INTERIM ORDER

November 12, 2019 Government Records Council Meeting

Mark Demitroff
Complainant
v.
Buena Vista Township (Atlantic)
Custodian of Record

At the November 12, 2019 public meeting, the Government Records Council (“Council”) considered the October 30, 2019 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. A plain reading of OPRA supports that social media records are “government records” subject to disclosure to the extent that they are “made, maintained or kept on file . . . or . . . received in the course of . . . official business . . .” N.J.S.A. 47:1A-1.1. The Council stresses that this determination broadly addresses the characterization of social media posts as “government records” and notes that exemptions to disclosure may apply on a case-by-case basis. Accordingly, this determination should not be construed to provide for unmitigated access to all of a public agency, employee, or official’s social media posts.

2. The Custodian and Mayor Chiarello may have unlawfully denied access to the Complainant’s July 7, 2017 OPRA request. N.J.S.A. 47:1A-6. Specifically, Mayor Chiarello’s support of a Township project through a GoFundMe campaign is inextricably considered “official business” and the associated records are thus “government records” for purposes of OPRA. N.J.S.A. 47:1A-1.1; Larkin v. Borough of Glen Rock, Docket No. BER-L-2573-18 (June 15, 2018). Although both parties have asserted that the GoFundMe campaign was terminated and no records likely exist, there is no evidence in the record to support such a position. Thus, the Custodian and Mayor Chiarello shall attempt to locate responsive records and either 1) disclose them to the Complainant, with redactions where applicable, or 2) certify to the nonexistence of records responsive to either OPRA request item. Regardless of the existence of records, both the Custodian and Mayor Chiarello must provide a detailed certification explaining their search for the requested records.

3. The Custodian and Mayor Chiarello shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian and Mayor
Chiarello shall simultaneously deliver certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director.\(^3\)

4. The Council defers analysis of whether the Custodian and/or Mayor Chiarello knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Interim Order Rendered by the Government Records Council
On The 12\(^{th}\) Day of November 2019

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: November 14, 2019**

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\(^1\) The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

\(^2\) “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.”

\(^3\) Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.
STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Council Staff
November 12, 2019 Council Meeting

Mark Demitroff¹
Complainant

v.

Buena Vista Township (Atlantic)²
Custodial Agency

Records Relevant to Complaint: Electronic copies of:

1. The most recent spreadsheet of all GoFundMe donation activity (as described on the GoFundMe website).
2. A computer screen snapshot of the most recent, entire GoFundMe activity dashboard (also as described on the GoFundMe website).

Custodian of Record: Lisa Tilton
Request Received by Custodian: July 7, 2017
Response Made by Custodian: July 18, 2017
GRC Complaint Received: August 17, 2017

Background³

Request and Response:

On July 7, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 18, 2019, the Custodian responded in writing denying access to the requested records. The Custodian stated that the request related to a private GoFundMe page held by Mayor Chuck Chiarello and not Buena Vista Township (“Township”). The Custodian thus stated that there are no responsive “government records” that exist, noting that she was denied access to the private GoFundMe page. The Custodian finally noted that she could not locate the GoFundMe campaign from the link the Complainant provided in his OPRA request; thus, she could not determine if it was a “government record.”

¹ No legal representation listed on record.
³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Council Staff the submissions necessary and relevant for the adjudication of this complaint.

Mark Demitroff v. Buena Vista Township (Atlantic), 2017-169 – Findings and Recommendations of the Council Staff
Denial of Access Complaint:

On August 17, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that in fall of 2016, Mayor Chiarello initiated a GoFundMe campaign via his private Facebook page to solicit funds for a tree-carving project at Saw Mill Park. The Complainant stated that the project goal was to turn a 135-year-old deceased oak tree in the park into a historical monument.

The Complainant stated that several individuals, including himself, made donations that were dispersed to Mayor Chiarello via WePay checks. The Complainant stated that he attempted to obtain GoFundMe records regarding this project on three occasions but was denied each time. The Complainant noted that when he submitted his third OPRA request, which is the subject of this complaint, the GoFundMe page was abruptly shuttered. The Complainant asserted that the shutdown effectively destroyed the records sought. The Complainant contended that the requested records were nonetheless considered “government records” under OPRA based on three points. N.J.S.A. 47:1A-1.1.

The Complainant first argued that Mayor Chiarello used the image of the oak tree as his logo on his personal Facebook page, which overtly endorsed his candidate choices in a recent election. The Complainant noted that Mayor Chiarello’s profile picture was utilized in the GoFundMe campaign page. The Complainant also argued that Mayor Chiarello received a $100 donation from IBEW and in turn posted support for them and their backed candidate on his Facebook page. The Complainant thus argued that the requested records were subject to OPRA because the GoFundMe campaign was tied to Mayor Chiarello’s Facebook page and that they shared the same profile picture.

The Complainant next argued that Mayor Chiarello used the GoFundMe page to conduct municipal business. The Complainant pointed to an excerpt on the page, which directed individuals to contact his office in the Township for more information about purchasing pavers for a walkway around the oak tree monument.

The Complainant finally contended that the checks were made out to Mayor Chiarello from WePay and addressed to the Township building. The Complainant further noted that Mayor Chiarello signed the checks over to the Township for deposit.

Statement of Information:

On September 8, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on July 7, 2017. The Custodian noted that she was familiar with the GoFundMe campaign because the Complainant previously requested records in connection with same. The Custodian noted that she denied those requests for various reasons including that records sought were not “government records” under OPRA.

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4 The Complainant argued that the payment evoked a sense of quid pro quo to the Facebook post. The GRC does not address this issue because it has no authority over such. N.J.S.A. 47:1A-7(b).

Mark Demitroff v. Buena Vista Township (Atlantic), 2017-169 – Findings and Recommendations of the Council Staff
The Custodian affirmed that notwithstanding the prior denials, she tried to obtain records from the GoFundMe page in connection with the subject OPRA request. The Custodian averred that she was denied the ability to access the GoFundMe page and had no authority to demand access to same because the Township did not make, maintain, or receive it. The Custodian certified that she responded in writing on July 18, 2017 denying access to the request because it did not seek “government records.” The Custodian noted that the GoFundMe page was taken down by Mayor Chiarello; thus, it is likely that any records responsive to this request was destroyed. The Custodian noted that there is no retention schedule for the records at issue here.

The Custodian argued that she lawfully denied access to the Complainant’s OPRA request. The Custodian asserted that Mayor Chiarello’s private GoFundMe page did not constitute a “government record” under OPRA.

Analysis

Definition of a Government Record

OPRA defines a “government record” as:

[1]any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file . . . or that has been received in the course of his or its official business by any officer[.]

[N.J.S.A. 47:1A-1.1. (emphasis added).]

The GRC has not previously reviewed the issue of whether records created on social media platforms fall within the definition of a “government record” under OPRA. New Jersey Courts have had some limited experience in this realm. See e.g. Larkin v. Borough of Glen Rock, Docket No. BER-L-2573-18 (June 15, 2018). Thus, this matter is one of first impression for the Council.

New Jersey Courts have provided that “[t]he purpose of OPRA ‘is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.’” Times of Trenton Publ'g Corp. v. Lafayette Yard Cnty. Dev. Corp., 183 N.J. 519, 535 (2005) (quoting Asbury Park Press v. Ocean Cnty. Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004)). The broad definition of a “government record” strongly supports OPRA’s purpose by casting a wide net to capture as many records as possible. Inclusive of the definition is “information stored or maintained electronically.” N.J.S.A. 47:1A-1.1; Paff v. Twp. of Galloway, 227 N.J. 340, 353 (2017). See also Zahler v. Ocean Cnty. Coll., GRC Complaint No. 2013-266 (Interim Order dated July 29, 2014). Thus, a plain reading of OPRA provides that the definition of a “government record” encompasses electronic records “made, maintained or kept on file . . . or that [have] been received in the course of . . . official business.” To that end, the GRC has held that the location of a defined “government record” did not abrogate a custodian’s responsibility to obtain and disclose same in response to an OPRA request. See
Here, and prior to determining whether the Custodian lawfully denied access to the records at issue, the GRC must address the threshold issue of whether social media posts in general can fall within the definition of a “government record” under OPRA. N.J.S.A. 47:1A-1.1.

Social media usage, whether through Facebook, Twitter, or other platforms, has become more commonplace in the daily life of many citizens. In fact, 72% of citizens nation-wide are now using social media for several purposes.5 Government agencies and elected officials have followed suit by establishing social media accounts to disseminate information to and interact with those citizens. With governmental use of social media comes uncertainty in the difference between “private” and “public” social media accounts. This is especially true where elected officials or government employees are utilizing their social media accounts for multiple purposes, both in their official capacity and as private citizens.

However, a plain reading of OPRA supports that “information stored or maintained electronically . . . that has been made, maintained or kept on file . . . or . . . received in the course of . . . official business” is considered a “government record” under OPRA. N.J.S.A. 47:1A-1.1. It is thus clear that OPRA firmly places social media posts regarding official business within the definition of a “government record.” Further, public officials or employees conducting “official business” on social media, whether through an account they deem “public” or “private,” does not disqualify those posts from disclosure. This was the essence of the argument in Meyers, GRC 2005-27; to wit, a mayor conducting official business on his personal e-mail account did not shield those e-mails from disclosure under OPRA. Such a ruling is also consistent with the GRC’s first impression ruling on text messages and their general classification as a “government record.” Verry v. Franklin Fire District No. 1 (Somerset), GRC Complaint No. 2014-387 (July 2015).

Therefore, a plain reading of OPRA supports that social media records are “government records” subject to disclosure to the extent that they are “made, maintained or kept on file . . . or . . . received in the course of . . . official business . . .” N.J.S.A. 47:1A-1.1. The Council stresses that this determination broadly addresses the characterization of social media posts as “government records” and notes that exemptions to disclosure may apply on a case-by-case basis. Accordingly, this determination should not be construed to provide for unmitigated access to all of a public agency, employee, or official’s social media posts.

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.

Having generally found that social media records may fall within the definition of a “government record” to the extent that they pertain to “official business,” the GRC now turns to whether the Custodian and/or Mayor Chiarello unlawfully denied access to the record sought. The GRC reiterates that the issue presently before the Council is a matter of first impression.

Initially, the trial court’s decision in Larkin, Docket No. BER-L-2573-18, although unpublished, contains a well-reasoned analysis of the social media issue that is instructive here. There, the court held that block lists from the Mayor and Councils’ individual Facebook pages were subject to disclosure under OPRA. Of significant note, the Larkin court defined “official business” as “those duties which are imposed by law as well as those which are clearly inherent in and naturally arise from the nature of the office.” Slip. Op. at 16 (citing State v. Schenkolewski, 30 N.J. Super. 115, 143 (App. Div. 2007)). Further, the court stressed that:

[P]rivate formulation of the Facebook accounts does not preclude the conclusion that they are government accounts. Because the Mayor and council members use the Facebook accounts for government functions, the control they exercise over the accounts is accordingly governmental in nature.

[Slip Op. at 17-18.]

The court also addressed decisions in both Washington State and New Mexico, ultimately holding that “[r]ather than applying a one-size-fits-all rule, this [c]ourt . . . has made a fact-sensitive review of the Facebook pages at issue.” Id. (citing West v. City of Puyallup, 410 P.3d 1197, 1200 (Wash Ct. App. 2018); Pacheco v. Hudson, 415 P.3d 505 (N.M. 2018).

In the instant Denial of Access Complaint, the Complainant contended that the requested records were “government records” under OPRA. First, the Complainant argued that Mayor Chiarello’s Facebook page, wherein he endorsed political candidates, shared the same oak tree logo as the GoFundMe page. The Complainant next argued that Mayor Chiarello conducted municipal business on the GoFundMe page when he referred parties interested in purchasing bricks an associated project to the Township. The Complainant finally argued that donations made to the GoFundMe campaign were deposited by the Township. The Complainant also noted that the GoFundMe campaign was terminated after the Township received the subject OPRA request; thus, it was likely no records existed as of the filing of the complaint.

Conversely, the Custodian argued in the SOI that she properly denied access to the Complainant’s OPRA request because the requested records were not considered “government records” under OPRA. The Custodian contended that Mayor Chiarello started the GoFundMe account as a private citizen and that she had no access to the requested records. The Custodian further affirmed that notwithstanding her denial, she attempted to fulfill the request to no avail. The Custodian noted that she also found that Mayor Chiarello terminated the GoFundMe campaign and that it was likely that responsive records were destroyed.

Turning to the social media platform in question here, GoFundMe is a free international fundraising platform that individuals can use to raise money for any number of causes.6 GoFundMe

also promotes a fundraiser’s ability to immediately access donated funds. A quintessential tool that GoFundMe offers is the ability reach many people by sharing a campaign via e-mail, text, and, most pertinent here, social media. When launching a GoFundMe campaign, a perspective fundraiser can sign in through Facebook or create a GoFundMe account. Thereafter, the fundraiser sets a fundraising goal, creates a campaign profile, and shares it accordingly through e-mail, text, or social media. The GRC notes that GoFundMe’s “Terms of Service” do not prohibit government officials or entities from raising money for community projects.

Now, the GRC must examine whether the fundraising campaign at the center of this complaint could be construed as “official business,” thus designating associated records as “government records” under OPRA. Mayor Chiarello started the GoFundMe campaign at issue here to raise funds for the tree-carving project. Notwithstanding that the Custodian argued that Mayor Chiarello started the campaign as a private citizen, the evidence of record suggests that the project, inclusive of fundraising, fell within the scope of “official business.” This is because the evidence of record supports that the Township and Mayor Chiarello “exercised control” over the tree-carving project. In reaching this conclusion, the GRC points to the Complainant’s Denial of Access Complaint submission proving that donations submitted to the GoFundMe campaign were made payable to the Township. Further, the Complainant provided evidence that Mayor Chiarello solicited on behalf of the Township for a corresponding brick fundraiser on the GoFundMe campaign message board.7

It further stands to reason that Mayor Chiarello’s GoFundMe campaign was inextricably linked to his official capacity with the Township. The forgoing position is supported by at least one local news article, as well as Township press releases. For instance, the Daily Journal reported on August 31, 2016 that Mayor Chiarello was “determined to raise the necessary funds so that no tax dollars are used for the project.”8 The Daily Journal further reported that “[t]hat’s why [Mayor Chiarello] set up a GoFundMe account and is asking area businesses and residents to help.” This article was followed by an October 8, 2016 Township press release soliciting donations for the tree-carving project.9 Also, in a May 16, 2017 Township press release announcing the May 27, 2017 memorial dedication, the Township stated that the “idea of a Tree Monument was born with the guidance of Mayor Chuck Chiarello and the . . . Committee.”10

To be clear, this is not a situation where a private citizen with no ties to the Township decided to aid the tree-carving project through a GoFundMe campaign. Instead, Mayor Chiarello “exercised control” of the project and its fundraising through his capacity as a Township official. Further, the GoFundMe campaign “naturally ar[o]se from” his own work on the tree-carving project with the Township. Based on this, Mayor Chiarello cannot assert that his “private” support

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7 The GRC notes that whether Mayor Chiarello utilized his Facebook account to support local candidates is not a factor in this analysis, as the Council has previously held that there exists a separation between campaigning and “official business” as defined in OPRA. See Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-318 (September 2016).
for the project through the GoFundMe campaign is somehow separate from his capacity as an elected official. Thus, in following the court’s analysis in Larkin, it is clear that the records the Complainant sought fell within the definition of a “government record” and Mayor Chiarello was required to provide same to the Custodian for review and potential disclosure.

Accordingly, the Custodian and Mayor Chiarello may have unlawfully denied access to the Complainant’s July 7, 2017 OPRA request. N.J.S.A. 47:1A-6. Specifically, Mayor Chiarello’s support of a Township project through a GoFundMe campaign is inextricably considered “official business” and the associated records are thus “government records” for purposes of OPRA. N.J.S.A. 47:1A-1.1; Larkin, Docket No. BER-L-2573-18. Although both parties have asserted that the GoFundMe campaign was terminated and no records likely exist, there is no evidence in the record to support such a position. Thus, the Custodian and Mayor Chiarello shall attempt to locate responsive records and either 1) disclose them to the Complainant, with redactions where applicable, or 2) certify to the nonexistence of records responsive to either OPRA request item. Regardless of the existence of records, both the Custodian and Mayor Chiarello must provide a detailed certification explaining their search for the requested records.

Knowing & Willful

The Council defers analysis of whether the Custodian and/or Mayor Chiarello knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. A plain reading of OPRA supports that social media records are “government records” subject to disclosure to the extent that they are “made, maintained or kept on file . . . or . . . received in the course of . . . official business . . .” N.J.S.A. 47:1A-1.1. The Council stresses that this determination broadly addresses the characterization of social media posts as “government records” and notes that exemptions to disclosure may apply on a case-by-case basis. Accordingly, this determination should not be construed to provide for unmitigated access to all of a public agency, employee, or official’s social media posts.

2. The Custodian and Mayor Chiarello may have unlawfully denied access to the Complainant’s July 7, 2017 OPRA request. N.J.S.A. 47:1A-6. Specifically, Mayor Chiarello’s support of a Township project through a GoFundMe campaign is inextricably considered “official business” and the associated records are thus “government records” for purposes of OPRA. N.J.S.A. 47:1A-1.1; Larkin v. Borough of Glen Rock, Docket No. BER-L-2573-18 (June 15, 2018). Although both parties have asserted that the GoFundMe campaign was terminated and no records likely exist, there is no evidence in the record to support such a position. Thus, the Custodian and Mayor Chiarello shall attempt to locate responsive records and either 1) disclose them to the Complainant, with redactions where applicable, or 2) certify to the nonexistence of
records responsive to either OPRA request item. Regardless of the existence of records, both the Custodian and Mayor Chiarello must provide a detailed certification explaining their search for the requested records.

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

4. The Council defers analysis of whether the Custodian and/or Mayor Chiarello knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Prepared By: Frank F. Caruso
Executive Director

October 30, 2019

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11 The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

12 “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.”

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

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