



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

April 25, 2023 Government Records Council Meeting

Jennifer Grana
Complainant

Complaint No. 2021-298

v.

Sparta Township School District (Sussex)
Custodian of Record

At the April 25, 2023 public meeting, the Government Records Council (“Council”) considered the April 18, 2023 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’s failure to conduct a reasonable search resulted in an insufficient response. Schneble v. N.J. Dep’t of Env’tl. Protection, GRC Complaint No. 2007-220 (April 2008); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint Nos. 2013-43 and 2013-53 (Interim Order dated September 24, 2013). Thus, the Custodian may have unlawfully denied access to responsive e-mails based on a narrowly construed search based solely on the keyword “Black Snake” and “Blacksnake.” N.J.S.A. 47:1A-1.1. Thus, the Custodian shall perform a new search to identify any additional records not previously located and either disclose them to her, advise if a valid lawful basis exists for withholding them, or advise that no additional responsive e-mails existed. The GRC notes that the Custodian is not required to disclose the e-mail chain already in the Complainant’s possession, which was attached to the Denial of Access Complaint. Bart v. City of Paterson Hous. Auth. 403 N.J. Super. 609, 618 (App. Div. 2008).
2. The Custodian unlawfully denied access to those e-mails redacted under the basis that they were 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 those e-mails withheld as not responsive to the subject OPRA request without redaction.
3. **The Custodian shall comply with conclusion Nos. 1 and 2 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 25th Day of April 2023

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: May 1, 2023

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 25, 2023 Council Meeting**

**Jennifer Grana¹
Complainant**

GRC Complaint No. 2021-298

v.

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

Records Relevant to Complaint: Electronic copies via e-mail of all communications, e-mail or hardcopy, including Patrick McQueeney, Scott Kercher, Dr. Saskia Brown, and Giuseppe Leone “regarding the piece of music called ‘Black Snake’ or ‘Blacksnake’” from March 1, 2021 through April 30, 2021.

Custodian of Record: H. Ronald Smith

Request Received by Custodian: October 19, 2021

Response Made by Custodian: October 28, 2021

GRC Complaint Received: November 17, 2021

Background³

Request and Response:

On October 19, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On October 28, 2021, Secretary Lisa Dougherty responded in writing on behalf of the Custodian attaching responsive records with redactions. On the same day, the Complainant responded asking for a specific lawful basis for the redactions. Ms. Dougherty responded advising that the redacted e-mails “were not responsive to [the Complainant’s] request.”

On November 10, 2021, Secretary Ann Warhol e-mailed the Complainant stating that she met with the Custodian and was forwarding for her information a response to another OPRA requestor who submitted a similar OPRA request. Therein, Ms. Warhol advised the requestor that e-mails were omitted because they did not include the words “Black Snake” in them. Ms. Warhol indicated that one of the redacted e-mails did contain the word at the very end and apologized for redacting it.

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.

Denial of Access Complaint:

On November 17 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that Sparta Township School District (“STSD”) violated OPRA by failing to provide responsive records, redacting records without providing a specific lawful basis for same, and failing to provide a specific lawful basis for denying access to additional records.

The Complainant contended that in response to her OPRA request, she received six (6) pages of records between a teacher and two (2) parents that were not identified in the OPRA request. The Complainant asserted that although Mr. Leone and Dr. Brown are copied in those disclosed, no responses were disclosed. The Complainant noted that because certain redactions did not fully cover the content beneath, she was able to determine that at least two of the e-mails redacted pertained to the subject matter and were sent by Mr. McQueeney and Mr. Leone. The Complainant also averred that she contacted Mr. Kercher, who confirmed that he was included in some of the e-mails that were not provided by STSD.

The Complainant thus contended that the redacted and other withheld e-mails are obviously responsive to her OPRA request. The Complainant stated that to obtain additional supporting evidence, she contacted the parents identified in the disclosed e-mails; one of them sent her an e-mail chain containing ten (10) additional e-mails not disclosed to her. The Complainant also noted that she discussed her OPRA request with another requestor that submitted a similar request; STSD admitted they redacted e-mails without “Black Snake” in them and mistakenly redacted an e-mail that did include the term.

The Complainant contended that STSD violated OPRA by failing to disclose those redacted e-mails and failed to provide a viable basis for their redaction. The Complainant further argued that STSD’s “document collection and production processes” are deficient and led to this unlawful denial of access. The Complainant further contended that it was clear that the e-mail chains related to the “Black Snake” topic and should have been disclosed. American Oversight v. U.S. Dep’t of Health & Human Serv., 280 F.Supp. 3d 45, 51 (D.D.C. 2018). The Complainant thus argued that the GRC should conduct an investigation “concerning the facts and circumstances of” this complaint.

Statement of Information:

On December 8, 2021, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on October 19, 2021. The Custodian certified that his search included working with the STSD’s Information Technology (“IT”) Department to locate responsive e-mails including the specific words “Black Snake” and “Blacksnake”. The Custodian certified that Ms. Dougherty responded in writing on his behalf on October 28, 2021 disclosing records with redactions. The Custodian certified that in response to follow-up questions from the Complainant, Ms. Dougherty stated that the redactions were applied to e-mails that “were not responsive to [the] request.” The Custodian certified that Ms. Warhol subsequently forwarded an e-mail to the Complainant on November 10, 2021, wherein she advised another requestor that only those e-mails containing the actual term were disclosed and that one

(1) e-mail that did contain the term was inadvertently redacted. The Custodian noted that Ms. Warhol further advised the other requestor that she has not disclosed it because she understood that requestor received the e-mail from another source.

The Custodian argued that STSD appropriately responded to the subject OPRA request based on a reasonable interpretation that same sought only those e-mails containing the words “‘Black Snake’ or ‘Blacksnake’” within the identified time frame. The Custodian noted that one (1) e-mail was inadvertently omitted and the Complainant was advised of this omission prior to the filing of this complaint. The Custodian argued that STSD’s use of the designated search terms “is the methodology by which [he], in consultation with the IT employees, searches for responsive records.” The Custodian argued that searching in any other way would require him to “have the onerous task of reading a voluminous number of e-mails to determine if they are responsive to the request.” The Custodian argued that the Council has previously held that no unlawful denial of access occurred where a custodian’s interpretation of a request is reasonable based upon its wording. Schmidt v. Borough of Lindenwold (Camden), GRC Complaint No. 2012-118 (May 2013). The Custodian argued that the Complainant only sought e-mails that “contained the words ‘Black Snake’.” The Custodian further contended that upon being made aware by Ms. Warhol of STSD’s interpretation of her request, it was “incumbent upon” the Complainant to clarify her request if she disagreed with same. The Custodian argued that instead of clarifying the request, the Complainant thanked Ms. Warhol for the explanation.

The Custodian finally argued that no knowing and willful violation occurred. The Custodian argued that he acted reasonably under the totality of the circumstances, notwithstanding the mistake of omitting a single e-mail that included the term.

Analysis

Insufficient Search

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.

Further, it is the custodian’s responsibility to perform a complete search for the requested records before responding to an OPRA request, as doing so will help ensure that the custodian’s response is accurate and has an appropriate basis in law. In Schneble v. N.J. Dep’t of Env’tl. Protection, GRC Complaint No. 2007-220 (April 2008), the custodian initially stated that no records responsive to the complainant’s OPRA request existed. The custodian certified that after receipt of the complainant’s denial of access complaint, which contained e-mails responsive to the complainant’s request, the custodian conducted a second search and found additional records responsive to the complainant’s request. The GRC held that the custodian had performed an inadequate search and thus unlawfully denied access to the responsive records. See also Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (January 2011).

Regarding requests for e-mails, the GRC has established specific criteria deemed necessary under OPRA to request an e-mail communication. See 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); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011). Further, the Council has provided guidance on how requests containing the Elcavage criteria do not require research, thus effectively resulting in a search:

[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, e-mails 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 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.

[Verry v. Borough of South Bound Brook (Somerset), GRC Complaint Nos. 2013-43 and 2013-53 (Interim Order dated September 24, 2013).]

Taken in tandem, Schneble, GRC 2007-220 and Verry, GRC 2014-43, *et seq.* provide that custodians perform an adequate search for e-mails by utilizing all required Elcavage criteria. Simply put, a custodian’s obligation is to search for records based on the sender and/or recipient, date or range of dates, and subject/content. Further, a custodian’s failure to perform such results in an insufficient search that yields an unnecessarily large volume of e-mails or correspondence that are likely not responsive to the request.

Here, the Complainant’s OPRA request sought e-mails between identified individuals over a certain time period “regarding” a particular subject/content. Thus, the OPRA request satisfied the Elcavage criteria.⁴ After receiving a response STSD, the Complainant filed this Denial of Access Complaint arguing that she believed the Custodian failed to disclose multiple e-mails. The Complainant noted that it appeared that she received no additional e-mails addressing the ones disclosed. The Complainant asserted that she confirmed with at least one individual identified in the OPRA request that he was copied on e-mails that were not disclosed. The Complainant also stated that she was able to obtain an e-mail chain of ten (10) e-mails that was responsive to her request, but that was not provided as part of STSD’s response.

⁴ The GRC notes that the Custodian did not assert that the Complainant’s OPRA request was invalid.

In the SOI, the Custodian argued that STSD’s search based on his reasonable interpretation that the OPRA request sought e-mails containing “Black Snake”. The Custodian further contended that his search was driven by that single term; any other process would require him to “have the onerous task of reading a voluminous number of e-mails to determine if they are responsive to the request.” Schmidt, GRC 2012-118.

The GRC does not agree that the Custodian conducted a sufficient search to locate all potentially responsive e-mails. This insufficient search is primarily based on the Custodian’s mistaken interpretation of the subject OPRA request. The Complainant sought e-mails “regarding” the identified terms: this is a significant difference from a request seeking e-mails “containing” a certain keyword. In fact, Merriam Webster’s definition of the word “regarding” is “with respect to” or “concerning.”⁵ It is readily apparent from a plain reading of the subject OPRA request that the Complainant sought those e-mails discussing the issue of “Black Snake” or “Blacksnake” and not limited to those only containing the word. Based on this, the e-mail chain the Complainant received from another parent in that the chain is responsive to the subject OPRA request because it contained clear discussions regarding “Black Snake” and concerns raised by that parent.

Further, the GRC does not find compelling the Custodian’s argument that the potential for a voluminous search is sufficient to justify such a limited interpretation of the OPRA request. Instead, OPRA requires a custodian to conduct a reasonable search, as described in Verry, GRC 2013-43, *et seq.* Also, Schmidt, GRC 2012-118 does not apply here because the GRC does not agree that the Custodian reasonably interpreted the OPRA request. Thus, it is possible that additional e-mails existed that were responsive to the request but not identified.

Accordingly, the Custodian’s failure to conduct a reasonable search resulted in an insufficient response. Schneble, GRC 2007-220; Verry, GRC 2013-43, *et seq.* Thus, the Custodian may have unlawfully denied access to responsive e-mails based on a narrowly construed search based solely on the keyword “Black Snake” and “Blacksnake.” N.J.S.A. 47:1A-1.1. Thus, the Custodian shall perform a new search to identify any additional records not previously located and either disclose them to her, advise if a valid lawful basis exists for withholding them, or advise that no additional responsive e-mails existed. The GRC notes that the Custodian is not required to disclose the e-mail chain already in the Complainant’s possession, which was attached to the Denial of Access Complaint. Bart v. City of Paterson Hous. Auth. 403 N.J. Super. 609, 618 (App. Div. 2008).

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

⁵ <https://www.merriam-webster.com/dictionary/regarding> (accessed April 12, 2023).

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, 435 N.J. Super. 533, 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 access to e-mails between specific senders and recipients “regarding the piece of music called ‘Black Snake’ or ‘Blacksnake’” in a specific time frame. Following an extension of time, STSD disclosed six (6) pages of e-mails to the Complainant; two (2) e-mails were redacted in their entirety. In response to the Complainant’s dispute over the redaction, both Ms. Dougherty and Ms. Warhol advised the Complainant that the e-mails were redacted because they were not responsive to the subject OPRA request. Ms. Warhol also added that the e-mails did not contain the word “Black Snake”; however, she admitted that one of the e-mails did contain the term and was erroneously redacted. There is no indication in the record whether STSD corrected this mistake by redisclosing the e-mail without redaction.

This Denial of Access Complaint ensued, wherein the Complainant argued that the Custodian failed to provide a specific lawful basis for redacting the e-mails. The Complainant further argued that she was able to determine that some of the redacted e-mail entries were responsive because either she could see through a portion of the redaction or she received some of the e-mails from those involved. In the SOI, the Custodian maintained his position that he lawfully redacted the e-mails as not responsive to the request. The Custodian further argued that STSD reasonably interpreted the request to seek only those e-mails containing the keyword “Blacksnake” and cited Schmidt, GRC 2012-118 to justify the search.

Factually, the Custodian has not argued that the redacted e-mails in question are not considered a “government record” under OPRA. Instead, the Custodian has maintained that the redacted e-mails were simply not responsive to the OPRA request because they did not include the term “Black Snake.”

Initially, the GRC notes that N.J.A.C. 1:1-15.2(a) and (b) state that official notice may be taken of judicially noticeable facts (as explained in Rule 201 of the New Jersey Rules of Evidence), as well as of generally recognized technical or scientific facts within the specialized knowledge of the agency or the judge. The Appellate Division has held that it was appropriate for an administrative agency to take notice of an appellant’s record of convictions because judicial notice could have been taken of the records of any court in New Jersey, and appellant’s record of convictions were exclusively in New Jersey. See Sanders v. Div. of Motor Vehicles, 131 N.J. Super. 95 (App. Div. 1974).

The GRC must take judicial notice of its prior decision in Grana v. Sparta Twp. Sch. Dist. (Sussex), GRC Complaint No. 2021-261 (Final Decision date December 13, 2022).⁶ There, the Council held that the Custodian’s denial of an e-mail on the basis that it was not responsive to the request was unlawful and ordered disclosure of same. Id. at 4 (citing ACLU, 435 N.J. Super. 533). Thus, both Grana, GRC 2021-261 and this complaint indicates that STSD redacts information it deems “not responsive” as a practice.

However, no provisions in OPRA allow for a custodian to apply redactions to information within a record because they determine said information is not responsive. In ACLU, 435 N.J. Super. 533, the court was tasked with determining “whether . . . a government agency has the authority to redact an admittedly responsive document to withhold information the agency deems to be outside the scope of the request.” Id. at 534. In reversing the trial court and rejecting redaction based on non-responsiveness, the ACLU court reasoned that:

In our view, the fact-sensitive approach employed by the trial court here authorizes the custodian to unilaterally determine what sections of an indisputably public document falls within the scope of a request, and there-after deny access to that record without “attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.” [N.J.S.A. 47:1A-5(g).] We discern no legal basis to expand the custodian's role beyond what the Legislature specifically described in N.J.S.A. 47:1A-5(g).

[Id. at 540-541.]

The Custodian here has provided a real-world example of the ACLU court’s concern in upholding the trial court’s ruling: he unilaterally determined that certain e-mails within the disclosed chains were not responsive to the request and then, in the SOI, took the Complainant to task for not “clarifying” her request after receiving Mr. Warhol’s explanation. Further, the practice of redacting e-mails unilaterally thought to be “not responsive” resulted in STSD redacting an e-mail in error that, even by their search standard, was responsive. The ACLU court clearly disagreed with the forgoing actions and the GRC follows that ruling accordingly.

Accordingly, the Custodian unlawfully denied access to those e-mails redacted under the basis that they were 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 those e-mails withheld as not responsive to the subject OPRA request without redaction.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian’s failure to conduct a reasonable search resulted in an insufficient response. Schneble v. N.J. Dep’t of Env’tl. Protection, GRC Complaint No. 2007-220

⁶ The GRC notes that the Custodian subsequently submitted a request for reconsideration, which is still under review.

(April 2008); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint Nos. 2013-43 and 2013-53 (Interim Order dated September 24, 2013). Thus, the Custodian may have unlawfully denied access to responsive e-mails based on a narrowly construed search based solely on the keyword “Black Snake” and “Blacksnake.” N.J.S.A. 47:1A-1.1. Thus, the Custodian shall perform a new search to identify any additional records not previously located and either disclose them to her, advise if a valid lawful basis exists for withholding them, or advise that no additional responsive e-mails existed. The GRC notes that the Custodian is not required to disclose the e-mail chain already in the Complainant’s possession, which was attached to the Denial of Access Complaint. Bart v. City of Paterson Hous. Auth. 403 N.J. Super. 609, 618 (App. Div. 2008).

2. The Custodian unlawfully denied access to those e-mails redacted under the basis that they were 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 those e-mails withheld as not responsive to the subject OPRA request without redaction.
3. **The Custodian shall comply with conclusion Nos. 1 and 2 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

April 18, 2023