



State of New Jersey

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JACQUELYN A. SUÁREZ
Acting Commissioner

FINAL DECISION

October 3, 2023 Government Records Council Meeting

Walter Marsico
Complainant

Complaint No. 2022-6

v.

Vernon Township (Sussex)
Custodian of Record

At the October 3, 2023 public meeting, the Government Records Council (“Council”) considered the September 26, 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 Complainant’s request items number 1 and 3 are invalid under prevailing case law. Specifically, request item number 1 sought information and not an identifiable “government record.” MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30 (App. Div. 2005); LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009). Request item number 3 did not include the requisite “date or range of dates.” Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). Thus, the Custodian lawfully denied the Complainant’s request item numbers 1 and 3 because they are invalid. N.J.S.A. 47:1A-6.
2. The Custodian did not unlawfully deny access to request item number 2, which are “[r]eports related to the pictures taken at 16 Jenny Layne,” request item number 4, which is “the time card for Robert Westernberger on the date the pictures were taken at 16 Jenny Layne,” and request item number 5, which is the “[a]uthorization for pictures taken at 16 Jenny Layne” 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. 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 3rd Day of October 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: October 10, 2023

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 3, 2023 Council Meeting**

**Walter Marsico ¹
Complainant**

GRC Complaint No. 2022-6

v.

**Vernon Township (Sussex)²
Custodial Agency**

Records Relevant to Complaint:

OPRA Request dated December 8, 2021 A copy via e-mail of “[p]ictures were taken at night of the residence located at 16 Jenny Layne by Robert Westernberger. Please forward the pictures that were taken along with the TIME and DATE that these photographs were taken. Also include the name of the individual who authorized these photographs to be taken and if Robert Westernberger was working on OVERTIME or did this on his personal time.” (Emphasis in original.)

OPRA Request dated December 29, 2021 A copy via e-mail of “[r]eports related to the pictures taken at 16 Jenny Layne. The time card for Robert Westernberger on the date the pictures were taken at 16 Jenny Layne. Authorization for pictures taken at 16 Jenny Layne. Emails between Robert Westernberger and Chuck Voelker specifically relating to pictures taken at 16 Jenny Layne and who authorized such.”

Custodian of Record: Marcy Gianattasio

Requests Received by Custodian: December 8, 2021 and December 29, 2021

Responses Made by Custodian: December 16, 2021 and January 10, 2022

GRC Complaint Received: January 11, 2022

Background³

Requests and Responses:

On December 8, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 16, 2021, the Custodian responded in writing informing the Complainant that the records responsive to his

¹ No legal representation listed on record.

² Represented by Joshua A. Zielinski, of O’Toole Scrivo (Cedar Grove, 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.

request were attached.⁴ The Custodian informed the Complainant that he could direct his questions to the Township Administrator.

On December 29, 2021, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On January 10, 2022, the Custodian responded in writing informing the Complainant that there are no records responsive to his request.

Denial of Access Complaint:

On January 11, 2022, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant attached copies of his requests dated December 8, 2021 and December 29, 2021. The Complainant stated the Custodian denied him access to the following request items contained within the two (2) requests by stating that there are no related documents:

- Request item number 1 identified as “date and time stamp.”
- Request item number 2 identified as “reports relating to pictures.”
- Request item number 3 identified as “emails relating to pictures taken.”
- Request item number 4 identified as “time card for Robert Westernberger.”
- Request item number 5 identified as “authorization for pictures.”

Statement of Information:

On January 31, 2022, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that on December 8, 2021, the Complainant submitted an OPRA request for photographs that were taken of the property located at 16 Jenny Layne. The Custodian certified that the Complainant also asked several questions as part of the request. The Custodian certified that the questions posed by the Complainant did not constitute requests for government records; therefore, she informed the Complainant that he could direct his questions to the Township Administrator.

The Custodian certified that on December 29, 2021, she received another OPRA request from the complainant, wherein he requested records related to the photographs of 16 Jenny Layne. The Custodian certified that she sent the Complainant’s request to Mr. Westernberger, the Township’s Construction Official, and Mr. Voelker, the Township Administrator, requesting responsive records. The Custodian certified that she was informed by Mr. Westernberger and Mr. Voelker that there were no records responsive to the Complainant’s December 29, 2021 request. The Custodian certified that she responded to the Complainant’s December 29, 2021 request, informing him that there were no responsive records.

The Custodian attached to the SOI a certification from Mr. Westernberger dated January 28, 2022. Mr. Westernberger certified that he is the Construction Official for the Township of Vernon. Mr. Westernberger certified that there were concerns about the property located at 16 Jenny Layne being unlawfully inhabited; therefore, when he noticed one evening that there were

⁴ Copies of two (2) photographs of a house with a darkened background were attached to the response.

signs the property was occupied, he took two (2) photographs to memorialize what he observed. Mr. Westernberger certified that on December 8, 2021, the Custodian provided him with a copy of the Complainant's OPRA request and asked him to provide responsive records, whereupon he delivered the two (2) photographs he took of the 16 Jenny Layne property. Mr. Westernberger certified that on December 29, 2021, the Custodian contacted him regarding another OPRA request that was filed by the Complainant, asking him to provide her with all responsive records. Mr. Westernberger certified that his e-mail account was checked; however, no records responsive to the request were found. Mr. Westernberger also certified that he did not prepare any reports related to the photographs he took of the 16 Jenny Layne property or shared the photographs with any other employee so that reports could be created. Mr. Westernberger further certified that he does not have a timecard and he does not have any written authorization allowing him to have taken the photographs of the 16 Jenny Layne property, as he did so of his own volition.

The Custodian also attached to the SOI a certification from Mr. Voelker dated January 28, 2022. Mr. Voelker certified that he is the Township Administrator for the Township of Vernon. Mr. Voelker certified that on December 8, 2021, the Custodian provided him with a copy of the Complainant's OPRA request and asked him to provide responsive records. Mr. Voelker certified that he did not have any responsive photographs in his possession. Mr. Voelker also certified that the Complainant's remaining questions in the request did not constitute a request for government records; however, he did review his e-mail account and files but did not find any records responsive to the Complainant's questions. Mr. Voelker certified that on December 29, 2021, the Custodian contacted him regarding another OPRA request that was filed by the Complainant. Mr. Voelker certified that he reviewed his e-mail account but did not find any responsive communications with Mr. Westernberger. Mr. Voelker also certified that he is not in possession of any reports, or aware of any reports, related to the photographs of 16 Jenny Layne. Mr. Voelker certified that Mr. Westernberger, as a salaried employee, does not have a timecard. Mr. Voelker further certified that he is not aware of any written authorizations for Mr. Westernberger to have taken the photographs of the 16 Jenny Layne property. Mr. Voelker certified that he notified the Custodian that he had no records responsive to the Complainant's December 29, 2021 OPRA request.

The Custodian certified that OPRA only allows for requests for records, and not requests for information. The Custodian cited Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005). The Custodian certified that the Complainant's requests for information in the request dated December 8, 2021 are not valid because they fail to identify specific government records. The Custodian certified that no records exist in response to the Complainant's request dated December 29, 2021. The Custodian certified that the Complainant's request for e-mails is further deficient because he failed to identify a specific date range for the e-mails. The Custodian cited Elcavage v. W. Milford Twp., GRC Complaint No. 2009-07 (April 2010), as requiring the provision of distinct criteria for a valid e-mail request.

Analysis

Validity of Request

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, 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. (emphasis added). Bent, 381 N.J. Super. at 37;⁵ N.J. Builders Ass’n, 390 N.J. Super. at 180; Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

The validity of an OPRA request typically falls into three (3) categories. The first is a request that is overly broad (“any and all,” requests seeking “records” generically, *etc.*) and requires a custodian to conduct research. MAG, 375 N.J. Super. 534; Donato v. Twp. of Union, GRC Complaint No. 2005-182 (January 2007). The second is those requests seeking information or asking questions. See e.g. Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012). The final category is a request that is either not on an official OPRA request form or does not invoke OPRA. See e.g. Naples v. N.J. Motor Vehicle Comm’n, GRC Complaint No. 2008-97 (December 2008).

Regarding generic requests for “records,” the request at issue in MAG sought “all documents or records evidencing that the ABC sought, obtained or ordered revocation of a liquor license for the charge of selling alcoholic beverages to an intoxicated person in which such person, after leaving the licensed premises, was involved in a fatal auto accident” and “all documents or records evidencing that the ABC sought, obtained or ordered suspension of a liquor license exceeding 45 days for charges of lewd or immoral activity.” Id. at 539-540. The court noted that plaintiffs failed to include additional identifiers such as a case name or docket number. See also

⁵ Affirmed on appeal regarding Bent v. Stafford Police Dep’t, GRC Case No. 2004-78 (October 2004).

Steinhauer-Kula v. Twp. of Downe (Cumberland), GRC Complaint No. 2010-198 (March 2012) (holding that the complainant’s request item No. 2 seeking “[p]roof of submission” was invalid); Edwards v. Hous. Auth. of Plainfield (Union), GRC Complaint No. 2008-183 *et seq.* (Final Decision dated April 25, 2012) (accepting the Administrative Law Judge’s finding that a newspaper article attached to a subject OPRA request that was related to the records sought did not cure the deficiencies present in the request) Id. at 12-13.

Moreover, in Feiler-Jampel v. Somerset Cnty. Prosecutor’s Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008), the Council similarly held that a request seeking “[a]ny and all documents and evidence” relating to an investigation being conducted by the Somerset County Prosecutor’s Office was invalid, reasoning that:

[B]ecause the records requested comprise an entire SCPO file, the request is overbroad and of the nature of a blanket request for a class of various documents rather than a request for specific government records. Because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to research the SCPO files to locate records potentially responsive to the Complainant’s request pursuant to the Superior Court’s decisions in [MAG], [Bent] and the Council’s decisions in Asarnow v. Department of Labor and Workforce Development, GRC Complaint No. 2006-24 (May 2006) and Morgano v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2007-190 (February 2008).

[Id. See also Schulz v. NJ State Police, GRC Complaint No. 2014-390 (Interim Order dated July 28, 2015) (holding that the portion of the request seeking “all documents” was overly broad and thus invalid).]

Additionally, in Lagerkvist v. Office of the Governor, 443 N.J. Super. 230, 236-237 (App. Div. 2015), the court held that plaintiff’s request was invalid because it required research. In reaching this conclusion, the court reasoned that:

The custodian in this case would have had to make a preliminary determination as to which travel records correlated to the governor and to his senior officials, past and present, over a span of years. The custodian would then have had to attempt to single out those which were third-party funded events. Next, he would have had to collect all documents corresponding to those events and search to ensure he had accumulated everything, including both paper and electronic correspondence. OPRA does not convert a custodian into a researcher.

[Id. at 237.]

Also, in LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009), the complainant requested the number of Jamesburg residents that hold library cards. The GRC deemed that the complainant’s request was a request for information, holding that “. . . because request Item No. 2 of the Complainant’s June 25, 2008 OPRA request seeks information rather than an identifiable government record, the request is invalid pursuant to

[MAG] . . .” Id. at 6. See also Ohlson v. Twp. of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009).

Finally, regarding requests for communications, including e-mails, text messages, and written correspondence, the GRC has established criteria deemed necessary under OPRA to request them. In 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. NJ State Parole Bd., GRC Complaint No. 2006-167 (Interim Order 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 May 24, 2011). Moreover, the Council has determined that requests failing to include the specific date or range of dates during which the e-mail(s) were transmitted are invalid. See Gardenier v. Borough of Cliffside Park (Bergen), 2022-171 (August 2023), finding that some request items were invalid because, *inter alia*, they did not include the requisite date or range of dates pursuant to Elcavage, GRC 2009-07.

Here, the Complainant’s request item No. 1 sought “the time and date that [photographs of the 16 Jenny Layne property] were taken.” The Complainant did not specifically identify a record, but rather asked for information regarding a record. Such requests for information have routinely been determined to be invalid. LaMantia, GRC 2008-140. The Complainant’s request item number 3 seeking “e-mails between Robert Westernberger and Chuck Voelker specifically relating to pictures taken at 16 Jenny Layne” is also invalid. The Custodian asserted that the request item was invalid because it did not contain sufficient search criteria pursuant to Elcavage, GRC 2009-07. And, upon examination by the GRC, it is clear that the request item is invalid because it failed to include all required criteria; to wit, the specific date or range of dates during which the e-mail(s) were transmitted.

Accordingly, the Complainant’s request items number 1 and 3 are invalid under prevailing case law. Specifically, request item number 1 sought information and not an identifiable “government record.” MAG, 375 N.J. Super. 534; Bent, 381 N.J. Super. 30; LaMantia, GRC 2008-140. Request item number 3 did not include the requisite “date or range of dates.” Elcavage, GRC 2009-07. Thus, the Custodian lawfully denied the Complainant’s request item numbers 1 and 3 because they are invalid. N.J.S.A. 47:1A-6.

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.

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.

Here, the Custodian certified that the records responsive to request item number 2, which are "[r]eports related to the pictures taken at 16 Jenny Layne," request item number 4, which is "the time card for Robert Westernberger on the date the pictures were taken at 16 Jenny Layne," and request item number 5, which is the "[a]uthorization for pictures taken at 16 Jenny Layne" are denied because they do not exist. In support of her denial the Custodian relied upon the certifications of Construction Official Robert Westernberger and Township Administrator Charles Voelker. Both Township officials averred in their respective certifications that said records do not exist.

As such, the Custodian did not unlawfully deny access to request item number 2, which are "[r]eports related to the pictures taken at 16 Jenny Layne," request item number 4, which is "the time card for Robert Westernberger on the date the pictures were taken at 16 Jenny Layne," and request item number 5, which is the "[a]uthorization for pictures taken at 16 Jenny Layne" 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Complainant's request items number 1 and 3 are invalid under prevailing case law. Specifically, request item number 1 sought information and not an identifiable "government record." MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30 (App. Div. 2005); LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009). Request item number 3 did not include the requisite "date or range of dates." Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). Thus, the Custodian lawfully denied the Complainant's request item numbers 1 and 3 because they are invalid. N.J.S.A. 47:1A-6.
2. The Custodian did not unlawfully deny access to request item number 2, which are "[r]eports related to the pictures taken at 16 Jenny Layne," request item number 4, which is "the time card for Robert Westernberger on the date the pictures were taken at 16 Jenny Layne," and request item number 5, which is the "[a]uthorization for pictures taken at 16 Jenny Layne" 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. Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

Prepared By: John E. Stewart

August 22, 2023