



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

Nicholas Patrick DiFelice
Complainant

Complaint No. 2017-233

v.

Monroe Township Public Schools (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:

1. The Custodian complied with the Council’s September 24, 2019 Interim Order. Specifically, the Custodian performed an adequate search using the identifiers contained in the subject OPRA request. Further, the Custodian responded in the prescribed time frame providing the responsive records, with redactions and statutory citations, to the Complainant via e-mail. Finally, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian’s failure to timely respond to the Complainant’s OPRA request resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian’s initial search was insufficient, and she unlawfully denied access to the responsive e-mails. N.J.S.A. 47:1A-6; Schneble v. N.J. Dep’t of Env’tl. Protection, GRC Complaint No. 2007-220 (April 2008); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint Nos. 2013-43 and 2013-53 (Interim Order dated September 24, 2013). Also, the Custodian failed to comply fully with the Council’s August 27, 2019 Interim Order. However, the Custodian complied with the Council’s September 24, 2019 Interim Order by performing a sufficient search and disclosed responsive records to the Complainant on October 3, 2019. Additionally, the evidence of record does not indicate that the Custodian’s violations of OPRA 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 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 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**

**Nicholas Patrick DiFelice¹
Complainant**

GRC Complaint No. 2017-233

v.

**Monroe Township Public Schools (Gloucester)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of e-mails to or from any Monroe Township Board of Education (“BOE”) members, Charles Earling, Ralph Ross, David Sullivan, the Custodian, and John Armano from October 1, 2017 through the present containing the keyword the name or “DiFelice” or any variations thereof (di felice, defelice, de felice).

Custodian of Record: Lisa Schulz

Request Received by Custodian: November 27, 2017

Response Made by Custodian: December 8, 2017

GRC Complaint Received: December 8, 2017

Background

September 24, 2019 Council Meeting:

At its September 24, 2019 public meeting, the Council considered the September 17, 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, found that:

1. The Custodian failed to comply fully with the Council’s August 27, 2019 Interim Order. The Custodian responded in the prescribed time frame simultaneously providing certified confirmation of compliance to the Executive Director. However, a review of the certification showed that the Custodian’s assessed special service charge and the Complainant’s denial in no way applied to the subject OPRA request.
2. Pursuant to Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-218, *et seq.* (Interim Order dated April 26, 2016), the Council is giving the Custodian a final opportunity to conduct a sufficient search based on the exact verbiage contained in the Complainant’s November 26, 2017 OPRA request. Upon conducting said search, the Custodian shall disclose the responsive e-mails to the Complainant. However,

¹ No legal representation listed on record.

² Represented by Lauren E. Tedesco, Esq., of Capehart, Scatchard, P.A. (Mt. Laurel, NJ).

should the Custodian determine that a special service charge is warranted thereafter, she must provide the Complainant with the amount of the special service charge required to purchase the requested records. Should the Custodian believe that any e-mails or portions thereof fall within an exemption, the Custodian must redact said record in a visually obvious manner and provide a document index identifying the specific lawful basis for each redaction. Further, should the Custodian's sufficient search identify no responsive e-mails, the Custodian must certify to this fact.

3. **The Custodian 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, and simultaneously deliver³ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁴ to the Executive Director.⁵**

4. **In the event the Custodian determines that a special service charge is applicable, the Custodian shall complete the GRC's 14-point analysis⁶ and calculate the appropriate special service charge. The Custodian shall then make the amount of the charge, together with the completed 14-point analysis, available to the Complainant within five (5) business days from receipt of the Council's Interim Order. 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 said time frame shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within twenty (20) business days following the Complainant's payment of the special service charge, the Custodian shall deliver to the Executive Director certified confirmation of compliance as first provided above. 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 in accordance with R. 1:4-4. The completed 14-point analysis shall be attached to the certification and incorporated therein by reference.**

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.

⁶ See <https://nj.gov/grc/pdf/OPRASpecialServiceCharge.pdf>.

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 3, 2019, the Custodian responded to the Council's Interim Order. Therein, the Custodian certified that she originally responded to the Council's August 27, 2019 Interim Order with belief that she conducted a sufficient search during the pendency of this complaint. The Custodian apologized for the confusion, noting that the BOE received 250 OPRA requests that were difficult to "organize, track, and respond to."

The Custodian certified that after receiving the September 24, 2019 Interim Order, she realized she confused the Complainant's other OPRA requests with the one at issue here. The Custodian affirmed that she conducted a new search on September 27, 2019 using the terms provided in the subject OPRA request. The Custodian certified that she disclosed the responsive records located with redactions. The Custodian noted that she included the specific lawful bases next to each redaction.

Analysis

Compliance

At its September 24, 2019 meeting, the Council ordered the Custodian to conduct a sufficient search as previously directed by the Council in its August 27, 2019 Interim Order. The Council further ordered the Custodian to disclose those e-mails located, with redactions if applicable, or to certify if no responsive records were located. Finally, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On September 26, 2019, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order.⁷ Thus, the Custodian's response was due by close of business on October 3, 2019.

On October 3, 2019, the third (3rd) business day after receipt of the Council's Order, the Custodian disclosed four (4) large files containing responsive records to the Complainant via e-mail, copying all parties. Further, the Custodian provided certified confirmation of compliance to the Executive Director. Upon review of the Custodian's submission, the GRC is satisfied that the Custodian adequately complied with the Council's Order.

Therefore, the Custodian complied with the Council's September 24, 2019 Interim Order. Specifically, the Custodian performed an adequate search using the identifiers contained in the subject OPRA request. Further, the Custodian responded in the prescribed time frame providing

⁷ The Council also provided a twenty (20) business day deadline to the Custodian should a special service charge be assessed. However, the GRC does not address this portion of the Interim Order because the Custodian did not levy any such charge.

the responsive records, with redactions and statutory citations, to the Complainant via e-mail. Finally, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

Knowing & Willful

OPRA states that “[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . .” N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states “. . . [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . .” N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

In the matter before the Council, the Custodian’s failure to timely respond to the Complainant’s OPRA request resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian’s initial search was insufficient, and she unlawfully denied access to the responsive e-mails. N.J.S.A. 47:1A-6; Schneble v. N.J. Dep’t of Env’tl. Protection, GRC Complaint No. 2007-220 (April 2008); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint Nos. 2013-43 and 2013-53 (Interim Order dated September 24, 2013). Also, the Custodian failed to comply fully with the Council’s August 27, 2019 Interim Order. However, the Custodian complied with the Council’s September 24, 2019 Interim Order by performing a sufficient search and disclosed responsive records to the Complainant on October 3, 2019. Additionally, the evidence of record does not indicate that the Custodian’s violations of OPRA 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 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 complied with the Council's September 24, 2019 Interim Order. Specifically, the Custodian performed an adequate search using the identifiers contained in the subject OPRA request. Further, the Custodian responded in the prescribed time frame providing the responsive records, with redactions and statutory citations, to the Complainant via e-mail. Finally, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

2. The Custodian's failure to timely respond to the Complainant's OPRA request resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian's initial search was insufficient, and she unlawfully denied access to the responsive e-mails. N.J.S.A. 47:1A-6; Schneble v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint Nos. 2013-43 and 2013-53 (Interim Order dated September 24, 2013). Also, the Custodian failed to comply fully with the Council's August 27, 2019 Interim Order. However, the Custodian complied with the Council's September 24, 2019 Interim Order by performing a sufficient search and disclosed responsive records to the Complainant on October 3, 2019. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA 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 unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso
Executive Director

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

Nicholas Patrick DiFelice
Complainant

Complaint No. 2017-233

v.

Monroe Township Public Schools (Gloucester)
Custodian of Record

At the September 24, 2019 public meeting, the Government Records Council (“Council”) considered the September 17, 2019 Supplemental 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 failed to comply fully with the Council’s August 27, 2019 Interim Order. The Custodian responded in the prescribed time frame simultaneously providing certified confirmation of compliance to the Executive Director. However, a review of the certification showed that the Custodian’s assessed special service charge and the Complainant’s denial in no way applied to the subject OPRA request.
2. Pursuant to Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-218, *et seq.* (Interim Order dated April 26, 2016), the Council is giving the Custodian a final opportunity to conduct a sufficient search based on the exact verbiage contained in the Complainant’s November 26, 2017 OPRA request. Upon conducting said search, the Custodian shall disclose the responsive e-mails to the Complainant. However, should the Custodian determine that a special service charge is warranted thereafter, she must provide the Complainant with the amount of the special service charge required to purchase the requested records. Should the Custodian believe that any e-mails or portions thereof fall within an exemption, the Custodian must redact said record in a visually obvious manner and provide a document index identifying the specific lawful basis for each redaction. Further, should the Custodian’s sufficient search identify no responsive e-mails, the Custodian must certify to this fact.
3. **The Custodian 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, and**

simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rule R. 1:4-4,² to the Executive Director.³

4. In the event the Custodian determines that a special service charge is applicable, the Custodian shall complete the GRC's 14-point analysis⁴ and calculate the appropriate special service charge. The Custodian shall then make the amount of the charge, together with the completed 14-point analysis, available to the Complainant within five (5) business days from receipt of the Council's Interim Order. 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 said time frame shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within twenty (20) business days following the Complainant's payment of the special service charge, the Custodian shall deliver to the Executive Director certified confirmation of compliance as first provided above. 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 in accordance with R. 1:4-4. The completed 14-point analysis shall be attached to the certification and incorporated therein by reference.
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.

⁴ See <https://nj.gov/grc/pdf/OPRASpecialServiceCharge.pdf>.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
September 24, 2019 Council Meeting**

**Nicholas Patrick DiFelice¹
Complainant**

GRC Complaint No. 2017-233

v.

**Monroe Township Public Schools (Gloucester)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of e-mails to or from any Monroe Township Board of Education (“BOE”) members, Charles Earling, Ralph Ross, David Sullivan, the Custodian, and John Armano from October 1, 2017 through the present containing the keyword the name or “DiFelice” or any variations thereof (di felice, defelice, de felice).

Custodian of Record: Lisa Schulz

Request Received by Custodian: November 27, 2017

Response Made by Custodian: December 8, 2017

GRC Complaint Received: December 8, 2017

Background

August 27, 2019 Council Meeting:

At its August 27, 2019 public meeting, the Council considered the August 20, 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 did not bear her burden of proof that she 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 v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian’s failure to conduct a reasonable search for responsive e-mails based on all the criteria included in the Complainant’s OPRA request resulted in an insufficient

¹ No legal representation listed on record.

² Represented by Lauren E. Tedesco, Esq., of Capehart, Scatchard, P.A. (Mt. Laurel, NJ).

search. Schneble v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint Nos. 2013-43 and 2013-53 (Interim Order dated September 24, 2013). Further, the Custodian may have unlawfully denied access to records responsive to the subject OPRA request. N.J.S.A. 47:1A-6. Thus, the Custodian shall perform a sufficient search for responsive records. Should the Custodian not locate any responsive records, she must certify to this fact. Also, should the Custodian determine that a special service charge is warranted thereafter, she must provide the Complainant with the amount of the special service charge required to purchase the requested records.

3. **The Custodian 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 shall simultaneously deliver³ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁴ to the Executive Director.⁵**

4. **In the event the Custodian determines that a special service charge is applicable, the Custodian shall complete the GRC's 14-point analysis⁶ and calculate the appropriate special service charge. The Custodian shall then make the amount of the charge, together with the completed 14-point analysis, available to the Complainant within five (5) business days from receipt of the Council's Interim Order. 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 said time frame shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within twenty (20) business days following the Complainant's payment of the special service charge, the Custodian shall deliver to the Executive Director certified confirmation of compliance as first provided above. 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 in accordance with R. 1:4-4. The completed 14-point analysis shall be attached to the certification and incorporated therein by reference.**

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.

⁶ See <https://nj.gov/grc/pdf/OPRASpecialServiceCharge.pdf>.

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 August 28, 2019, the Council distributed its Interim Order to all parties. On September 5, 2019, the Custodian responded to the Council's Interim Order. Therein, the Custodian certified that during the pendency of this complaint, she performed a search for e-mails responsive to the subject OPRA request. The Custodian certified that on March 10, 2018, she sent the Complainant a letter advising of a special service charge of \$878.85 for 25.11 hours of work to review and disclose 2,382 e-mails. The Custodian affirmed that the Complainant subsequently submitted a new OPRA request to the BOE on March 14, 2018 seeking an e-mail log containing potentially responsive e-mails. The Custodian certified that thereafter, the Complainant e-mailed the BOE on April 4, 2018 asserting that he was "satisfied" because he did not want to pay a special service charge.

Additional Submissions:

On September 8, 2019, the Complainant e-mailed the Government Records Council ("GRC") disagreeing with the Custodian's Interim Order response. The Complainant asserted that the Custodian's certification was "insufficient and irrelevant." The Complainant further argued that the correspondence the Custodian attached to her response was "not the correct information" and referred to a different OPRA request.

On September 10, 2019, the GRC e-mailed the Complainant seeking clarification of his e-mail. Specifically, the GRC asked the Complainant to clarify whether he intended to accept the Custodian's compliance without further action.

On September 12, 2019, the Complainant responded via e-mail advising that he did not accept the Custodian's compliance certification. The Complainant asserted that there was no correlation between the certification and the OPRA request at issue in this complaint. The Complainant noted that following the initiation of this complaint, he continued to submit OPRA requests to the BOE. The Complainant asserted that one such request sought e-mails with similar search terms, which was also ignored. The Complainant noted that the Custodian advised him that 2,382 e-mails were located and that a special service charge of \$878.85 applied. The Complainant argued that he subsequently sought and received an e-mail log containing the results of the later OPRA request. The Complainant noted that he was surprised to find that the number of e-mails allegedly responsive to that request decreased to 38. The Complainant asserted that the forgoing is an example of the "kinds of games" the BOE engaged in when responding to OPRA requests.

Analysis

Compliance

At its August 27, 2019 meeting, the Council ordered the Custodian to perform a sufficient search and either disclose the responsive records located or certify is none existed. The Council further ordered that if the Custodian determined that a special service charge was warranted, she had to advise the Complainant of the amount. Further, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. It should be noted that the certification submission time frame was determinate on the special service charge issue. On August 28, 2019, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on September 5, 2019.

On September 5, 2019, the fifth (5th) business day after receipt of the Council's Order, the Custodian responded stating that during the pendency of this complaint, she conducted another search and provided a special service charge estimate to the Complainant. The Custodian further affirmed that the Complainant declined to pay the charge, stating that he was "satisfied" on April 4, 2018. The Complainant subsequently asserted his disagreement with the Custodian's compliance response. Specifically, the Complainant asserted that the request the Custodian cited to in her certification was not the subject OPRA request. The Complainant provided additional background on the later OPRA request and ultimately alleged that the Custodian's actions represented the "kinds of games" the BOE engaged in when responding to OPRA requests.

Upon review of the evidence of record submitted in response to the Council's Order, the GRC is not satisfied that the Custodian complied with same. Specifically, the OPRA request for which the Custodian assessed a special service charge, dated February 12, 2018, was neither the subject OPRA request at issue here nor was it identical. For instance, the date range of that OPRA request spanned September 1, 2017 through February 12, 2018, or more than five (5) months. The OPRA request at issue in this complaint spanned from October 1, 2017 to November 26, 2017, or only about two (2) months. Further, the identified senders/recipients differed; the February 12, 2018 OPRA request changed the Custodian out for Administrator Caroline Yoder. Thus, the same search issue identified in the Council's Order has not been cured.

Therefore, the Custodian failed to comply fully with the Council's August 27, 2019 Interim Order. The Custodian responded in the prescribed time frame simultaneously providing certified confirmation of compliance to the Executive Director. However, a review of the certification showed that the Custodian's assessed special service charge and the Complainant's denial in no way applied to the subject OPRA request.

In the past, the GRC has provided custodians a "final opportunity to disclose [records required to be disclosed] and/or provide comprehensive arguments as to why same are not subject to disclosure." See Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-218, *et seq.* (Interim Order dated April 26, 2016) at 4. In Carter, the custodian submitted compliance in response to the Council's September 29, 2015 Interim Order. However, in reviewing that compliance, it became evident that it was incomplete. Specifically, several attachments were not disclosed, and the custodian did not provide an explanation for the nondisclosure. The Council thus held that the custodian did not comply fully with the its Order and provided him "a 'final

opportunity” to comply. Carter, GRC 2014-218 (citing Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-287 (Interim Order dated April 28, 2015) at 7).

Here, the Custodian submitted certified confirmation of compliance in timely manner; however, and as discussed above, it did not address the OPRA request at issue in this complaint. It is not clear here whether the Custodian simply confused the February 12, 2018 OPRA request as identical to the subject OPRA request. However, the fact remains that the Custodian, as well as other members of the BOE, have now twice attempted to assess a special service charge for a version of the subject OPRA request that was not identical.

As was the case in Carter, the Custodian’s compliance here was incomplete. An additional order should ensure that the Custodian conducts an accurate search based on the exact verbiage of the Complainant’s November 26, 2017 OPRA request. Thereafter, the Custodian shall either disclose those that exist, assess a special service charge, or certify if no records existed.

Accordingly, and pursuant to Carter, GRC 2014-218, the Council is giving the Custodian a final opportunity to conduct a sufficient search based on the exact verbiage contained in the Complainant’s November 26, 2017 OPRA request. Upon conducting said search, the Custodian shall disclose the responsive e-mails to the Complainant. However, should the Custodian determine that a special service charge is warranted thereafter, she must provide the Complainant with the amount of the special service charge required to purchase the requested records. Should the Custodian believe that any e-mails or portions thereof fall within an exemption, the Custodian must redact said record in a visually obvious manner and provide a document index identifying the specific lawful basis for each redaction. Further, should the Custodian’s sufficient search identify no responsive e-mails, the Custodian must certify to this fact.

Knowing & Willful

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian failed to comply fully with the Council’s August 27, 2019 Interim Order. The Custodian responded in the prescribed time frame simultaneously providing certified confirmation of compliance to the Executive Director. However, a review of the certification showed that the Custodian’s assessed special service charge and the Complainant’s denial in no way applied to the subject OPRA request.
2. Pursuant to Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-218, *et seq.* (Interim Order dated April 26, 2016), the Council is giving the Custodian a final opportunity to conduct a sufficient search based on the exact verbiage contained in the Complainant’s November 26, 2017 OPRA request. Upon conducting said search,

- the Custodian shall disclose the responsive e-mails to the Complainant. However, should the Custodian determine that a special service charge is warranted thereafter, she must provide the Complainant with the amount of the special service charge required to purchase the requested records. Should the Custodian believe that any e-mails or portions thereof fall within an exemption, the Custodian must redact said record in a visually obvious manner and provide a document index identifying the specific lawful basis for each redaction. Further, should the Custodian's sufficient search identify no responsive e-mails, the Custodian must certify to this fact.
3. **The Custodian 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, and simultaneously deliver⁷ certified confirmation of compliance, in accordance with N.J. Court Rule R. 1:4-4,⁸ to the Executive Director.⁹**
 4. **In the event the Custodian determines that a special service charge is applicable, the Custodian shall complete the GRC's 14-point analysis¹⁰ and calculate the appropriate special service charge. The Custodian shall then make the amount of the charge, together with the completed 14-point analysis, available to the Complainant within five (5) business days from receipt of the Council's Interim Order. 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 said time frame shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within twenty (20) business days following the Complainant's payment of the special service charge, the Custodian shall deliver to the Executive Director certified confirmation of compliance as first provided above. 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 in accordance with R. 1:4-4. The completed 14-point analysis shall be attached to the certification and incorporated therein by reference.**

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.

¹⁰ See <https://nj.gov/grc/pdf/OPRASpecialServiceCharge.pdf>.

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: Frank F. Caruso
Executive Director

September 17, 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

August 27, 2019 Government Records Council Meeting

Nicholas Patrick DiFelice
Complainant

Complaint No. 2017-233

v.

Monroe Township Public Schools (Gloucester)
Custodian of Record

At the August 27, 2019 public meeting, the Government Records Council (“Council”) considered the August 20, 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 did not bear her burden of proof that she 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 v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian’s failure to conduct a reasonable search for responsive e-mails based on all the criteria included in the Complainant’s OPRA request resulted in an insufficient search. Schneble v. N.J. Dep’t of Env’tl. Protection, GRC Complaint No. 2007-220 (April 2008); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint Nos. 2013-43 and 2013-53 (Interim Order dated September 24, 2013). Further, the Custodian may have unlawfully denied access to records responsive to the subject OPRA request. N.J.S.A. 47:1A-6. Thus, the Custodian shall perform a sufficient search for responsive records. Should the Custodian not locate any responsive records, she must certify to this fact. Also, should the Custodian determine that a special service charge is warranted thereafter, she must provide the Complainant with the amount of the special service charge required to purchase the requested records.
3. **The Custodian 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 shall simultaneously deliver¹ certified confirmation of**

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.

compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³

4. **In the event the Custodian determines that a special service charge is applicable, the Custodian shall complete the GRC's 14-point analysis⁴ and calculate the appropriate special service charge. The Custodian shall then make the amount of the charge, together with the completed 14-point analysis, available to the Complainant within five (5) business days from receipt of the Council's Interim Order. 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 said time frame shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within twenty (20) business days following the Complainant's payment of the special service charge, the Custodian shall deliver to the Executive Director certified confirmation of compliance as first provided above. 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 in accordance with R. 1:4-4. The completed 14-point analysis shall be attached to the certification and incorporated therein by reference.**
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 27th Day of August 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: August 28, 2019

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.

⁴ See <https://nj.gov/grc/pdf/OPRASpecialServiceCharge.pdf>.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 27, 2019 Council Meeting**

**Nicholas Patrick DiFelice¹
Complainant**

GRC Complaint No. 2017-233

v.

**Monroe Township Public Schools (Gloucester)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of e-mails to or from any Monroe Township Board of Education (“BOE”) members, Charles Earling, Ralph Ross, David Sullivan, the Custodian, and John Armano from October 1, 2017 through the present containing the keyword the name or “DiFelice” or any variations thereof (di felice, defelice, de felice).

Custodian of Record: Lisa Schulz

Request Received by Custodian: November 27, 2017

Response Made by Custodian: December 8, 2017

GRC Complaint Received: December 8, 2017

Background³

Request and Response:

On November 26, 2017 (a Sunday), the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 27, 2017, Confidential Secretary Michelle Caruso acknowledged receipt of the OPRA request. On November 30, 2017, Ms. Caruso sent an e-mail to Network Administrator John Romalino asking him to conduct a search for all e-mails between October 1, 2017 and November 26, 2017 sent or received by fourteen (14) individuals, exclusive of subject/content. On December 1, 2017, Mr. Romalino e-mailed Ms. Caruso and the Custodian advising that the search was complete, and stating that e-mails would be provided for review the following week.

Denial of Access Complaint:

On December 8, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian failed to

¹ No legal representation listed on record.

² 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 Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Nicholas Patrick DiFelice v. Monroe Township Public Schools (Gloucester), 2017-233 – Findings and Recommendations of the Executive Director

respond to the subject OPRA request in a timely manner.

Response:

On December 8, 2017, the Custodian responded in writing to the Complainant's OPRA request. The Custodian stated that the BOE began the process of amassing records through Information Technology ("IT"). The Custodian stated she accidentally failed to seek an extension of time to provide a response. The Custodian also noted that she has been responsive to "all other 50 [OPRA] requests" submitted by the Complainant, as well as "the other 44 requests" submitted by third parties. The Custodian thus averred that her failure to respond in a timely manner here was not a willful act.

The Custodian sent a separate e-mail stating that this OPRA request yielded 23,919 responsive e-mails. The Custodian stated that she previously assessed a special service charge of \$520.02 for a different OPRA request that produced 1,275 responsive e-mails; thus, she expected the charge to be significantly higher. The Custodian asked the Complainant to advise whether he would like her to continue with a calculation.

On the same day, the Complainant e-mailed the Custodian confirming receipt of the response e-mail and asserted that the BOE "did not have the correct info searched for." The Custodian also questioned whether the BOE used the specific search terms present in the OPRA request. The Complainant requested a copy of the Custodian's e-mail to IT.

On December 13, 2017, the Custodian e-mailed the Complainant a copy of Ms. Caruso's e-mail to IT, noting that it was sent prior to the expiration of the statutory time frame. The Custodian stated that once she received the e-mails, she needed to print them and review for redactions. The Custodian noted that she advised the Complainant on December 8, 2017 that a special service charge may need to be imposed.

On the same day, the Complainant e-mailed the Custodian stating that his OPRA request included search terms. The Complainant averred that those terms appeared to be left out of IT's search. The Complainant asserted that it seemed impossible that the terms yielded over 23,000 e-mails. The Complainant asked the Custodian to double check IT's search and advise how the BOE should proceed.

Statement of Information:

On December 20, 2017, the Custodian filed a Statement of Information ("SOF"). The Custodian certified that she received the Complainant's OPRA request on November 27, 2017. The Custodian certified that her search included forwarding the OPRA request to IT to conduct a search. The Custodian affirmed that IT identified responsive e-mails and loaded them onto a BOE laptop for review. The Custodian certified that she responded in writing on December 8, 2017 asserting that a special service charge may be necessary due to the number of responsive e-mails.

The Custodian argued that her failure to respond within the statutory time frame was "simply missed." The Custodian noted that she received 104 OPRA requests between October 10,

2017 and the filing of this complaint; the Complainant accounted for 52 of those requests. The Custodian noted that the subject OPRA request was one of two (2) requests⁴ submitted by the Complainant in the same e-mail. The Custodian contended that although the number of requests had become a disruption for the BOE, she routinely responded in a timely manner to each request to this point.

The Custodian averred that, notwithstanding the timeliness issue, she advised the Complainant that 23,919 responsive e-mails were located and that a special service charge needed to be assessed. The Custodian certified that she asked the Complainant to confirm whether the BOE should proceed with a potential calculation. The Custodian noted that on December 13, 2017, the Complainant questioned the search, and asked her to double check same.

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).

The Complainant filed the instant complaint contending that the Custodian failed to timely respond to the subject OPRA request. On the same day as the filing of this complaint, the Custodian e-mailed the Complainant accepting that she failed to timely respond, but that the BOE was working on fulfilling the subject OPRA request. In the SOI, the Custodian confirmed her failure to respond timely, asserting that a response was "simply missed." Thus, the evidence of record confirms a "deemed" denial occurred here.

Therefore, the Custodian did not bear her burden of proof that she 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.

⁴ The other OPRA request is the subject of DiFelice v. Monroe Twp. Pub. Sch. (Gloucester), GRC Complaint No. 2017-233, being concurrently adjudicated with this complaint.

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.

Nicholas Patrick DiFelice v. Monroe Township Public Schools (Gloucester), 2017-233 – Findings and Recommendations of the Executive Director

Insufficient Search

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.

Further, it is the custodian’s responsibility to perform a complete search for the requested records before responding to an OPRA request, as doing so will help ensure that the custodian’s response is accurate and has an appropriate basis in law. In Schneble v. N.J. Dep’t of Env’tl. Protection, GRC Complaint No. 2007-220 (April 2008), the custodian initially stated that no records responsive to the complainant’s OPRA request existed. The custodian certified that after receipt of the complainant’s denial of access complaint, which contained e-mails responsive to the complainant’s request, the custodian conducted a second search and found additional records responsive to the complainant’s request. The GRC held that the custodian had performed an inadequate search and thus unlawfully denied access to the responsive records. See also Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (January 2011).

Regarding requests for e-mails, the GRC has established specific criteria deemed necessary under OPRA to request an e-mail communication. See Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). The Council determined that to be valid, such requests must contain: (1) the content and/or subject of the e-mail, (2) the specific date or range of dates during which the e-mail(s) were transmitted, and (3) the identity of the sender and/or the recipient thereof. See also Sandoval v. N.J. State Parole Bd., GRC Complaint No. 2006-167 (Interim Order March 28, 2007); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011). Further, the Council has provided guidance on how requests containing the Elcavage criteria do not require research, thus effectively resulting in a search:

[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, 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).]

Taken in tandem, Schneble, GRC 2007-220 and Verry, GRC 2014-43, *et seq.* provide that custodians perform an adequate search for e-mails by utilizing all required Elcavage criteria. Simply put, a custodian's obligation is to search for records based on the sender and/or recipient, date or range of dates, and subject/content. Further, a custodian's failure to perform such results in an insufficient search that yields an unnecessarily large volume of e-mails or correspondence that are likely not responsive to the request.

Here, the Complainant's OPRA request sought e-mails between identified individuals over a certain time period containing a particular subject/content. Thus, the OPRA request satisfied the Elcavage criteria. However, in her e-mail to IT, Ms. Caruso omitted the subject/content identifier from the Complainant's OPRA request. The search, absent the subject/content identifier, yielded 23,919 e-mails. Based on this search, the Custodian responded to the Complainant advising that a special service charge would be required. The Complainant subsequently questioned the search, twice noting that it appeared the BOE did not search by subject/content. The Custodian acknowledged the Complainant's concerns in the SOI, but no evidence exists in the record that she addressed them subsequently.

Based on the forgoing, the search conducted here was ultimately insufficient based on Schneble and Verry. Specifically, the Complainant provided all necessary criteria as required by Elcavage, GRC 2009-07. However, Ms. Caruso did not provide the relevant subject/content to IT so that they may perform a sufficient search as Verry, GRC 2013-43, *et seq.* instructs. The search yielded 23,919 e-mails between all the parties for a certain time period, but with no indication of how many included the relevant subject/content. The Custodian relied on this search to assert a potential special service charge; however, same was insufficiently conducted.

The GRC is also persuaded that an unlawful denial of access may have occurred. Specifically, it is not clear whether any of the records located were responsive to the OPRA request. Only a proper search would allow the Custodian to determine which of the 23,919 e-mails were truly responsive to the OPRA request. Only after making this determination can the Custodian properly determine whether a special service charge is required.

Accordingly, the Custodian's failure to conduct a reasonable search for responsive e-mails based on all the criteria included in the Complainant's OPRA request resulted in an insufficient search. Schneble, GRC 2007-220; Verry, GRC 2013-43, *et seq.* Further, the Custodian may have unlawfully denied access to records responsive to the subject OPRA request. N.J.S.A. 47:1A-6. Thus, the Custodian must perform a sufficient search for responsive records. Should the Custodian not locate any responsive records, she must certify to this fact. Also, should the Custodian determine that a special service charge is warranted thereafter, she must provide the Complainant with the amount of the special service charge required to purchase the requested records.

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 did not bear her burden of proof that she 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 v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian's failure to conduct a reasonable search for responsive e-mails based on all the criteria included in the Complainant's OPRA request resulted in an insufficient search. Schneble v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint Nos. 2013-43 and 2013-53 (Interim Order dated September 24, 2013). Further, the Custodian may have unlawfully denied access to records responsive to the subject OPRA request. N.J.S.A. 47:1A-6. Thus, the Custodian shall perform a sufficient search for responsive records. Should the Custodian not locate any responsive records, she must certify to this fact. Also, should the Custodian determine that a special service charge is warranted thereafter, she must provide the Complainant with the amount of the special service charge required to purchase the requested records.
3. **The Custodian 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 shall simultaneously deliver⁶ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁷ to the Executive Director.⁸**
4. **In the event the Custodian determines that a special service charge is applicable, the Custodian shall complete the GRC's 14-point analysis⁹ and calculate the appropriate special service charge. The Custodian shall then make the amount of the charge, together with the completed 14-point analysis, available to the Complainant within five (5) business days from receipt of the Council's Interim Order. The Complainant shall, within five (5) business days from receipt of the**

⁶ 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.

⁷ "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."

⁸ 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.

⁹ See <https://nj.gov/grc/pdf/OPRASpecialServiceCharge.pdf>.

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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 said time frame shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within twenty (20) business days following the Complainant's payment of the special service charge, the Custodian shall deliver to the Executive Director certified confirmation of compliance as first provided above. 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 in accordance with R. 1:4-4. The completed 14-point analysis shall be attached to the certification and incorporated therein by reference.

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: Frank F. Caruso
Executive Director

August 20, 2019