



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

July 26, 2016 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint Nos. 2014-139 and 2014-161

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

At the July 26, 2016 public meeting, the Government Records Council (“Council”) considered the July 19, 2016 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian has failed to establish in his request for reconsideration of the Council’s June 30, 2015 Interim Order that either: 1) the Council’s decision is based upon a “palpably incorrect or irrational basis,” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The Custodian failed to establish that the complaint should be reconsidered based on extraordinary circumstances or a mistake. The Custodian has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. Specifically, the Custodian’s arguments are a recitation of the arguments already considered by the Council in its Interim Order. Thus, the Custodian’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. at 384; D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. The Council should rescind conclusion No. 3, holding that the Custodian unlawfully denied access to Complainant’s March 3, 2014 and March 24, 2014 OPRA requests. N.J.S.A. 47:1A-6. Specifically, the Complainant sought all e-mails containing a disclaimer: a generic disclaimer does not sufficiently narrow the scope of the subject or content of records sought. *See* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2015-97, *et seq.* (Interim Order dated April 26, 2016). Therefore, the Complainant’s requests are invalid, and the Custodian is not required to produce responsive records in accordance with Item No. 4 of the Council’s June 30, 2015 Interim Order. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); NJ Builders Ass’n v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Burke v. Brandes, 429 N.J. Super. 169, 172, 176 (App. Div. 2012).



Additionally, the Council should determine whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances since he did not bear his burden of proving a timely response to the March 24, 2014 OPRA request, and assess whether the Complainant is a prevailing party.

3. The Custodian failed to respond timely to the Complainant's March 24, 2014 OPRA request. N.J.S.A. 47:1A-5(g), (i). However, the Custodian lawfully denied access to the records because the request was invalid as not providing a sufficiently narrow subject or content of the records. 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 deemed denial of access did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
4. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Complainant's OPRA requests were invalid for failing to sufficiently identify the subject matter or content of the requested e-mails. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 51.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 26th Day of July, 2016

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 29, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration

**Supplemental Findings and Recommendations of the Executive Director
July 26, 2016 Council Meeting**

**Robert A. Verry¹
Complainant**

**GRC Complaint No. 2014-139
and 2014-161²**

v.

**Borough of South Bound Brook (Somerset)³
Custodian of Records**

Records Relevant to Complaint:

March 2, 2014 OPRA request:⁴ Electronic copies of e-mails sent to or from Donald E. Kazar from January 20, 2013, to present. The content of the e-mails sought contains language from Donald E. Kazar informing the recipient that “[e]mail received by or sent to Borough officials is subject to the Open Public Records Act” and further advising the recipient that they should “[c]onsider alternate avenues of communication” if they “have concerns about the contents of your email being read by someone other than the person(s) [they] are contacting.”

March 24, 2014 OPRA request:⁵ All emails sent by Donald E. Kazar between March 3, 2014, and March 23, 2014, “where Mr. Donald E. Kazar ‘[w]arns’ the recipient that their ‘[e]mail received by or sent to Borough officials is subject to the Open Records Act’ and where Mr. Kazar writes to the recipients that they should ‘[c]onsider alternative avenues of communication’ if they ‘have concerns about the content of your email being read by someone other than the person(s) [they] are contacting’.”

Custodian of Record: Donald E. Kazar

Request Received by Custodian: March 4, 2014, and March 24, 2014

Response Made by Custodian: March 18, 2014, and April 7, 2014

GRC Complaint Received: March 24, 2014, and April 8, 2014

¹ Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).

² The GRC has consolidated these complaints for adjudication because of the commonality of the parties and/or issues.

³ Represented by Francesco Taddeo, Esq. (Somerville, NJ).

⁴ This OPRA request is the subject of GRC Complaint No. 2014-139.

⁵ This OPRA request is the subject of GRC Complaint No. 2014-161.

Background

June 30, 2015 Council Meeting:

At its June 30, 2015 public meeting, the Council considered the April 21, 2015 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, found that:

1. There was no “deemed denial” of access to the Complainant’s March 2, 2014, OPRA request, because the Custodian provided a written response, seeking an extension of time to respond within the statutorily mandated seven (7) business day deadline, notwithstanding the Complainant’s objection thereto. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010), and Starkey v. NJ Dep’t of Transp., GRC Complaint Nos. 2007-315, 2007-316, and 2007-317 (February 2009).
2. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s March 24, 2014, 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).
3. The Custodian failed to bear his burden of proof that he lawfully denied access to the Complainant’s March 2, 2014, and March 24, 2014, OPRA requests. The Complainant’s requests are valid requests for e-mails pursuant to Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010), as they specifically identify the sender and/or recipient, a range of dates, and content and/or subject matter contained therein. Thus, the Custodian must provide the Complainant access to the records responsive to each OPRA request. If records for a particular OPRA request do not exist, the Custodian shall certify to this fact.
4. **The Custodian shall comply with Item No. 3 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, if necessary, and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4,⁶ to the Executive Director.⁷**

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 willing false, I am subject to punishment.”

⁷ Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Custodian, 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.

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.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On July 1, 2015, the Council distributed its Interim Order to all parties. On July 8, 2016, the Custodian requested an extension of time to respond to the Interim Order. The GRC granted the extension to July 15, 2015. On July 16, 2016, ten (10) business days following receipt of the Council's Interim Order, the Custodian filed a request for reconsideration.

The Custodian sought reconsideration based upon mistake and extraordinary circumstances. The Custodian did not challenge the GRC's citation of applicable law regarding the needed requirements for a valid search for e-mails. Rather, the Custodian objected to the GRC finding that the Complainant's OPRA request described the content and/or subject matter of the requested e-mails. According to the Custodian, the GRC made a mistake by accepting the disclaimer language (hereinafter "disclaimer"), quoted below, as sufficient content or subject matter:

"WARNING: Emails received by or sent to Borough officials is subject to the Open Public records Act [OPRA]. Consider alternative avenues of communication should you have concerns about the content of your email being read by someone other than the persons you are contacting."

The Custodian asserted that the disclaimer is boilerplate text, contained in most, if not all, e-mails subject to the Complainant's OPRA requests. Therefore, the Custodian claimed that the responsive records would comprise every e-mail sent to or from the Custodian during the specified time. The Custodian argued that allowing the disclaimer to be an adequate description of the e-mail's subject or content matter opens the door to requests for e-mails containing the phrase "Borough Clerk" or similar standardized text contained in e-mail correspondence.

The Custodian also claimed that the GRC erred in finding that the Complainant adequately defined the sender and/or recipient of the requested e-mails in accordance with Elcavage. The Custodian argued that the Complainant identified the sender and/or recipient as "Borough Officials," a generic description that could encompass every current or former Borough employee.

On July 28, 2015, the Complainant submitted objections to the request for reconsideration. The Complainant contended that the Custodian's request for reconsideration is merely an attempt to reargue the substance of the complaint. The Complainant stated that all of the arguments put forth by the Custodian had already been considered and rejected by the GRC in its initial decision. The Complainant asserted that the Custodian's hypothetical regarding a

search for e-mails containing “Borough Clerk” is irrelevant to the OPRA request at issue and its validity. The Complainant further argued that the Custodian bears the responsibility of implementing the disclaimer into his e-mails, and the possibility that the number of responsive records would be substantial does in itself not render the request invalid as overly broad.

Analysis

Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council, and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, the Custodian filed the request for reconsideration of the Council’s Order dated June 30, 2015, on July 16, 2015, after seeking a five (5) business day extension of time to response to the Council’s Order on July 8, 2015.

Applicable case law holds that:

“A party should not seek reconsideration merely based upon dissatisfaction with a decision.” D’Atria v. D’Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a “palpably incorrect or irrational basis;” or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D’Atria, . . . 242 N.J. Super. at 401. “Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.” Ibid.

In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

In this matter, the Custodian argued that, regarding conclusion No. 3, the GRC made a mistake and that extraordinary circumstances warrant reconsideration. In support of his request for reconsideration, the Custodian stated that the Complainant is intentionally making these requests in order to harass the Custodian, knowing in advance that these requests would be denied, and trigger a GRC complaint filing. The Custodian argued that the GRC’s decision conflicts with the principles behind Elcavage v. West Milford Twp., GRC Complaint No. 2009-

07 (April 2010), which prevent Custodian from having to conduct “open-ended” searches for records.

The Custodian also disputed the GRC’s conclusion that the Complainant sufficiently identified the sender/recipient of the e-mails sought, claiming that the requests seek all e-mail correspondence between “Borough Officials” within a limited period.

The Council should reject the Custodian’s request for reconsideration. The Custodian’s request for reconsideration merely expresses dissatisfaction with the Council’s conclusions and attempts to reassert arguments already contemplated in the Council’s Interim Order. Additionally, regarding the Custodian’s claims that the Complainant failed to identify a sender/recipient pursuant to Elcavage, the Custodian contradicts his own argument within the request for reconsideration. GRC 2009-07. The Custodian acknowledged on page four (4) of his request that “[a] fair reading of the subject request [sic] identifies the sender/recipient (Kazar) . . .” Thus, it is difficult to dispute that the Complainant failed to satisfy this prong in a request for e-mail correspondence.

As the moving party, the Custodian was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis," or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See Cummings*, 295 N.J. Super. at 384. The Custodian failed to establish that the complaint should be reconsidered based on extraordinary circumstances or mistake. Thus, the Custodian has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. *See D’Atria*, 242 N.J. Super. at 401. Thus, the Custodian request for reconsideration should be denied. *Cummings*, 295 N.J. Super. at 384; *D’Atria*, 242 N.J. Super. at 401; *Comcast*, 2003 N.J. PUC at 5-6.

However, notwithstanding the previous analysis on the Custodian’s request for reconsideration, the Council should reassess its conclusion that the Complainant specifically identified the subject matter/content of the requested e-mails. Recent GRC decisions on the validity of disclaimers contained within e-mail correspondence as subject matter/content warrant a review of the Complainant’s OPRA requests in this matter.

Analysis

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:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful*

information. Rather, OPRA simply operates to make identifiable government records “readily accessible for inspection, copying, or examination.” *N.J.S.A. 47:1A-1*.

MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 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);⁸ *NJ Builders Ass’n 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).

In *Elcavage*, GRC 2009-07, the GRC established criteria deemed necessary under OPRA to request an email communication. The Council determined that to be valid, such requests must contain: (1) the content and/or subject of the email, (2) the specific date or range of dates during which the email(s) were transmitted, and (3) the identity of the sender and/or the recipient thereof. *See also Sandoval v. NJ State Parole Bd.*, GRC Complaint No. 2006-167 (Interim Order March 28, 2007). The Council has also applied the criteria set forth in *Elcavage* to other forms of correspondence, such as letters. *See Armenti v. Robbinsville Bd. of Educ. (Mercer)*, GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011).

Additionally, the Court has found a request for “EZ Pass benefits afforded to retirees of the Port Authority, including all . . . correspondence between the Office of the Governor . . . and the Port Authority . . .” to be valid under OPRA because it “was confined to a specific subject matter that was clearly and reasonably described with sufficient identifying information . . . [and] was limited to particularized identifiable government records, namely, correspondence with

⁸ Affirming *Bent v. Stafford Police Dep’t*, GRC No. 2004-78 (October 2004).

another government entity, rather than information generally.” Burke v. Brandes, 429 N.J. Super. 169, 172, 176 (App. Div. 2012).

In Doss v. Borough of Paramus (Bergen), GRC Complaint No. 2014-149 (Interim Order dated January 30, 2015), one of the subject OPRA requests comprised sixteen (16) individual items seeking e-mails and correspondence between specifically identified persons over a defined time period for a number of keywords. The Council held that said request was invalid, reasoning that:

Even though the Complainant’s request items included the requisite criteria set forth in Elcavage, the inclusion of eighty (80) applicable search terms is contrary to the Appellate Division’s holding in Burke. Whereas the request at issue in Burke identified a particular subject (EZ Pass benefits for retirees), the Complainant’s request items here identify numerous terms, most very generic and others a little more specific (from “approvals” and “loans” to “297 Palisades Avenue”). In order to fulfill this type of request, the Custodian would not be limited to just electronically searching e-mails by the search terms provided but would also have to research all Borough files for a period greater than fourteen (14) months in an effort to locate all correspondence responsive to the request. Given all the search words for each of the sixteen (16) request items this would be a daunting task, and one not required under the law because “OPRA does not countenance open-ended searches of an agency’s files.” MAG, at 549.

Id. at 4.

In Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2013-43 *et seq.* (Interim Order dated September 24, 2013), the GRC provided that:

[A] valid OPRA request requires a search, not research. An OPRA request is thus only valid if the subject of the request can be readily identifiable based on the request. Whether a subject can be readily identifiable will need to be made on a case-by-case basis.

Id. at 5.

Most recently, the GRC addressed the series of requests where the complainant utilized individual keywords. In Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2015-97, *et seq.* (Interim Order dated April 26, 2016), the complainant submitted several requests conforming to the Elcavage, criteria; however, the “content and/or subject” comprised of several individual keywords. The keywords included proper names and individual generic keywords. In reviewing the facts, the Council looked to Elcavage, Burke, and Doss to determine this novel issue, holding that:

[T]he Complainant’s OPRA requests No. 1 and 2 are valid because the identification of an individual as the subject or content of correspondence is reasonably specific enough for a custodian to locate responsive records . . .

However, the Complainant's OPRA requests No. 3 through 8 are invalid because they fail to include a narrowly construed "subject or content." Elcavage, GRC 2009-07; Doss, GRC 2014-149. Specifically, the Complainant included a single generic keyword in each request that does not sufficiently narrow the scope of the subject or content of records sought.

Id. at 8-9.

In reaching this conclusion, the Council reasoned that proper names as "subject or content" could not be construed interchangeably. Further, the Council reasoned that "a custodian would easily be able to ascertain" whether located correspondence referred to the identified individuals. However, the Council was not persuaded that generic keywords without any context met the subject or content requirement. The Council noted that generic keywords are akin to "the type of overly broad request that the MAG and NJ Builder Courts determined to be invalid." Id. at 8. Further, the Council was not convinced that the complainant's requests contained enough context to conform to the "limited subject matter" requirement. Burke, 429 N.J. Super. at 178.

In the instant matter, the Complainant contended that his OPRA requests conformed to the Elcavage criteria, that they were valid, and that the Custodian unlawfully denied access to the responsive records. Conversely, the Custodian alleged in the SOI that the Complainant's OPRA requests lacked an identifiable sender/recipient and content/subject matter; thus, the request failed to conform to the criteria required for a valid request for e-mail communications.

A review of the subject OPRA requests reveals that same sought e-mails to or from the Custodian for a specific time period (January 20, 2013, to present, and March 3, 2014, to March 23, 2014) regarding an identifiable subject (inclusive of the disclaimer language). Thus, in form alone, the requests appear to contain all relevant criteria necessary for a valid request seeking correspondence under OPRA. Elcavage, GRC 2009-07; Armenti, GRC 2009-154.

However, the threshold issue is whether the Complainant's requests for all e-mails, including a disclaimer, sufficiently identifies the "subject or content" of the e-mails sought. The Council's decision in Verry, GRC 2015-97, *et seq.*, although adjudicated during the pendency of this complaint, is instructive here. The disclaimer appears in all e-mails the Custodian sent to the Complainant and/or GRC in this complaint. Moreover, by its very nature, a disclaimer within an e-mail is typically generic. The disclaimer alone is not synonymous to a "subject or content" as contemplated in Burke; rather, such a request would constitute a fishing expedition as contemplated in MAG. More specifically, the request would require the Custodian to disclose a broad cross section of e-mails regarding various different topics simply because of the inclusion of a generic disclaimer. Based on the foregoing, the GRC is satisfied that the Complainant's requests did not include a "limited subject matter" and were therefore invalid.

Accordingly, the Council should rescind conclusion No. 3 holding that the Custodian unlawfully denied access to Complainant's March 3, 2014 and March 24, 2014 OPRA requests. N.J.S.A. 47:1A-6. Specifically, the Complainant sought all e-mails containing a disclaimer: a generic disclaimer does not sufficiently narrow the scope of the subject or content of records sought. *See* Verry, GRC 2015-97, *et seq.* Therefore, the Complainant's requests are invalid, and

the Custodian is not required to produce responsive records in accordance with Item No. 4 of the Council's June 30, 2015 Interim Order. MAG, 375 N.J. Super. at 546; NJ Builders, 390 N.J. Super. at 180; Burke, 429 N.J. Super. at 177. Additionally, the Council should determine whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances since he did not bear his burden of proving a timely response to the March 24, 2014 OPRA request, and assess whether the Complainant is a prevailing party.

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)).

Here, the Custodian failed to respond timely to the Complainant's March 24, 2014 OPRA request. N.J.S.A. 47:1A-5(g), (i). However, the Custodian lawfully denied access to the records because the request was invalid as not providing a sufficiently narrow subject or content of the records. 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 deemed denial of access did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney's Fees

OPRA provides that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . . ; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council . . . a requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

N.J.S.A. 47:1A-6.

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Court held that a complainant is a “prevailing party” if he achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. Id. at 432. Additionally, the Court held that attorney’s fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Id.

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, 196 N.J. at 71, (quoting Buckhannon Bd. & Care Home v. West Virginia Dep’t of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties, Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.”

However, the Court noted in Mason, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, *citing* Teeters, 387 N.J. Super. at 429; *see, e.g.*, Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), *certif. denied*, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6. Under the prior RTKL, “[a] plaintiff in whose favor such an order [requiring access to public records]

issues . . . may be awarded a reasonable attorney's fee not to exceed \$500.00.” N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

Mason at 73-76 (2008).

The Court in Mason, further held that:

[R]equestors are entitled to attorney’s fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) ‘a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved’; and (2) ‘that the relief ultimately secured by plaintiffs had a basis in law.’ Singer v. State, 95 N.J. 487, 495, *cert denied* (1984).

Id. at 76.

Here, although the Custodian failed to timely respond to the Complainant’s March 24, 2014 OPRA request, he lawfully denied access to same as well as the March 2, 2014 OPRA request, as neither request for e-mails sufficiently identified the content or subject matter therein. Verry, GRC 2015-97, *et seq.*, MAG, 375 N.J. Super. at 546; NJ Builders, 390 N.J. Super. at 180; Burke, 429 N.J. Super. at 177.

Therefore, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters, 387 N.J. Super. at 432. Additionally, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 51. Specifically, the Complainant’s OPRA requests were invalid for failing to sufficiently identify the subject matter or content of the requested e-mails. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 51.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has failed to establish in his request for reconsideration of the Council’s June 30, 2015 Interim Order that either: 1) the Council's decision is based upon a “palpably incorrect or irrational basis,” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The Custodian failed to establish that the complaint should be reconsidered based on extraordinary circumstances or a mistake. The Custodian has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. Specifically, the Custodian’s arguments are a recitation of the arguments already considered by the Council in its Interim Order. Thus, the Custodian’s request for

reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. at 384; D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

2. The Council should rescind conclusion No. 3, holding that the Custodian unlawfully denied access to Complainant's March 3, 2014 and March 24, 2014 OPRA requests. N.J.S.A. 47:1A-6. Specifically, the Complainant sought all e-mails containing a disclaimer: a generic disclaimer does not sufficiently narrow the scope of the subject or content of records sought. *See* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2015-97, *et seq.* (Interim Order dated April 26, 2016). Therefore, the Complainant's requests are invalid, and the Custodian is not required to produce responsive records in accordance with Item No. 4 of the Council's June 30, 2015 Interim Order. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); NJ Builders Ass'n v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Burke v. Brandes, 429 N.J. Super. 169, 172, 176 (App. Div. 2012). Additionally, the Council should determine whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances since he did not bear his burden of proving a timely response to the March 24, 2014 OPRA request, and assess whether the Complainant is a prevailing party.
3. The Custodian failed to respond timely to the Complainant's March 24, 2014 OPRA request. N.J.S.A. 47:1A-5(g), (i). However, the Custodian lawfully denied access to the records because the request was invalid as not providing a sufficiently narrow subject or content of the records. 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 deemed denial of access did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
4. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Complainant's OPRA requests were invalid for failing to sufficiently identify the subject matter or content of the requested e-mails. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 51.

Prepared By: Samuel A. Rosado
Staff Attorney

July 19, 2016



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Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

June 30, 2015 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint Nos. 2014-139 and 2014-161

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

At the June 30, 2015 public meeting, the Government Records Council (“Council”) considered the April 21, 2015 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. There was no “deemed denial” of access to the Complainant’s March 2, 2014, OPRA request, because the Custodian provided a written response, seeking an extension of time to respond within the statutorily mandated seven (7) business day deadline, notwithstanding the Complainant’s objection thereto. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010), and Starkey v. NJ Dep’t of Transp., GRC Complaint Nos. 2007-315, 2007-316, and 2007-317 (February 2009).
2. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s March 24, 2014, 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).
3. The Custodian failed to bear his burden of proof that he lawfully denied access to the Complainant’s March 2, 2014, and March 24, 2014, OPRA requests. The Complainant’s requests are valid requests for e-mails pursuant to Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010), as they specifically identify the sender and/or recipient, a range of dates, and content and/or subject matter contained therein. Thus, the Custodian must provide the Complainant access to the records responsive to each OPRA request. If records for a particular OPRA request do not exist, the Custodian shall certify to this fact.



4. **The Custodian shall comply with Item No. 3 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, if necessary, and simultaneously provide certified confirmation of compliance pursuant to 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.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 30th Day of June, 2015

Robin Berg Tabakin, Esq., Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: July 1, 2015

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 records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Custodian, 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
June 30, 2015 Council Meeting**

**Robert A. Verry¹
Complainant**

**GRC Complaint No. 2014-139
and 2014-161²**

v.

**Borough of South Bound Brook (Somerset)³
Custodian of Records**

Records Relevant to Complaint:

March 2, 2014 OPRA request:⁴ Electronic copies of e-mails sent to or from Donald E. Kazar from January 20, 2013, to present. The content of the e-mails sought contains language from Donald E. Kazar informing the recipient that “[e]mail received by or sent to Borough officials is subject to the Open Public Records Act” and further advising the recipient that they should “[c]onsider alternate avenues of communication” if they “have concerns about the contents of your email being read by someone other than the person(s) [they] are contacting.”

March 24, 2014 OPRA request:⁵ All emails sent by Donald E. Kazar between March 23, 2014 and March 30, 2014 “where Mr. Donald E. Kazar ‘[w]arns’ the recipient that their ‘[e]mail received by or sent to Borough officials is subject to the Open Records Act’ and where Mr. Kazar writes to the recipients that they should ‘[c]onsider alternative avenues of communication’ if they ‘have concerns about the content of your email being read by someone other than the person(s) [they] are contacting’.”

Custodian of Record: Donald E. Kazar

Request Received by Custodian: March 4, 2014, and March 24, 2014

Response Made by Custodian: March 18, 2014, and April 7, 2014

GRC Complaint Received: March 24, 2014, and April 8, 2014

¹ Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).

² The GRC has consolidated these complaints for adjudication because of the commonality of the parties and/or issues.

³ Represented by Francesco Taddeo, Esq. (Somerville, NJ).

⁴ This OPRA request is the subject of GRC Complaint No. 2014-139.

⁵ This OPRA request is the subject of GRC Complaint No. 2014-161.

Robert A. Verry v. Borough of South Bound Brook (Somerset), 2014-139, 2014-161 – Findings and Recommendations of the Executive Director

Background⁶

Request and Response:

March 2, 2014, OPRA request

On March 2, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 10, 2014, the Custodian sought an extension of time to respond to until March 18, 2014. On March 18, 2014, the Custodian responded, in writing, denying the request as invalid for failing to specify the subject matter and recipient of the requested e-mails, *citing* Elcavage v. West Milford Twp. GRC Complaint No. 2009-07 (April 2010), and MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005).

March 24, 2014, OPRA request

On March 24, 2014 the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking above-mentioned records. On April 7, 2014, the tenth (10th) business day following the receipt of the request, the Custodian responded in writing, denying the request as in valid for failing to specify the subject matter of the e-mails sought and for failing to name specifically identifiable recipients, *citing* Elcavage, GRC No. 2009-07, and MAG, 375 N.J. Super. at 534.

Denial of Access Complaint:

March 2, 2014, OPRA request

On March 24, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). Regarding timeliness, the Complainant argued that he granted the Custodian’s request for an extension of time to respond on the condition that the requested documents would be released by the extended deadline. Because the Custodian did not release the records, the Complainant asserted that the Custodian’s response was a “deemed” denial and was done so “intentionally” and in “bad faith.” The Complainant claimed that the Custodian had been previously placed on notice that denying access to records after obtaining an extension will result in a “deemed” denial. *See e.g.*, Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (March 2009), Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2012-143 (Interim Order dated July 23, 2013).

The Complainant then contended that his OPRA request for e-mail correspondence was valid and conformed to the requirements set forth in Elcavage, GRC No. 2009-07. The Complainant asserted that he identified a sender and/or recipient (Donald E. Kazar), a date range (January 2013 to March 2, 2014), and specific content. The Complainant identified the content as e-mails containing the following statement:

⁶ 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.

Robert A. Verry v. Borough of South Bound Brook (Somerset), 2014-139, 2014-161 – Findings and Recommendations of the Executive Director

“WARNING: Emails received by or sent to Borough officials is subject to the Open Public records Act [OPRA]. Consider alternative avenues of communication should you have concerns about the content of your email being read by someone other than the persons you are contacting.”

(Hereinafter, “disclaimer”).

Furthermore, the Complainant challenged the Custodian’s denial by arguing that Elcavage does not require the requestor to identify both a sender and recipient. GRC No. 2009-07. The Complainant also asserted that he was not required to provide both the content and subject matter of the requested e-mails. Id. The Complainant insisted that a requestor need only identify a recipient and the content matter pursuant to case law.

The Complainant argued that given the Custodian’s twenty-four (24) years of service, attendance at various OPRA trainings, numerous guidance from the GRC, and dozens of Denial of Access Complaints, it is assumed that the Custodian is well-versed in OPRA. Particularly, the Complainant stated that the Custodian has been put on notice by the GRC of the proper and established criteria of the requirements of e-mail requests pursuant to OPRA through decisions that were adverse to the Custodian’s legal position, *citing Verry v. Borough of S. Bound Brook (Somerset)*, GRC Complaint No. 2009-108 (April 2010), and *Verry v. Borough of S. Bound Brook (Somerset)*, GRC Complaint No. 2011-114, *et. seq.* (Interim Order July 31, 2014). The Complainant contended that the Custodian’s actions here prove, by the preponderance of all credible evidence, that he knowingly and willfully violated OPRA. The Complainant asserted that the Custodian knew he was obligated to produce the responsive e-mails and consciously chose to deny access.

The Complainant thus requested the GRC: 1) order immediate disclosure of all responsive records; 2) determine that the Custodian knowingly and willfully violated OPRA, thus warranting an assessment of the civil penalty; 3) determine that the Complainant is a prevailing party entitled to an award of reasonable attorney’s fees; and 4) order any further relief deemed appropriate.

March 24, 2014, OPRA request

On April 8, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian had not responded by granting access, denying access, seeking an extension of time, or asking for a clarification within the required seven (7) business days.⁷ The Complainant argued that pursuant to Elcavage, his request for e-mails was valid as it had specified a sender (Donald E. Kazar), a date range (March 23, 2014, through March 30, 2014), and content. The content as described in the OPRA request was for e-mails containing the disclaimer identified in the Complainant’s March 2, 2014, OPRA request.

⁷ The record shows that the Custodian replied to the Complainant by e-mail on April 7, 2014 at 6:49 PM. While the Complainant prepared his Complaint on April 7, 2014, it was filed with the GRC on April 8, 2014.

The Complainant argued that in addition to the Custodian's knowledge of the requirements of Elcavage, the Custodian has been put on notice by the GRC of the proper and established criteria required for e-mail requests pursuant to OPRA through decisions that were adverse to the Custodian's legal position, *citing* Verry v. Borough of S. Bound Brook (Somerset), GRC Complaint No. 2009-108 (April 2010), and Verry v. Borough of S. Bound Brook (Somerset), GRC Complaint No. 2011-114, *et. seq.* (Interim Order July 31, 2014). The Complainant argues that the Custodian is hostile to OPRA. Finally, the Complainant asserted that the denial of the records was intentional, deliberate, unreasonable, and denied in bad faith.

The Complainant thus requested the GRC: 1) order immediate disclosure of all responsive records; 2) determine that the Custodian knowingly and willfully violated OPRA thus warranting an assessment of the civil penalty; 3) determine that the Complainant is a prevailing party entitled to an award of reasonable attorney's fees; and 4) order any further relief deemed appropriate.

Statement of Information:

March 2, 2014, OPRA request

On May 1, 2014, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's request on March 4, 2014, and responded on March 18, 2014.

The Custodian argued that the Complainant's request was invalid pursuant to Elcavage, GRC No. 2009-07, as the request failed to identify a recipient and a particular subject matter. Regarding the latter, the Custodian claimed that the content the Complainant sought (the aforementioned "WARNING" message) is a "tag" contained in every e-mail the Custodian has sent within the eighteen (18) month time period. As a result, the Custodian contended that the request is overly broad pursuant to MAG, as the responsive e-mails would encompass every e-mail sent within the requested date range, spanning every subject discussed therein. 375 N.J. Super. at 534. Finally, the Custodian argued the Complainant's request is one of continuing harassment and inquired if the GRC could review the possibility of assessing fees and costs against the Complainant.

March 24, 2014, OPRA request

On April 14, 2014, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on March 24, 2014, and responded on April 7, 2014. The Custodian's basis for his denial of access was the same as his denial of the Complainant's March 2, 2014, OPRA request. The Custodian argued that the Complainant's request was invalid pursuant to Elcavage, GRC No. 2009-07, and MAG, 375 N.J. Super. at 534, stating that the request failed to identify a recipient and subject matter.

Additional Submissions:

March 2, 2014, OPRA request

On May 20, 2014, the Complainant's Counsel argued via letter that the Custodian's SOI contradicted his original basis for denying access to the requested e-mails. Counsel contended that the Custodian cannot claim that the request was "overbroad" and simultaneously assert that the responsive e-mails would constitute "ever[y] e-mail sent by Mr. Kazar." Counsel also rejected the Custodian's implication that a "burdensome" OPRA request is, in itself, a valid basis for denial.

Furthermore, Counsel argued that the disclaimer was not a mere "tagline" as the Custodian described. Counsel asserted that usage of the disclaimer in e-mail correspondence was a policy decision by the Custodian, and disclaimer is itself a statement of policy for the Borough of South Bound Brook ("Borough"). Thus, the Complainant's request for e-mails containing the disclaimer sufficiently identified content as required pursuant to Elcavage, GRC No. 2009-07.

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).⁸ 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, dated October 31, 2007).

March 2, 2014, OPRA request

The GRC notes that the Custodian and Complainant disputed whether a requestor may place conditions on a request for an extension of time. In Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010), the Council determined in pertinent part that "because the Custodian provided a written response requesting an extension on the sixth (6th) business day following receipt of the Complainant's OPRA request and providing a date certain, on which to expect production of the records requested, and, notwithstanding the fact that the Complainant did not agree to the extension of time requested by the Custodian, the Custodian's request for an extension of time [to a specific date] to respond to the Complainant's

⁸ 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.

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OPRA request was made in writing within the statutorily mandated seven (7) business day response time.” The Custodian thus did not unlawfully deny access to the requested records. *See also Starkey v. NJ Dep’t of Transp.*, GRC Complaint Nos. 2007-315, 2007-316, and 2007-317 (February 2009) (holding that the only requirements for a proper extension of time are that said request is in writing and provides an anticipated deadline date upon which a custodian would respond). Thus, as long as the Custodian responded in writing seeking an extension of time and providing a deadline date, said request is valid and no conditions apply.

Here, the Custodian claimed to have received the Complainant’s OPRA request on March 4, 2014. Since March 2, 2014 fell on a Sunday, the earliest the Custodian could have received the OPRA request was March 3, 2014. Regardless of whether the Custodian received the OPRA request on March 3 or March 4, he sought an extension of time to respond on March 10, 2014, within the statutorily mandated seven (7) business day deadline. Furthermore, the Custodian provided a specific deadline date to respond, March 18, 2014.

Therefore, there was no “deemed denial” of access to the Complainant’s March 2, 2014, OPRA request, because the Custodian provided a written response, seeking an extension of time to respond within the statutorily mandated seven (7) business day deadline, notwithstanding the Complainant’s objection thereto. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), Criscione, GRC No. 2010-68, and Starkey, GRC Nos. 2007-315, 2007-316, and 2007-317.

March 24, 2014 OPRA request

In this matter, the Custodian acknowledged that he received the Complainant’s request on March 24, 2014. The Custodian also certified that he responded to the Complainant’s request on April 7, 2014, ten (10) business days after receipt. The Custodian did not assert that he requested an extension of time to respond to the March 24, 2014, OPRA request within the statutorily mandated seven (7) business day deadline. Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant’s March 24, 2014, 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 No. 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:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records “readily accessible for inspection, copying, or examination.” N.J.S.A. 47:1A-1.*

MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 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);⁹ NJ Builders Ass’n 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).

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. In Sandoval v. NJ State Parole Bd., GRC Complaint No. 2006-167 (Interim Order dated March 28, 2007), the Council established criteria deemed necessary to identify specifically an e-mail communication. 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).

⁹ Affirming Bent v. Stafford Police Dep’t, GRC No. 2004-78 (October 2004).

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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).

For both of the Complainant's OPRA requests, the Custodian claimed that because the requests lacked an identifiable recipient and subject matter, they failed to conform to the criteria required for a valid request for e-mail communications. Since there is no dispute that the Complainant provided a specific range of dates for both OPRA requests, the GRC shall address the other two factors individually.

Sender/Recipient

A review of the Complainant's March 2, 2014, and March 24, 2014, OPRA requests shows that said requests conform to this factor required under Elcavage. Specifically, both OPRA requests identify the Custodian, Donald E. Kazar, as the sender and/or recipient of the requested e-mails. The Custodian's claim that the Complainant identified the Custodian as only the sender of the requested e-mails is contradicted by the plain language of the Complainant's requests:

“(C) **Identification of the sender and/or recipient:** Donald E. Kazar”

Complainant's Denial of Access Complaint, Exhibit D.¹⁰ In Elcavage, the complainant identified one source's account in his request for e-mails. The Council interpreted this language to infer that responsive e-mails “could have been either *sent to or sent from*” this single source. Id. at 5 (emphasis in the original). The Council therefore held that the Complainant sufficiently “identified the e-mails by sender *and/or* recipient.” Id. (emphasis added). *See also* Verry v. Borough of S. Bound Brook (Somerset), GRC Complaint No. 2011-114 (Interim Order dated May 29, 2012).

Moreover, the Custodian's reliance on Elcavage to claim that the Complainant was required to provide both a sender and recipient is misplaced. The Council in Elcavage held that the complainant's identification of a single source of e-mails, whether it was the sender or recipient, was enough to satisfy the criteria. GRC No. 2009-07 at 5. By its plain language, the criterion does not require a complainant to identify both a sender and recipient of e-mails. Rather, one source need only be identified as the sender or recipient of the requested e-mails to satisfy the requirements set forth in Elcavage.

¹⁰ The Complainant's Denial of Access Complaints for both 2014-139 and 2014-161 mark their respective OPRA requests as “Exhibit D.”

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Subject Matter/Content

Similar to the discussion above regarding the identity of the sender and/or recipient of the requested e-mails, a review of the Complainant's OPRA requests show that they conform to this factor identified in Elcavage. Specifically, both requests identify the disclaimer as the content within the requested e-mail. The Custodian argued that the March 2, 2014, OPRA request would require production of every e-mail sent or received by the Custodian over an (18) month period, thus making the request invalid. However, the volume of responsive records is a factor considered when determining whether a request warrants a special service charge or would cause a substantial disruption of agency operations. *See* N.J.S.A. 47:1A-5(c) and (g). That the request would produce a voluminous amount of records does not in itself render the request invalid.

The Custodian failed to bear his burden of proof that he lawfully denied access to the Complainant's March 2, 2014 and March 24, 2014 OPRA requests. The Complainant's requests are valid requests for e-mails pursuant to Elcavage, GRC No. 2009-07, as they specifically identify the sender and/or recipient, a range of dates, and content and/or subject matter contained therein. Thus, the Custodian must provide the Complainant access to the records responsive to each OPRA request. If records for a particular OPRA request do not exist, the Custodian shall certify to this fact.

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.

Prevailing Party Attorney's Fees

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. There was no "deemed denial" of access to the Complainant's March 2, 2014, OPRA request, because the Custodian provided a written response, seeking an extension of time to respond within the statutorily mandated seven (7) business day deadline, notwithstanding the Complainant's objection thereto. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010), and Starkey v. NJ Dep't of Transp., GRC Complaint Nos. 2007-315, 2007-316, and 2007-317 (February 2009).

2. The Custodian did not bear his burden of proof that he timely responded to the Complainant's March 24, 2014, 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).
3. The Custodian failed to bear his burden of proof that he lawfully denied access to the Complainant's March 2, 2014, and March 24, 2014, OPRA requests. The Complainant's requests are valid requests for e-mails pursuant to Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010), as they specifically identify the sender and/or recipient, a range of dates, and content and/or subject matter contained therein. Thus, the Custodian must provide the Complainant access to the records responsive to each OPRA request. If records for a particular OPRA request do not exist, the Custodian shall certify to this fact.
4. **The Custodian shall comply with Item No. 3 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, if necessary, and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4,¹¹ to the Executive Director.¹²**
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.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado
Staff Attorney

Reviewed By: Joseph D. Glover
Executive Director

April 21, 2015¹³

¹¹ "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 willing false, I am subject to punishment."

¹² Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Custodian, 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.

¹³ This complaint was prepared for the Council's April 28, 2015 and May 26, 2015 meeting but could not be adjudicated due to lack of quorum.

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