



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

**FINAL DECISION**

**January 28, 2014 Government Records Council Meeting**

Larry Kohn  
Complainant

Complaint No. 2013-118

v.

Township of Livingston (Essex)  
Custodian of Record

At the January 28, 2014 public meeting, the Government Records Council (“Council”) considered the January 21, 2014 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 his burden of proof that he 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. Rockaway Twp., GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Notwithstanding the Custodian’s “deemed denial,” he responded to the Complainant’s OPRA request though his SOI by stating that there were no responsive documents for Item No. 1. Because there is no credible evidence in the record to refute the Custodian’s certification, the Custodian lawfully denied access to said records pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. Notwithstanding the Custodian’s “deemed denial,” he responded to the Complainant’s OPRA request though his SOI on May 13, 2013, and produced records responsive to requested Item Nos. 2 and 4. Because there is no credible evidence in the record to refute the Custodian’s certification, it is unnecessary for the Council to order disclosure of the responsive documents.
4. Notwithstanding the Custodian’s “deemed denial,” the Custodian did not unlawfully deny access to records for requested Item No. 3, because the Complainant’s OPRA



request is overly broad and invalid. *See* MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005), Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010), Armenti v. Robbinsville BOE (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011).

5. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian ultimately responded to the Complainant's OPRA request on May 13, 2013. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access 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 28<sup>th</sup> Day of January, 2014

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: January 30, 2014**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
January 28, 2014 Council Meeting**

**Larry Kohn<sup>1</sup>  
Complainant**

**GRC Complaint No. 2013-118**

v.

**Township of Livingston (Essex)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** copies of:

1. Correspondence Referenced by Township Attorney at Regular Council Meeting 4/8/13. Communication from CFO that sufficient funds were available to finance Libr litigation settlement figure – resolution of 11/26/12.
2. Resolution Referenced by Township Attorney at Regular Council meeting 4/8/13 approving specifics of a Merit Increase Program for Township Employees.
3. Correspondence from Township Manager Advising Mayor & Council of change in rate regarding disposal of contaminated soil – Municipal/Police Building Construction project.
4. Personnel Manual.

**Custodian of Record:** Glenn R. Turtletaub

**Request Received by Custodian:** April 10, 2013

**Response Made by Custodian:** May 13, 2013

**GRC Complaint Received:** April 24, 2013

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

**Request and Response:**

On April 10, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On May 13, 2013, twenty-three (23) business days later, the Custodian responded in writing to the Complainant’s request as follows:

1. The Township Attorney has advised that there are no written documents responsive to your request. The communication was verbal.

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

<sup>2</sup> Represented by Sharon L. Weiner of Murphy, McKeon, PC (Riverdale, NJ) (“Township Attorney”).

<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.

2. The Township Attorney has advised that Resolution R-86-89 for the Employee Performance Evaluation System is responsive to your request, and consists of one page and is attached in the file R86-89.pdf.
3. This request requires research, which the Custodian is not required to do so under the Open Public Records Act. Please clarify which document you seek and specify the time period that document may have been written.
4. The Employee Handbook is attached in the file EE HANDBOOK – FINAL – 10-16-09.pdf consisting of 69 pages.

#### Denial of Access Complaint:

On April 24, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that he submitted the OPRA request on April 9, 2013,<sup>4</sup> and has not received a response from the Custodian.

#### Statement of Information:

On May 13, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that upon receipt of the OPRA request, the Custodian’s assistant contacted members of other departments as well as the Township Attorney to search for any responsive documents.

Regarding requested Item No. 1, the Township Attorney advised the Custodian that there were no responsive documents to the Complainant’s OPRA request, as the communication between the parties was verbal only. The Custodian certifies in his SOI that he produced the document “Resolution R-86-89” in response to Complainant’s OPRA request Item No. 2. As to request Item No. 3, the Custodian responded that the Complainant’s request required the Custodian to conduct research, and requested clarification from the Complainant. Regarding requested Item No. 4, the Custodian certifies that he produced responsive documents to Complainant’s OPRA request.

Finally, the Custodian certifies that the reason for the delay in response was a result of his office being short-staffed due to a number of circumstances. The Custodian does not certify whether he requested an extension of time answer within the mandatory seven (7) day period.

### 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

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<sup>4</sup> The Custodian asserts that he received the OPRA request on April 10, 2013.

N.J.S.A. 47:1A-5(g).<sup>5</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 Custodian did not provide a response until May 13, 2013, the same day he submitted his SOI. The Custodian admits the delay in his certification, and does not state whether he requested additional time to respond to the Complainant's OPRA request within the statutorily mandated seven (7) days.

Therefore, the Custodian did not bear his burden of proof that he 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, GRC 2007-11.

### **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.

### **Requested Item No. 1**

In Pusterhofer v. New Jersey Dep't of Educ., GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The custodian responded stating that there was no record of any telephone calls made to the complainant. The custodian subsequently certified that no records responsive to the complainant's request existed and the complainant did not provide any evidence to refute the custodian's certification. The GRC determined that although the custodian failed to respond to the OPRA request in a timely manner, the custodian lawfully denied access to the requested records because the custodian certified that no records responsive to the request existed.

In this case, although the Custodian's delayed response to the Complainant resulted in a "deemed denial," the Custodian ultimately responded through his SOI, stating that there were no documents responsive to requested Item No. 1, as the communications between the attorney and CFO were verbal. There is no evidence in the record to refute the Custodian's certification.

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<sup>5</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.

Thus, notwithstanding the Custodian's "deemed denial," he responded to the Complainant's OPRA request through his SOI by stating that there were no responsive documents for Item No. 1. Because there is no credible evidence in the record to refute the Custodian's certification, the Custodian lawfully denied access to said records pursuant to N.J.S.A. 47:1A-6 and Pusterhofer, GRC No. 2005-49.

Requested Item Nos. 2 and 4

In this case, although the Custodian's delayed response to the Complainant resulted in a "deemed denial," the Custodian ultimately responded through his SOI and produced documents responsive to requested Item Nos. 2 and 4. There is no evidence in the record to refute the Custodian's certification that he attached all documents responsive to Item Nos. 2 and 4, and delivered them to the Complainant.

Thus, notwithstanding the Custodian's "deemed denial," he responded to the Complainant's OPRA request through his SOI on May 13, 2013, and produced records responsive to requested Item Nos. 2 and 4. Because there is no credible evidence in the record to refute the Custodian's certification, it is unnecessary for the Council to order disclosure of the responsive documents.

Requested Item No. 3

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, 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 Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005) (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. at 549 (emphasis added). Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005);<sup>6</sup> N.J. Builders Assoc. v. N.J. 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).

Moreover, the test under MAG is whether a requested record is a specifically identifiable government record. If it is, the record is disclosable barring any exemptions to disclosure contained in OPRA. The Council established criteria deemed necessary to specifically identify an e-mail communication in Sandoval v. N.J. State Parole Bd., GRC Complaint No. 2006-167 (Interim Order March 28, 2007). In Sandoval, the complainant requested “e-mail ... between [two individuals] from April 1, 2005 through June 23, 2006 [using seventeen (17) different keywords].” The custodian denied the request, claiming that it was overly broad. The Council held that “[t]he Complainant in the complaint now before the GRC requested specific e-mails *by recipient, by date range and by content*. Based on that information, the Custodian has identified [numerous] e-mails which fit the specific recipient and date range criteria Complainant requested.” Id. at 16 (emphasis added).

In Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010), the Council examined what constitutes a valid request for e-mails under OPRA. The Council determined that:

*In accord with MAG, supra, and its progeny, in order to specifically identify an e-mail, OPRA 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 was transmitted or the e-mails were transmitted, and (3) a valid e-mail request must identify the sender and/or the recipient thereof.*

Id. at 5 (emphasis in original).

The Council has also applied the criteria set forth in Elcavage to other forms of correspondence, such as letters. See Armenti v. Robbinsville BOE (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011).

The facts in this case are controlled by the criteria set forth in Elcavage and Armenti. Here, the Complainant seeks correspondence between the Township Manager and the Mayor and Council Members regarding a construction project. While the Complainant provides the sender and recipients as well as the subject matter, the Complainant provides no specific date range. Therefore, the Complainant’s request does not meet the standard of a valid OPRA request and the Custodian could not have unlawfully denied access to records that were not properly requested in the first place. Furthermore, the Custodian requested clarification from the Complainant and has received no response.

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<sup>6</sup> Affirming Bent v. Stafford Police Dep’t, GRC Case No. 2004-78 (October 2004).

Therefore, notwithstanding the Custodian's "deemed denial," the Custodian did not unlawfully deny access to records for requested Item No. 3, because the Complainant's OPRA request is overly broad and invalid. See MAG, 375 N.J. Super. at 534, Elcavage, GRC 2009-07, and Armenti, GRC 2009-154.

### **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 violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian ultimately responded to the Complainant's OPRA request on May 13, 2013. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he 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. Rockaway Twp., GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

2. Notwithstanding the Custodian’s “deemed denial,” he responded to the Complainant’s OPRA request through his SOI by stating that there were no responsive documents for Item No. 1. Because there is no credible evidence in the record to refute the Custodian’s certification, the Custodian lawfully denied access to said records pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. Notwithstanding the Custodian’s “deemed denial,” he responded to the Complainant’s OPRA request through his SOI on May 13, 2013, and produced records responsive to requested Item Nos. 2 and 4. Because there is no credible evidence in the record to refute the Custodian’s certification, it is unnecessary for the Council to order disclosure of the responsive documents.
4. Notwithstanding the Custodian’s “deemed denial,” the Custodian did not unlawfully deny access to records for requested Item No. 3, because the Complainant’s OPRA request is overly broad and invalid. *See* MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005), Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010), Armenti v. Robbinsville BOE (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011).
5. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian ultimately responded to the Complainant’s OPRA request on May 13, 2013. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

Prepared By: Samuel A. Rosado, Esq.  
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.  
Senior Counsel

January 21, 2014