



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

March 29, 2022 Government Records Council Meeting

Thomas M. Riche
Complainant

Complaint No. 2020-134

v.

Franklin Township Housing Authority (Somerset)
Custodian of Record

At the March 29, 2022 public meeting, the Government Records Council (“Council”) considered the March 22, 2022 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. Executive Director John Clarke, on behalf of the Custodian, did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, Executive Director Clarke’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days resulted 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). See also Owoh, Esq. (on behalf of African American Data and Research Institute) v. Borough of Helmetta (Middlesex), GRC Complaint No. 2018-65 (February 2020).
2. The Complainant’s OPRA request is invalid because it fails to seek identifiable government records. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30 (App. Div. 2005); N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166 (App. Div. 2007); Lagerkvist v. Office of the Governor, 443 N.J. Super. 230 (App. Div. 2015); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Thus, the Custodian did not unlawfully deny access to the Complainant’s request. N.J.S.A. 47:1A-6.
3. Although Executive Director John Clarke violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the evidence of record reveals that Executive Director Clarke’s intention was to timely respond to the Complainant’s OPRA request. Additionally, the evidence of record does not indicate that Executive Director Clarke’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, his 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 29th Day of March 2022

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: March 31, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 29, 2022 Council Meeting**

Thomas M. Riche¹
Complainant

GRC Complaint No. 2020-134

v.

Franklin Township Housing Authority (Somerset)²
Custodial Agency

Records Relevant to Complaint: Electronic copies via e-mail of:

“[A]ll documentation including proposals, emails, meeting minutes and agendas, handwritten notes, invoices, purchase orders, work orders and any and all documentation that may be applicable for any and all correspondence related to the solicitation and award of contract for new telephone system for the Franklin Township Housing Authority. Documentation submitted by EXTEL Communications, Inc may be omitted.”

Custodian of Record: Tina P. Adams
Request Received by Custodian: June 24, 2020
Response Made by Custodian: July 1, 2020
GRC Complaint Received: July 20, 2020

Background³

Request and Response:

On June 24, 2020, the Complainant submitted via fax an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 30, 2020, the Complainant e-mailed the Custodian, informing her that this was his third request for acknowledgement of the Complainant’s OPRA request. On July 1, 2020 at 8:11 a.m., the fifth (5th) business day following receipt of said request, Executive Director John Clarke, on behalf of the Custodian, responded in writing via e-mail informing the Complainant that his request was denied because the request was overbroad and unclear; however, the response was transmitted to an invalid e-mail address.

¹ No legal representation listed on record.

² Represented by Daryl J. Howard, Esq., of Manfredi & Pellechio (Colts Neck, 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.

On July 1, 2020 at 12:19 p.m., the Complainant transmitted an e-mail to the Franklin Township Housing Authority (“Authority”).⁴ The Complainant stated: “[m]ultiple request (sic) for OPRA submission have not been replied to.” On July 1, 2020 at 3:08 p.m., Executive Director Clarke replied to the Complainant’s e-mail, expressing confusion, and informing the Complainant that the Authority has only received one (1) request dated June 24, 2020, to which he had responded. Executive Director Clarke asked the Complainant for copies of the OPRA requests he submitted.

Denial of Access Complaint:

On July 20, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he did not receive a response to his OPRA request. The Complainant attached to the complaint a fax cover sheet directed to the Authority dated June 24, 2020, stating that an OPRA request is attached. The Complainant also attached to the complaint copies of two (2) e-mails sent to the Custodian. One of the e-mails is undated and is forwarding an OPRA request. The other e-mail is dated June 30, 2020, and states that it is the third request for acknowledgement of the Complainant’s OPRA request.

Supplemental Responses:

On July 29, 2020, Executive Director Clarke e-mailed the Complainant, informing him that the Authority discovered that the Complainant did not receive the July 1, 2020 response to the OPRA request because of a transposition error in the Complainant’s e-mail address. Executive Director Clarke stated that he was resending the July 1, 2020 response to the Complainant’s correct e-mail address, along with another e-mail on that same date that was sent to the Complainant’s correct e-mail address in which he had informed the Complainant that he responded to his OPRA request.⁵

On July 29, 2020, the Complainant sent a reply e-mail to Executive Director Clarke, wherein he stated that his OPRA request was not unclear or overbroad. The Complainant stated that the request required the Authority to provide readily available public documents related to solicitation and award of any contract associated with the procurement of a new telephone system.

Statement of Information:

On July 29, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on June 24, 2020, and that Executive Director John Clarke responded in writing on July 1, 2020. The Custodian certified that in his response Executive Director Clarke informed the Complainant that his request was denied as unclear and/or overbroad because it required the Custodian to conduct research. The Custodian certified that Executive Director Clark cited Lagerkvist v. Office of the Governor, 443 N.J. Super. 230 (App. Div. 2015). The Custodian further certified that Executive Director Clark informed the

⁴ This e-mail was not transmitted to either the Custodian’s or Executive Director Clarke’s e-mail address.

⁵ This was the 3:08 p.m. e-mail.

Complainant that he must narrow the scope of his request so the Custodian can search the files for identifiable government records.

The Custodian certified that a few hours later Executive Director Clark received another e-mail from the Complainant regarding the status of his OPRA request. The Custodian certified that Executive Director Clark replied to the Complainant, informing him that he received only one (1) OPRA request from him dated June 24, 2020, and that he had responded to that request. The Custodian certified that the Complainant never addressed that particular e-mail. The Custodian certified that if the Complainant informed Executive Director Clark that he never received the referenced response the issue could have been immediately resolved.

The Custodian certified that it was not until the Authority received the instant complaint that it was discovered that the response was sent to an incorrect e-mail address for the Complainant due to a clerical error. The Custodian certified that as soon as the Authority learned of its error, it corrected the error by resending the response to the Complainant's correct e-mail address.

The Custodian's Counsel argued that the Authority's response to the Complainant's request was fully justified. Counsel stated that the request failed to identify with reasonable clarity the records that were sought by the Complainant. Counsel stated that the Complainant sought "any and all documentation that may be applicable." Counsel argued that by including the language "may be applicable," the Complainant required the Custodian to conduct research and render subjective judgment as to what records are being sought. The Custodian's Counsel cited N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007) as noting that "research is not among the custodian's responsibilities." Counsel also cited MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 547 (App. Div. 2005) and Lagerkvist, 443 N.J. Super. 230 in support of his argument.

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).⁶ Thus, a custodian's failure to respond in writing to a complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

In Owoh, Esq. (on behalf of African American Data and Research Institute) v. Borough of Helmetta (Middlesex), GRC Complaint No. 2018-65 (February 2020), the custodian responded to

⁶ 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.

the complainant by seeking clarification of the OPRA request the day after the request was received; however, the custodian erroneously misspelled the complainant's e-mail address. After he failed to receive a response to his request, the complainant filed a complaint with the GRC. The Council held that the custodian violated OPRA because she failed to timely respond to the complainant's request.

Here, the Complainant stated that he submitted his OPRA request on June 24, 2020, but never received a response. Thereafter, the Complainant filed the within complaint on July 20, 2020. The Custodian certified that on July 1, 2020, Executive Director Clarke, on behalf of the Custodian, responded to the OPRA request denying access because the request was overly broad. The Custodian certified that after the complaint was received, she discovered that the Complainant did not receive Executive Director Clarke's July 1, 2020 response to the OPRA request because of a transposition error in the Complainant's e-mail address. The Custodian certified that on July 29, 2020, Executive Director Clarke forwarded his response to the Complainant's correct e-mail address.

Therefore, Executive Director Clarke, on behalf of the Custodian, did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, Executive Director Clarke's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days resulted in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. See also Owoh, Esq., GRC 2018-65.

Validity of Request

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 ABC, 375 N.J. Super. 534, 546 (App. Div. 2005) (emphasis added).]

The Court reasoned that:

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

[Id. at 549 (emphasis added)].

The Court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files.” Id. at 549 (emphasis added). Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005);⁷ N.J. Builders Assoc., 390 N.J. Super. at 180; Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Additionally, in Lagerkvist, 443 N.J. Super. 230, cited by both Executive Director Clark and Counsel, the court held that plaintiff’s request was invalid because it required research. In reaching this conclusion, the court reasoned that:

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

[Id. at 237].

Moreover, 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 v. NJ State Parole Bd., GRC Complaint No. 2006-167 (Interim Order 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 May 24, 2011).

⁷ Affirming Bent v. Stafford Police Dep’t, GRC Case No. 2004-78 (October 2004).

Here, the Complainant is seeking all records, including certain categories of records, and any and all documentation that *may be applicable* for any and all correspondence *related to* the solicitation and award of a contract for a telephone system. The Complainant did not provide a date or a range of dates for any of the records he was seeking. As such, the Complainant's request would require the Custodian to search for every record that could be related to the contract, then as the Custodian's Counsel pointed out, subjectively decide which records are being sought by reviewing the records and culling out those that may not be applicable. This would require the Custodian to conduct research to determine which records may or may not be responsive to the request. This is a task that the Custodian is not obligated to perform under OPRA and prevailing case law. Furthermore, the Complainant was seeking "emails" and "any and all correspondence" related to the contract; however, the Complainant failed to provide any of the search criteria required under Elcavage, GRC 2009-07.

Therefore, the Complainant's OPRA request is invalid because it fails 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; Lagerkvist, 443 N.J. Super. 230 at 237 (App. Div. 2015); Schuler, GRC 2007-151. Thus, the Custodian did not unlawfully deny access to the Complainant's request. 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)).

Although Executive Director Clarke violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the evidence of record reveals that Executive Director Clarke's intention was to timely respond to the Complainant's OPRA request. Additionally, the evidence of record does not indicate that

Executive Director Clarke's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, his 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. Executive Director John Clarke, on behalf of the Custodian, did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, Executive Director Clarke's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days resulted 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). See also Owoh, Esq. (on behalf of African American Data and Research Institute) v. Borough of Helmetta (Middlesex), GRC Complaint No. 2018-65 (February 2020).
2. The Complainant's OPRA request is invalid because it fails to seek identifiable government records. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30 (App. Div. 2005); N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166 (App. Div. 2007); Lagerkvist v. Office of the Governor, 443 N.J. Super. 230 (App. Div. 2015); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Thus, the Custodian did not unlawfully deny access to the Complainant's request. N.J.S.A. 47:1A-6.
3. Although Executive Director John Clarke violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the evidence of record reveals that Executive Director Clarke's intention was to timely respond to the Complainant's OPRA request. Additionally, the evidence of record does not indicate that Executive Director Clarke's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, his 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

March 22, 2022