



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

January 25, 2022 Government Records Council Meeting

Anonymous
Complainant

Complaint No. 2020-205

v.

Borough of Haledon (Passaic)
Custodian of Record

At the January 25, 2022 public meeting, the Government Records Council (“Council”) considered the January 18, 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. 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, the Custodian’s failure to respond in writing immediately to the portion of the Complainant’s OPRA request item No. 1 either granting access, denying access, seeking clarification or requesting an extension of time immediately resulted in a violation of OPRA. N.J.S.A. 47:1A-5(e); Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007).
2. The Custodian’s failure to locate and disclose the spreadsheet responsive to the Complainant’s OPRA request item No. 5 until after a more reasonable search was conducted following receipt of the Denial of Access Complaint resulted in an insufficient search. Thus, the Custodian unlawfully denied access to that spreadsheet. N.J.S.A. 47:1A-6; Schneble v. N.J. Dep’t of Env’tl. Protection, GRC Complaint No. 2007-220 (April 2008). However, the GRC need not order disclosure of the spreadsheet because same was disclosed as part of the Statement of Information.
3. The Complainant’s request Nos. 1, 4, and 6 seeking a several types of records related to § 48-36.1(A)(3) are invalid because they required research. The Custodian had no legal duty to research her files, or cause research, to locate records potentially responsive to the request. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 549 (App. Div. 2005); Bent v. Stafford Twp. 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); Lagerkvist v. Office of the Governor, 443 N.J. Super. 230, 236-237 (App. Div. 2015); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Further, the Complainant’s request item No. 2 is invalid because it failed to include a sender and/or recipient. Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Caggiano v. N.J. Office of the Governor, GRC Complaint No. 2015-276 (Final Decision dated November 13, 2018). Finally, the

Complainant's request item No. 3 seeking minutes at which contacts were discussed and/or voted on is invalid for all reasons discussed in Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2011-147, *et seq.* (July 2012). Thus, the Custodian lawfully denied access to these request items. N.J.S.A. 47:1A-6.

4. The Custodian's failure to timely respond to the Complainant's request item No. 1 seeking "immediate" access records resulted in a violation of N.J.S.A. 47:1A-5(e). Further, the Custodian failure to locate the spreadsheet responsive to the Complainant's OPRA request item No. 5 until after the filing of this complaint resulted in an insufficient search and unlawful denial of access. N.J.S.A. 47:1A-6. However, the Complainant's request item Nos. 1 through 4 and 6 are invalid because they required research; thus, no unlawful denial of access occurred. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 25th Day of January 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: January 27, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 25, 2022 Council Meeting**

**Anonymous¹
Complainant**

GRC Complaint No. 2020-205

v.

**Borough of Haledon (Passaic)²
Custodial Agency**

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

1. All contract and agreements created per Borough of Haledon (“Borough”) Code 48-36.1(A)(3).
2. All correspondence, e-mails, and other communications related to said contracts and agreements.
3. All Mayor and Council meeting minutes in which said contracts and agreements were discussed or action was taken.
4. All time estimates and approvals per § 48-36.1(A)(3)(a).
5. All escrow account records for each contract or agreement per § 48-36.1(A)(3)(b) that shows all receipts, disbursements, transfers, and other transactions.
6. All posted requests for services per § 48-36.1(A)(3)(d).

Custodian of Record: Allan Susen
Request Received by Custodian: April 21, 2020
Response Made by Custodian: August 14, 2020
GRC Complaint Received: October 5, 2020

Background³

Request and Response:

On April 21, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 29, 2020, the Custodian responded in writing stating per a memorandum from Mohammad Ramadan, no responsive records exist. On September 23, 2020, the Custodian again responded reiterating that per Mr. Ramadan’s memorandum, no records exist.

¹ No legal representation listed on record.

² Represented by Andrew Oddo, Esq., of Oddo Law Firm (Oradell, 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.

Denial of Access Complaint:

On October 5, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that following multiple extensions,⁴ the Custodian responded on June 29, 2020 and September 23, 2020 advising that the Borough Police Department did not maintain any responsive records. The Complainant first contended that the Custodian violated OPRA’s “immediate” access provision by failing to immediately address his OPRA request items seeking contracts. N.J.S.A. 47:1A-5(e).

The Complainant disputed the Custodian’s response because the Borough’s Code required the certain records regarding off-duty police work to be made and maintained. § 48-36.1. The Complainant argued that per the Borough’s Code, any off-duty police work required a written agreement which “would need to be approved by a resolution of the Borough Council.” The Complainant argued that a resolution was necessary to sign the resulting contracts, which would be in the Custodian’s possession. N.J.S.A. 40A:9-133(e).

The Complainant contended that it was “unconscionable” that the Custodian could not provide records in the five (5) month period since he submitted the OPRA request. The Complainant asserted that the Custodian need only ask the Chief Financial Officer (“CFO”) to provide escrow account dates so that he could “work backwards in time to locate the respective meeting minutes[,] resolutions, and other records.” The Complainant further contended that the contracts should be “kept in an organized file” that references the corresponding signed resolution. The Complainant thus contended that the Custodian failed to perform an adequate search.

Statement of Information:

On November 13, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the subject OPRA request on April 20, 2020. The Custodian certified that his search included reviewing the Borough’s Code Book and performing a search in his office and at the Police Department. The Custodian certified that following multiple extensions, he responded in writing on June 29, 2020 and September 23, 2020 stating that no records existed.

The Custodian argued that after reviewing the Borough’s Code Book and conducting a search, he failed to locate any records responsive to the Complainant’s OPRA request item Nos. 1 through 4 and 6. The Custodian noted that he was able to locate a spreadsheet used by the Accounts Receivable Finance Clerk that shows vendor names, dates, and transactions. The Custodian affirmed that he was attaching that spreadsheet, and that no other records were located.

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

⁴ The Complainant noted that the Custodian responded multiple times seeking an extension to a date certain. However, neither the Complainant nor Custodian included copies of the correspondence wherein the extensions were taken.

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).⁵ 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 Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007), the GRC held that “immediate access language of OPRA (N.J.S.A. 47:1A-5(e)) suggests that the Custodian was still obligated to immediately notify the Complainant. . .” Inasmuch as OPRA requires a custodian to respond within a statutorily required time frame, when immediate access records are requested, a custodian must respond to the request for those records immediately, granting or denying access, requesting additional time to respond or requesting clarification of the request. Additionally, if immediate access items are contained within a larger OPRA request containing a combination of records requiring a response within seven (7) business days and immediate access records requiring an immediate response, a custodian still has an obligation to respond to immediate access items immediately. See Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-330 (Interim Order dated February 26, 2013).

Here, the Complainant’s OPRA request item No. 1 sought contracts created per Borough Code 48-36.1(a)(3). Although the Complainant indicated that the Custodian extended the response time frame several times, no evidence is present in the record to support that an “immediate” response to OPRA request item No. 1 occurred. Thus, and consistent with Kohn, GRC 2011-330, the Custodian violated the “immediate” access provision of OPRA.

Therefore, 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, the Custodian’s failure to respond in writing immediately to the portion of the Complainant’s OPRA request item No. 1 either granting access, denying access, seeking clarification or requesting an extension of time immediately resulted in a violation of OPRA. N.J.S.A. 47:1A-5(e); Herron, GRC 2006-178.

Insufficient Search

It is the custodian’s responsibility to perform a complete search for the requested records before responding to an OPRA request, as doing so will help ensure that the custodian’s response is accurate and has an appropriate basis in law. In Schneble v. N.J. Dep’t of Env’tl. Protection, GRC Complaint No. 2007-220 (April 2008), the custodian initially stated that no records responsive to the complainant’s OPRA request existed. The custodian certified that after receipt of the complainant’s denial of access complaint, which contained e-mails responsive to the complainant’s request, the custodian conducted a second search and found records responsive to the complainant’s request. The GRC held that the custodian had performed an inadequate search

⁵ 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.

and thus unlawfully denied access to the responsive records. See also Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (January 2011).

Here, the Custodian received the subject OPRA request and responded on June 29, 2020 and again on September 23, 2020 stating that no records existed based on Mr. Ramadan's explanation that "[t]his information does not exist. . . ." Upon filing of the SOI, the Custodian confirmed that he was able to locate a spreadsheet presumably responsive to OPRA request item No. 5. That spreadsheet, which the Custodian disclosed as an attachment to the SOI, included a series of vendor accounts with account transactions and dates. The Custodian also indicated that his searches resulted in no responsive records.

A custodian has a legal obligation to search for and disclose all records that exist unless otherwise exempt. Here, the Custodian caused the Borough Police Department to locate records and also conducted his own search. It was not until after the filing of this complaint that the Custodian was able to locate the spreadsheet, which appears to be responsive to OPRA request item No. 5. Thus, the evidence of record strongly indicates that the Custodian did not contact the Finance Clerk until some point after proffering his second response. Thus, the facts here are on point with those in Schneble, GRC 2007-220 and it follows that an insufficient search occurred in the instant complaint.

Accordingly, the Custodian's failure to locate and disclose the spreadsheet responsive to the Complainant's OPRA request item No. 5 until after a more reasonable search was conducted following receipt of the Denial of Access Complaint resulted in an insufficient search. Thus, the Custodian unlawfully denied access to that spreadsheet. N.J.S.A. 47:1A-6; Schneble, GRC 2007-220. However, the GRC need not order disclosure of the spreadsheet because same was disclosed as part of the SOI.

Validity of Request

Initially, the Council is permitted to raise additional defenses regarding the disclosure of records pursuant to Paff v. Twp. of Plainsboro, 2007 N.J. Super. Unpub. LEXIS 2135 (App. Div.) (certif. denied, 193 N.J. 292 (2007)).⁶ In Paff, the complainant challenged the GRC's authority to uphold a denial of access for reasons never raised by the custodian. Specifically, the Council did not uphold the basis for the redactions cited by the custodian. The Council, on its own initiative, determined that the Open Public Meetings Act prohibited the disclosure of the redacted portions to the requested executive session minutes. The Council affirmed the custodian's denial to portions of the executive session minutes but for reasons other than those cited by the custodian. The complainant argued that the GRC did not have the authority to do anything other than determine whether the custodian's cited basis for denial was lawful. The court held that:

The GRC has an independent obligation to "render a decision as to whether the record which is the subject of the complaint is a government record which must be made available for public access pursuant to' OPRA . . . The GRC is not limited to assessing the correctness of the reasons given for the custodian's initial determination; it is charged with determining if the initial decision was correct."

⁶ On appeal from Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (March 2006).

The court further stated that:

Aside from the clear statutory mandate to decide if OPRA requires disclosure, the authority of a reviewing agency to affirm on reasons not advanced by the reviewed agency is well established. Cf. Bryant v. City of Atl. City, 309 N.J. Super. 596, 629-30 (App. Div. 1998) (citing Isko v. Planning Bd. of Livingston, 51 N.J. 162, 175 (1968) (lower court decision may be affirmed for reasons other than those given below)); Dwyer v. Erie Inv. Co., 138 N.J. Super. 93, 98 (App. Div. 1975) (judgments must be affirmed even if lower court gives wrong reason), certif. denied, 70 N.J. 142 (1976); Bauer v. 141-149 Cedar Lane Holding Co., 42 N.J. Super. 110, 121 (App. Div. 1956) (question for reviewing court is propriety of action reviewed, not the reason for the action) (aff'd, 24 N.J. 139 (1957)).

Having already addressed the fact that the Custodian was able to produce a spreadsheet that is responsive to OPRA request item No. 5, the GRC now turns to the remaining request items Nos. 1 through 4 and 6. To this end, the items on their face are either invalid based on prior case law or would require research to respond to each. The GRC thus raises a *sua sponte* defense regarding the validity of the remaining request items.

The New Jersey Appellate Division has held that:

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

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

The court reasoned that:

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

[Id. at 549 (emphasis added).]

The court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt . . . In short, OPRA does not countenance open-ended searches of an agency’s files.” Id. (emphasis added). Bent v. Stafford Twp. Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005);⁷ N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

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

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). The Council has also found that an OPRA request not containing a sender and/or recipient is invalid. See Caggiano v. N.J. Office of the Governor, GRC Complaint No. 2015-276 (Final Decision dated November 13, 2018).

Further, 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 No. 2011-147, *et seq.* (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*

⁷ Affirmed on appeal regarding Bent v. Stafford Police Dep’t, GRC Complaint No. 2004-78 (October 2004).

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)).]

In Lagerkvist v. Office of the Governor, 443 N.J. Super. 230, 236-237 (App. Div. 2015), the court's rationale of what amounted to research supports the Council's decision in Valdes. There, the court reasoned that the plaintiff's request:

. . . 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. See also Carter v. N.J. Dep't of Cmty. Affairs, Div. of Local Gov't Serv., 2019 N.J. Super. Unpub LEXIS 2510 (App. Div. Dec. 10, 2019) (affirming Carter, GRC Complaint No. 2016-262 (August 2018)).]

Here, the Complainant's OPRA request sought multiple records related to a contracting process set forth in § 48-36.1(A)(3). Specifically, item No. 1 sought contracts and agreements; item No. 2 sought all correspondence and communications regarding the above; item No. 3 sought meeting minutes wherein contracts and agreements were discussed; item No. 4 sought "time estimates and approvals; and item No. 6 sought posted requests for service. The Custodian initially responded stating that no records existed. In the Denial of Access Complaint, the Complainant contended that the Borough's Code required the creation of these records and that same should have contained to an "organized file."⁸ Further, the Complainant argued the Custodian only needed to ask the CFO to provide escrow account dates so that he could "work backwards in time to locate the respective meeting minutes[,] resolutions, and other records." In the SOI, the Custodian stated that both he and the Borough Police Department performed a search but were unable to locate any records responsive to the items.

Notwithstanding the Custodian's assertion of nonresponsive records, these request items on their face are clearly invalid. Specifically, item Nos. 1, 4, and 6 clearly require the type of research for which the Lagerkvist and Carter courts determined was not required of a records custodian under OPRA. That is, the Custodian would have had to determine what the Code required, then to locate swathes of records for an indeterminate time frame and carefully review each to determine whether they related to § 48-36.1(A)(3). Further, the Complainant's request item

⁸ The GRC's authority does not extend to whether an agency was maintaining records required by law or how same are filed. N.J.S.A. 47:1A-7(b);

No. 2 fails to include the senders and/or recipients, which as the Council previously held in Caggiano, GRC 2015-276 renders a request for communications invalid under Elcavage, GRC 2009-7. Also, request item No. 3 is like the one at issue in Valdes, GRC 2011-147, *et seq.*, that the GRC previously determined to be invalid because it required research. The forgoing finding is further supported by the Complainant's own description of how the Custodian could locate responsive records: asking a CFO to provide account dates for which the Custodian "could work backwards in time to locate" responsive records relating to a very narrow Code provision.

Accordingly, the Complainant's request Nos. 1, 4, and 6 seeking a several types of records related to § 48-36.1(A)(3) are invalid because they required research. The Custodian had no legal duty to research her files, or cause research, to locate records potentially responsive to the request. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; N.J. Builders, 390 N.J. Super. at 180; Lagerkvist, 443 N.J. Super. at 236-237; Schuler, GRC 2007-151. Further, the Complainant's request item No. 2 is invalid because it failed to include a sender and/or recipient. Elcavage, GRC 2009-7; Caggiano, GRC 2015-276. Finally, the Complainant's request item No. 3 seeking minutes at which contacts were discussed and/or voted on is invalid for all reasons discussed in Valdes, GRC 2011-147, *et seq.* Thus, the Custodian lawfully denied access to these request items. N.J.S.A. 47:1A-6.

The GRC briefly addresses the Complainant's allegations that certain records should have been maintained or that the Borough should have "organized" their files. Pursuant to N.J.S.A. 47:1A-7(b), which delineates the GRC's powers and duties, the Council does not have the authority to regulate the way an agency maintains its files, or which records an agency must maintain. See Van Pelt v. Edison Twp. Bd. of Educ., GRC Complaint No. 2007-179 (January 2008); Toscano v. N.J. Dep't of Labor, Div. of Vocational Rehabilitation Serv., GRC Complaint No. 2007-296 (March 2008); Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2010-218 (March 2012) at 8-9. Thus, the GRC cannot address the merits of these allegations due to a lack of authority over retention and maintenance issues.

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's failure to timely respond to the Complainant's request item No. 1 seeking "immediate" access records resulted in a violation of N.J.S.A. 47:1A-5(e). Further, the Custodian failure to locate the spreadsheet responsive to the Complainant's OPRA request item No. 5 until after the filing of this complaint resulted in an insufficient search and unlawful denial of access. N.J.S.A. 47:1A-6. However, the Complainant's request item Nos. 1 through 4 and 6 are invalid because they required research; thus, no unlawful denial of access occurred. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing immediately to the portion of the Complainant's OPRA request item No. 1 either granting access, denying access, seeking clarification or requesting an extension of time immediately resulted in a violation of OPRA. N.J.S.A. 47:1A-5(e); Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007).
2. The Custodian's failure to locate and disclose the spreadsheet responsive to the Complainant's OPRA request item No. 5 until after a more reasonable search was conducted following receipt of the Denial of Access Complaint resulted in an insufficient search. Thus, the Custodian unlawfully denied access to that spreadsheet. N.J.S.A. 47:1A-6; Schneble v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008). However, the GRC need not order disclosure of the spreadsheet because same was disclosed as part of the Statement of Information.
3. The Complainant's request Nos. 1, 4, and 6 seeking a several types of records related to § 48-36.1(A)(3) are invalid because they required research. The Custodian had no legal duty to research her files, or cause research, to locate records potentially responsive to the request. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 549 (App. Div. 2005); Bent v. Stafford Twp. 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); Lagerkvist v. Office of the Governor, 443 N.J. Super. 230, 236-237 (App. Div. 2015); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Further, the Complainant's request item No. 2 is invalid because it failed to

include a sender and/or recipient. Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Caggiano v. N.J. Office of the Governor, GRC Complaint No. 2015-276 (Final Decision dated November 13, 2018). Finally, the Complainant's request item No. 3 seeking minutes at which contacts were discussed and/or voted on is invalid for all reasons discussed in Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2011-147, *et seq.* (July 2012). Thus, the Custodian lawfully denied access to these request items. N.J.S.A. 47:1A-6.

4. The Custodian's failure to timely respond to the Complainant's request item No. 1 seeking "immediate" access records resulted in a violation of N.J.S.A. 47:1A-5(e). Further, the Custodian failure to locate the spreadsheet responsive to the Complainant's OPRA request item No. 5 until after the filing of this complaint resulted in an insufficient search and unlawful denial of access. N.J.S.A. 47:1A-6. However, the Complainant's request item Nos. 1 through 4 and 6 are invalid because they required research; thus, no unlawful denial of access occurred. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso
Executive Director

January 18, 2022