



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

June 24, 2014 Government Records Council Meeting

David J. Roundtree
Complainant

Complaint No. 2013-260

v.

New Jersey Department of State
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 the New Jersey Department of State’s policy not to accept OPRA requests via e-mail does not impose an unreasonable obstacle to the transmission of a request for a government record because the Department accepts requests via mail, hand-delivery and OPRA Central. *See 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). Further, the Council should decline to address the Complainant’s amended request and clarification because same did not comply with the Department’s transmittal methods. Thus, the Custodian has not violated OPRA. N.J.S.A. 47:1A-6.

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 No. 2013-260

v.

New Jersey Department of State²
Custodial Agency

Records Relevant to Complaint: Copies of “. . . all documents in the investigation for [the Complainant’s] personal records.”

Custodian of Record: Joseph Klett

Request Received by Custodian: August 28, 2013³

Response Made by Custodian: August 28, 2013

GRC Complaint Received: September 13, 2013

Background⁴

Request and Response:

On August 12, 2013, the Complainant submitted an e-mail request attaching a letter referencing the Open Public Records Act (“OPRA”) to Ms. Patricia Warford seeking the above-mentioned records. On August 16, 2013, Ms. Warford forwarded the Complainant’s e-mail with attachment to the Custodian.

On August 28, 2013, the same day as receipt of the e-mail, the Custodian responded in writing stating that based on May 17, 2013, e-mail from Deputy Attorney General (“DAG”) Bruce Solomon to the Complainant (*citing Paff v. City of East Orange*, 407 N.J. Super. 221 (App. Div. 2009)(holding that a public agency may limit the methods by which a requestor can submit an OPRA request)⁵ the Complainant needed to submit his request on the established OPRA request form. The Custodian further noted that personnel files of other persons and investigation files are exempt from access under OPRA. The Custodian finally stated that the

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Donald Palombi.

³ The Custodian certified in the Statement of Information that he read the Complainant’s initial submission on August 28, 2013 but that he did not receive an actual OPRA request until September 17, 2013.

⁴ 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.

⁵ DAG Solomon’s e-mail advised the Complainant that the NJ Department of Law & Public Safety’s official request form states that it would not accept requests via fax and e-mail.

Complainant's request for the above-mentioned records is overly broad. On the same day, the Complainant disputed the Custodian's response (*citing Renna v. Cnty. of Union*, 407 N.J. Super. 230 (App. Div. 2009)).

On August 28, 2013, the Custodian asked the Complainant to confirm whether or not he would like the Custodian to enter an OPRA request in the State's OPRA tracking system ("OPRA Central") for the above-mentioned records. The Custodian noted that there is no registered OPRA request based on the Complainant's August 12, 2013 e-mail. The Custodian further noted that as currently composed, the request would be invalid as overly broad and as a request for personnel records. On August 29, 2013, the Complainant confirmed that he wanted the Custodian to enter a request into OPRA Central. Further, the Complainant contended that his request was not vague and the Custodian should get clarification from Ms. Warford who knows exactly what the Complainant was seeking. The Complainant also stated that the Department of State ("DOS") has violated OPRA because he sent his request to Ms. Warford on August 12, 2013 and has not received the responsive records to date.

On September 5, 2013, the Custodian stated that he just received the Complainant's August 29, 2013 e-mail, which was forwarded by Ms. Warford. The Custodian asked the Complainant to ensure that he had the Custodian's proper e-mail address. Further, the Custodian stated that he would enter the request and that the time frame to respond commenced the day of entry of the request into OPRA Central. The Custodian also stated that any issues with DOS's policy on submitting OPRA requests should be taken up with the Government Records Council ("GRC"). Shortly thereafter, the Custodian sent another e-mail to the Complainant advising that he needed the Complainant to provide a home address and answer to the conviction question in order to create an official request. On the same day, the Complainant responded that the Custodian's inquiry was a violation of OPRA and a stalling tactic. The Custodian subsequently responded stating that no OPRA request would be logged unless this information was provided and reiterated that the Complainant should pursue any issues with DOS's internal policy with the GRC.

On September 9, 2013, the Complainant questioned whether the Custodian was denying the request because it was not in a format suitable to the Custodian. On September 10, 2013, the Custodian again reiterated that the Complainant's request does not officially exist because of the absence of a home address and answer to the conviction question. The Custodian further memorialized a September 6, 2013, telephone conversation in which the Complainant repeatedly rejected the Custodian's attempts to clarify the records sought. Thereafter, the Custodian sent another e-mail seeking confirmation that the Complainant wished to submit his entire August 12, 2013 letter as the OPRA request, and again requested a home address and answer to the conviction question to open the request in OPRA Central.⁶

On September 11, 2013, the Complainant submitted an amended request citing to OPRA seeking:

⁶ Additional correspondence took place on September 10, 2013 that was repetitive in nature and need not be memorialized in this background.

[F]rom the department of HR and all department (sic) which handle the investigation made and handle (sic) by [Ms. Warford] and the report recommendation given to [Director William Schaum] of the HR department . . . All [d]ocuments that was reported, done and place (sic) in the hands of EEOC against [Ms. Gloria Jean Berry], copies of complete investigation with the (sic) all details associated with [Ms. Berry] that in (sic) the meeting referencing [the Complainant] by several employee's (sic) of the state and union including statements made by [Mr.] Robert Giles . . .

The Custodian responded asking for confirmation that the Complainant was seeking “[a]ll documents and that was reported . . . including statements made by [Mr. Giles].” On September 12, 2013, the Complainant responded providing language from N.J.S.A. 47:1A-3(b) and again amended his OPRA request to include multiple subparts as follows:

1. “Copies [a]ll documents that was reported, pertaining to [Ms. Berry] in meetings with [Mr. Giles], [Ms. Warford] and the Union CWA, investigation done and place in the hands of EEOC against [Ms.] Berry, copies of complete investigation with the (sic) all details associated with [Ms. Berry] that in the meeting referenced [the Complainant] by several employees of the state and union include statements made by [Mr. Giles] . . . copies of the investigation of the threat statement of Johnathan Gaye, what departments were contacted, copies of the e-mails and paperword (sic) filed and the review of information sent in to show that the treat (sic) never happened . . .”
2. “. . . copies of what action are going to be taking (sic) if the threat was a lie and the actions against [Ms.] Berry is proven false . . .”
3. “. . . the conflict of interest investigation papers to that the HR person ([Ms. Warford]) did not or should not have done this investigation and the actions that will be taken for knowing that this investigation was a retaliation because [Ms.] Berry know me and I was bring (sic) action against the Division of Election.”
4. “. . . copies of [e]mails . . . in reference . . . Director [Schaum] . . . [Ms.] Warford . . . [Mr.] Giles . . . and [the Custodian] in reference to [the Complainant], [Ms.] Berry and the issue of [Mr.] Gay (sic) with the employees who may have address (sic) this related information . . .”
5. “. . . from the department of HR and all department which handle the investigation made and handle by [Ms. Warford] and the report recommendation given to [Director Schaum] of the HR department.”
6. “. . . when was [Mr.] Gaye paid by the State, provide copies of employment records, are there any w2 (sic) records showing this fact were (sic) are the copies or ever employed by a process of background check, given a (sic) employee's handbook and never became apart (sic) of a union member of CWA.”

On the same day, the Custodian responded stating that the Complainant failed to confirm the records his request is seeking. The Custodian reiterated that the Complainant may file a complaint with the GRC if he believed his OPRA request was valid.⁷

⁷ Additional correspondence took place on September 13, 2013 that was repetitive in nature.

Denial of Access Complaint:

On September 13, 2013, the Complainant filed a Denial of Access Complaint with the GRC. The Complainant disputed that his August 12, 2013 OPRA request was invalid. The Complainant contended that the Custodian first denied his request on the grounds that it was not in a suitable format, but then agreed to accept the request.

The Complainant contended that on September 12, 2013, he acquiesced with the Custodian's request to confirm exactly what the Complainant sought by submitting an amended request identifying a method of delivery (electronic via e-mail), an e-mail address, and each request item in subparts. The Complainant refused to provide an answer to the conviction question because he felt it was an invasion of his privacy.

Supplemental Submissions

On September 17, 2013, the Complainant e-mailed the Custodian alleging that over a year ago, a meeting between Ms. Warford, Mr. Giles and Ms. Berry was held regarding a public record that was provided by Ms. Berry to the Complainant. The Complainant stated that he sought “. . . copies of the information . . . all documentation (copies of memo's) in reference to the meeting and statements maded (sic) by all parties . . . all investigated information from the HR department and [Mr.] Giles (sic) office, which would include emails, audio, personal dictation and inter-office mail.”

On September 18, 2013, the Custodian responded advising that the Complainant's e-mail identified specific records. The Custodian stated that he would log the Complainant's request as stated in the September 17, 2013 e-mail into OPRA Central once the Complainant provided a home address and answer to the conviction question. On the same day, the Custodian responded to the Complainant in writing denying access to the responsive records as exempt personnel records. N.J.S.A. 47:1A-10. The Custodian further noted that he did not conduct a search for the responsive records and thus can neither confirm nor deny their existence; however, those records that may exist are exempt.

Statement of Information:⁸

On October 24, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he did not receive an official OPRA request until September 17, 2013. The Custodian affirmed that prior to this date, he and the Complainant engaged in several weeks of e-mail communications regarding an August 16, 2013 e-mail with a letter attachment. The Custodian certified that he repeatedly notified the Complainant of DOS's new policy, per DAG Solomon, for accepting OPRA requests.

The Custodian contended that the e-mail conversation lasting from August 28 through September 18, 2013 proved that he exercised due diligence in attempting to ascertain the exact records the Complainant sought. Further, the Custodian argued that despite the Complainant's

⁸ On October 16, 2013, this complaint was referred to mediation. On November 1, 2013, this complaint was referred back to the GRC for adjudication.

continuous refusals to clarify exactly what records he was seeking, the Custodian wasted a significant amount of time trying to decipher incoherent, convoluted and misdirected communications. The Custodian noted that a concise request identifying actual records would have been accepted immediately.

The Custodian further argued that his September 18, 2013, denial of access under N.J.S.A. 47:1A-9(a) and N.J.S.A. 10:4-12 was lawful because the responsive records were personnel records and/or possibly involved a workplace violence investigation.

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 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. This permits requesters to write

their own correspondence requesting 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),⁹ 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 NJ Builders Ass'n v. NJ 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.

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 and OPRA request. The Council applied this reasoning in Paff v. Bordentown Fire Dist. No. 2 (Burlington), GRC Complaint No. 2012-158 (Interim Order dated May 28, 2013) at 3-4. 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

⁹ On appeal from Paff v. City of East Orange, GRC Complaint No. 2007-297 (March 2008).

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 DOS had instituted a new policy of transmittal methods for OPRA requests. Specifically, upon receipt of the Complainant's August 12, 2013 e-mail on August 28, 2013, the Custodian informed him of DOS's new policy for accepted forms of transmission based on an e-mail from DAG Solomon on May 17, 2013, prohibiting requests submitted by fax and e-mail. The Custodian maintained this position through and beyond the filing of this complaint. Further, the Custodian repeatedly offered to create an OPRA request for the Complainant in OPRA Central provided that the Complainant clarified his request, provided an address and answer to the conviction question. The Complainant, however, refused to provide both his address and an answer to the conviction question. Further, the Complainant submitted an amended request and what appeared to be a clarification of same; both by e-mail despite the Custodian's notification of the acceptable methods of transmission.

The Council's decision in Paff, GRC 2012-158, is applicable herein. Specifically, in this matter, the Custodian denied the complainant's requests on the basis that same was not submitted via DOS's accepted method of transmission. Here, the Custodian cited to Paff, 407 N.J. Super. 221, advising the Complainant that he could not submit a request via e-mail. The Custodian additionally provided that as per DAG Solomon's May 17, 2013 e-mail, the NJ Department of Law & Public Safety's ("LPS") policy did not allow for faxed or e-mailed OPRA requests. Further, the Custodian provided sufficient evidence that DOS adopted LPS's transmittal policy. Similarly, the custodian in Paff, 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). For these reasons, the GRC is satisfied that the Custodian sufficiently advised the Complainant of a change in DOS's transmittal policy.

Therefore, DOS's policy not to accept OPRA requests via e-mail does not impose an unreasonable obstacle to the transmission of a request for a government record because DOS accepts requests via mail, hand-delivery and OPRA Central. *See* Paff, 407 N.J. Super. 221; Paff, GRC 2012-158. Further, the Council should decline to address the Complainant's amended request and clarification because same did not comply with DOS's transmittal methods. Thus, the Custodian has not violated OPRA. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the New Jersey Department of State's policy not to accept OPRA requests via e-mail does not impose an unreasonable obstacle to the transmission of a request for a government record because the Department accepts requests via mail, hand-delivery and OPRA Central. *See* 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). Further, the Council should

decline to address the Complainant's amended request and clarification because same did not comply with the Department's transmittal methods. Thus, the Custodian has not violated OPRA. N.J.S.A. 47:1A-6.

Prepared By: Frank F. Caruso
Senior Case Manager

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

June 17, 2014