



## State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS  
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TRENTON, NJ 08625-0819

PHILIP D. MURPHY  
Governor

TAHESHA L. WAY  
Lieutenant Governor

JACQUELYN A. SUÁREZ  
Acting Commissioner

### FINAL DECISION

#### March 26, 2024 Government Records Council Meeting

James Boland  
Complainant

Complaint No. 2022-397

v.

Township of Pemberton (Burlington)  
Custodian of Record

At the March 26, 2024 public meeting, the Government Records Council (“Council”) considered the March 19, 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 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 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).
2. 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). Further, the Custodian may have unlawfully denied access to responsive e-mailed announcements due to the narrowly construed search based her misinterpretation that the OPRA request only sought e-mails related to the “boil water advisory.” N.J.S.A. 47:1A-6. Thus, the Custodian shall perform a new search to identify any additional records not previously located and either disclose them to Complainant, 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 June 27, 2022 “Water Carnival” e-mail 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).
3. **The Custodian shall comply with conclusion No. 2 above within twenty (20) 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 26<sup>th</sup> Day of March 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: April 1, 2024**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
March 26, 2024 Council Meeting**

**James Boland<sup>1</sup>  
Complainant**

**GRC Complaint No. 2022-397**

v.

**Township of Pemberton (Burlington)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of e-mails from any Township of Pemberton (“Township”) e-mail account ending in “@pemberton-twp.com” containing “public announcements” regarding “water in regard[] to any recreational activity, events at lakes, bathing and/consumption . . .” between June 23, 2022 and June 29, 2022 (during which a “Boil Water Advisory” was issued and lifted).

**Custodian of Record:** Amy P. Cosnoski  
**Request Received by Custodian:** July 18, 2022  
**Response Made by Custodian:** July 28, 2022  
**GRC Complaint Received:** August 9, 2022

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

**Request and Response:**

On July 15, 2022 at 5:04 p.m., the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 28, 2022, the Complainant e-mailed the Township seeking a status update on the subject OPRA request. Shortly thereafter, on the eighth (8<sup>th</sup>) business day after receipt of the OPRA request, Deputy Clerk Sunshine Dashiell responded in writing on behalf of the Custodian stating that no responsive records exist.

**Denial of Access Complaint:**

On August 9, 2022, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant first asserted that the Township violated

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

<sup>2</sup> Represented by Andrew Bayer, Esq., of Pashman, Stein, Walder, Hayden, P.C. (Holmdel, NJ).

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

OPRA by not timely responding to his OPRA request. The Complainant argued that Ms. Dashiell's response was the eighth (8<sup>th</sup>) business day after he submitted the subject OPRA request.

The Complainant next argued that the Township's denial was unlawful because records responsive to his request did exist. The Complainant asserted that he was told by other residents that "announcements" were sent out. The Complainant further noted that he received in his "Spam" folder an e-mail about a "Water Carnival" from "[recreation@pemberton-twp.com](mailto:recreation@pemberton-twp.com)" on June 27, 2022, which he attached to his complaint. The Complainant contended that the e-mail was responsive to the subject OPRA request because it came from a Township address, "mentions water," and was sent between the dates identified in his OPRA request. The Complainant asserted that it was his understanding that this e-mail was not the only one sent between June 23, and 29, 2022.

#### Statement of Information:

On August 19, 2022, the Custodian filed a Statement of Information ("SOI").<sup>4</sup> The Custodian certified that she received the Complainant's OPRA request on July 18, 2022. The Custodian affirmed that Ms. Dashiell forwarded the request to the Township Administrator on July 19, 2022, who directed her to send same to Public Works. The Custodian certified that on July 26, 2022, Public Works advised Ms. Dashiell that no records existed. The Custodian certified that Ms. Dashiell subsequently responded in writing on her behalf on July 28, 2022 stating that no records existed.

The Custodian first disputed that the Township's response was untimely. The Custodian affirmed that the Township's office hours are 8:00 a.m. to 4:30 p.m. The Custodian affirmed that the Complainant submitted his OPRA request on a Friday after 5:00 p.m.; thus, the Township did not receive it until July 18, 2022. The Custodian averred that while Ms. Dashiell was not in the office on July 18, 2022, she returned on July 19, 2022 and began processing the OPRA request. The Custodian certified that Ms. Dashiell responded on July 28, 2022 stating that no responsive records existed.

The Custodian next contended that notwithstanding the inclusion of the vague term of "public announcement," the Township made a sufficient attempt to locate responsive records. The Custodian noted that the Township interpreted "announcement" to mean any e-mails sent to residents during the "Boil Water Advisory," which was in effect from June 24, 2022 through June 28, 2022. The Custodian asserted that her office, in discussion with the Administrator, determined that the request should be sent to Public Works, who issued the advisory. The Custodian averred that Public Works responded stating that no notices regarding the advisory were sent via e-mail but were sent through the Nixle<sup>5</sup> system.

The Custodian noted that the Complainant is an active community member who has submitted 61 OPRA requests to the Township since 2017. The Custodian asserted that the

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<sup>4</sup> The Custodian included in the SOI a signed certification page from Ms. Dashiell.

<sup>5</sup> The Nixle Mass Notification system, owned and operated by Everbridge Nixle, enables client organizations to send important notifications to subscribers through text, e-mail, voicemail, and other methods. <https://www.everbridge.com/products/mass-notification-and-incident-communications/>.

Township has denied only one (1) of those OPRA requests as invalid and has fully complied with all others. The Custodian contended that following the denial here, the Complainant never contacted the Township disputing the response or stating that he was in possession of an e-mail he believed was responsive to the OPRA request. The Custodian argued that instead of giving the Township a chance to resolve the issue, he filed the instant complaint.

## 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 N.J.S.A. 47:1A-5(g).<sup>6</sup> 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).

Here, the Complainant submitted his OPRA request to Township at 5:04 p.m., after business hours, on Friday, July 15, 2022. Ms. Dashiell responded in writing on behalf of the Custodian on July 28, 2022. In the Denial of Access Complaint, the Complainant argued that the Custodian failed to timely respond until the eighth (8<sup>th</sup>) business day after he submitted his OPRA request. In the SOI, the Custodian certified that she received the subject OPRA request on July 18, 2022 and Ms. Dashiell responded in writing on her behalf July 28, 2022. The Custodian further averred that the Township's office hours were 8:00 a.m. to 4:30 p.m. and that Ms. Dashiell was not in the office on July 18, 2022.

Upon review, the evidence of record supports that the Custodian, through Ms. Dashiell, did not timely respond to the Complainant's OPRA request. The Complainant submitted his OPRA request after business hours on July 15, 2022 and the Custodian received same on July 18, 2022, as certified in the SOI. However, the Custodian appears to dispute the timeliness allegation in the SOI by arguing that Ms. Dashiell was not at work on July 18, 2022 and returned to work on July 19, 2022. However, Ms. Dashiell's absence does not impact the calculation: the response time frame began after Custodian received the OPRA request on July 18, 2022 and not upon Ms. Dashiell's return to work on July 19, 2022. Thus, Ms. Dashiell's response fell on the eighth (8<sup>th</sup>) business day and a "deemed" denial of access occurred.

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 statutorily mandated seven (7) business

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<sup>6</sup> 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.

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, GRC 2007-11.

### **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. See also DiFelice v. Monroe Twp. Pub. Sch. (Gloucester), GRC Complaint No. 2017-233 (Interim Order dated August 27, 2019); Grana v. Sparta Twp. Sch. Dist. (Sussex), GRC Complaint No. 2021-298 (April 2023).

Here, the Complainant's OPRA request sought "public announcements . . . via e-mail" from any e-mail account with the suffix "@pembeton-twp.com" over a seven (7) calendar day period "in which the announcement mentions or refers to water in regard to any recreational activity, events at lakes, bathing and/or consumption (drinking water) . . ." Thus, and contrary to the Custodian's assertion that the request was vague because "public announcements" was not defined, the OPRA request satisfies the Elcavage criteria to be considered valid under OPRA. After receiving Ms. Dashiell's response that no records existed, the Complainant filed this Denial of Access Complaint arguing that he believed additional records existed. The Complainant noted that other residence told him about e-mails they received, and he received in his "Spam" folder an e-mail about a "Water Carnival" from "recreation@pemberton-twp.com" on June 27, 2022.

In the SOI, the Custodian argued that the Township conducted a search based on their interpretation that the OPRA request sought e-mails regarding a "boil water advisory" in effect from June 24, 2022 through June 28, 2022. The Custodian further asserted that Ms. Dashiell forwarding the request to Public Works was driven by that interpretation. The Custodian then asserted that the Complainant filed the instant complaint rather than contacting the Township with evidence that records may have existed.

Upon review, the GRC finds that the Custodian did not conduct a sufficient search to locate all potentially responsive e-mails. This insufficient search is primarily based on the Custodian's misinterpretation of the subject OPRA request. The Complainant sought e-mailed announcements from any e-mail account with the "@pembeton-twp.com" that "mentions or refers to water. . ." The Complainant added some examples that included "consumption (drinking water)" but also recreational activities, events at lakes, and bathing. It is readily apparent from a plain reading of the subject OPRA request that the Complainant sought those e-mailed announcements from the entirety of the Township addressing any type of water-related activities, and not just Public Works announcements about the "boil water advisory." Thus, the Custodian's determination that the Complainant's OPRA request was only limited to the forgoing, which occurred in a limited portion of the time frame identified in the OPRA request, is erroneous. Further, the evidence of record supports that at least some e-mailed announcements to the public may have existed. That is, the Complainant identified an e-mail he received in his "SPAM" folder that fits the criteria set forth in his OPRA request. Based on all the forgoing, evidence of record supports that the Custodian failed to initiate a reasonable search, as described in Verry, GRC 2013-43, *et seq.*

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.* Further, the

Custodian may have unlawfully denied access to responsive e-mailed announcements due to the narrowly construed search based her misinterpretation that the OPRA request only sought e-mails related to the “boil water advisory.” N.J.S.A. 47:1A-6. Thus, the Custodian shall perform a new search to identify any additional records not previously located and either disclose them to Complainant, 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 June 27, 2022 “Water Carnival” e-mail 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).

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. 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 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).
2. 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). Further, the Custodian may have unlawfully denied access to responsive e-mailed announcements due to the narrowly construed search based her misinterpretation that the OPRA request only sought e-mails related to the “boil water advisory.” N.J.S.A. 47:1A-6. Thus, the Custodian shall perform a new search to identify any additional records not previously located and either disclose them to Complainant, 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 June 27, 2022 “Water Carnival” e-mail 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).
3. **The Custodian shall comply with conclusion No. 2 above within twenty (20) 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

March 19, 2024