



State of New Jersey

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Lieutenant Governor

JACQUELYN A. SUÁREZ
Acting Commissioner

INTERIM ORDER

April 30, 2024 Government Records Council Meeting

Peter Michel
Complainant

Complaint No. 2022-27

v.

Borough of Washington (Warren)
Custodian of Record

At the April 30, 2024 public meeting, the Government Records Council (“Council”) considered the April 23, 2024 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 immediately respond in writing to the Complainant’s request item number 8 for immediate access records; namely “agreements,” either granting access, denying access, seeking clarification or requesting an extension of time violates 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); Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007) (holding that the custodian was obligated to notify the complainant immediately as to the status of “immediate access” records); Harris v. N.J. Dep’t of Corr., GRC Complaint No. 2011-65 (August 2012). Moreover, the Custodian failed to provide an explanation that would reasonably justify a delay in access to the requested records.
2. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the extended time frame results in a “deemed” denial of said 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). See also Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
3. The Custodian did not unlawfully deny access to request item numbers 1, 2, 5 (except for the OPRA request), 6 and 7 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. The Custodian did not unlawfully deny the Complainant access to the Complainant's request item number 5 (OPRA request) because the Complainant provided proof in his Denial of Access Complaint that a copy of said request was in his possession at the time he filed the request. Therefore, the Complainant could not have been denied access to the requested record because he already had it in his possession at the time of the request. See Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008).
5. The Complainant's request item numbers 8 and 10 are invalid because they do not seek specifically identifiable records and would require the Custodian to conduct research by searching through all of the Borough's files to compile any records that might be responsive to the request. 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); Lagerkvist v. Office of the Governor, 443 N.J. Super. 230 (App. Div. 2015). Thus, the Custodian lawfully denied the request items. N.J.S.A. 47:1A-6.
6. Notwithstanding the Custodian's "deemed" denial, the Custodian did not deny access to request item numbers 3, 4, 9, 11 and 12, with the exception of the aforementioned April 20, 2021 e-mail and June 2, 2021 e-mail with attached letter. N.J.S.A. 47:1A-6. Specifically, the Custodian certified that said records with noted exception were disclosed to the Complainant on February 7, 2022, and the Complainant provided no competent, credible evidence to refute the Custodian's certification. See Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010).
7. The GRC must conduct an *in camera* review of: (1) the April 20, 2021 e-mail from Leslie Parikh, Esq. to Councilwoman LouAnn Cox; and (2) the June 2, 2021 e-mail and attached letter from Matt Lyons, Esq. of Gebhardt & Kiefer to Councilwoman LouAnn Cox, to validate the Custodian's contention that these records are attorney-client privileged and therefore exempt from access under OPRA. N.J.S.A. 47:1A-1.1; Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
8. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion number 7 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,³ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within ten (10) business days from receipt of the Council's Interim Order.**
9. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

¹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

² The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Interim Order Rendered by the
Government Records Council
On The 30th Day of April 2024

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 2, 2024

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 30, 2024 Council Meeting**

**Peter Michel¹
Complainant**

GRC Complaint No. 2022-27

v.

**Borough of Washington (Warren)²
Custodial Agency**

Records Relevant to Complaint: From January 1, 2020 to January 6, 2022, electronic copies of the following records pertaining to ethics and ethics-related policies, procedures, and complaints:

1. A blank copy of the Borough of Washington (“Borough”) complaint form(s).
2. Completed/submitted complaint forms pertaining to complaints about Borough officials and/or employees.
3. Ethics complaint related communications including emails, letters, text messages, etc. (search keywords: “ethics,” “ethical,” “unethical,” “corrupt,” “corruption,” “theft,” and “nepotism”).
4. The Borough’s ethics policy and procedures.
5. OPRA requests involving ethics (search keywords: “ethics,” “ethical,” “unethical,” “corrupt,” “corruption,” “theft,” and “nepotism”).
6. Audio and video recordings of meetings pertaining specifically to, or involving potential, suspected, or actual ethics violations.
7. Open and executive session meeting minutes involving or pertaining to ethics violations (search keywords: “ethics,” “ethical,” “unethical,” “corrupt,” “corruption,” “theft,” and “nepotism”).
8. Signed copies of ethics-related forms, documents, agreements, policies (also search keywords: “ethics,” “ethical,” “unethical,” “corrupt,” “corruption,” “theft,” and “nepotism”).
9. Documents that local government officers and/or employees receive upon becoming an officer or employee of the Borough, or during their tenure or employment, that relate specifically to ethics that they may or may not be asked or required to sign.
10. Documents pertaining to New Jersey local government ethical standards and/or legal requirements.
11. Communications from local, county, and/or State officials or agencies such as the NJ Local Finance Board, police detectives, county prosecutors, etc., pertaining to specific Borough officer and/or employee violations or potential/suspected violations of ethics or other laws (also search keywords: “ethics,” “ethical,” “unethical,” “corrupt,” “corruption,” “theft,” and “nepotism”).

¹ No legal representation listed on record.

² Represented by Tara A. St. Angelo, Esq., of Gebhardt & Kiefer, P.C. (Annandale, NJ).

12. Inquiries and communications involving State, county, and/or local government agencies or officials pertaining to perceived or actual ethical violations (search keywords: “ethics,” “ethical,” “unethical,” “corrupt,” “corruption,” “theft,” and “nepotism”).

Custodian of Record: Laurie Barton

Request Received by Custodian: January 11, 2022

Responses Made by Custodian: January 21, 2022 and February 7, 2022

GRC Complaint Received: February 7, 2022

Background³

Request and Response:

On January 11, 2022, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 21, 2022, the seventh (7th) business day following receipt of said request, the Custodian responded in writing requesting an extension of time until February 4, 2022 to address the request.⁴

Denial of Access Complaint:

On February 7, 2022, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that on January 11, 2022, he submitted his OPRA request to the Custodian. The Complainant stated that the Custodian responded on January 21, 2022, declaring she was taking an extension of time until February 4, 2022, to address the request. The Complainant stated that he received a “deemed” denial of the request on February 5, 2022, because the Custodian neither sought an additional extension of time nor disclosed the requested records. The Complainant further stated that request item number 8 sought agreements and therefore the Custodian should have responded immediately to that portion of his request.

Supplemental Response:

On February 7, 2022, the Custodian responded in writing addressing each request item. The Custodian informed the Complainant that no records exist responsive to request item numbers 1, 2, 5 (except for the subject OPRA request), 6 and 7. The Custodian denied request item numbers 8 and 10 as overly broad. The Custodian also denied request item numbers 3, 11 and 12 as attorney-client privileged, and disclosed records responsive to request item numbers 4 and 9.

Statement of Information:

On February 24, 2022, the Custodian filed a Statement of Information (“SOF”). The Custodian certified that she responded to the request in a timely manner, and due to the voluminous

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 January 17, 2022 was a state holiday.

nature of the request, requested an extension of time to respond until February 4, 2022. The Custodian certified that on the extended due date of the response she was out of the office. The Custodian certified that upon returning to the office on February 7, 2022, she immediately responded to the Complainant’s request disclosing responsive records. The Custodian certified that the one (1) business day delay in responding to the request was inadvertent.

The Custodian certified that she responded to the Complainant’s request as set forth in the following table:

Request Item	Response
1	“No such record exists responsive to this request.”
2	“No such records exist.”
3	<p>The Custodian certified that e-mails dated between January 1, 2020 and January 11, 2022 are responsive to the request. The Custodian certified that “[s]uch emails were provided on February 7, 2022.”</p> <p>The Custodian also certified that “[t]he following correspondence was found responsive to this request but is privileged as attorney-client communications: June 2, 2021 letter from Matt Lyons, Esq. (Gebhardt & Kiefer) to Councilwoman LouAnn Cox (and transmitting email). April 20, 2021 email from Leslie Parikh, Esq. to Councilwoman LouAnn Cox[.]”</p>
4	“[T]he Borough personnel manual addresses ethics. Attached please find that portion of the personnel manual.”
5	“No responsive documents exist, with the exception of your OPRA request.” The Custodian, citing <u>Bart v. City of Paterson Hous. Auth.</u> , 403 <u>N.J. Super.</u> 609 (App. Div. 2008), certified that the Complainant is not entitled to receive records already in his possession.
6	“No responsive documents exist.”
7	“No responsive documents exist.”
8	“This request is denied as vague. <u>Shipyard Associates, L.P. v. City of Hoboken</u> , 2015 <u>N.J. Super.</u> Unpub. LEXIS 2117 (App. Div. Sept. 1, 2015) (citing <u>MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control</u> , 375 <u>N.J. Super.</u> 534, 546 (App. Div. 2005)).” The Custodian stated in the response that she was unclear as to what the Complainant meant by “ethics-related forms, documents, agreements, and policies.”
9	“See attached documents that are provided to new employees and officials.”
10	“This request is denied as vague. <u>Shipyard Associates, L.P. v. City of Hoboken</u> , 2015 <u>N.J. Super.</u> Unpub. LEXIS 2117 (App. Div. Sept. 1, 2015) (citing <u>MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control</u> , 375 <u>N.J. Super.</u> 534, 546 (App. Div. 2005)).”
11	“See response to #3 above.”
12	“See response to #3 above.”

The Custodian also certified that the Complainant failed to provide a completed Denial of Access Complaint because he failed to provide a mailing address and did not sign the complaint.⁵ The Custodian further certified that she understands the response was sent to the Complainant one (1) business day beyond the due date; however, the delay was not intentional. The Custodian certified that her delay in responding in a timely manner may have been negligent but was not a knowing and willful violation of OPRA.

Additional Submissions:

On February 24, 2022, the Complainant called the GRC to report that he had received the SOI and had a few questions. The Complainant said that he was unsure if he should file an amended complaint because his name was printed, not signed, on the complaint. The Complainant also said that he wanted to address some of the issues raised in the SOI and wondered whether an amended complaint would be the proper document to address the issues. The Complainant also asked what the GRC considers a duplicate complaint, and how the GRC processes duplicate complaints.

The GRC informed the Complainant that the GRC accepts a complaint as valid if the Complainant's name and date are printed within the signature block of a complaint. The GRC further informed the Complainant that an amended complaint is not the proper form on which to address issues raised in the SOI. The GRC informed the Complainant that, although the GRC's regulations do not provide for it, the GRC will generally accept a submission in reply to the SOI. The Complainant was informed that he must receive written approval from the GRC to submit such a submission and that all parties must be copied.⁶ The GRC also explained to the Complainant what the GRC considers to be a duplicate complaint and how such complaints are processed by the GRC.⁷

On February 25, 2022, the Custodian's Counsel e-mailed the GRC, stating that if the Complainant files an amended complaint the Borough wants an opportunity to respond to any new allegations or claims. The GRC replied to the Custodian's Council on this same date, informing her that the GRC's regulations provide for the Custodian to reply to an amended complaint within five (5) business days.⁸

Analysis

Timeliness

OPRA mandates that a custodian must either 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 within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to

⁵ The GRC notes that the Complainant's failure or refusal to complete these items on the complaint form did not invalidate the complaint.

⁶ The GRC's regulations were readopted with amendments effective November 7, 2022, and now provide for a reply to the SOI. N.J.A.C. 5:105-2.4(n).

⁷ The GRC confirmed the telephone conversation in writing, copying the Custodian's Counsel, on February 24, 2022.

⁸ The Complainant did not file an amended complaint or reply to the SOI.

N.J.S.A. 47:1A-5(g).⁹ 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).

Immediate Access

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).¹⁰ See Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007) (holding that the custodian was obligated to notify the complainant immediately as to the status of "immediate access" records). See also Harris v. N.J. Dep't of Corr., GRC Complaint No. 2011-65 (August 2012).

In the instant complaint, the Complainant's request item number 8 sought "immediate access" records, viz., agreements. The Council has long held that agreements are tantamount to contracts, which are immediate access records pursuant to N.J.S.A. 47:1A-5(e). See e.g., Paff v. Twp. Of Blairstown (Warren), GRC Complaint No. 2009-53 (February 2010). The Custodian ignored the immediate access nature of this request item and did not respond until the seventh (7th) business day, requesting an extension of time to address the Complainant's entire OPRA request. As such, the Custodian violated OPRA's immediate access provision.

Therefore, the Custodian's failure to immediately respond in writing to the Complainant's request item number 8 for immediate access records; namely agreements, either granting access, denying access, seeking clarification or requesting an extension of time violates 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); Herron, GRC 2006-178 (holding that the custodian was obligated to notify the complainant immediately as to the status of "immediate access" records); Harris, GRC 2011-65. Moreover, the Custodian failed to provide an explanation that would reasonably justify a delay in access to the requested records.

Extension of Time

In Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5th) business day after receipt of the complainant's March 19, 2007 OPRA request seeking an extension of time until April 20, 2007. However, the custodian responded again on April 20, 2007, stating that the requested records

⁹ 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.

¹⁰ 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. 47:1A-5(e). The Council has also determined that invoices are "immediate access" records. See Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2012-03 (April 2013).

would be provided later in the week. Id. The evidence of record showed that no records were provided until May 31, 2007. Id. The GRC held that:

The Custodian properly requested an extension of time to provide the requested records to the Complainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) . . . however . . . [b]ecause the Custodian failed to provide the Complainant access to the requested records by the extension date anticipated by the Custodian, the Custodian violated N.J.S.A. 47:1A-5(i) resulting in a “deemed” denial of access to the records.

[Id.]

Here, the Complainant submitted his OPRA request on January 11, 2022. On January 21, 2022, the seventh (7th) business day following receipt of the request, the Custodian responded in writing informing the Complainant that an extension of time would be needed until February 4, 2022. When the Custodian failed to respond by the extended date the Complainant filed the within complaint on February 7, 2022, alleging that he received a “deemed” denial of the request on February 5, 2022, because the Custodian neither sought an additional extension of time nor disclosed the requested records.

The evidence of record supports a “deemed” denial of access. Specifically, the Custodian set an extended response deadline of February 4, 2022; however, she subsequently failed to respond by the expiration of said deadline. Instead, the Custodian did not respond until February 7, 2022. Thus, like Kohn, GRC 2007-124, the Custodian’s failure to respond by the extended deadline results in a “deemed” denial of access.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the extended time frame results in a “deemed” denial of said request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. See also Kohn, GRC 2007-124.

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 numbers 1, 2, 5 (except for the OPRA request), 6 and 7

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 numbers 1, 2, 5 (except for the OPRA request), 6 and 7 do not exist. Moreover, there is nothing in the evidence of record to indicate that the Complainant submitted any evidence to contradict the Custodian's certification.

As such, the Custodian did not unlawfully deny access to request item numbers 1, 2, 5 (except for the OPRA request), 6 and 7 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 item number 5 (OPRA request)

In Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008), the Appellate Division held that a complainant could not have been denied access to a requested record if he already had in his possession at the time of the OPRA request the document he sought pursuant to OPRA. With respect to this issue, the court noted:

[I]t is undisputed that Bart at all times had within his possession a copy of the cover letter at issue; indeed, he attached a copy to the complaint he filed with the Council. He could not have been denied access to the document, however, if he already had the document he sought.

[Id. at 618].

The Appellate Division noted that requiring a custodian to duplicate another copy of the requested record and send it to the complainant "...does not...advance the purpose of OPRA, which is to ensure an informed citizenry." Id. (citations omitted).

Here, the Custodian determined that the Complainant's January 11, 2022 OPRA request is responsive to request item number 5; however, she did not disclose a copy to the Complainant. Identical to the facts in Bart, the Complainant already had in his possession at the time of the OPRA request the document he sought pursuant to OPRA. Indeed, the Complainant attached a copy of the January 11, 2022 OPRA request to the complaint. As such, the Complainant could not have been denied access to the OPRA request which formed the basis of the instant complaint.

Accordingly, the Custodian did not unlawfully deny the Complainant access to the Complainant's request item number 5 (OPRA request) because the Complainant provided proof

in his Denial of Access Complaint that a copy of said request was in his possession at the time he filed the request. Therefore, the Complainant could not have been denied access to the requested record because he already had it in his possession at the time of the request. See Bart, 403 N.J. Super. 609.

Request item numbers 8 and 10

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. 534, 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. 30, 37;¹¹ N.J. Builders, 390 N.J. Super. 166, 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. 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).

¹¹ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

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 Steinbauer-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.]

Here, the Complainant's request item number 8 seeks signed copies of *ethics-related* forms, documents, agreements and policies. The Custodian denied the request as vague and stated that she was unclear as to what the Complainant meant by "ethics-related" records. Likewise, the Custodian denied request item number 10 as vague. This request item seeks documents *pertaining to* New Jersey local government ethical standards and/or legal requirements. Although the Complainant included additional identifiers in the form of keywords for request item number 8, the Custodian would still have to make a judgment call as to which records could be construed as "ethics-related" records. For request item number 10, the Custodian would have to first determine whether the records the Complainant is seeking refer to, relate to, belong to, are appropriate to, or otherwise have some connection to the subject, which is itself somewhat nebulous because the subject is ethical standards and legal requirements or legal requirements.

To fulfill request item number 8, the Custodian would first have to guess what the Complainant means by "ethics-related" records, then search through all of the Borough's files and extract all forms, documents, agreements and policies that may be related to "ethics." Thereafter, the Custodian would have to conduct further research to determine which of the extracted records have been "signed" and whether such signatory is contemplated by the request. To fulfill request item number 10, the Custodian would have to search through all documents that may pertain to an imprecise subject, namely local government ethical standards *and/or* legal requirements. This the Custodian is not required to do because OPRA requires requestors to specifically identify the records sought. ". . . OPRA does not countenance open-ended searches of an agency's files." MAG, 375 N.J. Super. 534, 549. Moreover, the Custodian is not required to conduct research to fulfill an OPRA request. See Lagerkvist, 443 N.J. Super. at 236-37.

Therefore, the Complainant's request item numbers 8 and 10 are invalid because they do not seek specifically identifiable records and would require the Custodian to conduct research by searching through all of the Borough's files to compile any records that might be responsive to the request. MAG, 375 N.J. Super. 534; Bent, 381 N.J. Super. 30; Lagerkvist, 443 N.J. Super. 230. Thus, the Custodian lawfully denied the request items. N.J.S.A. 47:1A-6.

Request item numbers 3, 4, 9, 11 and 12

In Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010), the Council found that the custodian did not unlawfully deny access to the requested records based on the custodian's certification that all such records were provided to the complainant. The Council held that the custodian's certification, in addition to the lack of refuting evidence from the complainant, was sufficient to meet the custodian's burden of proof. See also Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005); Holland v. Rowan Univ., GRC Complaint No. 2014-63, *et seq.* (March 2015).

Here, the Custodian certified in the SOI that e-mails dated between January 1, 2020 and January 11, 2022 are responsive to request item numbers 3, 11 and 12. The Custodian further certified that the e-mails were disclosed to the Complainant on February 7, 2022. The Custodian also certified that an April 20, 2021 e-mail from Leslie Parikh, Esq. to Councilwoman LouAnn

Cox, and a June 2, 2021 letter from Matt Lyons, Esq. of Gebhardt & Kiefer to Councilwoman LouAnn Cox, together with its transmitting e-mail, were responsive to request item number 3. The Custodian certified that she denied access to these communications because they are attorney-client privileged. The Custodian also certified that on February 7, 2022, she disclosed to the Complainant all records responsive to request item numbers 4 and 9.

Therefore, notwithstanding the Custodian's "deemed" denial, the Custodian did not deny access to request item numbers 3, 4, 9, 11 and 12, with the exception of the aforementioned April 20, 2021 e-mail and June 2, 2021 e-mail with attached letter. N.J.S.A. 47:1A-6. Specifically, the Custodian certified that said records with noted exception were disclosed to the Complainant on February 7, 2022, and the Complainant provided no competent, credible evidence to refute the Custodian's certification. See Danis, GRC 2009-156, *et seq.*

In Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council¹² that accepted the custodian's legal conclusion for the denial of access without further review. The Appellate Division noted that "OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers." Id. The Court stated that:

[OPRA] also contemplates the GRC's *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the 'Open Public Meetings Act,' N.J.S.A. 10:4-6 to -21, it also provides that the GRC 'may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.' N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

[Id. at 355.]

Further, the Court found that:

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC's obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

[Id.]

¹² Paff v. NJ Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

Here, the Custodian certified that she denied access to an April 20, 2021 e-mail from Leslie Parikh, Esq. to Councilwoman LouAnn Cox, and a June 2, 2021 e-mail with attached letter from Matt Lyons, Esq. of Gebhardt & Kiefer to Councilwoman LouAnn Cox, because they are exempt from access as attorney-client privileged communications. In view of the Custodian's burden to prove a lawful denial of access, the GRC must conduct a "meaningful review of the basis for an agency's decision to withhold government records." Paff, 379 N.J. Super. 346, 354.

Accordingly, the GRC must conduct an *in camera* review of: (1) the April 20, 2021 e-mail from Leslie Parikh, Esq. to Councilwoman LouAnn Cox; and (2) the June 2, 2021 e-mail and attached letter from Matt Lyons, Esq. of Gebhardt & Kiefer to Councilwoman LouAnn Cox, to validate the Custodian's contention that these records are attorney-client privileged and therefore exempt from access under OPRA. N.J.S.A. 47:1A-1.1; Paff, 379 N.J. Super. 346.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to immediately respond in writing to the Complainant's request item number 8 for immediate access records; namely "agreements," either granting access, denying access, seeking clarification or requesting an extension of time violates 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); Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007) (holding that the custodian was obligated to notify the complainant immediately as to the status of "immediate access" records); Harris v. N.J. Dep't of Corr., GRC Complaint No. 2011-65 (August 2012). Moreover, the Custodian failed to provide an explanation that would reasonably justify a delay in access to the requested records.
2. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the extended time frame results in a "deemed" denial of said 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). See also Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
3. The Custodian did not unlawfully deny access to request item numbers 1, 2, 5 (except for the OPRA request), 6 and 7 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. The Custodian did not unlawfully deny the Complainant access to the Complainant's request item number 5 (OPRA request) because the Complainant provided proof in his Denial of Access Complaint that a copy of said request was in his possession at the time he filed the request. Therefore, the Complainant could not have been denied access to the requested record because he already had it in his possession at the time of the request. See Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008).
5. The Complainant's request item numbers 8 and 10 are invalid because they do not seek specifically identifiable records and would require the Custodian to conduct research by searching through all of the Borough's files to compile any records that might be responsive to the request. 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); Lagerkvist v. Office of the Governor, 443 N.J. Super. 230 (App. Div. 2015). Thus, the Custodian lawfully denied the request items. N.J.S.A. 47:1A-6.
6. Notwithstanding the Custodian's "deemed" denial, the Custodian did not deny access to request item numbers 3, 4, 9, 11 and 12, with the exception of the aforementioned April 20, 2021 e-mail and June 2, 2021 e-mail with attached letter. N.J.S.A. 47:1A-6. Specifically, the Custodian certified that said records with noted exception were disclosed to the Complainant on February 7, 2022, and the Complainant provided no competent, credible evidence to refute the Custodian's certification. See Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010).
7. The GRC must conduct an *in camera* review of: (1) the April 20, 2021 e-mail from Leslie Parikh, Esq. to Councilwoman LouAnn Cox; and (2) the June 2, 2021 e-mail and attached letter from Matt Lyons, Esq. of Gebhardt & Kiefer to Councilwoman LouAnn Cox, to validate the Custodian's contention that these records are attorney-client privileged and therefore exempt from access under OPRA. N.J.S.A. 47:1A-1.1; Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
8. **The Custodian must deliver¹³ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion number 7 above), a document or redaction index¹⁴, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,¹⁵ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must**

¹³ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

¹⁴ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

¹⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

be received by the GRC within ten (10) business days from receipt of the Council's Interim Order.

9. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: John E. Stewart

April 23, 2024