



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

May 18, 2021 Government Records Council Meeting

D. Scott Carew
Complainant

Complaint No. 2019-151

v.

Township of Willingboro (Burlington)
Custodian of Record

At the May 18, 2021 public meeting, the Government Records Council (“Council”) considered the May 11, 2021 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 June 21, 2019 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 extended time frame results in a “deemed” denial of said 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 dated October 31, 2007). See also Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). Furthermore, the Custodian’s failure to timely respond to the Complainant’s June 25, 2019 OPRA request also resulted in a “deemed” denial pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. However, the Council need not order the Custodian to provide a response to the June 25, 2019 OPRA request since the Custodian did so on January 13, 2020.
2. Because the Custodian failed to provide a specific lawful basis for denying access to the e-mail attachments, her response to the Complainant’s June 21, 2019 OPRA request was insufficient. N.J.S.A. 47:1A-5(g); Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008).
3. Notwithstanding the Custodian’s “deemed” denial, the portion of the Complainant’s June 21, 2019 OPRA request item No. 2 seeking “any documents” relating to the application process of Ms. Rogers and June 25, 2019 OPRA request item No. 3 seeking “any document” containing interview questions are invalid because they fail to identify specific records. MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); 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 (Hunterdon),



GRC Complaint No. 2007-151 (Interim Order dated December 19, 2007); Feiler-Jampel v. Somerset Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008). Thus, the Custodian lawfully denied access to these portions of the requests. N.J.S.A. 47:1A-6.

4. The GRC declines to hold that the Complainant's June 21, 2019 OPRA request item No. 3 and June 25, 2019 request item No. 1 are invalid because the Custodian was able to locate responsive records using the identifiers provided. See Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012); MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011); Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint Nos. 2011-147, 2011-157, 2011-172, and 2011-181 (July 2012). However, the Council declines to order disclosure since the evidence of record demonstrates that the Custodian provided the responsive records to the Complainant on July 12, 2019 and January 13, 2020.
5. Notwithstanding the Custodian's "deemed denial," the responsive "list of scenarios" and interview letter attached to the May 8, 2019 e-mail are exempt from disclosure under the "inter-agency or intra agency advisory, consultative, or deliberative material" exemption. N.J.S.A. 47:1A-1.1; Educ. Law Center, 198 N.J. 274, 285 (2009); Sandoval v. N.J. State Parole Bd., GRC Complaint No. 2006-167 (Interim Order dated March 28, 2007). For this reason, the Custodian lawfully denied access to same. N.J.S.A. 47:1A-6.
6. Notwithstanding the Custodian's "deemed" denial, she lawfully denied access to the e-mail attachments comprising Ms. Rogers' presentation materials and list of references. N.J.S.A. 47:1A-6. The records are exempt from access under Executive Order No. 26 (Gov. McGreevy 2002)'s exemption for employment applications and OPRA's personnel records exemption. See N.J.S.A. 47:1A-9(a); N.J.S.A. 47:1A-10.
7. Notwithstanding the Custodian's "deemed" denial, the application materials attached to the e-mails dated January 13, 2017 and January 14, 2017 were not responsive to the Complainant's June 21, 2019 OPRA request. Thus, there was no unlawful denial of access. N.J.S.A. 47:1A-6.
8. The Custodian violated N.J.S.A. 47:1A-5(g) and (i) by failing to timely respond to the Complainant's OPRA requests. Additionally, the Custodian provided an insufficient response to the Complainant's June 21, 2019 OPRA request. Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008) However, the Custodian lawfully denied access to the requested e-mail attachments and ultimately provided records responsive to the Complainant's June 25, 2019 OPRA request. Additionally, the evidence of record does not indicate that the Custodian's violation 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 18th Day of May 2021

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, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 18, 2021 Council Meeting**

**D. Scott Carew¹
Complainant**

GRC Complaint No. 2019-151

v.

**Township of Willingboro (Burlington)²
Custodial Agency**

Records Relevant to Complaint:

June 21, 2019 OPRA Request: Electronic copies via e-mail of:

1. “All written and/or electronic communication where my candidacy for the Willingboro Township Manager position is discussed and/or referenced. The timeframe for the communication sought is from January 1, 2016 through June 21, 2019. This request is for all communication sent or received by the following former and current Council members: Martin Nock, Jacqueline Jennings, Nathaniel Anderson, Darvis Holley, Chris Walker.”
2. “Now that the search for a new township manager is completed, all documents related to the application of Sharon Rogers. This includes, but is not limited to her resume, cover letter, references, salary history, and salary request.”
3. “All written and/or electronic communications between Sharon Rogers and any Willingboro official and/or employee between January 1, 2018 and June 18, 2019.”³

June 25, 2019 OPRA Request: Electronic copies via e-mail of:

1. Closed session meeting minutes that included interviews with the Complainant and Sharon Rogers.
2. Any recordings or notes taken during those meetings.
3. Any document that includes the questions asked by the Township Mayor and Council to the Complainant and Ms. Rogers as part of the interview process.

Custodian of Record: Sarah Wooding⁴

Request Received by Custodian: June 21, 2019; June 25, 2019

Response Made by Custodian: July 12, 2019

GRC Complaint Received: July 30, 2019

¹ No legal representation listed on record.

² Represented by Brian E. Turner, Esq., of Malamut & Associates, LLC (Cherry Hill, NJ). Previously represented by Michael P. Marotta, Esq., of Florio, Perrucci, Steinhardt & Cappelli, LLC (Rochelle Park, NJ).

³ The Complainant sought additional records that are not at issue in this complaint.

⁴ The current Custodian of Record is Brenda Bligen.

Background⁵

June 21, 2019 Request:

On June 21, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.

June 25, 2019 Request:

On June 25, 2019, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records.

June 21, 2019 Response:

On June 27, 2019, the Custodian requested an extension of time of a week to respond to the Complainant’s OPRA request. The Complainant consented to the extension that same day.

On July 12, 2019, the second (2nd) business day after the expiration of the extended period, Brandon Garcia responded on the Custodian’s behalf in writing, providing the requested e-mail correspondence, among other records. That same day, the Complainant acknowledged receipt of the records.

June 21, 2019 Additional Correspondence:

On July 15, 2019, the Complainant e-mailed Mr. Garcia and the Custodian, stating that two (2) of the e-mails provided appeared to contain an attachment described as a “list of scenarios.” The Complainant stated that the Custodian did not provide a basis for withholding the attachment, and it should have been provided as part of the response.

In a subsequent e-mail sent that same day, the Complainant stated that he identified four (4) additional e-mails containing attachments that should have been provided. The Complainant stated that one attachment contained in an e-mail from Ms. Rogers was described as “a few documents which support innovation, leadership, and administrative excellence,” and another attachment entitled “a list of professional references.” The Complainant stated that the Custodian should have provided these attachments or provide a lawful basis to withhold same.

June 25, 2019 Response:

On July 18, 2019, the Complainant e-mailed the Custodian and Mr. Garcia, stating that the statutory time to respond to the request has long passed. The Complainant stated that if the Township of Willingboro (“Township”) was going to deny access, the Custodian was obligated to inform him of same and provide a legal basis. That same day, the Custodian responded to the Complainant stating that she would try to obtain an answer for the Complainant by the next day.

⁵ 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.

On July 19, 2019, Mr. Garcia responded to the Complainant stating that he was resubmitting his response to the Complainant's June 21, 2019 OPRA request over several e-mails. That same day, the Complainant replied to Mr. Garcia, stating that the response did not address the OPRA request referenced. In a subsequent e-mail, the Complainant stated that his July 18, 2019 correspondence did not reference the June 21, 2019 OPRA request but instead the June 25, 2019 OPRA request.

On July 26, 2019, the Complainant e-mailed Mr. Garcia and Custodian, stating that he has not received a response to his June 25, 2019 OPRA request, or the outstanding attachments pertaining to his June 21, 2019 OPRA request.

Denial of Access Complaint:

On July 30, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that regarding his June 21, 2019 OPRA request, he should have been provided with the attachments referenced by the e-mails he received from the Custodian. The Complainant argued that the descriptions of the attachments match those of records he sought under request item No. 1, and the Custodian failed to provide a legal basis to withhold them.

Regarding the June 25, 2019 OPRA request, the Complainant asserted that the Custodian failed to provide any response to his request. The Complainant argued that Mr. Garcia instead provided the same records the Complainant received in response to his June 21, 2019 OPRA request.

Statement of Information:⁶

On January 13, 2020, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA requests on June 21, 2019 and June 25, 2019. The Custodian certified that her search included reviewing the Township's e-mail system and other databases. The Custodian certified that the Township responded to the Complainant's June 21, 2019 OPRA request in writing on July 12, 2019, providing responsive records. The Custodian also certified that the Complainant's June 25, 2019 OPRA request was inadvertently overlooked while processing the June 21, 2019 OPRA request and provided a response to same as part of the SOI, with redactions contained therein.

June 21, 2019 OPRA Request

The Custodian initially argued that the June 21, 2019 OPRA request was overly broad because it failed to identify specific government records. MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 549 (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 requests seeking "all" documents and communications have been repeatedly held to be overly broad. See Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005). The Custodian

⁶ On August 13, 2019, the matter was transferred to mediation. On December 19, 2019, the matter was transferred back to the GRC for adjudication.

noted that similar requests have been ruled as invalid by the GRC. See Salley v. City of Newark (Essex), GRC Complaint No. 2018-158 (Interim Order dated August 28, 2018); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Gatson v. N.J. Dep't of Corr., GRC Complaint No. 2011-28 (May 2012); Cavanaugh v. N.J. Dep't of Law & Public Safety, GRC Complaint No. 2009-302 (July 2010); Della Vella v. City of Wildwood (Cape May), GRC Complaint No. 2007-51 (November 2009). The Custodian asserted that the records specifically identified in the request, such as the resume, cover letter, and salary information were provided to the Complainant.

The Custodian argued that even if the June 21, 2019 OPRA request was valid, the requested attachments were exempt from disclosure. The Custodian asserted that the requested attachments were: 1) Presentation materials submitted by Ms. Rogers during the application process in an e-mail dated March 22, 2019; 2) Ms. Rogers' list of professional references in an e-mail dated April 12, 2019; 3) a letter to Ms. Rogers from the Township regarding her final interview, along with a "list of scenarios" to be discussed during the interview, in an e-mail dated May 8, 2019; 4) Ms. Rogers' resume, cover letter, writing sample, and list of professional references in an e-mail dated January 13 2017; and 5) Ms. Rogers' Curriculum Vitae in an e-mail dated January 14, 2017.

Regarding the lists of references, the Custodian argued that the records contained nothing but personally identifiable information. The Custodian asserted that the individuals identified were not applicants for employment, and the Township had an obligation under OPRA to safeguard personal information when there was an expectation of privacy. N.J.S.A. 47:1A-1.

The Custodian also argued that the "list of scenarios" described by the Complainant constituted advisory, consultative, or deliberative ("ACD") material and therefore exempt under OPRA. In re Liquidation of Integrity Ins. Co., 165 N.J. 75 (2000). The Custodian asserted that the records pertained to the interview and application process for Ms. Rogers, and constituted pre-decisional and deliberative material, like the records sought in Sandoval v. N.J. State Parole Bd., GRC Complaint No. 2006-167 (Interim Order dated March 28, 2007).

The Custodian also asserted that under Executive Order No. 26 (Gov. McGreevy 2002) ("EO 26"), only the resumes of successful candidates were subject to disclosure. See Keenan v. N.J. Dep't of Labor, GRC Complaint No. 2015-388 (Interim Order dated June 27, 2017). The Custodian therefore argued that the interview letter accompanying the "list of scenarios" was exempt as it was part of the application process. See Sandoval, GRC 2006-167. The Custodian also argued that Ms. Rogers' presentation materials as well as her writing sample constituted part of her employment application, and because she was hired the attachments were exempt as personnel records under N.J.S.A. 47:1A-10. Lastly, the Custodian argued that the Curriculum Vitae and other application materials submitted by Ms. Rogers via e-mails from 2017 were not responsive to the Complainant's OPRA request, since item No. 3's request for correspondence was dated from 2018 through 2019.

June 25, 2019 OPRA Request

The Custodian argued that this request was inadvertently overlooked while communicating with the Complainant regarding his first request. The Custodian asserted that records responsive

to item No. 1 were being provided as part of the SOI, with redactions for personally identifiable information of unsuccessful candidates.

The Custodian also asserted that no responsive records exist regarding item No. 2, but nevertheless would have been exempt from disclosure as ACD material. Salley, GRC 2018-158. The Custodian also asserted that item No. 3 was overly broad in that it seeks “any document that includes questions asked” during the interview process. The Custodian also argued that even if the request item was valid, it was still exempt from disclosure as ACD material. N.J.S.A. 47:1A-1.1.

Additional Submissions:

On April 12, 2021, the GRC requested additional information from the Custodian. Specifically, the GRC asked the Custodian:

1. Regarding the e-mails dated January 13 and 14, 2017 containing the resume, cover letter, and other application materials of Sharon Rogers: please identify the OPRA request item to which the e-mails were responsive (*i.e.*, “June 21, 2019 OPRA Request item No. 3 seeking e-mails . . .”).
2. Did Sharon Rogers submit her January 13 and 14, 2017 e-mails in response to a prior opening for the position of Township Manager? If so, when did that recruitment process conclude, and was Ms. Rogers the successful candidate.

On April 26, 2021, the Custodian’s Counsel responded to the GRC’s request, providing a certification from the current Custodian. The current Custodian certified that she could not provide an answer for question no. 1 as she was not the Custodian of Record at the time of the request. The current Custodian then certified that for question no. 2, according to the Township’s payroll records, they hired Eric Berry as the Township Manager on March 30, 2017 and thereafter hired Ms. Rogers on July 3, 2019.

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).⁷ 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 dated October 31, 2007).

⁷ 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.

Additionally, in Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5th) business day after receipt of the complainant's March 19, 2007 OPRA request seeking an extension of time until April 20, 2007. However, the custodian responded again on April 20, 2007, stating that the requested records would be provided later in the week. Id. The evidence of record showed that no records were provided until May 31, 2007. Id. The GRC held that:

The Custodian properly requested an extension of time to provide the requested records to the Complainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) . . . however . . . [b]ecause the Custodian failed to provide the Complainant access to the requested records by the extension date anticipated by the Custodian, the Custodian violated N.J.S.A. 47:1A-5(i) resulting in a "deemed" denial of access to the records.

[Id.]

In the matter before the Council, the Custodian sought an extension of time to respond to the Complainant's June 21, 2019 OPRA request through July 10, 2019. However, the Custodian did not respond again until July 12, 2019. In the SOI, the Custodian certified to these facts. Based on the forgoing and the Council's decision in Kohn, GRC 2007-124, the Custodian's failure to respond prior to the expiration of the extended time frame resulted in a "deemed" denial.

Furthermore, the Custodian conceded that no response was provided to the Complainant regarding his June 25, 2019 OPRA request due to an oversight. The Custodian also certified that a response was provided as part of the SOI on January 13, 2020. Thus, the request was also "deemed" denied.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's June 21, 2019 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 extended time frame results in a "deemed" denial of said request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. See also Kohn, GRC 2007-124. Furthermore, the Custodian's failure to timely respond to the Complainant's June 25, 2019 OPRA request also resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. However, the Council need not order the Custodian to provide a response to the June 25, 2019 OPRA request since the Custodian did so on January 13, 2020.

Sufficiency of Response

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. In Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008), the Council held that ". . . [t]he Custodian's response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5(g)." See also Lenchitz v. Pittsgrove Twp. (Salem),

GRC Complaint No. 2012-265 (Interim Order dated August 27, 2013).

Here, the Custodian disclosed e-mails in response to the Complainant's June 21, 2019 OPRA request item No. 2 but withheld several records that were attached to some of the e-mails. The Custodian did not provide any specific lawful basis for these denials until submission of the SOI. Thus, the evidence of records supports that the Custodian's response to this OPRA request was insufficient in accordance with Paff, GRC 2007-209.

As such, because the Custodian failed to provide a specific lawful basis for denying access to the e-mail attachments, her response to the Complainant's June 21, 2019 OPRA request was insufficient. N.J.S.A. 47:1A-5(g); Paff, GRC 2007-209.

Validity of Request

The New Jersey Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records "readily accessible for inspection, copying, or examination."* N.J.S.A. 47:1A-1.

[MAG, 375 N.J. Super. at 546 (emphasis added).]

The court reasoned that:

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

[Id. at 549 (emphasis added).]

The court further held that "[u]nder OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt . . . In short, OPRA does not countenance open-ended searches of an agency's files." Id. (emphasis added). See also Bent, 381 N.J. Super. at 37;⁸ N.J. Builders Ass'n, 390 N.J. Super. at 180; Schuler v. Borough of Bloomsbury (Hunterdon), GRC Complaint No. 2007-151 (Interim Order dated December 19, 2007).

⁸ Affirmed on appeal regarding Bent v. Stafford Police Dep't, GRC Complaint No. 2004-78 (October 2004).

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. at 546; 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.

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. N.J. 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).]

June 21, 2019 Item No. 2 & June 25, 2019 Item No. 3

Here, a portion of the Complainant’s June 21, 2019 OPRA request item No. 2 sought “all

documents pertaining to the application of Sharon Rogers.” The remainder of the request went on to identify specific records, which the Custodian provided in part and denied in part. Additionally, the Complainant’s June 25, 2019 OPRA request item No. 3 sought “any document” containing questions asked by the Township to the Complainant or Ms. Rogers during the interview process.

Notwithstanding that the Custodian denied access to multiple records, which will be addressed below, the portions of the Complainant’s June 21, 2019 request item No. 1 seeking “all documents” is clearly invalid, as well as the June 25, 2019 request item No. 3 seeking “any document.” Although the Complainant did identify specific government records, he utilized overly broad language intended to require the Custodian to perform an open-ended search of every record in her office that may pertain to his and Ms. Rogers’ candidacy for employment.

Accordingly, notwithstanding the Custodian’s “deemed” denial, the portion of the Complainant’s June 21, 2019 OPRA request item No. 2 seeking “all documents” relating to the Ms. Rogers’ application and the June 25, 2019 OPRA request item No. 3 seeking “any document” containing interview questions are invalid because they fail to identify specific records. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; N.J. Builders Ass’n, 390 N.J. Super. at 180; Schuler, GRC 2007-151; Feiler-Jampel, GRC 2007-190. Thus, the Custodian lawfully denied access to these portions of the requests. N.J.S.A. 47:1A-6.

June 21, 2019 Item No. 3 & June 25, 2019 Item No. 1

Regarding requests for communications, including e-mails, text messages, and written correspondence, the GRC has established criteria deemed necessary under OPRA to request them. In 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, GRC 2006-167. The Council has also applied the criteria set forth in Elcavage to other forms of correspondence, such as letters. See Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011).

Additionally, there are instances where a request can be specific enough to induce research, thus rendering it invalid. For instance, in Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint Nos. 2011-147, 2011-157, 2011-172, and 2011-181 (July 2012), the complainant submitted four (4) OPRA requests seeking copies of meeting minutes containing motions to approve other minutes. The Council, citing Taylor v. Cherry Hill Bd. of Educ. (Camden), GRC Complaint No. 2008-258 (August 2009) and Ray v. Freedom Academy Charter Sch. (Camden), GRC Complaint No. 2009-185 (August 2010), determined that the 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 UCBOE 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 UCBOE’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.

[Valdes, GRC 2011-147 *et seq.* (emphasis added) (citing N.J. Builders Ass’n, 390 N.J. Super. at 180; Bent, 381 N.J. Super. 30 (App. Div. 2005); MAG, 375 N.J. Super. at 546; Schuler, GRC 2007-151; Donato, GRC 2005-182. See also Valdes v. Gov’t Records Council, GRC Complaint No. 2013-278 (September 2014).]

Here, the Complainant’s June 21, 2019 OPRA request item No. 3 sought “all written or electronic communications between Ms. Rogers and any Willingboro official and/or employee between January 1, 2018 and June 18, 2019.” Because the request item lacks a subject or content matter as required under Elcavage and Armenti, it was invalid under OPRA. Furthermore, the Complainant’s June 25, 2019 OPRA request item No. 1 sought “closed session meeting minutes that included interviews with the Complainant and Ms. Rogers.” Because the request did not specify a date or time frame of the minutes sought but instead identified a topic, said request required the Custodian to impermissibly research the Township’s meeting minutes to locate responsive records. See Valdes, GRC 2011-147 *et seq.*

However, in situations where a request was overly broad on its face, but the custodian was able to locate records, the Council has followed Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012), in determining that the request contained sufficient information for record identification. See Bond v. Borough of Washington (Warren), GRC Complaint No. 2009-324 (March 2011); Inzelbuch v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2014-92 (September 2014). Here, the Custodian was clearly able to locate e-mails and meeting minutes responsive to the aforementioned request items. Therefore, the records and accompanying attachments are subject to disclosure unless exempt under OPRA.

Accordingly, the GRC declines to hold that the Complainant’s June 21, 2019 OPRA request item No. 3 and June 25, 2019 request item No. 1 are invalid because the Custodian was able to locate responsive records using the identifiers provided. See Burke, 429 N.J. Super. at 177; MAG, 375 N.J. Super. at 546; Elcavage, GRC 2009-07; Armenti, GRC 2009-154; Valdes, GRC 2011-147 *et seq.* However, the Council declines to order disclosure since the evidence of record demonstrates that the Custodian provided the responsive records to the Complainant on July 12, 2019 and January 13, 2020.

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.

Attachments to E-Mail dated May 8, 2019

OPRA provides that the definition of a government record “shall not include . . . inter-agency or intra-agency advisory, consultative, or deliberative [(“ACD”)] material.” N.J.S.A. 47:1A-1.1. When the exception is invoked, a governmental entity may “withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated.” Educ. Law Center, 198 N.J. 274, 285 (2009) (citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975)). The New Jersey Supreme Court has also ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Educ. Law Ctr., 198 N.J. 274.

A custodian claiming an exception to the disclosure requirements under OPRA on that basis must initially satisfy two conditions: 1) the document must be pre-decisional, meaning that the document was generated prior to the adoption of the governmental entity's policy or decision; and 2) the document must reflect the deliberative process, which means that it must contain opinions, recommendations, or advice about agency policies. Id. at 286 (internal citations and quotations omitted). The key factor in this determination is whether the contents of the document reflect “formulation or exercise of . . . policy-oriented judgment or the process by which policy is formulated.” Id. at 295 (adopting the federal standard for determining whether material is “deliberative” and quoting Mapother v. Dep't of Justice, 3 F.3d 1533, 1539 (D.C. Cir. 1993)). Once the governmental entity satisfies these two threshold requirements, a presumption of confidentiality is established, which the requester may rebut by showing that the need for the materials overrides the government's interest in confidentiality. Id. at 286-87.

In Sandoval, GRC 2006-167, the complainant sought interview forms, information regarding evaluation criteria, letters sent to candidates regarding the scheduling of interviews, and letters noting the outcome of said interviews. The GRC held that the “questions, answers, and interview notes” were pre-decisional and deliberative, and therefore exempt under the ACD exemption. N.J.S.A. 47:1A-1.

In response to the June 21, 2019 OPRA request item No. 3, the Complainant received an e-mail dated May 8, 2019 containing a “list of scenarios” and interview scheduling letter sent by the Township to Ms. Rogers during her application process. The Complainant asserted that the records should have been produced, whereas the Custodian denied access under the ACD exemption.

Upon review of precedential case law, as well as the Council’s decision in Sandoval, GRC 2006-167, the Council is persuaded that the Custodian lawfully denied access to the records. Specifically, the list of scenarios clearly meets the two-prong test to be considered ACD material. Educ. Law Ctr., 198 N.J. 274. Further, the deliberative nature of the list as well as the scheduling letter submitted during the interview process prior to the Township’s hiring decision is apparent. See Sandoval, GRC 2006-167. Thus, the “list of scenarios” letter scheduling Ms. Rogers’ final interview were properly exempt under the ACD exemption.

Accordingly, notwithstanding the Custodian's "deemed denial," the responsive "list of scenarios" and interview letter attached to the May 8, 2019 e-mail are exempt from disclosure under the ACD exemption. N.J.S.A. 47:1A-1.1; Educ. Law Ctr., 198 N.J. 274; Sandoval, GRC 2006-167. For this reason, the Custodian lawfully denied access to same. N.J.S.A. 47:1A-6.

Attachments to E-mails Dated March 22, 2019 and April 12, 2019

Additionally, OPRA provides that its provisions:

[S]hall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; *Executive Order of the Governor*; Rules of Court; any federal law; federal regulation; or federal order.

[N.J.S.A. 47:1A-9(a) (emphasis added).]

EO 26 provides that:

No public agency shall disclose the resumes, applications for employment or other information concerning job applicants while a recruitment search is ongoing. The resumes of successful candidates shall be disclosed once the successful candidate is hired. The resumes of unsuccessful candidates may be disclosed after the search has been concluded and the position has been filled, but only where the unsuccessful candidate has consented to such disclosure.

[Id.]

EO 26 is clear on the disclosability of resumes at the conclusion of the recruitment process: successful candidate resumes must be disclosed. Id. However, EO 26 is less clear on applications and "other information concerning job applicants." To this end, the Council has previously held that employment applications were not disclosable, reasoning that EO 26 made no mention of employment applications being disclosed after the completion of the recruitment search. See Toscano v. N.J. Dep't of Human Serv., Div. of Health Serv., GRC Complaint No. 2010-147 (May 2011). The Council further equated applications to "personnel records" not among the enumerated list of releasable records set forth at N.J.S.A. 47:1A-10 (allowing for limited disclosure of certain personnel information). See also Deutsch v. N.J. Civil Serv. Comm'n, GRC Complaint No. 2011-361 (March 2013).

Here, the Complainant received e-mails dated March 22, 2019 and April 12, 2019 as responsive to his June 21, 2019 OPRA request item No. 3. The Custodian asserted that the respective e-mails contained presentation materials submitted by Ms. Rogers and a list of references. The Complainant argued that the attachments should have been disclosed as responsive to his June 21, 2019 OPRA request item No. 2. The Custodian argued that the attachments fell under OPRA's exemption for personnel records, as well as EO 26 regarding employment applications.

Upon review of the prevailing case law, the requested attachments are exempt under EO 26. The list of references is a record typically included with employment applications but separate from the resume itself, thus constituting “other information concerning job applicants.” EO 26. Furthermore, Ms. Rogers’ presentation materials were given to the Township during the recruitment process and were reviewed along with her other submissions. Thus, the presentation materials are also included as part of Ms. Rogers’ employment application and became part of her personnel record when hired. Id. See also N.J.S.A. 47:1A-10.

Therefore, notwithstanding the Custodian’s “deemed” denial, she lawfully denied access to the e-mail attachments comprising Ms. Rogers’ presentation materials and list of references. N.J.S.A. 47:1A-6. The records are exempt from access under EO 26’s exemption for employment applications and OPRA’s personnel records exemption. See N.J.S.A. 47:1A-9(a); N.J.S.A. 47:1A-10.

Attachments to E-Mails Dated January 13, 2017 and January 14, 2017

Additionally, the Custodian provided the Complainant with e-mails between the Township and Ms. Rogers dated January 13, and 14, 2017. The Custodian asserted that the e-mails contained Ms. Rogers’ resume, cover letter, Curriculum Vitae, list of references, and writing sample. The Complainant asserted that the attachments were responsive to his June 21, 2019 OPRA request and should have been provided. The Custodian argued that the records were withheld since the Township provided Ms. Rogers’ cover letter and resume from 2019, and the remaining records were exempt under EO 26 and N.J.S.A. 47:1A-10. Additionally, the Custodian argued that the records were not responsive to his request as they were dated outside the Complainant’s requested period.

In response to the GRC’s request for additional information, the current Custodian certified that the Township hired Eric Berry in 2017 as Township Manager, and thereafter Ms. Rogers in July 2019. Therefore, the Township sought candidates for the position on two (2) separate occasions between 2016-2019, with the Complainant and Ms. Rogers applying in both instances. However, while the Complainant’s June 21, 2019 OPRA request item No. 1 sought correspondence during that period, the subject matter pertained only to the Complainant’s candidacy for employment. In contrast, item No. 3’s request for correspondence by and between Ms. Rogers was dated from January 1, 2018 through June 18, 2019.

Furthermore, the Complainant prefaced item No. 2 with the comment that the “search for a new township manager [was] completed” when seeking Ms. Rogers’ application materials. It can thus be inferred that item No. 2 sought Ms. Rogers’ application materials regarding her 2019 application for the position and would therefore not include her application for the position in 2017.⁹

Therefore, notwithstanding the Custodian’s “deemed” denial, the application materials attached to the e-mails dated January 13, 2017 and January 14, 2017 were not responsive to the

⁹ Even if the Complainant’s June 21, 2019 OPRA request included Ms. Rogers’ 2017 application materials, same would be exempt from disclosure pursuant to EO 26, as she was an unsuccessful candidate for the position at the time.

Complainant's June 21, 2019 OPRA request. Thus, there was no unlawful denial of access. 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)).

Here, the Custodian violated N.J.S.A. 47:1A-5(g) and (i) by failing to timely respond to the Complainant's OPRA requests. Additionally, the Custodian provided an insufficient response to the Complainant's June 21, 2019 OPRA request. Paff, GRC 2007-272. However, the Custodian lawfully denied access to the requested e-mail attachments and ultimately provided records responsive to the Complainant's June 25, 2019 OPRA request. Additionally, the evidence of record does not indicate that the Custodian's violation 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 June 21, 2019 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 extended time frame results in a “deemed” denial of said 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 dated October 31, 2007). See also Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). Furthermore, the Custodian's failure to timely respond to the Complainant's June 25, 2019 OPRA request also resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. However, the Council need not order the Custodian to provide a response to the June 25, 2019 OPRA request since the Custodian did so on January 13, 2020.
2. Because the Custodian failed to provide a specific lawful basis for denying access to the e-mail attachments, her response to the Complainant's June 21, 2019 OPRA request was insufficient. N.J.S.A. 47:1A-5(g); Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008).
 3. Notwithstanding the Custodian's "deemed" denial, the portion of the Complainant's June 21, 2019 OPRA request item No. 2 seeking "any documents" relating to the application process of Ms. Rogers and June 25, 2019 OPRA request item No. 3 seeking "any document" containing interview questions are invalid because they fail to identify specific records. MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); 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 (Hunterdon), GRC Complaint No. 2007-151 (Interim Order dated December 19, 2007); Feiler-Jampel v. Somerset Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008). Thus, the Custodian lawfully denied access to these portions of the requests. N.J.S.A. 47:1A-6.
 4. The GRC declines to hold that the Complainant's June 21, 2019 OPRA request item No. 3 and June 25, 2019 request item No. 1 are invalid because the Custodian was able to locate responsive records using the identifiers provided. See Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012); MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011); Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint Nos. 2011-147, 2011-157, 2011-172, and 2011-181 (July 2012). However, the Council declines to order disclosure since the evidence of record demonstrates that the Custodian provided the responsive records to the Complainant on July 12, 2019 and January 13, 2020.
 5. Notwithstanding the Custodian's "deemed denial," the responsive "list of scenarios" and interview letter attached to the May 8, 2019 e-mail are exempt from disclosure under the "inter-agency or intra agency advisory, consultative, or deliberative material" exemption. N.J.S.A. 47:1A-1.1; Educ. Law Center, 198 N.J. 274, 285 (2009); Sandoval v. N.J. State Parole Bd., GRC Complaint No. 2006-167 (Interim Order dated March 28, 2007). For this reason, the Custodian lawfully denied access to same. N.J.S.A. 47:1A-6.

6. Notwithstanding the Custodian's "deemed" denial, she lawfully denied access to the e-mail attachments comprising Ms. Rogers' presentation materials and list of references. N.J.S.A. 47:1A-6. The records are exempt from access under Executive Order No. 26 (Gov. McGreevy 2002)'s exemption for employment applications and OPRA's personnel records exemption. See N.J.S.A. 47:1A-9(a); N.J.S.A. 47:1A-10.
7. Notwithstanding the Custodian's "deemed" denial, the application materials attached to the e-mails dated January 13, 2017 and January 14, 2017 were not responsive to the Complainant's June 21, 2019 OPRA request. Thus, there was no unlawful denial of access. N.J.S.A. 47:1A-6.
8. The Custodian violated N.J.S.A. 47:1A-5(g) and (i) by failing to timely respond to the Complainant's OPRA requests. Additionally, the Custodian provided an insufficient response to the Complainant's June 21, 2019 OPRA request. Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008) However, the Custodian lawfully denied access to the requested e-mail attachments and ultimately provided records responsive to the Complainant's June 25, 2019 OPRA request. Additionally, the evidence of record does not indicate that the Custodian's violation 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: Samuel A. Rosado
Staff Attorney

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