



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

September 30, 2014 Government Records Council Meeting

Lauren Potts
Complainant

Complaint No. 2013-232

v.

Ewing Township Board of Education (Mercer)
Custodian of Record

At the September 30, 2014 public meeting, the Government Records Council (“Council”) considered the September 23, 2014 Supplemental 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 complied with the Council’s July 29, 2014 Interim Order because he responded within the extended time period, producing additional responsive records and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian failed to conduct an adequate search to locate all responsive emails and correspondence prior to his initial response. It is evident by the discovery and disclosure of additional records that the Custodian failed to conduct an adequate search. *See Paff v. New Jersey Dep’t of Labor*, 392 N.J. Super. 334 (App. Div. 2007); *Schneble v. N.J. Dep’t of Env’tl. Protection*, GRC Complaint No. 2007-220 (April 2008). Moreover, the Custodian unlawfully denied access to the additional records and failed to bear the burden of proving his due diligence in searching for the requested records pursuant to N.J.S.A. 47:1A-6.
3. The Custodian performed an insufficient search to locate the requested emails and correspondence; thus he failed to bear the burden of proving his due diligence in searching for the responsive records to the Complainant’s July 8, 2012 OPRA request pursuant to N.J.S.A. 47:1A-6. However, the Custodian provided the Complainant with the additional records in compliance with the Council’s July 29, 2014 Interim Order. 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 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 30th Day of September, 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: October 3, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
September 30, 2014 Council Meeting**

**Lauren Potts¹
Complainant**

GRC Complaint No. 2013-232

v.

**Ewing Township Board of Education (Mercer)²
Custodial Agency**

Records Relevant to Complaint: Hard or electronic copies of:

“Any and all emails, correspondence or documents pertaining to my son [RP] that have to do with Mr. Ray and Algebra II from the period of April 15, 2013 through today’s date [July 8, 2013]. This is to include any and all email [sic] sent to me, from me, or in regards to my son to any and all email addresses that I have; Laurenpotts@verizon.net, Lpotts@ogy-grmurray.com, Laurenpottsgrm@gmail.com. all [sic] emails to and from Lisa Roth, Betty Jo Price, and Dr. Logan and Don Wahlers regarding my son.”

Custodian of Record: Dennis J. Nettleton³

Request Received by Custodian: July 8, 2013

Response Made by Custodian: July 10, 2013; July 24, 2013; July 29, 2013

GRC Complaint Received: August 12, 2013

Background

July 29, 2014 Council Meeting:

At its July 29, 2014 public meeting, the Council considered the July 22, 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, found that:

1. The Custodian’s July 10, 2013 e-mail to the Complainant is an insufficient response pursuant to N.J.S.A. 47:1A-5(i), and Hardwick v. N.J. Dep’t of Transportation, GRC Complaint No. 2007-164 (February 2008). Moreover, 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

¹ No legal representation listed on record.

² Represented by Marc H. Zitomer, Esq., Schenk, Price, Smith, & King, LLP (Florham Park, NJ).

³ At the time of the OPRA request and the Council’s July 29, 2013 public meeting, Brian Falkowski was the Custodian of Record.

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. Since the Custodian did not respond to the GRC’s request for additional information, it remains unclear whether there are additional responsive e-mails or correspondence to the Complainant’s request. Furthermore, if there are such documents, it is unknown whether they are exempt from disclosure as advisory, consultative, or deliberative material, or student records. It is thus unknown whether the Custodian has unlawfully denied access to the Complainant’s OPRA request. Therefore, Custodian shall submit a certification as to whether he possesses responsive e-mails or correspondence, in addition to those already disclosed on July 24, 2013. If the Custodian possesses such records, they must be produced to the Complainant.
3. Notwithstanding the Custodian’s “deemed” denial, he has met his burden of proving he did not unlawfully deny access to the Complainant’s request seeking “any and all . . . documents” regarding her son and his teacher. A request for “documents” is invalid as overly broad, and fails to identify a specific government record. Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 549 (App. Div. 2005).
4. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁴ to the Executive Director.⁵**
5. 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.

Procedural History:

On July 30, 2014, the Council distributed its Interim Order to all parties. On August 4, 2014, the Custodian sought a thirty-day (30) extension of time to respond to the Council’s Interim Order. The Government Records Council (“GRC”) granted the Custodian a two (2) week extension of time to respond.

⁴ "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."

⁵ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

On August 19, 2014, the Custodian responded to the Council's Interim Order. The Custodian certified that he conducted an additional search for emails using multiple variances of the Complainant's son's name as a keyword. The Custodian certified that he located additional responsive emails and delivered them to the Complainant. Further, the Custodian certified that he redacted the names of students contained within ten (10) responsive emails, and provided a redaction index.

Analysis

Compliance

At its July 29, 2014 meeting, the Council ordered the Custodian to certify whether he possessed any responsive emails in addition to those already disclosed to the Complainant. The Council also ordered the Custodian to provide a document index for any discovered records that were redacted prior to disclosure. The Council further required that the Custodian submit certified confirmation of compliance, in accordance with R. 1:4-4, to the Executive Director. On July 30, 2014, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on August 6, 2014.

On August 4, 2014, the third (3rd) business day after receipt of the Council's Order, the Custodian requested a thirty (30) day extension of time to submit compliance to the Council. On August 5, 2014, the GRC granted the Custodian a two (2) week extension, moving the due date to the end of business on August 20, 2014. On August 19, 2014, the Custodian submitted certified confirmation of compliance with the Council's Order.

Therefore, the Custodian complied with the Council's July 29, 2014 Interim Order because he responded within the extended time period, produced additional responsive records and simultaneously provided certified confirmation of compliance to the Executive Director.

Insufficient Search

The Council has maintained that it is among a custodian's duties 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 Paff v. New Jersey Dep't of Labor, 392 N.J. Super. 334 (App. Div. 2007), the Department of Labor ("DOL") located an additional record responsive to the claimant's June 21, 2003 OPRA request after the GRC requested that DOL conduct one final inspection of its records. The court subsequently ordered agencies "to which the request is made . . . to produce sworn statements . . . setting forth in detail . . . the search undertaken to satisfy the request[.]" Id. at 341.

In Schneble v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008), the custodian initially responded to the complainant's OPRA request stating that no responsive records existed. However, the complainant submitted responsive emails within her Denial of Access Complaint. Upon receiving the Denial of Access Complaint, the custodian certified that he conducted another search of the agency's files and located responsive records to the complainant's request. The GRC held that because the custodian performed an inadequate

initial search, the custodian unlawfully denied the complainant access to the requested records. *See also* Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (January 2011).

Unlike Schneble, here the Custodian's initial search located responsive records to the Complainant's request. GRC No. 2007-220. However, the Custodian did not conduct a second search upon receipt of the Denial of Access Complaint. Because the Custodian failed to respond to the GRC's request for additional information, the Council's July 29, 2014 Order required the Custodian to certify whether he possessed any additional responsive records. *See* Paff, 392 N.J. Super. at 338. The Custodian, prompted by receipt of the Order, initiated a second search, which resulted in the disclosure of additional records.

The Custodian failed to conduct an adequate search to locate all responsive emails and correspondence prior to his initial response. It is evident by the discovery and disclosure of additional records that the Custodian failed to conduct an adequate search. *See* Paff, 392 N.J. Super. at 338; Schneble, GRC No. 2007-220. Therefore, the Custodian unlawfully denied access to the additional records and failed to bear the burden of proving his due diligence in searching for the requested records pursuant to N.J.S.A. 47:1A-6.

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)).

The Custodian performed an insufficient search to locate the requested emails and correspondence; thus he failed to bear the burden of proving his due diligence in searching for the responsive records to the Complainant's July 8, 2012 OPRA request pursuant to N.J.S.A. 47:1A-6. However, the Custodian provided the Complainant with the additional records in compliance with the Council's July 29, 2014 Interim Order. 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 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 complied with the Council's July 29, 2014 Interim Order because he responded within the extended time period, producing additional responsive records and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian failed to conduct an adequate search to locate all responsive emails and correspondence prior to his initial response. It is evident by the discovery and disclosure of additional records that the Custodian failed to conduct an adequate search. *See Paff v. New Jersey Dep't of Labor*, 392 N.J. Super. 334 (App. Div. 2007); *Schneble v. N.J. Dep't of Env'tl. Protection*, GRC Complaint No. 2007-220 (April 2008). Moreover, the Custodian unlawfully denied access to the additional records and failed to bear the burden of proving his due diligence in searching for the requested records pursuant to N.J.S.A. 47:1A-6.
3. The Custodian performed an insufficient search to locate the requested emails and correspondence; thus he failed to bear the burden of proving his due diligence in searching for the responsive records to the Complainant's July 8, 2012 OPRA request pursuant to N.J.S.A. 47:1A-6. However, the Custodian provided the Complainant with the additional records in compliance with the Council's July 29, 2014 Interim Order. 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 unreasonable denial of access under the totality of the circumstances.

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

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

September 23, 2014



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
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RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

July 29, 2014 Government Records Council Meeting

Lauren Potts
Complainant

Complaint No. 2013-232

v.

Ewing Township Board of Education (Mercer)
Custodian of Record

At the July 29, 2014 public meeting, the Government Records Council (“Council”) considered the July 22, 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’s July 10, 2013 e-mail to the Complainant is an insufficient response pursuant to N.J.S.A. 47:1A-5(i), and Hardwick v. N.J. Dep’t of Transportation, GRC Complaint No. 2007-164 (February 2008). Moreover, 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. Since the Custodian did not respond to the GRC’s request for additional information, it remains unclear whether there are additional responsive e-mails or correspondence to the Complainant’s request. Furthermore, if there are such documents, it is unknown whether they are exempt from disclosure as advisory, consultative, or deliberative material, or student records. It is thus unknown whether the Custodian has unlawfully denied access to the Complainant’s OPRA request. Therefore, Custodian shall submit a certification as to whether he possesses responsive e-mails or correspondence, in addition to those already disclosed on July 24, 2013. If the Custodian possesses such records, they must be produced to the Complainant.
3. Notwithstanding the Custodian’s “deemed” denial, he has met his burden of proving he did not unlawfully deny access to the Complainant’s request seeking “any and all . . . documents” regarding her son and his teacher. A request for “documents” is invalid as overly broad, and fails to identify a specific government record. Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 549 (App. Div. 2005).



4. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**
5. 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.

Interim Order Rendered by the
Government Records Council
On The 29th Day of July, 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: July 30, 2014

¹ "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."

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 29, 2014 Council Meeting**

**Lauren Potts¹
Complainant**

GRC Complaint No. 2013-232

v.

**Ewing Township Board of Education (Mercer)²
Custodial Agency**

Records Relevant to Complaint: Hard or electronic copies of:

“Any and all emails, correspondence or documents pertaining to my son Robert M. Potts that have to do with Mr. Ray and Algebra II from the period of April 15, 2013 through today’s date [July 8, 2013]. This is to include any and all email [sic] sent to me, from me, or in regards to my son to any and all email addresses that I have; Laurenpotts@verizon.net, Lpotts@ogy-grmurray.com, Laurenpottsgrm@gmail.com. all [sic] emails to and from Lisa Roth, Betty Jo Price, and Dr. Logan and Don Wahlers regarding my son.”

Custodian of Record: Brian Falkowski

Request Received by Custodian: July 8, 2013

Response Made by Custodian: July 10, 2013; July 24, 2013; July 29, 2013

GRC Complaint Received: August 12, 2013

Background³

Request and Response:

On July 10, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 10, 2013, two (2) business days later, the Custodian responded, in writing, stating that he is working on the Complainant’s request and asked whether it was okay to electronically deliver the responsive documents.

On July 22, 2013, eight (8) business days later, the Complainant sent an e-mail to the Custodian requesting a status update of her OPRA request, claiming she had not received any

¹ No legal representation listed on record.

² Represented by Schenk, Price, Smith, & King, LLP (Florham Park, 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.

correspondence since July 10, 2013. That same day, the Custodian responded via e-mail, stating that he would produce responsive documents later that day.

On July 22, 2013, the Complainant received another e-mail from Jessica DeWysockie (“Ms. DeWysockie”) of the Ewing Township Board of Education (“EBOE”). Ms. DeWysockie stated that the Custodian was out of town and had limited internet access. Ms. DeWysockie added that if the Complainant re-submitted her OPRA request, she would “work on [the OPRA request] this week for [the Complainant].” On July 22, 2013, the Complainant acquiesced and re-submitted her OPRA request via e-mail to Ms. DeWysockie.

On July 24, 2013, ten (10) business days after the Complainant first submitted her OPRA request, Ms. DeWysockie responded, via e-mail, producing responsive documents. That same day, the Complainant replied to Ms. DeWysockie via e-mail, stating that she possessed responsive e-mails that were not disclosed within the response.

On July 29, 2013, Ms. DeWysockie e-mailed the Complainant stating that she could not find any other responsive documents, and surmised that they may have been deleted. On July 30, 2013, the Complainant directly e-mailed the Custodian, stating that her OPRA request had not been fulfilled. The Complainant also restated her claim that she possessed responsive documents that were not disclosed on July 24, 2013. On August 3, 2013, the Complainant e-mailed the Custodian, stating that if she did not receive a response in five (5) business days, she would file this complaint.

Denial of Access Complaint:

On August 12, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant claimed that she possessed responsive e-mails that were not disclosed within the Custodian’s July 24, 2013 response. As a result, she alleged that the Custodian conducted an insufficient search.

Statement of Information:

On August 21, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he provided all responsive records to the Complainant. Additionally, the Custodian argued that any other responsive documents, which may or may not exist, would be exempt from disclosure under OPRA. The Custodian claimed that the Complainant’s request for e-mails amongst staff pertaining to a student and his/her development of an educational plan would be exempt from OPRA as advisory, consultative, and deliberative (“ACD”) material, and/or student records.

Additional Submissions:

On August 22, 2013, the Complainant sent an e-mail to the GRC in response to the Custodian’s SOI. The Complainant argued that the Custodian should not have limited his search for responsive e-mails by using “Robert M. Potts” as the sole iteration of her son’s name. The Complainant asserted that she never refers to her son by his full legal name, and therefore a

search conducted using only that iteration would fail to turn up responsive documents. Finally, the Complainant questioned how and why certain e-mails were deleted in violation of EBOE's retention policy.

On May 29, 2014, the GRC submitted a request to the Custodian for additional information. The GRC asked whether the Custodian possessed any additional responsive documents to the Complainant's OPRA request, and if so, whether the documents were exempt from disclosure as ACD material and/or as student records. To date, the Custodian has not responded to the GRC.

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).⁴ 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).

OPRA also provides that a custodian may have an extension of time to respond to a complainant's OPRA request, but the custodian must provide a date certain. N.J.S.A. 47:1A-5(i). OPRA further provides that should the custodian fail to provide a response on that specific date, "access shall be deemed denied." N.J.S.A. 47:1A-5(i).

In Hardwick v. N.J. Dep't of Transportation, GRC Complaint No. 2007-164 (February 2008), the custodian, seven (7) business days after receiving the complainant's request, sought an extension of time to respond to same. The custodian however, failed to provide a date certain upon which he would produce the requested records. The Council held that the custodian's response was inadequate under OPRA pursuant to N.J.S.A. 47:1A-5(i).

In the instant matter, the Custodian failed to request an extension of time to respond in his July 10, 2013 e-mail to the Complainant. The Custodian stated that he was "currently working on" the Complainant's request and that he would send "the results as quickly as [he] can." Similar to the custodian in Hardwick, the Custodian failed to provide a date certain on which he would produce the records. GRC No. 2007-167. On July 24, 2013, ten (10) business days after the Complainant submitted her OPRA request, Ms. DeWysockie, on behalf of the Custodian, produced the responsive records.

⁴ 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.

Therefore, the Custodian's July 10, 2013 e-mail to the Complainant is an insufficient response pursuant to N.J.S.A. 47:1A-5(i), and Hardwick, GRC No. 2007-164. Moreover, 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.

The New Jersey Appellate Division has 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." MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 549 (App. Div. 2005) (emphasis added). See also Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005).⁵

The Court further held 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.

MAG, 375 N.J. Super. at 549 (emphasis added).

The test under MAG is whether a requested record is a specifically identifiable government record. Id. If so, the record is shall be disclosed barring any exemptions contained in OPRA. See Id. 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 dated 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]." GRC No. 2006-167. The custodian denied the request, claiming that it was overly broad. Id. 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,

⁵ Affirming Bent v. Stafford Police Dep't, GRC Complaint No. 2004-78 (October 2004).

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 dated May 24, 2011).

E-mails/Correspondence

The Complainant’s OPRA request sought “emails and correspondence” pertaining to her son and his teacher. The Complainant identified the subject matter as pertaining to her son, Robert M. Potts, and his Algebra II teacher, “Mr. Ray.” The Complainant identified a date range from April 15, 2013 to “today’s date,” as in July 8, 2013. The Complainant named herself as the sender or recipient of e-mails and correspondence, and listed three (3) personal e-mail addresses. Pursuant to Elcavage, GRC No. 2009-07, and Armenti, GRC No. 2009-154, the Complainant’s request is valid under OPRA.

Additionally, the Complainant sought “all emails to and from Lisa Roth, Betty Joe Price, and Don Wahlers regarding my son.” The request identified the sender, recipient, subject matter, and the date range of April 15, 2013, to July 8, 2013. Therefore, the Complainant’s request is also valid under OPRA. See Elcavage, GRC No. 2009-07.

There is no dispute that on July 24, 2013, the Custodian produced responsive records to the Complainant. The Complainant, however, alleged that she possessed responsive e-mails, which the Custodian failed to disclose. Further, the Complainant claimed that the Custodian conducted an insufficient search by using “Robert M. Potts” as the only iteration of her son’s name. Moreover, the Custodian’s SOI was ambiguous as to whether he possessed additional responsive records that were withheld as ACD material and/or student records.

Since the Custodian did not respond to the GRC’s request for additional information, it remains unclear whether there are additional responsive e-mails or correspondence to the Complainant’s request. Furthermore, if there are such documents, it is unknown whether they are exempt from disclosure as ACD material and/or student records. Thus, it is unknown whether the Custodian has unlawfully denied access to the Complainant’s OPRA request. Therefore, the

Custodian shall submit a certification as to whether he possesses responsive e-mails or correspondence, in addition to those already disclosed on July 24, 2013. If the Custodian possesses such records, they must be produced to the Complainant.

Documents

In addition to e-mails and correspondence, the Complainant's request sought "any and all . . . documents" regarding her son and his teacher. In Bent, the court held that a valid request under OPRA "must identify with reasonable clarity those documents that are desired and a party cannot satisfy this requirement by simply requesting all of an agency's documents." 381 N.J. Super. at 37. Unlike the Complainant's request for e-mails and correspondence, her request for "documents" fails to identify a specific government record, and lacks a reasonable level of clarity. *See id.*

Therefore, notwithstanding the Custodian's "deemed" denial, he has met his burden of proving he did not unlawfully deny access to the Complainant's request seeking "any and all . . . documents" regarding her son and his teacher. A request for "documents" is invalid as overly broad, and fails to identify a specific government record. Bent, 381 N.J. Super. at 37; MAG, 375 N.J. Super. at 549.

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 July 10, 2013 e-mail to the Complainant is an insufficient response pursuant to N.J.S.A. 47:1A-5(i), and Hardwick v. N.J. Dep't of Transportation, GRC Complaint No. 2007-164 (February 2008). Moreover, 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. Since the Custodian did not respond to the GRC's request for additional information, it remains unclear whether there are additional responsive e-mails or correspondence to the Complainant's request. Furthermore, if there are such documents, it is unknown whether they are exempt from disclosure as ACD material or student records. It is thus unknown whether the Custodian has unlawfully denied access to the Complainant's OPRA request. Therefore, Custodian shall submit a certification as to

whether he possesses responsive e-mails or correspondence, in addition to those already disclosed on July 24, 2013. If the Custodian possesses such records, they must be produced to the Complainant.

3. Notwithstanding the Custodian's "deemed" denial, he has met his burden of proving he did not unlawfully deny access to the Complainant's request seeking "any and all . . . documents" regarding her son and his teacher. A request for "documents" is invalid as overly broad, and fails to identify a specific government record. Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 549 (App. Div. 2005).
4. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁶ to the Executive Director.⁷**
5. 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: Samuel A. Rosado, Esq.
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

July 22, 2014

⁶ "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."

⁷ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.