



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

January 26, 2021 Government Records Council Meeting

Shane P. Walsh
Complainant

Complaint No. 2019-24 and 2019-25

v.

NJ Office of the Governor
Custodian of Record

At the January 26, 2021 public meeting, the Government Records Council (“Council”) considered the January 19, 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 OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA requests 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 requests 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 Complainant’s OPRA requests are invalid because they fail to seek identifiable government 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); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Thus, the Custodian lawfully denied access to the Complainant’s requests. N.J.S.A. 47:1A-6.
3. Although the Custodian failed to respond to the Complainant’s requests in the statutorily-mandated time period, thereby violating N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), 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 an 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 26th Day of January 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: January 28, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 26, 2021 Council Meeting**

**Shane P. Walsh¹
Complainant**

**GRC Complaint Nos. 2019-24
and 2019-25²**

v.

**New Jersey Office of the Governor³
Custodial Agency**

Records Relevant to Complaint:

Request which formed the basis of GRC Complaint No. 2019-24:

1. All emails and text messages between Governor-elect Phil Murphy and Brendan Gill from November 7, 2017 to January 16, 2018 regarding executive branch staff resume referrals, hiring practices, and staffing decisions;
2. All emails and text messages between Governor Phil Murphy and Brendan Gill from January 16, 2018 to [December 26, 2018], regarding executive branch staff resume referrals, hiring practices, and staffing decisions;
3. All emails and text messages between Governor-elect Phil Murphy and Peter Cammarano from November 7, 2017 to January 16, 2018 regarding executive branch staff resume referrals, hiring practices, and staffing decisions;
4. All emails and text messages between Governor Phil Murphy and Peter Cammarano from January 16, 2018 to [December 26, 2018], regarding executive branch staff resume referrals, hiring practices, and staffing decisions;
5. All emails and text messages between Governor-elect Phil Murphy and Matt Platkin from November 7, 2017 to January 16, 2018 regarding executive branch staff resume referrals, hiring practices, and staffing decisions;
6. All emails and text messages between Governor Phil Murphy and Matt Platkin from January 16, 2018 to [December 26, 2018], regarding executive branch staff resume referrals, hiring practices, and staffing decisions;
7. All emails and text messages between Brendan Gill and Peter Cammarano from November 7, 2017 to January 16, 2018 regarding executive branch staff resume referrals, hiring practices, and staffing decisions;
8. All emails and text messages between Brendan Gill and Peter Cammarano from January 16, 2018 to [December 26, 2018], regarding executive branch staff resume referrals, hiring practices, and staffing decisions;

¹ No legal representation listed on record.

² These complaints have been consolidated because of the commonality of parties and issues.

³ Represented by Deputy Attorney General Kerry Soranno. Previously represented by Deputy Attorney General Kathryn Duran.

9. All emails and text messages between Brendan Gill and Matt Platkin from November 7, 2017 to January 16, 2018 regarding executive branch staff resume referrals, hiring practices, and staffing decisions.

Request which formed the basis of GRC Complaint No. 2019-25:

1. All emails and text messages between Brendan Gill and Matt Platkin from January 16, 2018 to [December 26, 2018], regarding executive branch staff resume referrals, hiring practices, and staffing decisions;
2. All emails and text messages between Matt Platkin and Peter Cammarano from November 7, 2017 to January 16, 2018 regarding executive branch staff resume referrals, hiring practices, and staffing decisions;
3. All emails and text messages between Matt Platkin and Peter Cammarano from January 16, 2018 to [December 26, 2018], regarding executive branch staff resume referrals, hiring practices, and staffing decisions;
4. All emails and text messages between Matt Platkin and William Castner from November 7, 2017 to January 16, 2018 regarding executive branch staff resume referrals, hiring practices, and staffing decisions;
5. All emails and text messages between Matt Platkin and William Castner from January 16, 2018 to [December 26, 2018], regarding executive branch staff resume referrals, hiring practices, and staffing decisions;
6. All emails and text messages between Peter Cammarano and William Castner from November 7, 2017 to January 16, 2018 regarding executive branch staff resume referrals, hiring practices, and staffing decisions;
7. All emails and text messages between Peter Cammarano and William Castner from January 16, 2018 to [December 26, 2018], regarding executive branch staff resume referrals, hiring practices, and staffing decisions;
8. All emails and text messages between Governor-elect Phil Murphy and William Castner from November 7, 2017 to January 16, 2018 regarding executive branch staff resume referrals, hiring practices, and staffing decisions;
9. All emails and text messages between Governor-elect Phil Murphy and William Castner from January 16, 2018 to [December 26, 2018], regarding executive branch staff resume referrals, hiring practices, and staffing decisions.⁴

Custodian of Record: Heather Taylor

Requests Received by Custodian: December 26, 2018

Responses Made by Custodian: January 14, 2019

GRC Complaint Received: February 6, 2019

⁴ The Complainant stated that e-mail was his preferred delivery method for the records responsive to the requests.

Background⁵

Requests and Responses:

On December 26, 2018, the Complainant submitted two (2) Open Public Records Act (“OPRA”) requests to the Custodian seeking the above-mentioned records. The two (2) requests formed the basis of GRC Complaint Numbers 2019-24 and 2019-25. On January 14, 2019, the twelfth (12th) business day following receipt of said requests, the Custodian responded in writing informing the Complainant that the requests were overbroad and invalid under OPRA.⁶

Denial of Access Complaints:

On February 6, 2019, the Complainant filed two (2) Denial of Access Complaints with the Government Records Council (“GRC”). Both complaints were identical except for the request items and the corresponding description of the records in the Records Denied List.

The Complainant recited the first five (5) paragraphs of Question #28 in the Frequently Asked Questions (“FAQ”) section on the GRC’s website.⁷ Thereafter, the Complainant asserted that his requests complied with the example provided in the FAQ section because he identified the type of record sought, the individuals who wrote and received the e-mails and texts, the subject matter of the e-mails and texts, and the time period that the e-mails and texts were sent and received. The Complainant stated that the only reason given by the Custodian for denial of access is that the requests were overbroad and thus invalid under OPRA.

Statement of Information:

On March 6, 2019, the Custodian filed one (1) Statement of Information (“SOI”) addressing both complaints. The Custodian certified that she received the Complainant’s OPRA requests on December 26, 2018, and responded in writing to both requests on January 14, 2019. The Custodian certified that all of the request items in both OPRA requests were overbroad because they failed to identify a discrete and limited subject matter. As such, the Custodian certified that the requests were invalid under OPRA.

The Custodian cited Burke v. Brandes, 429 N.J. Super. 169, 177 (App. Div. 2012) as providing that records sought under OPRA must be described with “requisite specificity” and confine themselves to a “discrete and limited subject matter.” Id. at 177. The Custodian certified that, because of the breadth of the subject matter terms used by the Complainant in the requests, she could not conduct a search for responsive records. The Custodian certified that the category of “executive branch staff” is overly broad because the Executive Branch has fifteen (15)

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.

⁶ The response letters denying the requests were identical except for recitation of the request items. The letters were transmitted as attachments to two (2) separate e-mails. The request forming the basis of GRC Complaint No. 2019-24 was assigned agency tracking number W140403 and the request forming the basis of GRC Complaint No. 2019-25 was assigned agency tracking number W140405.

⁷ See <https://www.nj.gov/grc/public/faqs/#28>.

departments with multiple agencies and subdivisions. The Custodian certified that the “executive branch staff” would encompass thousands of individuals and she would have to do research to determine if any records found pertained to an individual that is, or was, employed within the Executive Branch.

The Custodian further certified that there is no standard definition for “resume referrals.” Moreover, the Custodian certified that conducting such a search would require research and would also require her to exercise discretion to determine if a record is responsive to the request. The Custodian certified that even if she could locate responsive records, she would still need to do research because résumés of unsuccessful job applicants are not subject to disclosure.

The Custodian also certified that the term “hiring practices” is not a clearly defined subject matter because there is no set standard for when a course of action becomes a “practice.” The Custodian further certified that the term “staffing decisions” is extremely broad because such decisions “. . . could range from decisions regarding who to hire, fire or promote to decisions related to how many employees to invite to a meeting and anything in between.” The Custodian certified that the only way she could locate responsive records would be to search under “staff” and “staffing,” read each e-mail and use her discretion to make a determination as to which records were responsive to the Complainant’s request. The Custodian certified that taking such action is not required under OPRA, citing Lagerkvist v. Office of the Governor, 443 N.J. Super. 230, 236 (App. Div. 2015) and Am. Civil Liberties Union of N.J. v. N.J. Div. of Criminal Justice, 435 N.J. Super. 533, 540-41 (App. Div. 2014). The Custodian concluded that each of the Complainant’s requests are overbroad and invalid under OPRA.

Analysis

Timeliness

Unless a shorter time period is otherwise provided, a custodian must 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 accordingly 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).⁸ 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).

Here, the Custodian certified that she received the Complainant’s two (2) OPRA requests on December 26, 2018, and responded to the requests on January 14, 2019, which was the twelfth (12th) business day following receipt of said requests.

⁸ 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.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA requests 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 requests pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

Validity of Requests

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.

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 Alcoholic Beverage Control, 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. at 549 (emphasis added). See also Bent v. Stafford

Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005);⁹ 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).

Moreover, in Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 8, 2010), the Council established criteria deemed necessary under OPRA to request an e-mail communication. For such requests to be valid, they must contain: (1) the content and/or subject of the e-mail(s), (2) the specific date or range of dates during which the e-mail(s) were transmitted, and (3) the identity of the sender and/or the recipient thereof. See also Sandoval v. N.J. State Parole Bd., GRC Complaint No. 2006-167 (Interim Order dated March 28, 2007). 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).

Here the Complainant, citing the GRC website's FAQ section, asserted that he complied with all of the necessary criteria for a valid request of e-mail and text message communications. The GRC notes that he did comply with all of the criteria set forth in Elcavage, GRC 2009-07; therefore, the requests were valid in form. However, although valid in form, the first criterion in Elcavage which requires the requestor to set forth the content and/or subject of the e-mails was lacking in substance. Each request item within both requests sought correspondence "regarding executive branch staff resume referrals, hiring practices, and staffing decisions." Such content is overly broad under MAG, 375 N.J. Super. 534, and its progeny.

As pointed out by the Custodian, staff within the Executive Branch could number thousands of individuals. And although the Custodian stated that "resume referral" lacks a standard definition, locating responsive résumés for the entire staff would be an awesome task not required under OPRA. Moreover, "hiring practices" is a nebulous term because a myriad of various methods and procedures could be considered part of a "practice." Similarly, "staffing decisions" could run the full gamut of managerial decision making, which requires consideration of numerous possible options. As such, locating responsive records would require the Custodian to search through all of the agency's files to identify potential responsive records, then conduct research in order to determine from such potential pool which records should be produced. The Custodian is not required to perform such a search and conduct subsequent research to respond to the requests.

Therefore, the Complainant's OPRA requests are invalid because they fail to seek identifiable government records. MAG, 375 N.J. Super. 534 at 546; Bent, 381 N.J. Super. 30 at 37; N.J. Builders Ass'n, 390 N.J. Super. 166 at 180; Armenti, GRC 2009-154; Schuler, GRC 2007-151. Thus, the Custodian lawfully denied access to the Complainant's 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

⁹ Affirming Bent v. Stafford Police Dep't, GRC Case No. 2004-78 (October 2004).

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)).

Although the Custodian failed to respond to the Complainant’s requests in the statutorily-mandated time period, thereby violating N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), 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 an 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 OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA requests 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 requests 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 Complainant’s OPRA requests are invalid because they fail to seek identifiable government 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); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Thus, the Custodian lawfully denied access to the Complainant's requests. N.J.S.A. 47:1A-6.

3. Although the Custodian failed to respond to the Complainant's requests in the statutorily-mandated time period, thereby violating N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), 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 an unreasonable denial of access under the totality of the circumstances.

Prepared By: John E. Stewart
Staff Attorney

January 19, 2021