



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

May 19, 2020 Government Records Council Meeting

Adam C. Miller
Complainant

Complaint No. 2018-236,
2018-243 and 2018-244

v.

Township of Howell (Monmouth)
Custodian of Record

At the May 19, 2020 public meeting, the Government Records Council (“Council”) considered the May 12, 2020 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 did not bear her burden of proof that she timely responded to the Complainant’s September 27, 2018 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, through Ms. Belton, unlawfully denied access to the Complainant’s September 18, 2018 and September 24, 2018 OPRA requests. N.J.S.A. 47:1A-6. Specifically, whether records should be sought through discovery is not a valid basis to deny access to an OPRA request. Mid-Atlantic Recycling Technologies v. City of Vineland, 222 F.R.D. 81 (D.N.J. 2004); Bart v. City of Passaic (Passaic), GRC Complaint No. 2007-162 (Interim Order dated February 27, 2008).
3. The Complainant’s September 18, 2018 request seeking “all documents” was invalid because it failed to identify a specific record. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Feiler-Jampel v. Somerset Cnty. Prosecutor’s Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008). Further the Complainant’s September 24, 2018 and September 27, 2018 OPRA requests seeking police and arrest reports naming him in “any capacity” are invalid because they required research. Lagerkvist v. Office of the Governor, 443 N.J. Super. 230, 236-237 (App. Div. 2015); Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2011-147, *et seq.* (July 2012). See also Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); 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). Thus, the Custodian lawfully denied access to the Complainant's three (3) OPRA requests. N.J.S.A. 47:1A-6.

4. The Custodian's failure to timely respond to the Complainant's September 27, 2018 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, through Ms. Belton, unlawfully denied access to the Complainant's September 18, 2018 and September 24, 2018 requests by requiring the Complainant to submit a discovery request. N.J.S.A. 47:1A-6. Notwithstanding these violations, the Custodian lawfully denied access to all three (3) requests because they were invalid. 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 19th Day of May 2020

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: May 20, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 19, 2020 Council Meeting**

**Adam C. Miller¹
Complainant**

**GRC Complaint No. 2018-236,
2018-243, and 2018-244²**

v.

**Township of Howell (Monmouth)³
Custodial Agency**

Records Relevant to Complaint:

September 18, 2018 OPRA request:⁴ Hardcopies via U.S. mail of “all documents served and/or given to [the Complainant] upon date August 9, 2018” from the Township of Howell (“Township”).

September 24, 2018 OPRA request:⁵ Copies via U.S. mail or e-mail of “all police reports and any and all arrest records” naming the Complainant “in any capacity.”

September 27, 2018 OPRA request:⁶ Copies via U.S. mail or e-mail of “all police reports and any and all arrest records” naming the Complainant “in any capacity.”

Custodian of Record: Penny A. Wollman

Request Received by Custodian: September 21, 2018; September 24, 2018; September 27, 2018

Response Made by Custodian: September 21, 2018;

GRC Complaint Received: October 16, 2018; October 18, 2018

Background⁷

Request and Response:

On September 18, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 21, 2018, Administrative Assistant Donna Belton responded in writing on behalf of the Custodian seeking

¹ No legal representation listed on record.

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

³ Represented by Joseph A. Clark, Esq. (Howell, NJ).

⁴ This OPRA request is the subject of GRC Complaint No. 2018-236.

⁵ This OPRA request is the subject of GRC Complaint No. 2018-243.

⁶ This OPRA request is the subject of GRC Complaint No. 2018-244.

⁷ 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.

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clarification of the Complainant's OPRA request. On September 22, 2018, the Complainant responded via e-mail advising that he was seeking "all documents" the Township Police Department ("HPD") served on him. The Complainant noted that he did not wish to "specify any further" records to determine the full universe of HPD's records regarding him.

On September 24, 2018, Ms. Belton responded stating that the Complainant would need to contact HPD and that the September 21, 2018 OPRA request was considered closed. On the same day, the Complainant stated that Ms. Belton's response was improper and asked her to forward the OPRA request to HPD. The Complainant noted that ignoring the OPRA request "will [be] reported as a violation of [OPRA]."

On September 24, 2018, the Complainant submitted a second (2nd) OPRA request to the Custodian seeking the above-mentioned records. On September 25, 2018, Ms. Belton responded on behalf of the Custodian emphasizing that she was "trying to explain that OPRA does not apply to [p]olice discovery issues." Ms. Belton reiterated that the Complainant should address his request with HPD through discovery and not OPRA. Ms. Belton stated that the request was considered closed.

Also, on September 25, 2018, the Complainant responded noting that he filed his September 21, 2018 OPRA request *pro se* and wished to proceed through the OPRA process. Ms. Belton responded again asserting that the September 21, 2018 OPRA request "did not apply to [HPD] discovery issues." Ms. Belton reiterated that there was no need to file an OPRA request for discovery and that the September 21, 2018 OPRA request was closed. The Complainant responded again requesting that his September 21, 2018 OPRA request be forwarded to the HPD or he would file a complaint with the Government Records Council ("GRC").

On September 27, 2018, the Complainant submitted a third (3rd) OPRA request to the Custodian seeking the above-mentioned records.

Denial of Access Complaint:

On October 16, 2018, the Complainant filed the Denial of Access Complaint relevant to GRC 2018-236 with the GRC. The Complainant asserted that the Township violated OPRA by failing to properly respond to his OPRA request. The Complainant noted that he was seeking access to records related to an August 9, 2018 incident so that he could defend himself in municipal court.⁸

On October 18, 2018, the Complainant filed two (2) additional Denial of Access Complaints relevant to GRC 2018-243 and 2018-244 with the GRC. The Complainant contended that the Township violated OPRA by failing to disclose responsive records in response to his September 24, 2018 OPRA request. The Complainant further contended that the Custodian failed to respond to his September 27, 2018 OPRA request.

⁸ The Complaint also included a discussion of the Complainant's interactions with officials in the Township of Howell Municipal Court and the Superior Court of New Jersey, Monmouth County. However, such interactions are not relevant to OPRA because the judiciary is not subject to it. N.J.S.A. 47:1A-7(g); Tomkins v. City of Newark Mun. Court, GRC Complaint No. 2013-159 (July 2013).

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Statement of Information:

On November 8, 2018, the Custodian filed three (3) Statements of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA requests on September 21, September 24, and September 27, 2018. The Custodian certified that Ms. Belton responded in writing on her behalf to the first two OPRA requests on September 21, 2018 and September 25, 2018 advising that the Complainant should contact HPD.

Regarding the September 18, 2018 OPRA request, the Custodian contended that GRC 2018-236 provided an example of the “confusing manner in which [the Complainant] interacts with the Township.” The Custodian argued that the Complainant refused the Township’s attempt to obtain clarification, even though the initial OPRA request was clearly invalid. The Custodian further noted that “all documents . . . served or given” could relate to multiple different types of individual police records. The Custodian argued that after the Complainant failed to submit clarification and further rejected Ms. Belton’s directive to obtain records from HPD through the discovery process, he filed the GRC 2018-236. The Custodian noted that therein, after arguing at length about his interaction with the courts, the Complainant “established a temporal restriction” to an incident occurring on August 9, 2018.⁹ The Custodian asserted that had she been provided with this date, the Township could have identified records that it would have denied under the domestic violence exemption.

Regarding the September 24, 2018 and September 27, 2018 OPRA requests, the Custodian contended that both were exactly the same except for the date of submission. The Custodian further contended that both requests were invalid. The Custodian argued that the requests did not delineate whether he was seeking records specific to the Township or those maintained by other surrounding police departments. The Custodian argued that it was also unclear whether he sought arrest records wherein he was the party arrested, or another person’s arrest records containing his name.

Regarding all three (3) OPRA requests, the Custodian averred that the Complainant submitted them within less than a two (2) week period. The Custodian further averred that each request sought generic “documents,” “police reports,” and “any and all arrest reports.” The Custodian argued that a plain reading of each request, as well as the Complainant’s long history with HPD, supports that same were invalid. Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007). The Custodian argued that she should not be required to determine whether the Complainant sought records relating to current actions in municipal court or any records relating “to all or some of the other incidents on record.”

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

⁹ The GRC notes that the Complainant included the August 9, 2018 date in his original OPRA request. Adam C. Miller v. Township of Howell (Monmouth), 2018-236, 2018-243, and 2018-244 – Findings and Recommendations of the Executive Director

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).¹⁰ 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 GRC 2018-244, the Complainant alleged that the Custodian failed to respond to his September 27, 2018 OPRA request. In the SOI, the Custodian argued that said request was exact to the September 24, 2018 OPRA request (except for the date). However, the Custodian did not certify to a date on which she responded.

Upon review of the responses sent to the Complainant, it is evident that a “deemed” denial occurred. The timing of the September 24, 2018 and September 27, 2018 OPRA requests so close to the September 18, 2018 OPRA request may have caused a response issue. However, neither the Custodian nor Ms. Belton responded to the Complainant after September 25, 2018. While the GRC understands that Ms. Belton had already rejected the September 24, 2018 OPRA request, the Custodian’s obligation to respond to the September 27, 2018 OPRA request was not abrogated.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant’s September 27, 2018 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.

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.

Additionally, OPRA provides that if a “. . . custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor . . . on the request form and promptly return it to the requestor.” N.J.S.A. 47:1A-5(g) (emphasis added).

In Mid-Atlantic Recycling Technologies v. City of Vineland, 222 F.R.D. 81 (D.N.J. 2004), the City of Vineland sought a protective order precluding Mid-Atlantic from utilizing OPRA in lieu of discovery and outside the limitations of the Federal Rules of Civil Procedure. There, Mid-

¹⁰ A custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.
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Atlantic sought access to records under OPRA which were related to a lawsuit involving the parties. The Court held that:

[D]ocuments that are “government records” and subject to public access under OPRA are no less subject to public access because the requestor filed a lawsuit against the governmental entity. The fact that a party may obtain documents through OPRA at an earlier time or that OPRA provides for a shorter time period to respond than the time when document requests are permitted to be served under Rule 26 [of the Federal Rules of Civil Procedure] does not create a conflict so as to deny a citizen of legal rights to seek governmental records under OPRA.

[Id.]

Thereafter, in Bart v. City of Passaic (Passaic), GRC Complaint No. 2007-162 (Interim Order dated February 27, 2008), the custodian denied access to the complainant’s OPRA request stating that records could only be obtained through discovery. The Council applied Mid-Atlantic, 222 F.D.R. 81 to the facts there and found an unlawful denial of access. Specifically, the Council held that the custodian’s response was not a lawful basis for denying access to the requested records.

In the matter before the Council, Ms. Belton rejected the Complainant’s September 18, 2018 and September 24, 2018 OPRA requests on the ground that he should have submitted them directly to HPD as discovery requests. However, the Council’s decision in Bart, GRC 2007-162 is clear that potential discovery requests do not abrogate an individual’s right to access the same records under OPRA. Thus, the denials resulted in an unlawful denial of access to these two (2) OPRA requests.

Therefore, the Custodian, through Ms. Belton, unlawfully denied access to the Complainant’s September 18, 2018 and September 24, 2018 OPRA requests. N.J.S.A. 47:1A-6. Specifically, whether records should be sought through discovery is not a valid basis to deny access to an OPRA request. Mid-Atlantic, 222 F.D.R. 81; Bart, GRC 2007-162.

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 Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005) (emphasis added).]

The court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

[Id. at 549 (emphasis added).]

The court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt . . . In short, OPRA does not countenance open-ended searches of an agency's files.” Id. (emphasis added). Bent, 381 N.J. Super. at 37;¹¹ N.J. Builders, 390 N.J. Super. at 180; Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

The validity of an OPRA request typically falls into three (3) categories. The first is a request that is overly broad (“any and all,” requests seeking “records” generically, *etc.*) and requires a custodian to conduct research. MAG, 375 N.J. Super. 534; Donato v. Twp. of Union, GRC Complaint No. 2005-182 (January 2007). The second is those requests seeking information or asking questions. See e.g. Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012). The final category is a request that is either not on an official OPRA request form or does not invoke OPRA. See e.g. Naples v. N.J. Motor Vehicle Comm’n, GRC Complaint No. 2008-97 (December 2008).

Regarding generic requests for “records,” the request at issue in MAG sought “all documents or records evidencing that the ABC sought, obtained or ordered revocation of a liquor license for the charge of selling alcoholic beverages to an intoxicated person in which such person, after leaving the licensed premises, was involved in a fatal auto accident” and “all documents or records evidencing that the ABC sought, obtained or ordered suspension of a liquor license exceeding 45 days for charges of lewd or immoral activity.” Id. at 539-540. The court noted that plaintiffs failed to include additional identifiers such as a case name or docket number. See also Steinhauer-Kula v. Twp. of Downe (Cumberland), GRC Complaint No. 2010-198 (March 2012) (holding that the complainant’s request item No. 2 seeking “[p]roof of submission” was invalid); Edwards v. Hous. Auth. of Plainfield (Union), GRC Complaint No. 2008-183 *et seq.* (Final Decision dated April 25, 2012) (accepting the Administrative Law Judge’s finding that a newspaper article attached to a subject OPRA request that was related to the records sought did not cure the deficiencies present in the request) Id. at 12-13.

¹¹ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004). Adam C. Miller v. Township of Howell (Monmouth), 2018-236, 2018-243, and 2018-244 – Findings and Recommendations of the Executive Director

Moreover, in Feiler-Jampel v. Somerset Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008), the Council similarly held that a request seeking “[a]ny and all documents and evidence” relating to an investigation being conducted by the Somerset County Prosecutor’s Office was invalid, reasoning that:

[B]ecause the records requested comprise an entire SCPO file, the request is overbroad and of the nature of a blanket request for a class of various documents rather than a request for specific government records. Because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to research the SCPO files to locate records potentially responsive to the Complainant’s request pursuant to the Superior Court’s decisions in [MAG], [Bent] and the Council’s decisions in Asarnow v. Department of Labor and Workforce Development, GRC Complaint No. 2006-24 (May 2006) and Morgano v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2007-190 (February 2008).

[Id. See also Schulz v. NJ State Police, GRC Complaint No. 2014-390 (Interim Order dated July 28, 2015) (holding that the portion of the request seeking “all documents” was overly broad and thus invalid).]

Additionally, in Lagerkvist v. Office of the Governor, 443 N.J. Super. 230, 236-237 (App. Div. 2015), the court held that plaintiff’s request was invalid because it required research. In reaching this conclusion, the court reasoned that:

The custodian in this case would have had to make a preliminary determination as to which travel records correlated to the governor and to his senior officials, past and present, over a span of years. The custodian would then have had to attempt to single out those which were third-party funded events. Next, he would have had to collect all documents corresponding to those events and search to ensure he had accumulated everything, including both paper and electronic correspondence. OPRA does not convert a custodian into a researcher.

[Id. at 237.]

In Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2011-147, *et seq.* (July 2012), the complainant submitted four (4) OPRA requests, seeking copies of minutes containing motions to approve other minutes to which the custodian had denied access as overly broad. The Council, citing Taylor v. Cherry Hill Bd. of Educ. (Camden), GRC Complaint No. 2008-258 (August 2009) and Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010), determined that the complainant’s requests were overly broad:

[S]aid requests do not specify the date or time frame of the minutes sought. Rather, the requests seek those minutes at which the [Union County Board of Education] motioned to approve meeting minutes for four (4) other meetings. Similar to the facts of both Taylor and Ray, the requests herein seek minutes that refer to a topic

and would require the Custodian to research the [Union County Board of Education's] meeting minutes in order to locate the particular sets of minutes that are responsive to the Complainant's requests . . . because the Complainant's four (4) requests for minutes "that include a motion made by the Union City Board of Education to approve the minutes . . ." from other meetings fail to identify the specific dates of the minutes sought and would require the Custodian to conduct research in order to locate the responsive records, the Complainant's requests are invalid under OPRA.

[Id. at 10.]

Here, the Complainant's September 18, 2018 request sought "all documents served and/or given to" him from an August 9, 2018 incident. Ms. Belton initially sought clarification before denying the request on an unlawful basis. However, in the SOI, the Custodian argued that the request was invalid because it failed to identify any particular record and that the Complainant declined to clarify it.

The GRC is persuaded that this request is invalid. A plain reading of the request supports that it fails to identify any specific records. Further, the Complainant admitted this fact in response to Ms. Belton's request for clarification by stating that he did not want "to specify any further." Thus, in accordance with MAG and Feiler-Jampel, the Custodian lawfully denied access to the instant OPRA request.

Furthermore, the Complainant's September 24, 2018 and September 27, 2018 requests seek police reports and arrest reports, absent any definitive time frame, where he is named "in any capacity." In the SOI, the Custodian argued that each request would have required research, especially given the Complainant's lengthy history with HPD. The Custodian further contended that it was not clear whether the Complainant was seeking police and arrest reports where he was the person of interest, or whether he sought any report with his name in it.

The GRC is also persuaded that these requests are invalid in that they amount to open-ended research of every police and arrest report for any mention of the Complainant. The requests are further complicated by the lack of a reasonable time frame within which the Custodian may have focused her search. As stated in both Lagerkvist and Valdes, OPRA does not contemplate such research. Thus, the Custodian lawfully denied these requests as invalid.

Accordingly, the Complainant's September 18, 2018 request seeking "all documents" was invalid because it failed to identify a specific record. MAG, 375 N.J. Super. at 546; Feiler-Jampel, GRC 2007-190. Further the Complainant's September 24, 2018 and September 27, 2018 OPRA requests seeking police and arrest reports naming him in "any capacity" are invalid because they required research. Lagerkvist, 443 N.J. Super. at 236-237; Valdes, GRC 2011-147. See also Bent, 381 N.J. Super. at 37, N.J. Builders Ass'n, 390 N.J. Super. at 180; Schuler, GRC 2007-151. Thus, the Custodian lawfully denied access to the Complainant's three (3) OPRA requests. N.J.S.A. 47:1A-6.

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 September 27, 2018 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, through Ms. Belton, unlawfully denied access to the Complainant’s September 18, 2018 and September 24, 2018 requests by requiring the Complainant to submit a discovery request. N.J.S.A. 47:1A-6. Notwithstanding these violations, the Custodian lawfully denied access to all three (3) requests because they were invalid. 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 did not bear her burden of proof that she timely responded to the Complainant’s September 27, 2018 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, through Ms. Belton, unlawfully denied access to the Complainant's September 18, 2018 and September 24, 2018 OPRA requests. N.J.S.A. 47:1A-6. Specifically, whether records should be sought through discovery is not a valid basis to deny access to an OPRA request. Mid-Atlantic Recycling Technologies v. City of Vineland, 222 F.R.D. 81 (D.N.J. 2004); Bart v. City of Passaic (Passaic), GRC Complaint No. 2007-162 (Interim Order dated February 27, 2008).
3. The Complainant's September 18, 2018 request seeking "all documents" was invalid because it failed to identify a specific record. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Feiler-Jampel v. Somerset Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008). Further the Complainant's September 24, 2018 and September 27, 2018 OPRA requests seeking police and arrest reports naming him in "any capacity" are invalid because they required research. Lagerkvist v. Office of the Governor, 443 N.J. Super. 230, 236-237 (App. Div. 2015); Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2011-147, *et seq.* (July 2012). See also Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); 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). Thus, the Custodian lawfully denied access to the Complainant's three (3) OPRA requests. N.J.S.A. 47:1A-6.
4. The Custodian's failure to timely respond to the Complainant's September 27, 2018 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, through Ms. Belton, unlawfully denied access to the Complainant's September 18, 2018 and September 24, 2018 requests by requiring the Complainant to submit a discovery request. N.J.S.A. 47:1A-6. Notwithstanding these violations, the Custodian lawfully denied access to all three (3) requests because they were invalid. 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

May 12, 2020