



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

November 12, 2019 Government Records Council Meeting

Tara Park
Complainant

Complaint No. 2017-200

v.

Township of Monroe (Gloucester)
Custodian of Record

At the November 12, 2019 public meeting, the Government Records Council (“Council”) considered the October 30, 2019 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that this complaint should be dismissed because the Complainant withdrew it in writing via e-mail on October 1, 2019. Thus, no further adjudication is required.

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 12th 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 15, 2019



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
November 12, 2019 Council Meeting**

**Tara Park¹
Complainant**

GRC Complaint No. 2017-200

v.

**Township of Monroe (Gloucester)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. "ALL Emailed correspondence between the following employees: Susan Wiley, Ginny Hise (Carbonaro), Ninette Orbaczewski, Steve D'Amico, Donna Marks, Roseann Deleo, Judy Delconte since January 1, 2015."
2. "All Email correspondence by any township employee, administrator or council person with the name TARA or TARA PARK within the email since January 1, 2015."

Custodian of Record: Susan McCormick

Request Received by Custodian: August 23, 2017

Response Made by Custodian: August 25, 2017

GRC Complaint Received: October 16, 2017

Background

September 24, 2019 Council Meeting:

At its September 24, 2019 public meeting, the Council considered the September 17, 2019 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 has borne her burden of proof that she timely responded to the Complainant's August 23, 2017 OPRA request. N.J.S.A. 47:1A-6. The Custodian's extensions of time to respond to the Complainant's request were reasonable and not unduly excessive based upon the totality of the circumstances. N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). See also Ciccarone v. N.J. Dep't of Treas., GRC Complaint No. 2013-280 (Interim Order dated July 29, 2014).

¹ No legal representation listed on record.

² Represented by John Trimble, of Trimble & Armano (Blackwood, NJ).

2. Item No. 2 of the Complainant's August 23, 2017 ORPA request seeking e-mails is valid because it identified a sender/recipient, a specific date range, and content and/or subject matter. Burke v. Brandes, 429 N.J. Super. 169, 177 (App. Div. 2012); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010).
3. The Custodian unlawfully denied access to Item No. 2 of the Complainant August 23, 2017 OPRA request seeking e-mails pertaining to personnel information subject to disclosure under N.J.S.A. 47:1A-10. N.J.S.A. 47:1A-6. Therefore, the Custodian must: 1) disclose to the Complainant the responsive e-mails at issue; or 2) if the Custodian believes a special service charge is warranted, she must calculate it and provide the Complainant with a chance to accept or reject. N.J.S.A. 47:1A-5(c).
4. **The Complainant shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order. If applicable, the Custodian shall deliver to the Complainant a statement of the amount of the special service charge. The Complainant shall, within five (5) business days from receipt of the special service charge, deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase the records. The Complainant's failure to take any action within the allotted five (5) business days shall be construed as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5(b) and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Should the Complainant remit payment, the Custodian shall provide access to the responsive records and simultaneously deliver³ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁴ to the Executive Director⁵ within ten (10) business days following receipt of said payment. Conversely, if the Complainant declined to purchase the records, the Custodian shall deliver to the Executive Director a statement confirming the Complainant's refusal to purchase the requested records and such statement shall be in the form of a certification as described above.**
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.

Procedural History:

On September 26, 2019, the Council distributed its Interim Order to all parties. On October 1, 2019, the Complainant e-mailed the GRC, stating that she no longer wished to have the

³ 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.

⁴ "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."

⁵ 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.

requested information, and requested that the matter be dismissed.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint should be dismissed because the Complainant withdrew it in writing via e-mail on October 1, 2019. Thus, no further adjudication is required.

Prepared By: Samuel A. Rosado
Staff Attorney

October 30, 2019



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

September 24, 2019 Government Records Council Meeting

Tara Park
Complainant

Complaint No. 2017-200

v.

Township of Monroe (Gloucester)
Custodian of Record

At the September 24, 2019 public meeting, the Government Records Council (“Council”) considered the September 17, 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. The Custodian has borne her burden of proof that she timely responded to the Complainant’s August 23, 2017 OPRA request. N.J.S.A. 47:1A-6. The Custodian’s extensions of time to respond to the Complainant’s request were reasonable and not unduly excessive based upon to the totality of the circumstances. N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). See also Ciccarone v. N.J. Dep’t of Treas., GRC Complaint No. 2013-280 (Interim Order dated July 29, 2014).
2. Item No. 2 of the Complainant’s August 23, 2017 ORPA request seeking e-mails is valid because it identified a sender/recipient, a specific date range, and content and/or subject matter. Burke v. Brandes, 429 N.J. Super. 169, 177 (App. Div. 2012); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010).
3. The Custodian unlawfully denied access to Item No. 2 of the Complainant August 23, 2017 OPRA request seeking e-mails pertaining to personnel information subject to disclosure under N.J.S.A. 47:1A-10. N.J.S.A. 47:1A-6. Therefore, the Custodian must: 1) disclose to the Complainant the responsive e-mails at issue; or 2) if the Custodian believes a special service charge is warranted, she must calculate it and provide the Complainant with a chance to accept or reject. N.J.S.A. 47:1A-5(c).
4. **The Complainant shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council’s Interim Order. If applicable, the Custodian shall deliver to the Complainant a statement of the amount of the special service charge. The Complainant shall, within five (5) business days from receipt of the special service charge, deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase the records. The Complainant’s failure to take any action within the allotted five (5) business days shall be construed as (b) above and the Custodian shall no longer be required to**

disclose the records pursuant to N.J.S.A. 47:1A-5(b) and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Should the Complainant remit payment, the Custodian shall provide access to the responsive records and simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director³ within ten (10) business days following receipt of said payment. Conversely, if the Complainant declined to purchase the records, the Custodian shall deliver to the Executive Director a statement confirming the Complainant's refusal to purchase the requested records and such statement shall be in the form of a certification as described above.

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.

Interim Order Rendered by the
Government Records Council
On The 24th Day of September 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: September 26, 2019

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 Executive Director
September 24, 2019 Council Meeting**

**Tara Park¹
Complainant**

GRC Complaint No. 2017-200

v.

**Township of Monroe (Gloucester)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. “ALL Emailed correspondence between the following employees: Susan Wiley, Ginny Hise (Carbonaro), Ninette Orbaczewski, Steve D’Amico, Donna Marks, Roseann Deleo, Judy Delconte since January 1, 2015.”
2. “All Email correspondence by any township employee, administrator or council person with the name TARA or TARA PARK within the email since January 1, 2015.”

Custodian of Record: Susan McCormick

Request Received by Custodian: August 23, 2017

Response Made by Custodian: August 25, 2017

GRC Complaint Received: October 16, 2017

Background³

Request and Response:

On August 23, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 25, 2017, the Custodian responded in writing stating that the request was overly broad and burdensome as to the subject matter and stated that agencies are required to disclose only “identifiable government records that are not otherwise exempt.” Further, the Custodian stated that “OPRA does not require an open-ended search of an agency’s files.”

On August 25, 2017, the Complainant e-mailed the Custodian, asking whether any part of the request would be fulfilled. On August 29, 2017, the Custodian responded to the Complainant, stating that the Complainant needed to specifically identify what government record or subject

¹ No legal representation listed on record.

² Represented by Gary H. Lomanno, of the Law Offices of Gary H. Lomanno (Williamstown, NJ).

³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

matter pertaining to request Item No. 1. That same day, the Complainant replied to the Custodian, stating that regarding Item No. 1, she was seeking e-mails discussing “office issues, procedures, or problems specifically with other employees.” As to Item No. 2, the Complainant stated that she was seeking any e-mails discussing her “employment, [her] duties or responsibilities, comp[ensation] time, or salary.”

On August 30, 2017, the Custodian responded to the Complainant, stating that as a result of receiving clarification on the request, a new deadline to respond was set for the end of business on September 7, 2017. However, the Custodian added that a ten (10) day extension of time was warranted due to the voluminous amount of records references. The Custodian stated that a response would be provided by September 20, 2017.

On September 19, 2017, the Custodian requested an additional thirty (30) days to provide a response to the OPRA request. The Custodian stated that the additional time was necessary for potential redactions as well as medium conversion of the records due to the voluminous amount involved. The Custodian stated that the new return date would be October 20, 2017.

On September 22, 2017, the Complainant responded to the Custodian, stating that the Custodian’s new request for an extension was excessive. The Complainant stated that she had not received any update from the Custodian beyond the initial denial. The Complainant added that she believed her initial request was valid. The Complainant then said she would file a complaint with the Government Records Council (“GRC”) as a result of the response time and how the matter was handled.

On September 26, 2017, the Custodian responded to the Complainant, stating that her OPRA request generated thousands of responses to their search. The Custodian added that these records could contain confidential and or private information, and that the Township of Monroe (“Township”) has an obligation not only to the Complainant to provide responsive records, but also to the privacy rights of other employees. The Custodian stated that she is not required to turn over all responsive documents to the Complainant and allow her to sort through them.

On September 28, 2017, the Custodian notified the Complainant via telephone and e-mail that responsive records for Item No. 1 were ready to be picked up, as they were contained in a CD-ROM (“CD”) disc. Regarding Item No. 2, the Custodian denied access to those records pursuant to N.J.S.A. 47:1A-10, which exempts access to personnel or pension records, including records relating to any grievance filed by or against an individual. The Custodian also cited N.J.S.A. 47:1A-1, where a public agency has the responsibility to protect a citizen’s personal information when disclosure of such would violate the citizen’s reasonable expectation of privacy.

Additionally, the CD contained a memorandum from Kevin Heydel (“Mr. Heydel”), the Township’s Business Administrator, where he detailed how many responsive records were located from each identified individual’s e-mail address. Mr. Heydel also stated that Item No. 2 of the request was denied as the results of the search yielded 43,133 records containing the keyword “Tara Park,” and 50,643 records containing the keyword “Tara.” Mr. Heydel said this part of the request was “overly burdensome” as providing it required a manual visual review of the e-mails

and communications regarding personnel would have to be physically extracted. Mr. Heydel stated that the request needed to be narrowed.

Denial of Access Complaint:

On October 16, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant disputed the time taken to fulfill the request overall, and the denial of Item No. 2.

Statement of Information:

On December 4, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on August 23, 2017. The Custodian certified that she responded in writing on August 25, 2017, denying the request as overly broad. Upon receiving clarification from the Complainant on August 29, 2017, the Custodian certified that a search was conducted via the “Email Archive System,” which contained 1,491,000 records. Regarding Item No. 1, the Custodian certified that for each identified person, the time period requested was reviewed, tagged, and placed into an individual folder for each person. The Custodian certified that the records were provided to the Complainant via CD on September 28, 2017. Regarding Item No. 2, the Custodian certified that the request was denied.

The Custodian argued that she properly denied both items of the request in her initial response, arguing that custodians “are required to disclose only ‘identifiable’ government records not otherwise exempt” and “OPRA does not countenance open-ended searches of an agency’s files,” citing MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005). The Custodian also asserted that a requestor must specifically describe the document sought and that OPRA does not allow a requestor “satisfy this requirement by simply requesting all of an agency’s documents.” Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005). The Custodian therefore asserted that the Complainant’s request was a “fishing expedition,” and the Township was not required to perform an open-ended search of its files to satisfy the OPRA request.

The Custodian also contended that the extension of time was reasonable considering the voluminous nature of the request, and ultimately provided the Complainant with a CD containing responsive records for Item No. 1 of her request. The Custodian also asserted that Item No. 2 was properly denied in accordance with N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-10.

Additional Submissions:

On December 17, 2017, the Complainant e-mailed the GRC in response to the Custodian’s SOI. The Complainant stated that when clarifying Item No. 2 of her request, the “complaints” she referred to were not intended to mean official grievances filed, but of word-of-mouth complaints allegedly mentioned by other supervisors. The Complainant added that no formal grievance or complaint was ever filed from the identified parties. The Complainant maintained that she was willing to review the results of the search herself.

Additionally, the Complainant stated that the information contained in the documents pertained to her own personnel file and/or comments on her ability to do her job, so she was unsure why such information would need to be redacted from her.

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).⁴ 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 Rivera v. City of Plainfield Police Dep't (Union), GRC Complaint No. 2009-317 (May 2011), the custodian responded in writing to the complainant's request on the fourth (4th) business day by seeking an extension of time to respond and providing an anticipated date by which the requested records would be made available. The complainant did not consent to the custodian's request for an extension of time. The Council stated that:

The Council has further described the requirements for a proper request for an extension of time. Specifically, in Starkey v. N.J. Dep't of Transp., GRC Complaint Nos. 2007-315 through 317 (February 2009), the Custodian provided the Complainant with a written response to his OPRA request on the second (2nd) business day following receipt of said request in which the Custodian requested an extension of time to respond to said request and provided the Complainant with an anticipated deadline date upon which the Custodian would respond to the request. The Council held that "because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5(g) [and] N.J.S.A. 47:1A-5(i).

Further, in Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010), the Council held that the custodian did not unlawfully deny access to the requested records, stating in pertinent part that:

[B]ecause the Custodian provided a written response requesting an extension on the sixth (6th) business day following receipt of the Complainant's OPRA request and

⁴ 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.

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 OPRA request was made in writing within the statutorily mandated seven (7) business day response time.

Although extensions are rooted in well-settled case law, the Council need not find valid every request for an extension containing a clear deadline. In Ciccarone v. N.J. Dep't of Treas., GRC Complaint No. 2013-280 (Interim Order dated July 29, 2014), the Council found that the custodian could not lawfully exploit the process by repeatedly rolling over an extension once obtained. In reaching the conclusion that the continuous extensions resulted in a "deemed" denial of access, the Council looked to what is "reasonably necessary." Id.

To determine if the extended time for a response is reasonable, the GRC must first consider the complexity of the request as measured by the number of items requested, the ease in identifying and retrieving requested records, and the nature and extent of any necessary redactions. Id. The GRC must next consider the amount of time the custodian already had to respond to the request. Id. Finally, the GRC must consider any extenuating circumstances that could hinder the custodian's ability to respond effectively to the request.⁵ Id.

In the instant complaint, Item No. 1 of the request sought e-mail correspondence between several identified employees between January 1, 2015 and August 23, 2017. Upon receiving clarification, the Custodian sought an extension of time of ten business (10) days, and then an additional thirty calendar (30) days for a total of thirty-six (36) business days requested. However, the Custodian responded on September 28, 2017, for a total of twenty-one (21) business days taken to respond to the clarified request.

The result was approximately 577 identified e-mails out of 28,084 reviewed for Item No. 1. The Custodian also denied Item No. 2 as overly burdensome, locating approximately 50,000 records. In consideration of the above circumstances, the GRC finds that the response time for the OPRA request was not excessive due to the nature of the request and the time needed to review each record for potential redactions. Both Items of the Complainant's request sought e-mails containing personnel information arguably exempt from access under N.J.S.A. 47:1A-10. Thus, the Custodian was justified in requesting the time needed to review each record for potential redactions.

Therefore, the Custodian has borne her burden of proof that she timely responded to the Complainant's August 23, 2017 OPRA request. N.J.S.A. 47:1A-6. The Custodian's extensions of time to respond to the Complainant's request were reasonable and not unduly excessive based upon to the totality of the circumstances. N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). See also Ciccarone, GRC 2013-280.

⁵ "Extenuating circumstances" could include, but not necessarily be limited to, retrieval of records that are in storage or archived (especially if located at a remote storage facility), conversion of records to another medium to accommodate the requestor, emergency closure of the custodial agency, or the custodial agency's need to reallocate resources to a higher priority due to *force majeure*.

Validity of Request

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, 375 N.J. Super. at 546 (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). See also Bent, 381 N.J. Super. at 37⁶; N.J. Builders Ass'n v. N.J. 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).

Regarding requests requiring research, the distinction between search and research can be fact-sensitive at times. That is, there are instances where the very specificity of a request requires only a search, as would the case would be with OPRA requests for communications properly containing all three (3) criteria set forth in Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). To that end, the Council has provided guidance on how requests containing the Elcavage criteria do not require research:

[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. When it comes to e-mails or documents stored on a computer,

⁶ Affirming Bent v. Stafford Police Dep't, GRC Complaint No. 2004-78 (October 2004).

a simple keyword search may be sufficient to identify any records that may be responsive to a request. As to correspondence, a custodian may be required to search an appropriate file relevant to the subject. In both cases, e-mails and correspondence, a completed “subject” or “regarding” line may be sufficient to determine whether the record relates to the described subject. Again, what will be sufficient to determine a proper search will depend on how detailed the OPRA request is, and will differ on a case-by-case basis. What a custodian is not required to do, however, is to actually read through numerous e-mails and correspondence to determine if same is responsive: in other words, conduct research.

[Verry v. Borough of South Bound Brook (Somerset), GRC Complaint Nos. 2013-43 and 2013-53 (Interim Order dated September 24, 2013).]

Additionally, in Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010), the plaintiff appealed from an order of summary judgment entered against him in his suit to compel production by the County of Gloucester of documents requested pursuant to OPRA, consisting of “[a]ny and all settlements, releases or similar documents entered into, approved or accepted from 1/1/2006 to present.” Id. at 508. The Appellate Division determined that the request sought a *specific type of document, although it did not specify a particular case to which such document pertained*, and was therefore not overly broad. Id. at 515-16 (emphasis added). Likewise, the court in Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012), found a request for the E-Z Pass benefits of Port Authority retirees to be valid because it was confined to a specific subject matter that was clearly and reasonably described with sufficient identifying information. Id. at 176. The court noted that “the fact that the custodian of records actually performed a search and was able to identify records responsive to plaintiff’s request belies any assertion that the request was lacking specificity or was overbroad.” Id. at 177.

With respect to Item No. 2 of the Complainant’s August 23, 2017 OPRA request, the Custodian asserted that the request was invalid pursuant to MAG, 375 N.J. Super. at 546, and Bent, 381 N.J. Super. at 37.

Upon review, the GRC is satisfied that Item No. 2 of the Complainant’s request conforms to the requirements under Elcavage as a valid request for e-mails. The Complainant identified the e-mails’ sender/recipients, a date range, and contained the subject matter or content of “Tara” or “Tara Park.” See Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2015-97, *et seq.* (Interim Order dated March 22, 2016) (listing proper names as keywords satisfies the subject matter requirement). Moreover, the fact that the Custodian was able to locate responsive records undermines her claim that the request was overly broad. See Burke, 429 N.J. Super. at 177.

Accordingly, Item No. 2 of the Complainant’s August 23, 2017 ORPA request seeking e-mails is valid because it identified a sender/recipient, a specific date range, and content and/or subject matter. Burke, 429 N.J. Super. at 177; Elcavage, GRC 2009-07.

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.

Regarding personnel records, OPRA begins with a presumption against disclosure and “proceeds with a few narrow exceptions that . . . need to be considered.” Kovalcik v. Somerset Cnty. Prosecutor’s Office, 206 N.J. 581, 594 (2011). These are:

[A]n individual’s name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of any pension received shall be government record;

[P]ersonnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and

[D]ata contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.

[Id. (citing N.J.S.A. 47:1A-10).]

The Council has addressed whether personnel records not specifically identified in OPRA were subject to disclosure. For instance, in Guerrero v. Cnty. of Hudson, GRC Complaint No. 2010-216 (December 2011), the complainant sought, among other records, “[a]ny known felony charges.” Id. In the SOI, the custodian argued that he was precluded from acknowledging the existence of felony charges because such information is not included within the excepted personnel information under OPRA. The Council agreed, determining that “. . . even if records of any felony charges were contained within Mr. Spinello’s personnel file, such records are not disclosable under OPRA . . .” Id. at 8. The Council reasoned that “OPRA clearly identifies certain [personnel] information that is subject to disclosure . . . These exceptions do not include any possible felony or criminal charges . . . Thus, OPRA implies that personnel records referencing felony charges are not subject to disclosure . . .” Id.

Here, the Custodian argued that Item No. 2 of the Complainant’s request would result in locating e-mails containing personnel information exempt from disclosure under N.J.S.A. 47:1A-10. In her e-mail dated August 29, 2017, the Complainant clarified her request as seeking e-mails discussing her “employment, [her] duties or responsibilities, comp[ensation] time, or salary.” Notwithstanding, in accordance with the above caselaw, responsive e-mails pertaining to the Complainant’s “title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of any pension received” are subject to access. Additionally, the voluminous nature of the request does not permit a custodian to deny access to records that are otherwise subject to disclosure under OPRA.

Accordingly, the Custodian unlawfully denied access to Item No. 2 of the Complainant August 23, 2017 OPRA request seeking e-mails pertaining to personnel information subject to disclosure under N.J.S.A. 47:1A-10. N.J.S.A. 47:1A-6. Therefore, the Custodian must: 1) disclose to the Complainant the responsive e-mails at issue; or 2) if the Custodian believes a special service charge is warranted, she must calculate it and provide the Complainant with a chance to accept or reject. N.J.S.A. 47:1A-5(c).

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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has borne her burden of proof that she timely responded to the Complainant's August 23, 2017 OPRA request. N.J.S.A. 47:1A-6. The Custodian's extensions of time to respond to the Complainant's request were reasonable and not unduly excessive based upon to the totality of the circumstances. N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). See also Ciccarone v. N.J. Dep't of Treas., GRC Complaint No. 2013-280 (Interim Order dated July 29, 2014).
2. Item No. 2 of the Complainant's August 23, 2017 ORPA request seeking e-mails is valid because it identified a sender/recipient, a specific date range, and content and/or subject matter. Burke v. Brandes, 429 N.J. Super. 169, 177 (App. Div. 2012); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010).
3. The Custodian unlawfully denied access to Item No. 2 of the Complainant August 23, 2017 OPRA request seeking e-mails pertaining to personnel information subject to disclosure under N.J.S.A. 47:1A-10. N.J.S.A. 47:1A-6. Therefore, the Custodian must: 1) disclose to the Complainant the responsive e-mails at issue; or 2) if the Custodian believes a special service charge is warranted, she must calculate it and provide the Complainant with a chance to accept or reject. N.J.S.A. 47:1A-5(c).
4. **The Complainant shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order. If applicable, the Custodian shall deliver to the Complainant a statement of the amount of the special service charge. The Complainant shall, within five (5) business days from receipt of the special service charge, deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase the records. The Complainant's failure to take any action within the allotted five (5) business days shall be construed as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5(b) and Paff v. City of Plainfield,**

GRC Complaint No. 2006-54 (July 2006). Should the Complainant remit payment, the Custodian shall provide access to the responsive records and simultaneously deliver⁷ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁸ to the Executive Director⁹ within ten (10) business days following receipt of said payment. Conversely, if the Complainant declined to purchase the records, the Custodian shall deliver to the Executive Director a statement confirming the Complainant's refusal to purchase the requested records and such statement shall be in the form of a certification as described above.

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.

Prepared By: Samuel A. Rosado
Staff Attorney

September 17, 2019

⁷ 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.

⁸ "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."

⁹ 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.