

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 29, 2015 Council Meeting**

**Thomas Dello Russo¹
Complainant**

GRC Complaint No. 2014-430

v.

**City of East Orange (Essex)²
Custodial Agency**

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

1. Computer-aided dispatch (“CAD”) event logs and CAD abstract reports for 140 Park Avenue between July 1, 2009, and July 31, 2011.
2. Inspections and/or violations for 140 Park Avenue between July 1, 2009, and July 31, 2011.
3. CAD event logs and CAD abstract reports generated during the incident designated as Case No. 12-16202.
4. Arrest report or log related to the arrest of Tariq Sewell in Case No. 12-16202.
5. Use of Force Report (“UFR”) generated by arrests of Mr. Sewell between July 1, 2009, and July 31, 2011.

Custodian of Record: Cynthia S. Brown

Request Received by Custodian: December 16, 2014

Response Made by Custodian: December 18, 2014

GRC Complaint Received: December 22, 2014

Background³

Request and Response:

On December 16, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. The Complainant noted that the City of East Orange’s (“City”) OPRA request form did not include a statement prohibiting transmission of OPRA requests via e-mail and that no e-mail address was listed on the form.

¹ No legal representation listed on record.

² Represented by Marlin Townes, Esq. (East Orange, 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 December 18, 2014, the Custodian responded telephonically to advise the Complainant that the City did not accept OPRA requests via facsimile or e-mail.

Denial of Access Complaint:

On December 22, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant argued that the Custodian unlawfully denied access to his OPRA request on the basis that the City did not accept OPRA requests via e-mail. The Complainant asserted that the City’s failure to accept OPRA requests via e-mail places an unreasonable burden on a requestor’s right to access. Paff v. City of East Orange, 407 N.J. Super. 221, 229 (App. Div. 2009).

The Complainant averred that the City currently accepts OPRA requests via hand-delivery and U.S. mail only. However, the City’s current OPRA request form, available on its website, does not prescribe methods of transmission.⁴ Additionally, the Complainant noted that the form contains a space for a requestor’s e-mail and that the Custodian has a valid e-mail address. The Complainant asserted that a requestor is thus placed in the position of either delivering the request directly to the City or mailing same, which would cause additional expense in cases where a requestor chose to track the delivery via “Priority” or “Registered” mail. The Complainant asserted that, in both instances, a requestor would incur an unnecessary cost of paper and gasoline to submit an OPRA request to the City.

Additionally, the Complainant asserted that this complaint is different from Paff, 407 N.J. Super. 221, because the Court reached that decision under the apparently “mistaken” assumption that the City accepted OPRA requests “by mail or ‘electronically’.” Id. at 229. The Complainant contended that, while he acknowledges the Custodian’s latitude to prescribe methods of transmission, the City’s policy certainly places an undue burden on requestors. The Complainant also acknowledged that fax submissions could be problematic and that accepting e-mailed requests could facilitate the response process. The Complainant argued that the currently prescribed methods allow the Custodian to avoid scrutiny and accountability in complying with OPRA.

Finally, the Complainant requested that the Council consider setting a universal policy to which public agencies can adhere when setting prescribed methods of transmission. The Complainant noted that he has submitted OPRA requests throughout the State in the past three (3) years and has never encountered one that precluded a requestor from transmitting an OPRA request via e-mail. The Complainant asserted that the Custodian cannot provide an argument to justify the continuation of the City’s current policy. Also, the Complainant asserted that, if the City is unwilling to change the current policy, the Council should rule in his favor and compel the City to accept OPRA requests via e-mail.

Statement of Information:

On January 16, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on December 16, 2014.

⁴ <http://eastorange-nj.gov/wp-content/uploads/2015/01/OPRA.pdf> (last accessed on July 8, 2015).

The Custodian certified that she conducted no search at that time because she was waiting for the Complainant to submit his OPRA request properly via hand-delivery or U.S. mail. The Custodian certified that she responded telephonically on December 18, 2014, advising that the City did not accept OPRA requests via e-mail.

The Custodian argued that the City's policy is not to accept OPRA requests via e-mail. The Custodian noted that the GRC previously held that a custodian had discretion "to accept, or not accept, requests by e-mail, *etc.*" Hascup v. Waldwick Bd. of Educ., GRC Complaint No. 2005-192 (April 2007) at 10-11. The Custodian stated that the GRC also explored the City's policy in Paff, GRC 2007-297, wherein it held that the City did not have to accept requests via facsimile per N.J.S.A. 47:1A-5(g). The Custodian noted that the Appellate Division affirmed the GRC's decision, noting that not accepting OPRA requests via facsimile did not impose an unreasonable restriction on requestors. 407 N.J. Super. at 229. The Custodian further noted that following the Court's decision in Paff, the GRC updated its "Handbook for Records Custodians" (5th Edition – January 2011) to include same and stated that OPRA did not require public agencies to provide new services beyond those currently available in order to accept OPRA requests electronically. Id. at 15.

The Custodian argued that she had a right to limit transmission of OPRA requests to U.S. mail or hand-delivery because the City does not have a dedicated e-mail address for same. The Custodian contended that there would be no way to ensure receipt of every OPRA request without such a dedicated address. More specifically, the Custodian asserted that the City's e-mail program may block requests as spam or a requestor could input the wrong e-mail address. Further, the Custodian asserted that she receives a large number of e-mails every day with no capability to filter out e-mailed OPRA requests. The Custodian contended that e-mail requests would also cause operational deficiencies in delegating requests to staff members for processing. The Custodian asserted that East Orange is not required to create a dedicated e-mail address because it would constitute a new service beyond what the City currently offers.

The Custodian contended that, contrary to the Complainant's allegations, the City's current methods of transmission are reasonable. The Custodian argued that citizens may have a right to access certain records, but citizens are not exempt from incurring reasonable cost and/or exerting effort in the process. The Custodian asserted that postage is a *de minimus* cost and that gasoline consumption is incidental to automobile usage. Also, the Custodian refuted that a requestor should be able to track a request, noting that a telephone call to confirm receipt is a reasonable alternative to certified mail. The Custodian noted that both state and federal agencies require citizens to mail or hand-deliver requests.

Further, the Custodian contended that the Court's decision in Paff was not influenced by a mistaken belief that the City accepted requests via e-mail. The Custodian asserted that the Court's assertion concerning electronic submissions was *dicta* and has no precedential value. *See* Lucent Tech. v. Twp. of Berkeley Heights, 201 N.J. 237 (March 17, 2010). The Custodian argued that, even if the Court's *dicta* statement were to carry precedent, same simply acted to support the Court's affirmation of the GRC's decision.

Analysis

Method of Transmission

OPRA states that “a request for access to a government record *shall be in writing* and hand-delivered, mailed, *transmitted electronically*, or otherwise conveyed to the appropriate custodian.” N.J.S.A. 47:1A-5(g)(emphasis added).

In Paff, 407 N.J. Super. 221,⁵ the Appellate Division stated that “N.J.S.A. 47:1A-5(f)(1) expressly delegates authority to each custodian of government records to adopt a form for use in making OPRA requests that includes ‘specific directions and procedures for requesting a record.’” The Court went on to state that “. . . the procedures adopted by a custodian of government records for transmittal of OPRA requests, like any other action by a public official or agency, must be reasonable. *See NJ Builders Ass’n v. NJ Council on Affordable Hous.*, 390 N.J. Super. 166, 181-84 (App. Div. 2007). Consequently, a custodian may not exercise his authority under N.J.S.A. 47:1A-7(f)(1) in a manner that would impose an unreasonable obstacle to the transmission of a request for a governmental record, such as, for example, by requiring any OPRA request to be hand-delivered.” Id. at 229.

Thus, an agency has the authority to dictate the reasonable methods by which a requestor can transmit an OPRA request. The Council applied this reasoning in Paff v. Bordentown Fire Dist. No. 2 (Burlington), GRC Complaint No. 2012-158 (Interim Order dated May 28, 2013). There, among other requests for relief, the complainant requested that the Council determine whether an agency could “ban all ‘electronic’ methods of submitting a request . . .” Id. at 5. The Council determined that the Fire District’s policy of not accepting requests via e-mail did not impose an unreasonable obstacle to transmission of OPRA requests. Id. Additionally, the Council determined this policy was proper because the Fire District publically acknowledged same on its OPRA request form. The Council reasoned that:

[T]he Custodian did not refuse to accept the Complainant’s May 11, 2012 faxed request on the basis that it was submitted electronically. Rather, the Custodian’s sole basis for denying the request was that the Complainant did not use the Fire District’s official OPRA request form. Further, upon reviewing the Fire District’s official OPRA request form, the form provides the Fire District’s mailing address, telephone number, and fax number as contact information. The form does not include an e-mail address, but rather indicates that “[n]o electronic submissions will be accepted.”

Based on the evidence of record, the original Custodian did not refuse to accept all types of electronic submissions. The evidence provides that the original Custodian refused to accept only e-mailed submissions. The original Custodian specifically refused to accept the Complainant’s e-mailed OPRA request as an “electronic submission” but did not refuse the faxed request as an “electronic submission.” More importantly, the Fire District includes its own fax number on its official OPRA request form, but fails to include an e-mail address. This

⁵ On appeal from Paff v. City of East Orange, GRC Complaint No. 2007-297 (March 2008).

evidence supports the finding that the Fire District will not accept e-mailed requests, but will accept requests hand-delivered, mailed, or faxed.

Id.

The threshold issue here is not unlike the issue in Paff, GRC 2012-158: whether the City's policy of not accepting OPRA requests via e-mail imposed an unreasonable obstacle against transmittal of OPRA requests.

The GRC first notes that it recently spoke to the greatly increased manner in which citizens and public agencies are utilizing the Internet. *See* Rodriguez v. Kean Univ., GRC Complaint No. 2013-69 (March 2014) at 3-4. There, the Council revisited and reversed prior decisions that barred custodians from directing requestors to responsive records posted to an agency's website. In doing so, the Council reasoned that:

Since the creation of the GRC . . . the use and availability of Internet, as well as technological capability in general, has greatly increased. Many New Jerseyans turn to the Internet to conduct business with government, including electronically filing taxes, renewing motor vehicle registrations, paying penalties for motor vehicle violations, and making OPRA requests. Indeed, the Legislature signified its awareness of this fact by passing a statute requiring “[a]ny State authority, board, or commission, regional authority, or environmental authority, board, or commission [to] develop and maintain either an Internet website or a webpage on the State's, municipality's, or county's Internet website . . . to provide increased public access to . . . operations and activities” N.J.S.A. 40:56A-4.1.

A reversal of the Council's past holdings that found referring requestors to records readily available on the Internet to be a violation of OPRA will not infringe on the statute's purpose of “maximiz[ing] public knowledge about public affairs in order to ensure an informed citizenry” Mason v. City of Hoboken, 196 N.J. 51, 64 (2008) (citing Asbury Park Press v. Ocean Cnty. Prosecutor's Office, 374 N.J. Super. 312, 329 (Law. Div. 2004)). Directing a requestor to the specific location of a government record on the Internet will save government, and thus taxpayers, time and money, while also providing an efficient and expedient way for a requestor to easily obtain and examine the responsive record as required under OPRA. N.J.S.A. 47:1A-1. The reversal of the GRC's prior policy is thus beneficial to both citizens and the governmental entities that serve them.

The Legislature incorporated the notion of “reasonableness” into several sections of OPRA. *See, e.g.*, N.J.S.A. 47:1A-1 (directing government entities to safeguard personnel information when disclosure would violate citizen's reasonable expectation of privacy); N.J.S.A. 47:1A-5(c)-(d) (allowing custodians to impose reasonable special service charge); N.J.S.A. 47:1A-5(g) (permitting denial of requests that would substantially disrupt agency operations after custodian attempts to reach reasonable solution with requestor); N.J.S.A. 47:1A-6, 7(f)

(stating requestors who prevail in any proceeding are entitled to reasonable attorney's fee). As such, a custodian directing a requestor to responsive records located online shall take reasonable action in light of OPRA's purpose, and under the existing set of circumstances, to disclose the documents. *See* N.J.S.A. 47:1A-1 (declaring public policy favoring disclosure and right of access); Burnett v. County of Bergen, 198 N.J. 408, 423 (2009) (“Section 1 is neither a preface nor a preamble. . . . [I]nstead, it focuses on the law's implementation. Specifically, it imposes an obligation on public agencies . . .”).

Id.

The City's practice of not accepting all electronic methods of transmission and limiting requests to either regular mail or hand-delivery imposes an unreasonable obstruction on access. Such a decision is consistent with prior precedent set forth above. Specifically, although the Court's statement of the City's allowance of requests “electronically” can be seen as *dicta*, it conforms with the Council's later decision in Paff, GRC 2012-158, suggesting that agencies should allow for one form of electronic transmission. That is, the Council concluded that the Fire District still allowed for faxed requests (specified as an “electronic” submission) and that not accepting requests via e-mail was reasonable. *See also* Roundtree v. NJ Dep't of State, GRC Complaint No. 2013-260 (June 2014) at 7 (holding that the Department's policy of not allowing for transmission of requests via e-mail was reasonable because the Department accepted requests via hand-delivery, U.S. mail and online through OPRA Central). Although the Complainant's arguments regarding unnecessary expenses may be slightly overstated, the GRC is not persuaded by the Custodian's arguments that a dedicated e-mail address is necessary to ensure proper receipt of e-mailed OPRA requests.

Further, such a decision is consistent with the Council's comments in Rodriguez, GRC 2013-69. Allowing for at least one form of electronic transmission method is reasonable in a time when citizens and public agencies are increasingly relying on technology to perform their daily duties. Additionally, allowing for at least one electronic method will provide an efficient and expedient method for requestors to obtain records.

To briefly address the Complainant's statements about the City's OPRA request form not providing a statement as to the allowable methods of transmission, the GRC notes that it finds no language on the City's official OPRA request form advising a requestor that the City does not accept requests electronically. It should be further noted that the request form does not include either a fax number or e-mail address, similar to the request in Paff, GRC 2012-158. However, unlike the request in Paff, the form did not contain a definitive statement addressing the electronic limitation. For these reasons, the GRC is not satisfied that the Custodian adequately held the City's policy out to the public.

Accordingly, the City's policy of banning submission of OPRA requests electronically represents an unreasonable obstacle on access. N.J.S.A. 47:1A-5(g); Paff, 407 N.J. Super. at 229; Paff, GRC 2012-158. *See also* Roundtree, GRC 2013-260. Thus, the Custodian shall accept and respond to the Complainant's electronically submitted OPRA request pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). The Council stresses that its determination addresses an

agency's blanket limitations on electronic submissions and does not necessarily require agencies to accept OPRA requests via e-mail, for example, if another reasonable form of electronic submission (*e.g.*, fax, online form, etc.) is available.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The City's policy of banning submission of OPRA requests electronically represents an unreasonable obstacle on access. N.J.S.A. 47:1A-5(g); Paff v. City of East Orange, 407 N.J. Super. 221, 229 (App. Div. 2009); Paff v. Bordentown Fire Dist. No. 2 (Burlington), GRC Complaint No. 2012-158 (Interim Order dated May 28, 2013). *See also* Roundtree v. NJ Dep't of State, GRC Complaint No. 2013-260 (June 2014). Thus, the Custodian shall accept and respond to the Complainant's electronically submitted OPRA request pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). The Council stresses that its determination addresses an agency's blanket limitations on electronic submissions and does not necessarily require agencies to accept OPRA requests via e-mail, for example, if another reasonable form of electronic submission (*e.g.*, fax, online form, etc.) is available.
2. **The Custodian shall comply with item No. 1 above within seven (7) business days (the statutorily mandated time frame) from receipt of the Council's Interim Order. If the Custodian asserts that records are exempt or that redactions are necessary, she must include a detailed document index explaining the lawful basis for each denial/redaction. Further, the Custodian must simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁶ to the Executive Director.⁷**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

⁶ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁷ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Reviewed By: Joseph D. Glover
Executive Director

September 22, 2015