the basis that it was not responsive to the subject OPRA request. N.J.S.A. 47:1A-6; ACLU v. N.J. Div. of Criminal Justice, 435 N.J. Super. 533 (App. Div. 2014). Specifically, OPRA does not contain an exemption allowing custodians to redact information from a record that it not otherwise responsive to an OPRA request. Id. at 536. Thus, the Custodian shall disclose the relevant e-mail without redaction.
2. **The Custodian shall comply with conclusion No. 1 above within ten (10) business days from receipt of the Council's Final Decision. In the circumstance where the records ordered for disclosure are not provided to the Complainant, the Council's Final Decision may be enforced in the Superior Court of New Jersey. N.J. Court Rules, R. 4:67-6; N.J.A.C. 5:105-2.9(c).**

Prepared By: Frank F. Caruso
Executive Director

December 6, 2022