



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

May 26, 2015 Government Records Council Meeting

Kevin R. Lare
Complainant

Complaint No. 2014-225

v.

Township of Lower (Cape May)
Custodian of Record

At the May 26, 2015 public meeting, the Government Records Council (“Council”) considered the May 19, 2015 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. While the Complainant’s OPRA request on its face was overly broad and unclear because it failed to state a subject matter and used a vague term requesting “all correspondence/interactions” between the parties, the Custodian was able to locate responsive e-mails at the time of the Complainant’s request. She initially advised the Complainant that the requested records were exempt as “interagency or intra-agency advisory, consultative or deliberative material.” However, no foundation for such an argument was proffered to the GRC. Thus, notwithstanding the facially overbroad nature of the request, the Custodian attached records to the SOI that were or may have been responsive to the Complainant’s request and therefore failed to bear her burden in proving a lawful denial of access to those records. N.J.S.A. 47:1A-6. See Bond v. Borough of Washington (Warren), GRC Complaint No. 2009-324 (Interim Order dated March 29, 2011); Verry v. Borough of S. Bound Brook (Somerset), GRC Complaint No. 2010-302 (Interim Order dated January 31, 2012). However, she also certified there were no other responsive records. There was no evidence refuting that certification. See Pusterhofer v NJ Dep’t. of Educ., GRC Complaint No. 2005-49 (July 2005). As the two responsive emails were provided to the Complainant with the SOI, the GRC need not order any further action.
2. Although the Custodian unlawfully denied access to the March 7, 2014, and May 13, 2014, e-mails to the Complainant, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was deliberate or intentional. Rather, the evidence demonstrates the Custodian made a good faith effort to comply with an overly broad request. Moreover, she provided the Complainant with copies of the two responsive emails attached to her Statement of Information on June 26, 2014. Accordingly, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA under the totality of the circumstances.



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 26th Day of May, 2015

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 28, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 26, 2015 Council Meeting**

Kevin R. Lare¹
Complainant

GRC Complaint No. 2014-225

v.

Township of Lower (Cape May)²
Custodial Agency

Records Relevant to Complaint: Electronic copies via e-mail of “All correspondence/interaction including any emails [in the past 12 months] between...”

1. Recreation Director Mitch Plenn (“Director”) and any member of L.T. Football Boosters (the “Boosters”);
2. The Director and Township Manager Mike Voll, (“Manager”);
3. The Director and any state agency.

Custodian of Record: Julie Picard
Request Received by Custodian: May 20, 2014
Response Made by Custodian: May 27, 2014
GRC Complaint Received: June 5, 2014

Background³

Request and Response:

On May 20, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-described records.⁴ On May 27, 2014, the Custodian responded in writing to deny the request, stating that OPRA excludes “inter-agency or intra-agency advisory, consultative or deliberative material,” *citing* N.J.S.A. 47:1A-1.1 and that this exemption “would appear to apply to internal emails that meet the above criteria.” On that same day, the Complainant, in what he termed an amended request, stated his “disagreement” with the Custodian’s response and again requested the same documents. On June 5, 2014, the Custodian wrote to the Complainant and added to her response that there were no e-mails between “Mitch and the Boosters” that she was aware of.

¹ No legal representation listed on record.

² Represented by Ronald J. Gelzunas, Esq. (Wildwood Crest, 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.

⁴ The Complainant requested other documents which are not the subject matter of the Complaint.

Denial of Access Complaint:

On June 5, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the on May 27, 2014, the Custodian denied his request on the basis that the records were “exempt.” Further, the Complainant asserted that on June 5, 2014, the Custodian changed the reason for the denial of the correspondence between the Director and the Boosters, stating there were no such records that she “was aware of.” The Complainant emphasized that his request sought all correspondence during the past twelve (12) months between the parties specified, regardless of the subject matter.

Statement of Information:

On June 26, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that, on May 21, 2014, she asked the Director whether he had made any e-mail communications with any state agency “regarding the Athletic field or the press box.” She certified that the Director replied that he did not have any e-mails. Further, the Custodian certified that she inquired of the Director if he had any e-mails between himself and the football Boosters concerning said field and box. The Custodian stated that the Director provided her with an e-mail dated March 7, 2014, containing security codes which she deemed confidential information. Thus, she did not provide the March 7, 2014, e-mail to the Complainant. The Custodian added that when she received the e-mail she was unaware that Ms. Connelly was affiliated with the Boosters and did not believe the e-mail was pertinent.⁵

The Custodian also stated that she was aware of only one other e-mail dated May 13, 2014, between the Director and the Manager concerning the press box and the Athletic field. She stated that this e-mail was not provided to the Complainant because it was “apparent that he [the Complainant] already had a copy of the email.”

The Custodian attached a copy of the aforementioned responsive e-mails to the SOI. The Custodian also certified that there were no other e-mails between the Director and the Manager pertaining to the press box or Athletic field. Therefore, the Custodian argued, that although she initially invoked the “interagency or intra-agency advisory, consultative or deliberative material” exemption as a basis for her original denial of the records, the Township need not invoke the exemption because there are no responsive records other than the two e-mails now disclosed.

Additional Submissions

On April 23, 2015, the GRC submitted a request to the Custodian for additional information. The GRC asked the Custodian to clarify her statement that it was “apparent” that the May 13, 2014, e-mail between the Manager and Director, discussing the press box and

⁵ As noted in her certification, the Custodian’s impression of what was pertinent to the request was formed by a series of emails sent to and from the Complainant and her between April 29, 2014, to June 5, 2014, which consisted of informal requests for various documents seeking information or explanations pertaining to the Athletic Field; a lease between the NJ Dept. of Environmental Protection and the Division of Fish and Wildlife; and a press box located at the field. All of her inquiries to determine if there were responsive records to the ORPA request of May 27, 2014, were, according to the SOI, limited to records pertaining to this subject matter.

Athletic field, had been received by the Complainant prior to the filing of his OPRA request. On April 28, 2015, the Custodian replied that she believed that the Complainant already had a copy of the May 13, 2014, 8:37 A.M. e-mail from the Manager to the Director, because a second e-mail transmitted that day at 8:59 A.M. from the Manager to the Complainant referenced the 8:37 A.M. e-mail. In addition, she stated that the Complainant had responded to the Manager by e-mail on May, 13, 2014, at 4:45 P.M. in which he commented on the content of the 8:37 A.M. e-mail. The Custodian attached copies of the aforesaid e-mails to her certification.

On May 8, 2015, the GRC inquired of the Complainant whether he received a copy of the Custodian's June 26, 2014, SOI, and if so, if it included copies of the March 7, 2014, e-mail between the Director and Liz Connelly and the May 13, 2014, e-mail transmitted at 8:37 A.M. from the Manager to the Director.

Analysis

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

The New Jersey Appellate Division has held that "[w]hile 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." (Emphasis added.) MAG Entm't LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). As the court noted in invalidating MAG's request under OPRA:

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 v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005);⁶ NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

The GRC established criteria deemed necessary under OPRA to specifically request an email communication in Elcavage v. W. 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 email, (2) the specific date or range of dates during which the email(s) were transmitted, and (3) the identity of the sender and/or the recipient thereof. *See* Elcavage, GRC 2009-07; 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). The GRC notes that the Council has routinely determined that requests omitting the specific date or range of dates are invalid. *See* Tracey-Coll v. Elmwood Park Bd. of Educ. (Bergen), GRC Complaint No. 2009-206 (June 2010); Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2013-118 (January 2014).

Additionally, in Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012), the Court held that the defendant "performed a search and was able to locate records responsive . . ." which ". . . belied any assertion that the request was lacking in specificity or was overbroad." Id. at 177. *See also* Gannett v. Cnty. of Middlesex, 379 N.J. Super. 205 (App. Div. 2005) (holding that "[s]uch a voluntary disclosure of most of the documents sought . . . constituted a waiver of whatever right the County may have had to deny Gannett's entire OPRA request on the ground that it was improper." Id. at 213).

Generally, in situations where a request was overly broad on its face but the custodian was able to locate records, the Council has followed Burke in determining that the request contained sufficient information for record identification. *See* Bond v. Borough of Washington (Warren), GRC Complaint No. 2009-324 (Interim Order dated March 29, 2011); Verry v. Borough of S. Bound Brook (Somerset), GRC Complaint No. 2010-302 (Interim Order dated January 31, 2012). In Bond, the complainant requested "all proposals submitted for the position

⁶ Affirming Bent v. Stafford Police Dep't, GRC Case No. 2004-78 (October 2004).

of ...solicitor". The custodian responded that there were three records responsive but access was denied. In Verry, the Complainant made a broad request for "all correspondence" in several itemized categories which constituted, on its face, an invalid "open-ended search." However, the GRC found the evidence of record indicated the Borough was "clearly able to identify the records sought."

Here, the Custodian was able to locate responsive documents, to wit: the March 7, 2014, and May 13, 2014, e-mails. The Custodian certified that she did not disclose the March 7, 2014, e-mail between the Director and Liz Connelly because it contained security information and she failed to see how it was pertinent. In addition, she stated that at the time she received the Complainant's request she was unaware that Ms. Connelly belonged to the Boosters. Further, the Custodian certified that she did not provide the May 13, 2014, e-mail to the Complainant because it appeared to her that the Manager had copied the Complainant on the e-mail. The GRC, however, has held even though a document was previously provided to the Complainant a custodian must disclose another copy when requested under OPRA. See Leak v. Union Cnty. Prosecutor's Office, GRC Complaint No. 2007-148 (June 2009). Citing Vessio v. Twp. of Manchester GRC Complaint No. 2006-130 (April 2008).

On June 26, 2014, the Custodian produced the March 7, 2014 and May 13, 2014 e-mails to the Complainant with her SOI. She also certified in the SOI that there were no other records responsive to the Complainant's request. The Complainant put forth no evidence refuting this certification. See Pusterhofer v. NJ Dept. of Educ., GRC Complaint No. 2005-49 (July 2005).

While the Complainant's OPRA request on its face was overly broad and unclear, because it failed to state a subject matter and used a vague term requesting "all correspondence/interactions" between the parties, the Custodian was able locate two responsive e-mails at the time of the Complainant's request. She initially advised the Complainant that the requested records were exempt as "interagency or intra-agency advisory, consultative or deliberative material." However, no foundation for such an argument was proffered to the GRC. Thus, notwithstanding the facially overbroad nature of the request, the Custodian attached records to the SOI that were or may have been responsive to the Complainant's request, and therefore failed to bear her burden in proving a lawful denial of access to those records. N.J.S.A. 47:1A-6. See Bond, 2009-324 (Interim Order dated March 29, 2011); Verry, GRC Complaint No. 2010-302 (Interim Order dated January 31, 2012). However, she also certified there were no other responsive records. There was no evidence refuting that certification. See Pusterhofer, (July 2005). As the two responsive emails were provided to the Complainant with the SOI, the GRC need not order any further action.

Knowing & Willful

OPRA states that "[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty[.]" N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states "[i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully

violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA.]” N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Id.; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Although the Custodian unlawfully denied access to the March 7, 2014, and May 13, 2014, e-mails to the Complainant, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was deliberate or intentional. Rather, the evidence demonstrates the Custodian made a good faith effort to comply with an overly broad request. Moreover, she provided the Complainant with copies of the two responsive emails attached to her SOI on June 26, 2014. Accordingly, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. While the Complainant’s OPRA request on its face was overly broad and unclear because it failed to state a subject matter and used a vague term requesting “all correspondence/interactions” between the parties, the Custodian was able to locate responsive e-mails at the time of the Complainant’s request. She initially advised the Complainant that the requested records were exempt as “interagency or intra-agency advisory, consultative or deliberative material.” However, no foundation for such an argument was proffered to the GRC. Thus, notwithstanding the facially overbroad nature of the request, the Custodian attached records to the SOI that were or may have been responsive to the Complainant’s request and therefore failed to bear her burden in proving a lawful denial of access to those records. N.J.S.A. 47:1A-6. See Bond v. Borough of Washington (Warren), GRC Complaint No. 2009-324 (Interim Order dated March 29, 2011); Verry v. Borough of S. Bound Brook (Somerset), GRC Complaint No. 2010-302 (Interim Order dated January 31, 2012). However, she also certified there were no other responsive records. There was no evidence refuting that certification. See Pusterhofer v NJ Dep’t. of Educ., GRC Complaint No. 2005-49

(July 2005). As the two responsive emails were provided to the Complainant with the SOI, the GRC need not order any further action.

2. Although the Custodian unlawfully denied access to the March 7, 2014, and May 13, 2014, e-mails to the Complainant, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was deliberate or intentional. Rather, the evidence demonstrates the Custodian made a good faith effort to comply with an overly broad request. Moreover, she provided the Complainant with copies of the two responsive emails attached to her Statement of Information on June 26, 2014. Accordingly, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA under the totality of the circumstances.

Prepared By: Ernest Bongiovanni
Staff Attorney

Approved By: Dawn R. SanFilippo
Deputy Executive Director

Dated: May 19, 2015