



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

July 26, 2016 Government Records Council Meeting

Vesselin Dittrich
Complainant

v.

City of Hoboken (Hudson)
Custodian of Record

Complaint No. 2015-214

At the July 26, 2016 public meeting, the Government Records Council ("Council") considered the July 19, 2016 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 the Complainant has failed to establish in his request for reconsideration of the Council's May 24, 2016 Final Decision that: 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 v. Bahr*, 295 N.J. Super. 374, 384 (App. Div. 1996). The Complainant failed to establish that the complaint should be reconsidered based on a mistake. The Complainant has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. *See D'Atria v. D'Atria*, 242 N.J. Super. 392, 401 (Ch. Div. 1990). The Complainant merely raised various allegations and asked the GRC to substitute his judgment for its own. The Custodian did not provide any competent evidence to dispute the Final Decision or support his argument. Thus, the Complainant's 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. 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).

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

Vesselin Dittrich¹
Complainant

GRC Complaint No. 2015-214

v.

City of Hoboken (Hudson)²
Custodial Agency

Records Relevant to Complaint: For pick up: “[c]opies of all records re 931 Park Ave #3R”

Custodian of Record: Michael Mastropasqua

Request Received by Custodian: June 22, 2015; July 7, 2015

Response Made by Custodian: None

GRC Complaint Received: July 15, 2015³

Background⁴

May 24, 2016 Council Meeting:

During its public meeting on May 24, 2016, the Council considered the May 17, 2016 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. Johnson v. Borough of Oceanport (Monmouth), GRC Complaint No 2007-201 (March 2008); Colasante v. Cnty. of Bergen, GRC Complaint No. 2010-18 (Interim Order dated September 27, 2011),

¹ No legal representation listed on record.

² Represented by Alysia M. Proko, Esq., Interim Corporation Counsel, City of Hoboken.

³ The GRC referred the matter to mediation on July 27, 2015. Following the parties’ unsuccessful efforts to mediate, the matter was referred back to the GRC on December 11, 2015.

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.

2. Because the Complainant's June 22, 2015 request sought "all documents" relating to a property, and did not specify the type, time range, parties involved in the communication, nor give any other identifier, the request is overbroad pursuant to MAG Entm't LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005). The request sought a broad class of documents rather than specifically named and identifiable records. Feiler-Jampel v. Somerset Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (March 2008); Bradley-Williams v. Atlantic Cnty. Jail, GRC Complaint No. 2011-232 (December 2012).
3. The Complainant filed his Denial of Access Complaint on July 15, 2015, six (6) business days after filing an amended OPRA request. The requested records were not immediate access records that would have required an immediate response. Based on the foregoing, the Complainant verified his Complaint before the Custodian's statutory time for response had ended. Therefore the Complaint, with respect to the subsequent July 7, 2015 OPRA request, is materially defective and must be dismissed. N.J.S.A. 47:1A-5(i). Sallie v. N.J. Dep't of Banking and Ins., GRC Complaint No. 2007- 226 (April 2009); Herron v. Borough of Red Bank (Monmouth), GRC Complaint No. 2012-113 (April 2012); Kulig v. Cumberland Cnty. Improvement Auth., GRC Complaint No. 2013-178 (July 2014).
4. The Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to give a written response within seven (7) business days of his receipt of the initial June 22, 2015 request. However, on June 30, 2015, a City staffer telephoned the Complainant, advising that the request was vague, yielded no responsive records, and offered to make the pertinent file in its entirety available for onsite inspection. Additionally, the request was invalid for being overbroad. Further, when the Complainant modified the search criterion and made a modified request on July 7, 2015, he failed to give the Custodian the statutorily required seven (7) business days to respond in writing. Based on the foregoing, there is no evidence in the record to suggest that the Custodian's failure to provide a written response to the Complainant's OPRA request had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

Procedural History:

On May 27, 2016, the Council distributed its May 24, 2016 Final Decision to all parties. On June 10, 2016, the tenth (10th) business day following his receipt of the Final Decision, the Complainant filed a request that the Council reconsider its May 24, 2016 Final Decision based on a mistake, specifically that the Complainant does not agree that the OPRA request was overbroad, unclear, or vague. He also denied the Custodian's accusation that the Complainant was "attempting to continually instigate the City to perform a technical violation of his OPRA request(s) so that he can file a GRC Complaint." The Complainant also argues that the Custodian

violated OPRA by never telling the Complainant (until the Complaint was underway) that two responsive records existed and failing to provide the records once they were located. The Complainant further alleges that the Custodian and his Counsel acted in bad faith by e-mailing the SOI to an old e-mail address.⁵ He also states bad faith on the part of the City's employees against him is evidenced by the fact that when the Complainant asked for copies of specific records, he was instead only offered the file to review.

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 Complainant filed the request for reconsideration of the Council's May 24, 2016 Final Decision, mailed to him on May 27, 2016 on June 10, 2016 or the tenth (10th) business day following his receipt of the Order. Therefore, the request to reconsider the May 24, 2016 Final Decision was timely received.

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).

⁵ The Custodian avers that he also sent the SOI to the Complainant via certified mail. However, the Complainant alleges that he did not receive it because he was out of the country at that time. The Complainant further alleges that Counsel was well aware of the Complainant's absence from the country.

The Complainant's request addresses only the Council's determination that the request for "All records re 931 Park Avenue Unit 3R" was overbroad and invalid. The Council determined that the request was invalid as it sought "all documents relating to a property and failed to specify the type, time range, parties involved in the communication." Thus the request sought a broad class of documents rather than specifically named and identifiable records. The Complainant now argues that his request only related to "one street, one address, and one apartment." However, the GRC has consistently held that a request that names a subject matter and asks for any and all related records is overbroad. Moreover, at the Reconsideration phase, the Complainant asks the Council to rule that it made a "mistake," but the Complainant's argument is a mere personal criticism. For example, the Complainant cites no precedent where either the Council or a Court reviewed a similar request. The Complainant's argument consists of his own personal findings, such as where he argues that the Council "misunderstands" the seminal MAG case.

Even had the Complainant contented that the Council overlooked evidence or precedent which would justify a "mistake," the Complainant failed to address the second reason why the GRC found there was no unlawful denial of access, namely that the cause of action was unripe. As noted in the decision, the Complainant submitted an amended request on July 7, 2015. The GRC found the amended request to be a clarified yet new submission that contained a material change from the original request: the amendments changed the scope of the prior request from "copies of all records re 931 Park Ave #3R. Not copies of any records about any other units" to "copies of all records regarding 931 Park Avenue Unit 3R." The Complainant made this request on July 7, 2015, but filed a Complaint with the GRC on July 15, 2015, thus failing to give the Custodian the required seven business days to comply with the request. The Complainant did not dispute this finding.⁶

As the moving party, the Complainant 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 Complainant failed to establish that the complaint should be reconsidered based on a mistake. The Complainant has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. *See D'Atria*, 242 N.J. Super. at 401. The Complainant merely raised various allegations and asked the GRC to substitute his judgment for its own. The Complainant did not provide any competent evidence to dispute the Final Decision or support his argument. Thus, the 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Complainant has failed to establish in his request for reconsideration of the Council's May 24, 2016 Final Decision that: 1) the Council's decision is based is upon a "palpably incorrect or irrational basis"; or 2) it is obvious that the Council did not consider the significance of probative,

⁶ The Complainant spells out various criticisms of the Custodian and other City employees, none of which rise to the level of a valid argument that records were unlawfully denied.

competent evidence. *See Cummings v. Bahr*, 295 N.J. Super. 374, 384 (App. Div. 1996). The Complainant failed to establish that the complaint should be reconsidered based on a mistake. The Complainant has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. *See D'Atria v. D'Atria*, 242 N.J. Super. 392, 401 (Ch. Div. 1990). The Complainant merely raised various allegations and asked the GRC to substitute his judgment for its own. The Custodian did not provide any competent evidence to dispute the Final Decision or support his argument. Thus, the Complainant's 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. 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).

Prepared By: Ernest Bongiovanni,
Staff Attorney

July 19, 2016



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
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FINAL DECISION

May 24, 2016 Government Records Council Meeting

Vesselin Dittrich
Complainant

v.

City of Hoboken (Hudson)
Custodian of Record

Complaint No. 2015-214

At the May 24, 2016 public meeting, the Government Records Council (“Council”) considered the May 17, 2016 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 did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. Johnson v. Borough of Oceanport (Monmouth), GRC Complaint No 2007-201 (March 2008); Colasante v. Cnty. of Bergen, GRC Complaint No. 2010-18 (Interim Order dated September 27, 2011),
2. Because the Complainant’s June 22, 2015 request sought “all documents” relating to a property, and did not specify the type, time range, parties involved in the communication, nor give any other identifier, the request is overbroad pursuant to MAG Entm’t LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005). The request sought a broad class of documents rather than specifically named and identifiable records. Feiler-Jampel v. Somerset Cnty. Prosecutor’s Office, GRC Complaint No. 2007-190 (March 2008); Bradley-Williams v. Atlantic Cnty. Jail, GRC Complaint No. 2011-232 (December 2012).
3. The Complainant filed his Denial of Access Complaint on July 15, 2015, six (6) business days after filing an amended OPRA request. The requested records were not immediate access records that would have required an immediate response. Based on the foregoing, the Complainant verified his Complaint before the Custodian’s statutory time for response had ended. Therefore the Complaint, with respect to the subsequent July 7, 2015 OPRA request, is materially defective and must be dismissed. N.J.S.A. 47:1A-5(i). Sallie v. N.J. Dep’t of Banking and Ins., GRC



Complaint No. 2007- 226 (April 2009); Herron v. Borough of Red Bank (Monmouth), GRC Complaint No. 2012-113 (April 2012); Kulig v. Cumberland Cnty. Improvement Auth., GRC Complaint No. 2013-178 (July 2014).

4. The Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to give a written response within seven (7) business days of his receipt of the initial June 22, 2015 request. However, on June 30, 2015, a City staffer telephoned the Complainant, advising that the request was vague, yielded no responsive records, and offered to make the pertinent file in its entirety available for onsite inspection. Additionally, the request was invalid for being overbroad. Further, when the Complainant modified the search criterion and made a modified request on July 7, 2015, he failed to give the Custodian the statutorily required seven (7) business days to respond in writing. Based on the foregoing, there is no evidence in the record to suggest that the Custodian's failure to provide a written response to the Complainant's OPRA request had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

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

Final Decision Rendered by the
Government Records Council
On The 24th Day of May, 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: May 27, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 24, 2016 Council Meeting**

**Vesselin Dittrich¹
Complainant**

GRC Complaint No. 2015-214

v.

**City of Hoboken (Hudson)²
Custodial Agency**

Records Relevant to Complaint: For pick up: “[c]opies of all records re 931 Park Ave #3R”

Custodian of Record: Michael Mastropasqua

Request Received by Custodian: June 22, 2015; July 7, 2015

Response Made by Custodian: None

GRC Complaint Received: July 15, 2015³

Background⁴

Request and Response:

On June 22, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian, seeking “[c]opies of all records re 931 Park Ave, Unit 3R. Not copies of any records about other units.” On June 30, 2015, a Construction Office employee contacted the Complainant and “left a message” to advise the Complainant that there were no records on file that pertain only to Unit 3R. However, the Custodian offered to make the entire file on 931 Park Avenue available for onsite inspection. On July 7, 2015, the Complainant amended the request to remove the limitation regarding other units. On July 15, 2015, the sixth (6th) business day following the Custodian’s receipt of the Complainant’s amended request, the Complainant submitted the instant Denial of Access Complaint to the Government Records Council (GRC).

Denial of Access Complaint:

The Complainant asserted that he filed an OPRA request on June 22, 2015, for “copies of all records re 931 Park Ave Unit 3R. *Not copies of any records about other units*” (emphasis supplied). He alleged that sometime between June 29 and July 7, 2015, the Custodian asked him

¹ No legal representation listed on record.

² Represented by Alysia M. Proko, Esq., Interim Corporation Counsel, City of Hoboken.

³ The GRC referred the matter to mediation on July 27, 2015. Following the parties’ unsuccessful efforts to mediate, the matter was referred back to the GRC on December 11, 2015.

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.

to speak to staff of the Construction Office about his request. The Complainant further stated that he spoke with the Construction Office's staff on July 7, 2015, and submitted the amended request later that same day. He alleged that he received no response.

Statement of Information

On January 4, 2016, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that the Complainant had made a request on June 22, 2015. She certified that the office found the request unclear because there appeared to be no records that pertained to only to Unit 3R. Nevertheless, on June 30, 2015, the Construction Office responded to the Complainant by leaving a voicemail message, which explained that no responsive records were located but that the entire file containing records pertaining to 931 Park Avenue would be available at their office for the Complainant's onsite review. The Custodian certified that the Complainant visited the Construction office on July 7, 2015, refused to review the file, and left an amended request to which his office assigned a new tracking number. The amended request deleted the limitation that read: "not copies of any records about any other units." The Custodian further certified that on July 7, 2015, six (6) business days following receipt of the amended request and before the statutorily required time to respond had expired, the Complainant filed the instant Denial of Access Complaint. The Custodian argued that the Complaint was unripe for adjudication because it was filed one day prior to the statutory deadline to provide a response to the amended request. He also stated that the request, once amended, was clearer than the original and yielded two responsive records, which were made available for pick up. Accordingly, he argued, there was no denial of access.

Additional Submissions:

On February 4, 2016, the Complainant submitted an additional argument, contending that the Custodian's SOI was incorrect. He stated that the OPRA request he made on July 7, 2015, was not a new request but a modification of his OPRA request of June 22, 2015. The amended request contained, he said, a reference to the earlier OPRA request's tracking number and simply dropped the language "not copies of any records about other units."

On February 23, 2016, the Custodian's Counsel ("Counsel") responded to the Complainant's additional submission. Counsel argued that the earlier June 22, 2015 request was vague and that no responsive records existed. Counsel argued that the Custodian therefore correctly and timely advised the Complainant telephonically on June 30, 2015, that no responsive records existed. Nevertheless, Counsel said, the Construction Office's file was left open for the Complainant to review. Counsel further contended that the July 7, 2015 "clarification" by the Complainant was in fact a new request to which the City had seven (7) business days to respond. Counsel argued that the Complainant refused to review the Construction Office's file and that the Complainant's refusal, coupled with his subsequent filing of an unripe complaint, demonstrates his bad faith. Counsel argued that "the Requestor [is] attempting to continually instigate the Custodian and the City to perform a technical violation of his OPRA request(s) so that he could file a complaint." Counsel attached certifications from two Construction Code Officials, both of whom stated that there were no records in the file that pertain only to Unit 3R and that are unrelated to any other units.

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).⁵ Thus, a custodian's failure to respond in writing to a complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

In Johnson v. Borough of Oceanport (Monmouth), GRC Complaint No 2007-201 (March 2008), the Custodian orally responded to the Complainant on the fifth (5th) business day following the receipt of the Complainant's OPRA request, noting that no records responsive to the Complainant's request existed. The GRC determined that the "Custodian's failure to respond *in writing* [emphasis supplied] to the Complainant's request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, even though no records responsive to the request existed, resulted in a 'deemed denial' of the Complainant's OPRA request." *Citing Kelley*, GRC 2007-11. *See also Feiler-Jampel v. Somerset Cnty. Prosecutor's Office*, GRC Complaint No. 2007-190 (March 2008); N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i),

Moreover, in Colasante v. Cnty. of Bergen, GRC Complaint No. 2010-18 (Interim Order dated September 27, 2011), the custodian orally responded and subsequently allowed the complainant to inspect records four (4) business days after receipt of the OPRA request. Notwithstanding both the oral response and inspection within seven (7) business days, the Council determined that the "Custodian's failure to respond *in writing* . . . result[ed] in a "deemed" denial of the Complainant's request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and [Kelley, GRC 2007-11]." Id. at 7 (emphasis in original). In Demitroff v. Buena Vista Twp. (Atlantic), GRC Complaint No. 2014-184 (January 2015), the Custodian permitted the Complainant, who appeared at the Township's offices of his own volition, to inspect potentially responsive records on the seventh (7th) business day. However, the Custodian did not send an actual written response to the Complainant until March 12, 2014, four (4) business days after the expiration of the statutorily mandated timeframe. Notwithstanding that the Complainant inspected records within seven (7) business days, the GRC found that such inspection did not alleviate the Custodian's requirement to respond in writing.

In the instant matter, an employee of the City contacted the Complainant telephonically on June 30, 2015, six (6) business days after receiving Complainant's original OPRA request. The message advised the Complainant that while no responsive records could be found, the entire file would be available in the Construction office for his review. The facts show the file

⁵ 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.

remained there, and when the Complainant went to the Construction office, he refused to review it. Notwithstanding the Complainant's disinterest in the file, which may have included responsive records, the evidence of record shows no written response, as required, to the OPRA request. Moreover, it was incumbent upon the Custodian, who claimed the request was vague, to inform the Complainant in writing⁶ that he should clarify his request. Kelly, GRC 2007-11.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. Johnson, GRC 2007-201, Colasante, GRC 2010-18.

Invalid Request

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 "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.'* N.J.S.A. 47:1A-1." (Emphasis added.) MAG Entm't LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005).

As the court noted in invalidating MAG's request under OPRA:

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.

⁶ In a lengthy response to the Complainant's rebuttal of the Custodian's SOI, Counsel for the Custodian confirms that no written response was sent to the Complainant and argues "[t]here was no actual denial under [OPRA], which requires actual denials to be in writing . . ." Considering the clear requirements of OPRA, Counsel's argument is untenable.

Id. at 549 (emphasis added).

The Court further held that "[u]nder OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files." Id. (emphasis added); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005);⁷ NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Additionally, in Feiler-Jampel v. Somerset Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (March 2008), the complainant sought "[a]ny and all documents and evidence" related to an investigation conducted by the Somerset County Prosecutor's Office (SCPO). The Council found that while the complainant's request identified an entire investigation file by number, the complainant failed to identify specific government records. Id. The Council also held that:

[B]ecause the records requested comprise an entire SCPO file, the request is overbroad and of the nature of a blanket request for a class of various documents rather than a request for specific government records. Because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to research the SCPO files to locate records potentially responsive to the Complainant's request pursuant to the Superior Court's decisions in MAG, *supra* and Bent, *supra* and the Council's decisions in Asarnow, *supra* and Morgano, *supra*. [citations omitted].

Id.

Moreover, in Torian v. N.J. State Parole Bd., GRC Complaint No. 2013-245 (June 2014), the complainant sought his "entire parole folder" with the exception of any documents deemed confidential. The Council found that the complainant's request was invalid since it sought a class of various documents with the complainant's parole file and did not identify specific government records therein. *See also* Bradley-Williams v. Atlantic Cnty. Jail, GRC Complaint No. 2011-232 (December 2012). There the complainant's original OPRA request sought "all of [the Complainant's] incarceration files from October 2005 to April 2006." Citing Feiler-Jampel, GRC 2007-190, the GRC held the Complainant's request to be invalid as a "blanket request for a class of various documents, rather than a request for specifically named or identifiable records."

Likewise here, the Complainant's initial request was vague and overbroad. It sought "all records re 931 Park Ave Unit 3R. *Not copies of any records about other units.*" The request did not state when the records might have been made, by whom, nor the type of record sought.

Because the Complainant's June 22, 2015 request sought "all documents" relating to a property and did not specify the type, time range, parties involved in the communication, nor give any other identifier, the request is overbroad pursuant to MAG, 375 N.J. Super. at 546, Bent, 381 N.J. Super. at 3. The request sought a broad class of documents rather than specifically

⁷ Affirming Bent v. Stafford Police Dep't, GRC Case No. 2004-78 (October 2004).

named and identifiable records. Feiler-Gampel, GRC 2007-190, Bradley-Williams, GRC, 2011-32.

Unripe Cause of Action

OPRA provides that “a custodian of a government record shall grant access to a government record or deny access to a government record as soon as possible, but not later than *seven business days after receiving the request . . .*” N.J.S.A. 47:1A-5(i) (emphasis added). OPRA further states that “[a] person who is denied access to a government record by the custodian of the record . . . may institute a proceeding to challenge the custodian’s decision by filing . . . a complaint with the Government Records Council . . .” N.J.S.A. 47:1A-6.

In Sallie v. N.J. Dep’t of Banking and Ins., GRC Complaint No. 2007- 226 (April 2009), the complainant forwarded a complaint to the GRC, asserting that he had not received a response from the custodian, and seven (7) business days would have passed by the time the GRC received the Denial of Access Complaint. The custodian argued in the SOI that the complainant filed the complaint prior to the expiration of the statutorily mandated seven (7) business day time frame set forth in N.J.S.A. 47:1A-5(i). The Council held that:

[B]ecause the Complainant’s cause of action was not ripe at the time he verified his Denial of Access Complaint; to wit, the Custodian had not at that time denied the Complainant access to a government record, the complaint is materially defective and therefore should be dismissed.

Id.; see also Herron v. Borough of Red Bank (Monmouth), GRC Complaint No. 2012-113 (April 2012) and Kulig v. Cumberland Cnty. Improvement Auth., GRC Complaint No. 2013-178 (July 2014).

In the present matter, the Complainant submitted an amended request on July 7, 2015. The GRC finds this request to be a clarified yet new submission that contains a material change from the original June 22, 2015 request, because it changed the range of the prior request from “copies of all records re 931 Park Ave #3R. Not copies of any records about any other units” to “copies of all records regarding 931 Park Avenue Unit 3R.”⁸

The Complainant filed his Denial of Access Complaint on July 15, 2015, six (6) business days after filing an amended OPRA request. The requested records were not immediate access records that would have required an immediate response. Based on the foregoing, the Complainant verified his Complaint before the Custodian’s statutory time for response had ended. Therefore the Complaint, with respect to the subsequent July 7, 2015 OPRA request, is materially defective and must be dismissed. N.J.S.A. 47:1A-5(i). Sallie, GRC 2007-226; Herron, GRC 2012-113; Kulig, GRC 2013-178.

⁸ The GRC notes that the Complainant described the records sought on the “records denied list,” contained in his Denial of Access Complaint, as “all records regarding 931 Park Avenue # 3R,” which mirrors the request made on July 7, 2015 and not the request made on June 22, 2015.

Knowing and 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. 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)).

In the instant matter, the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to give a written response within seven (7) business days of his receipt of the initial June 22, 2015 request. However, on June 30, 2015, a City staffer telephoned the Complainant, advising that the request was vague, yielded no responsive records, and offered to make the pertinent file in its entirety available for onsite inspection. Additionally, the request was invalid for being overbroad. Further, when the Complainant modified the search criterion and made a modified request on July 7, 2015, he failed to give the Custodian the statutorily required seven (7) business days to respond in writing. Based on the foregoing, there is no evidence in the record to suggest that the Custodian’s failure to provide a written response to the Complainant’s OPRA request had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the

statutorily mandated seven (7) business days, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. Johnson v. Borough of Oceanport (Monmouth), GRC Complaint No 2007-201 (March 2008); Colasante v. Cnty. of Bergen, GRC Complaint No. 2010-18 (Interim Order dated September 27, 2011),

2. Because the Complainant’s June 22, 2015 request sought “all documents” relating to a property, and did not specify the type, time range, parties involved in the communication, nor give any other identifier, the request is overbroad pursuant to MAG Entm’t LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005). The request sought a broad class of documents rather than specifically named and identifiable records. Feiler-Jampel v. Somerset Cnty. Prosecutor’s Office, GRC Complaint No. 2007-190 (March 2008); Bradley-Williams v. Atlantic Cnty. Jail, GRC Complaint No. 2011-232 (December 2012).
3. The Complainant filed his Denial of Access Complaint on July 15, 2015, six (6) business days after filing an amended OPRA request. The requested records were not immediate access records that would have required an immediate response. Based on the foregoing, the Complainant verified his Complaint before the Custodian’s statutory time for response had ended. Therefore the Complaint, with respect to the subsequent July 7, 2015 OPRA request, is materially defective and must be dismissed. N.J.S.A. 47:1A-5(i). Sallie v. N.J. Dep’t of Banking and Ins., GRC Complaint No. 2007- 226 (April 2009); Herron v. Borough of Red Bank (Monmouth), GRC Complaint No. 2012-113 (April 2012); Kulig v. Cumberland Cnty. Improvement Auth., GRC Complaint No. 2013-178 (July 2014).
4. The Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to give a written response within seven (7) business days of his receipt of the initial June 22, 2015 request. However, on June 30, 2015, a City staffer telephoned the Complainant, advising that the request was vague, yielded no responsive records, and offered to make the pertinent file in its entirety available for onsite inspection. Additionally, the request was invalid for being overbroad. Further, when the Complainant modified the search criterion and made a modified request on July 7, 2015, he failed to give the Custodian the statutorily required seven (7) business days to respond in writing. Based on the foregoing, there is no evidence in the record to suggest that the Custodian’s failure to provide a written response to the Complainant’s OPRA request had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

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