



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

January 7, 2020 Government Records Council Meeting

Mark Demitroff
Complainant

Complaint No. 2018-27

v.

Buena Vista Township (Atlantic)
Custodian of Record

At the January 7, 2020 public meeting, the Government Records Council (“Council”) considered the December 10, 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, finds that the Complainant’s request seeking “access to Mayor Chuck Chiarello’s Facebook page” is invalid because it was a blanket request that failed to identify the specific records sought. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005),¹ N.J. Builders Assoc. 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); Randazzo-Thompson v. City of Vineland (Cumberland), GRC Complaint No. 2010-76 (May 2011); Bragg v. N.J. Dep’t of Corr., GRC Complaint No. 2010-145 (March 2011). Thus, the Custodian lawfully denied access to the Complainant’s request. N.J.S.A. 47:1A-6. The GRC does not address the Complainant’s remaining arguments because the request is invalid on its face.

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.



Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

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Final Decision Rendered by the
Government Records Council
On The 7th Day of January 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: January 9, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 7, 2020 Council Meeting**

**Mark Demitroff¹
Complainant**

GRC Complaint No. 2018-27

v.

**Buena Vista Township (Atlantic)²
Custodial Agency**

Records Relevant to Complaint: “[D]igital access to Mayor Chuck Chiarello’s Facebook page, [the Complainant’s] preferred method of view.”

Custodian of Record: Lisa Tilton

Request Received by Custodian: September 5, 2017

Response Made by Custodian: September 14, 2017

GRC Complaint Received: February 20, 2018

Background³

Request and Response:

On September 1, 2017, the Complainant e-mailed Dominic DiYanni, Esq. of Custodian Counsel’s law firm advising that he had been blocked entirely from Mayor Chiarello Facebook page. The Complainant referred Mr. DiYanni to a news article about a recent federal court case holding that politicians’ social media accounts could be considered a First Amendment forum. The Complainant argued that Mayor Chiarello conducted official business through his Facebook account and that Mayor Chiarello violated his First Amendment rights by blocking him. The Complainant asked Mr. DiYanni to explain why he had been blocked from Mayor Chiarello’s Facebook page.

On September 2, 2017, a Saturday, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. The Complainant noted that records created in the scope of official business are subject to disclosure under OPRA. The Complainant asserted that Mayor Chiarello’s used his Facebook page “with the appearance of being in an official government role.” The Complainant further noted that in an unpublished

¹ No legal representation listed on record.

² Represented by Eric M. Bernstein, Esq., of Eric M. Bernstein & Associates, LLC (Warren, NJ).

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

Virginia case, the court held that a politician’s social media platform could be considered a First Amendment forum.⁴

On September 14, 2017, the Custodian responded in writing stating that she did not have access to the private Facebook page in question. The Custodian further stated that because the Township of Buena Vista (“Township”) had no control over the personal account, it could not gain access. The Custodian finally stated that because the Facebook page was not “made or maintained by the [Township],” she could not provide any records responsive to the OPRA request.

Denial of Access Complaint:

On February 20, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that social media misuse “is a current topic of national debate.” The Complainant further asserted that there existed a lack of defined rules governing Facebook and Twitter as a governmental tool. The Complainant stated that he submitted the subject OPRA request after being blocked by Mayor Chiarello on Facebook.

The Complainant argued that he should be given access to the Facebook page because its an “electronically stored record” wherein Mayor Chiarello conducted official business. The Complainant argued that Mayor Chiarello’s Facebook page gave the appearance of an “official” page in both “appearance and tone.” The Complainant pointed to several examples of constituents interacting with Mayor Chiarello through his Facebook page, and contended that same was a “government record” when viewed in light of John Paff’s criteria set forth in a recent news article.⁵ The Complainant also noted that Mayor Chiarello ran a GoFundMe campaign for a public project through his Facebook page.⁶

The Complainant argued that Mayor Chiarello blocked him in total from his Facebook page as a political reprisal. The Complainant argued that Mayor Chiarello effectively weaponized his Facebook page to cater only to certain constituents. The Complainant argued that the GRC cannot allow a public official to circumvent OPRA by conducting official business through social media simply because the law has not kept up with technological advances.

Statement of Information:

On March 15, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on September 5, 2017. The Custodian affirmed that she determined that the Complainant’s OPRA request sought access to Mayor Chiarello’s private Facebook account. The Custodian certified that she responded in writing on

⁴ <https://arstechnica.com/tech-policy/2017/07/politician-dinged-for-blocking-critical-constituent-from-facebook-page/> (referring to *Davidson v. Loudon Cnty. Bd. of Supervisors, et al.*, 267 F.Supp. 3d 702 (4th Cir. 2017)) (accessed November 4, 2019).

⁵ https://www.nj.com/south/2015/04/do_municipal_facebook_pages_count_as_public_record.html (accessed November 4, 2019).

⁶ The Complainant separately submitted an OPRA request for certain go records from the GoFundMe campaign. That OPRA request was the subject of *Demitroff v. Buena Vista Twp. (Atlantic)*, GRC Complaint No. 2017-169 (Interim Order dated November 12, 2019).

September 14, 2017 denying access to the Facebook page in question because she did not have access to it.

The Custodian contended that she properly denied access to the Complainant's OPRA request. The Custodian noted that although no precedential GRC case law spoke to this issue, she was able to determine that the Complainant did not seek access to a defined "government record." The Custodian argued that instead, the Complainant sought access to a private Facebook page that was not considered a "government record" under OPRA. The Custodian noted that the Complainant conceded this point in a recent OPRA request.⁷ Finally, the Custodian argued that because "[a]ccess to a personal Facebook account is not a government record," the GRC should dispose of this complaint administratively.

Analysis

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).]

⁷ On March 6, 2018, the Complainant submitted an OPRA request seeking "non-redacted electronic access to the [Township] Facebook page" because Mayor Chiarello's shared posts, from "his ostensibly private Facebook page," were not visible to him.

The Court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt . . . In short, OPRA does not countenance open-ended searches of an agency’s files.” Id. (emphasis added). Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005),⁸ 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).

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).

The GRC has typically held that a request seeking access to a “file” is invalid because it represents a blanket request for a class of various, unidentifiable records. See Morgano v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2007-190 (February 2008); Nunley v. N.J. State Parole Bd., GRC Complaint No. 2013-335 (July 2014). By way of example, in Randazzo-Thompson v. City of Vineland (Cumberland), GRC Complaint No. 2010-76 (May 2011), the complainant sought access to her entire personnel record. The complainant subsequently filed a complaint asserting that the custodian withheld multiple records from her. Once the Council addressed the overriding personnel issue, it determined that the complainant’s request was invalid. In reaching this conclusion, the Council noted that the request “fail[ed] to identify specific government records and constitutes a broad and unclear request.” Id. at 10 (citing Redden v. Cape May Cnty. Prosecutor’s Office, GRC Complaint No. 2007-206 (September 2009)).

Further, in Bragg v. N.J. Dep’t of Corr., GRC Complaint No. 2010-145 (March 2011), the complainant disputed the custodian’s denial of his request seeking his “[c]omplete institutional” and “Special Investigation Division” files. In the SOI, the custodian argued that a portion of the request was invalid because it failed to identify specific records. The Council agreed, finding that both request items were invalid because the complainant’s “request seeks entire files rather than specific identifiable government records.” (Citations Omitted). See also Bradley-Williams v. Atlantic Cnty. Jail, GRC Complaint No. 2011-232 (December 2012); Torian v. N.J. State Parole Bd., GRC Complaint No. 2013-245 (June 2014).

In the matter before the Council, the Complainant sought “digital access” to Mayor Chiarello’s Facebook page, from which he had allegedly been blocked. The Custodian denied access stating that the Township did not maintain the page and thus could not provide responsive records. The Complainant subsequently filed this complaint arguing that Mayor Chiarello circumvented OPRA by blocking the him from a Facebook page wherein Mayor Chiarello was conducting official business. In the SOI, the Custodian argued that “[a]ccess to a personal Facebook account is not a government record” and the GRC should administratively dispose of this complaint.

⁸ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

Turning to the social media platform in question here, Facebook, Inc. is a publicly traded social networking company with multiple interactive social media platforms such as Facebook, Instagram, and Messenger.⁹ Each of Facebook's offerings can be accessed via computer, laptop, or smartphone. In terms of Facebook, users create accounts and set up a unique page that they can use to interact with the public at large or with individuals they have connected with as "Friends." Larkin v. Borough of Glen Rock, Docket No. BER-L-2573-18 (June 15, 2018). Through their Facebook pages, users post a multitude of personal and public information, including photographs, and can interact with other users. Ibid. Other Facebook functions include sharing other user posts, joining groups, fundraising, engaging in commerce, or promoting events. Facebook also allows users to set certain privacy levels, control incoming and outgoing posts, and block access to their accounts. Ibid. See also Davison v. Randall, 912 F.3d 666 (4th Cir. 2019).

The GRC notes that it recently held that social media records could fall within the definition of a "government record." Demitroff v. Buena Vista Twp. (Atlantic), GRC Complaint No. 2017-169 (Interim Order dated November 12, 2019). Thus, to the extent that the Complainant sought access to certain identifiable records from Mayor Chiarello's Facebook page, prior case law supports that said records could be disclosable if they fell within OPRA's definition of a "government record." N.J.S.A. 47:1A-1.1. However, the Complainant here does not seek access to specific posts, comments, or other Facebook records. Instead, the Complainant sought blanket access to the identified Facebook profile by requesting that the GRC order Mayor Chiarello to unblock him. Much like the requests at issue in Randazzo-Thomson and Bragg, the subject request fails to identify a specific type of record within Mayor Chiarello's Facebook page. Rather, the request is akin to a blanket request for access to Mayor Chiarello's Facebook page, which likely comprises of a combination of defined "government records," as well as personal records.

Further, the Complainant's argument that he should have been given access to the entire Facebook page because Mayor Chiarello may have conducted "official business" is in error. Such an argument does not consider the real possibility that Mayor Chiarello's Facebook page comprises a mix of "government" and non-government records. Rather, the argument is akin to requiring a public official to disclose every e-mail in their personal e-mail account because they conducted "official business" therein on a few occasions. OPRA does not operate to require disclosure of records not within the definition of a "government record." Similarly, a public official conducting both official and personal business on their social media accounts does not render the entire account subject to access under OPRA.

Accordingly, the Complainant's request seeking "access to Mayor Chuck Chiarello's Facebook page" is invalid because it was a blanket request that failed to identify the specific records sought. MAG, 375 N.J. Super. at 549; Bent, 381 N.J. Super. at 37; N.J. Builders Ass'n, 390 N.J. Super. at 180; Schuler, GRC 2007-151; Randazzo-Thompson, GRC 2010-76; Bragg, GRC 2010-145. Thus, the Custodian lawfully denied access to the Complainant's request. N.J.S.A. 47:1A-6. The GRC does not address the Complainant's remaining arguments because the request is invalid on its face.

⁹ <https://about.fb.com/company-info/> (accessed November 25, 2019).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Complainant's request seeking "access to Mayor Chuck Chiarello's Facebook page" is invalid because it was a blanket request that failed to identify the specific records sought. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005),¹⁰ N.J. Builders Assoc. 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); Randazzo-Thompson v. City of Vineland (Cumberland), GRC Complaint No. 2010-76 (May 2011); Bragg v. N.J. Dep't of Corr., GRC Complaint No. 2010-145 (March 2011). Thus, the Custodian lawfully denied access to the Complainant's request. N.J.S.A. 47:1A-6. The GRC does not address the Complainant's remaining arguments because the request is invalid on its face.

Prepared By: Frank F. Caruso
Executive Director

December 10, 2019

¹⁰ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).