



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

June 24, 2014 Government Records Council Meeting

David J. Roundtree
Complainant

Complaint Nos. 2013-257 and 2013-259

v.

NJ Department of State, Division of Elections
Custodian of Record

At the June 24, 2014 public meeting, the Government Records Council (“Council”) considered the June 17, 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. Although the Division of Elections may have instituted a policy of not allowing requestors to submit OPRA requests via e-mail, the Custodian improperly required that the Complainant must submit his OPRA requests using “. . . the proper form . . .” Paff v. City of East Orange, 407 N.J. Super. 221 (App. Div. 2009); Paff v. Bordentown Fire Dist. No. 2 (Burlington), GRC Complaint No. 2012-158 (Interim Order dated May 28, 2013)(*citing* Renna v. Cnty. of Union, 407 N.J. Super. 230 (App. Div. 2009)). Thus, the Complainant’s requests at issue here were appropriately filed and the Custodian should have responded to same specifically advising of Elections’ policy change regarding the methods by which the Complainant could submit a request.
2. The Complainant’s August 5, 2013 request No. 1 sought information regarding an action performed by the Division of Elections. Further, the Complainant’s request No. 2 failed to identify, with reasonable clarity, the records sought Henceforth, the Complainant’s two (2) requests are invalid under OPRA. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); 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); Ohlson v. Twp. of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009). Thus, the Custodian has not unlawfully denied access to the Complainant’s requests.
3. Although the Custodian improperly required the Complainant to submit his requests on the Division of Elections’ official OPRA request form, the Complainant’s requests



seek information and fail to specify with reasonable clarity the records sought respectively. Additionally, the evidence of record does not indicate that the Custodian's violations 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 24th Day of June, 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: June 26, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 24, 2014 Council Meeting**

**David J. Roundtree¹
Complainant**

GRC Complaint Nos. 2013-257 and 2013-259

v.

**NJ Department of State, Division of Elections²
Custodial Agency**

Records Relevant to Complaint: Copies of:

1. “The document (sic) statute of title 19 that gave the Division of Elections (“Elections”) the right to substitute . . .” Jim Whelan’s name per a previous e-mail.
2. “Please add this to . . . the file showing that [Elections] violated the [statutes] and is hiding communication in emails to that effect, along with a conspiracy to commit fraud, violate [NJ] constitution and OPRA by stating these documents do not exist or not replying to e-mail send (sic), not forwarding emails to those who should prepare the documents. Please note and advise [Ms. Donna Barber’s] adviser to this statutes (sic), N.J.S.A. 19:63-28. Yes, this [statute] deals with all parties handling these petitions, cert. of acceptance, disclosure statement, oath, certifying of the following candidates running for these position (sic) Senator, Assemblyman, and Governor by approving documents [Ms. Barber] were given and emails stating that the documents were falsified to the division. [The Complainant] await[s] the certify verification letter of all candidates for the primary who was approved being that [the Complainant] wanted to challenge the right to be able to run due to circulators issues, legal voter name issue and sample ballot names used to run for office that none of those [the Complainant] wanted to challenge could receive a sample ballot, and that the NJ Constitutional voters law pertaining to requirements to run for the office was not met.”

Custodian of Record: Robert F. Giles
Request Received by Custodian: N/A
Response Made by Custodian: None
GRC Complaint Received: September 13, 2013

¹ No legal representation listed on record.

² Represented by Deputy Attorney General George N. Cohen.

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Background³

Request and Response:

On August 5, 2013, the Complainant submitted an e-mail request referencing the Open Public Records Act (“OPRA”) to the Custodian seeking the above-mentioned records. On the same day, the Complainant submitted a second (2nd) request via e-mail to Ms. Barber.

Denial of Access Complaint:

On September 13, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that the Custodian did not respond to his requests.

Statement of Information:⁴

On November 25, 2013, the Custodian filed a Statement of Information (“SOF”). The Custodian certified that in e-mails dated May 31, 2013 and June 12, 2013, he instructed the Complainant that he was “. . . required to use the proper OPRA form . . .” per Paff v. City of East Orange, 407 N.J. Super. 221 (App. Div. 2009). The Custodian argued that here, the e-mails sent by the Complainant do not represent valid OPRA requests due to the Complainant’s continued failure to comply with the Custodian’s instructions. The Custodian thus contended that he did not receive an OPRA request from the Complainant and did not respond to the Complainant’s e-mailed requests.

The Custodian asserted that Paff, authorizes a custodian to set the method of transmission, “. . . which need not include every method . . . mentioned in N.J.S.A. 47:1A-5(g).” Id. at 224. The Custodian argued that Elections properly required the Complainant to use the form, as he had in the past and yet the Complainant refused to do so. The Custodian thus contended that there has been no denial of access because the Complainant repeatedly failed to use the required OPRA request form provided by Elections.

Analysis

Valid OPRA Request

OPRA provides that:

The custodian of a public agency shall adopt a form for the use of any person who requests access to a government record held or controlled by the public agency. The form shall provide space for the name, address, and phone number of the

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 On October 16, 2013, these complaints were referred to mediation. On November 1, 2013, these complaints were referred back to the GRC for adjudication.

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requestor and a brief description of the government record sought. The form shall include space for the custodian to indicate which record will be made available, when the record will be available, and the fees to be charged. The form shall also include the following:

- 1) specific directions and procedures for requesting a record;
- 2) a statement as to whether prepayment of fees or a deposit is required;
- 3) the time period within which the public agency is required by [OPRA], to make the record available;
- 4) a statement of the requestor's right to challenge a decision by the public agency to deny access and the procedure for filing an appeal;
- 5) space for the custodian to list reasons if a request is denied in whole or in part;
- 6) space for the requestor to sign and date the form;
- 7) space for the custodian to sign and date the form if the request is fulfilled or denied.

N.J.S.A. 47:1A-5(f).

Furthermore, OPRA states that “a request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian.” N.J.S.A. 47:1A-5(g).

In Renna v. Cnty. of Union, 407 N.J. Super. 230 (App. Div. 2009), the Appellate Division held that although requestors shall continue to use public agencies’ OPRA request forms when making requests, no custodian shall withhold such records if the written request for such records, not presented on the official form, contains the requisite information prescribed in the section of OPRA requiring custodians to adopt a form. Id. In effect, this permits requestors to write their own correspondence seeking records from a custodian, as long as the request properly invokes OPRA.

However, in Paff v. City of East Orange, 407 N.J. Super. 221 (App. Div. 2009),⁵ the Appellate Division stated that “N.J.S.A. 47:1A-5(f)(1) expressly delegates authority to each custodian of government records to adopt a form for use in making OPRA requests that includes ‘specific directions and procedures for requesting a record.’” The Court went on to state that “. . . the procedures adopted by a custodian of government records for transmittal of OPRA requests, like any other action by a public official or agency, must be reasonable. *See* N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 181-84 (App. Div. 2007). Consequently, a custodian may not exercise his authority under N.J.S.A. 47:1A-7(f)(1) in a manner that would impose an unreasonable obstacle to the transmission of a request for a governmental record, such as, for example, by requiring any OPRA request to be hand-delivered.” Id. at 229.

⁵ On appeal from Paff v. City of East Orange, GRC Complaint No. 2007-297 (March 2008).

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Thus, although a custodian is not permitted to deny a request for records under OPRA simply because it is not on the agency's form, an agency does have the authority to dictate the methods by which a requestor can transmit an OPRA request. The Council applied this rational in Paff v. Bordentown Fire Dist. No. 2 (Burlington), GRC Complaint No. 2012-158 (Interim Order dated May 28, 2013). There, the Council determined that the custodian improperly required the complainant to submit his requests on the official form but that the Fire District's policy of not accepting requests via e-mail was proper because it did not impose an unreasonable obstacle to transmission of OPRA requests. Id. at 5. The Council reasoned that:

The Complainant's April 21, 2012 request contains the following statement, "[p]lease accept this e-mail/fax as my request for government records in accordance with the Open Public Records Act (OPRA). . . ." The original Custodian's response dated May 2, 2012, states, "[t]he email appears to be a request, under OPRA, for certain documents of this Fire District." The original Custodian's response makes it clear that he understood the Complainant's e-mail to be an OPRA request for records. The Complainant's May 11, 2012 request also contains the following statement, "[p]lease accept this as my request for government records in accordance with the Open Public Records Act (OPRA). . . ." The original Custodian, in his response dated May 16, 2012, confirms receipt of the Complainant's request entitled "OPRA Request." Thus, the original Custodian's response makes it clear that he understood the Complainant's fax to be an OPRA request for records.

...

Based on the evidence of record, the original Custodian did not refuse to accept all types of electronic submissions. The evidence provides that the original Custodian refused to accept only e-mailed submissions. The original Custodian specifically refused to accept the Complainant's e-mailed OPRA request as an "electronic submission" but did not refuse the faxed request as an "electronic submission." More importantly, the Fire District includes its own fax number on its official OPRA request form, but fails to include an e-mail address. This evidence supports the finding that the Fire District will not accept e-mailed requests, but will accept requests hand-delivered, mailed, or faxed.

Id.

Here, the threshold issue is whether the Custodian clearly articulated to the Complainant that Elections had instituted a new policy of transmittal methods for OPRA requests. Specifically, the Custodian refused to accept the Complainant's previous OPRA requests via e-mail because the requests were not submitted on the official OPRA request form. E-mails from the Custodian to the Complainant dated May 31, 2013 and June 15, 2013. However, in the May 31, 2013 e-mail, the Custodian cited to Paff, 407 N.J. Super. 221, but continued that Elections required the Complainant to use the proper OPRA request form. Further, in the June 15, 2013 e-mail, the Custodian referred back to his previous e-mail and required the Complainant to ". . . use the proper form as [the Complainant had] done in the past." Thereafter, the Custodian did not

respond to the Complainant's requests at issue here, arguing in the SOI that the Complainant failed to use the proper form.

The Council's decision in Paff, GRC 2012-158, is applicable. Specifically, in this matter, the Custodian did not respond to the Complainant's requests on the basis that same were not on the form. Yet, the custodian in Paff, responded to both requests and, on at least one occasion, advised the complainant that the Fire District prohibited transmittal of OPRA requests "electronically" (or in that case, via e-mail). Additionally, as noted by the Council, the Fire District's OPRA request form specifically stated that "[n]o electronic submissions will be accepted." Here, the Custodian cited to Paff, 407 N.J. Super. 221, but then required submission of the request on the form as opposed to advising the Complainant that Elections has instituted a transmittal policy barring requestors from submitting requests via e-mail. Further, the Custodian provided no evidence supporting that Elections had changed their transmittal policy or that they made the public aware of this change. For these reasons, the GRC is not satisfied that the Custodian sufficiently advised the Complainant of a change in Elections' transmittal policy.

Thus, although Elections may have instituted a policy of not allowing requestors to submit OPRA requests via e-mail, the Custodian improperly required that the Complainant must submit his OPRA requests using ". . . the proper form . . ." Paff, 407 N.J. Super. 221; Paff, GRC 2012-158 (citing Renna, 407 N.J. Super. 230). Thus, the Complainant's requests at issue here were appropriately filed and the Custodian should have responded to same specifically advising of Elections' policy change regarding the methods by which the Complainant could submit a request.

Validity of Request

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." 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.* (emphasis added).

In addition, in *Bent v. Stafford Police Dep’t*, 381 N.J. Super. 30, 37 (App. Div. 2005),⁶ the Superior Court references *MAG* in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records “accessible.” “As such, a proper 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.”⁷ (emphasis added). See also *NJ Builders Assoc. v. NJ Council on Affordable Hous.*, 390 N.J. Super. 166, 180 (App. Div. 2007) and *Schuler v. Borough of Bloomsbury*, GRC Complaint No. 2007-151 (February 2009).

Request No. 1

In *Ohlson v. Twp. of Edison (Middlesex)*, GRC Complaint No. 2007-233 (August 2009), the complainant’s request Items Nos. 5 and 7 sought:

5. The law that allows the temporary changing of Township codes by any Township representatives without the approval of Council and penalty if such action is against the law.
. . .
7. The law on making alterations to a leased township property, such as tree removal, fence installation, etc., without the approval of Council and penalty if such alterations are against the law.

Id.

The GRC deemed that the complainant’s request items constituted requests for information, holding that “because the Complainant’s OPRA request Items No. 5 through No. 8 seek information rather than a specifically identifiable government record, the request items are invalid pursuant to [*MAG*] and [*Bent*]. . .” *Id.* at pg. 6.

In the instant complaint, the Complainant appears to be seeking the provision in Title 19 that allowed Elections to substitute Jim Whelan’s name, presumably on unidentified election-related document. As in *Ohlson*, the Complainant’s request No. 1 seeks information regarding what authorization Elections had to perform a task and is thus invalid under OPRA.

Request No. 2

Regarding the Complainant’s August 5, 2013, request No. 2 submitted to Ms. Barber, the Complainant identified OPRA in the subject but then proceeded to write a paragraph of commentary. There is one small section of the paragraph that was underlined; however, it is

⁶ Affirmed on appeal regarding *Bent v. Stafford Police Department*, GRC Case No. 2004-78 (October 2004).

⁷ As stated in *Bent*.

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unclear whether the Complainant was requesting the “. . . certify verification letter of all candidates for the primary . . .” or if he was referring to a previous request seeking such records. Inapposite to the Court’s holding in Bent, the paragraph-long submission does not exude with reasonable clarity the records sought so much as make statements about the Complainant’s ongoing dealings with Elections.

Therefore, the Complainant’s August 5, 2013 request No. 1 sought information regarding an action performed by Elections. Further, the Complainant’s request No. 2 failed to identify, with reasonable clarity, the records sought. Henceforth, the Complainant’s two (2) requests are invalid under OPRA. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; New Jersey Builders, 390 N.J. Super. at 180; Schuler, GRC 2007-151; Ohlson, GRC 2007-233. Thus, the Custodian has not unlawfully denied access to the Complainant’s requests.

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 improperly required the Complainant to submit his requests on Elections’ official OPRA form, the Complainant’s requests seek information and fail to specify with reasonable clarity the records sought respectively. Additionally, the evidence of record does not indicate that the Custodian’s violations 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. Although the Division of Elections may have instituted a policy of not allowing requestors to submit OPRA requests via e-mail, the Custodian improperly required that the Complainant must submit his OPRA requests using “. . . the proper form . . .” Paff v. City of East Orange, 407 N.J. Super. 221 (App. Div. 2009); Paff v. Bordentown Fire Dist. No. 2 (Burlington), GRC Complaint No. 2012-158 (Interim Order dated May 28, 2013)(*citing* Renna v. Cnty. of Union, 407 N.J. Super. 230 (App. Div. 2009)). Thus, the Complainant’s requests at issue here were appropriately filed and the Custodian should have responded to same specifically advising of Elections’ policy change regarding the methods by which the Complainant could submit a request.
2. The Complainant’s August 5, 2013 request No. 1 sought information regarding an action performed by the Division of Elections. Further, the Complainant’s request No. 2 failed to identify, with reasonable clarity, the records sought Henceforth, the Complainant’s two (2) requests are invalid under OPRA. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); 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); Ohlson v. Twp. of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009). Thus, the Custodian has not unlawfully denied access to the Complainant’s requests.
3. Although the Custodian improperly required the Complainant to submit his requests on the Division of Elections’ official OPRA request form, the Complainant’s requests seek information and fail to specify with reasonable clarity the records sought respectively. Additionally, the evidence of record does not indicate that the Custodian’s violations 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: Frank F. Caruso
Senior Case Manager

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

June 17, 2014