



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

**FINAL DECISION**

**March 22, 2013 Government Records Council Meeting**

Gerald Scarano  
Complainant

Complaint No. 2011-314

v.

City of Asbury Park (Monmouth)  
Custodian of Record

At the March 22, 2013 public meeting, the Government Records Council (“Council”) considered the March 15, 2013 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 request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the 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. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Because the Custodian certified in the Statement of Information that no records responsive to the Complainant’s request existed at the time of the request on June 21, 2011, and because the Complainant did not submit any evidence to refute the Custodian’s certification in this regard, the Custodian did not unlawfully deny access to the requested records. See Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Although the Custodian’s failure to timely respond to the Complainant’s OPRA request resulted in a “deemed” denial pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian bore her burden of proving that no records responsive to the request existed at the time of the request. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s untimely response did 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 22<sup>nd</sup> Day of March, 2013

I attest the foregoing is a true and accurate record of the Government Records Council.

Robin Berg Tabakin, Esq., Chair  
Government Records Council

**Decision Distribution Date: April 1, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
March 22, 2013 Council Meeting**

**Gerald Scarano<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-314**

v.

**City of Asbury Park (Monmouth)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** For the calendar year 2010, copies of total legal expenses broken out in the following categories by law firm: bonding, personnel lawsuits, citizen lawsuits, council meetings, committee meetings, board meetings, civil litigation, workmen's compensation claims, redevelopment lawsuit, review of redevelopment plans, other lawsuits, city expenditures, and the final costs thereof.

**Request Made:** June 21, 2011

**Response Made:** July 11, 2011

**GRC Complaint Filed:** October 3, 2011<sup>3</sup>

**Background<sup>4</sup>**

The Complainant filed an OPRA request on an official OPRA request form on June 21, 2011, seeking the records listed above. The Custodian telephoned the Complainant on July 11, 2011, advising the Complainant that no records responsive exist and stating that to comply with the request would require an extensive review of each and every legal bill sent to the City in 2010, extracting the specific information and formatting the information into a report.

The Complainant filed the Denial of Access Complaint with the Government Records Council ("GRC") on October 3, 2011, asserting that he did not receive a response to his OPRA request. The Complainant asserts that he telephoned the Custodian several times over a three month period to determine the status of the request and obtain the records sought. The Complainant further asserts that on September 8, 2011, the Custodian telephoned him to retrieve the records responsive to the request, but after waiting 25 minutes, the Complainant had not received the requested records and so he left the building.

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Christine Paulin, Acting CFO, Custodian of Records. Represented by Ansell, Grimm & Aaron, PC (Ocean, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

<sup>4</sup> 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.

The Custodian filed her Statement of Information (“SOI”) on November 10, 2011. In the SOI, the Custodian asserts that the Complainant’s OPRA request did not seek a specific government record but rather an analysis of all of the City’s legal expenses for 2010, broken down by specific categories. The Custodian certifies that no such record existed at the time the request was made. The Custodian further certifies that she contacted the Complainant by telephone on July 11, 2011, to so advise him and further advised him that to comply with the request would require an extensive review of all of the City’s legal bills in 2010 and the compilation of a report. The Custodian certifies that the Complainant informed her that he was amenable to waiting for the report.

The Custodian certifies that on August 9, 2011, she telephoned the Complainant and requested that he submit a more specific OPRA request. The Custodian further certifies that she inquired whether the Complainant sought specific information and that he stated that he was not. The Custodian certifies that she invited the Complainant to come to the City offices to review the legal bills in person in order to expedite the process and to take notes or make copies of the information he sought. The Custodian certifies that the Complainant declined this invitation.

The Custodian certifies that on or about August 25, 2011, she met with City Manager Terence Reidy (“Mr. Reidy”) to review the documents prepared in response to the Complainant’s OPRA request. The Custodian certifies that these documents were budgetary reports in the form of spreadsheets for City expenditures in the categories of Legal Fees, Liability Expenses, Planning and Zoning Board Attorney Expenses, and Worker’s Compensation Expenses. The Custodian certifies that the Complainant was present while Mr. Reidy reviewed the records. The Custodian certifies that the Complainant waited approximately three minutes and then left the City offices, stating that he would return later to pick up the records.

The Custodian certifies that the Complainant did not return to pick up the records until September 8, 2011. The Custodian certifies that the City requested a charge of \$0.95 for the copying of the records, but that the Complainant failed to pay this copying charge although he received the records.

The Custodian argues that the Complainant’s request was overly broad, burdensome and confusing. The Custodian argues that under MAG Entertainment, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), and NJ Builders Assoc. v. NJ Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), an OPRA request must specifically identify the records requested, and government agencies are required under OPRA to disclose only identifiable governmental records not otherwise exempt. The Custodian further argues that under Bent v. Stafford Twp. Police Dep’t, 381 N.J. Super. 30 (App. Div. 2005), a custodian is not required to conduct research from among its records and correlate data from various government records in its possession. The Custodian asserts that, given the improper nature of the request, the City was under no obligation to respond or to create a document that did not already exist. The Custodian argues that the City operated in good faith with the Complainant to obtain for him the information sought, including contacting him by telephone several times, providing the Complainant an opportunity to amend his request, providing access to the actual legal bills via review in the City’s offices, and finally producing budgetary reports

kept in the ordinary course of business that roughly corresponded to the categories named in the request.

## Analysis<sup>5</sup>

### 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). As also prescribed under N.J.S.A. 47:1A-5(i), a custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).<sup>6</sup> 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. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

In the matter before the Council, the Custodian certified in the SOI that her response to the Complainant's OPRA request on July 11, 2011, was verbal, via telephone, rather than in writing as required by N.J.S.A. 47:1A-5(g).

Therefore, the Custodian did not bear her burden of proof that she 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 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 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, supra.

### Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

The Custodian certified in the SOI dated November 10, 2011, that no records responsive to the Complainant's request existed at the time of the request on June 21, 2011. The Complainant did not submit any evidence to refute the Custodian's certification in this regard.

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<sup>5</sup> There may be other OPRA issues in this matter; however, the Council's analysis is based solely on the claims made in the Complainant's Denial of Access Complaint.

<sup>6</sup> It is the GRC's position that 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.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought a copy of a telephone bill from the custodian in an effort to obtain proof that a phone call was made to him by an official from the Department of Education. The custodian provided a certification in his submission to the GRC that certified that the requested record was nonexistent and the complainant submitted no evidence to refute the custodian's certification. The Council subsequently determined that "[t]he Custodian has certified that the requested record does not exist. Therefore, the requested record cannot (sic) be released and there was no unlawful denial of access."

Thus, because the Custodian certified in the SOI that no records responsive to the Complainant's request existed at the time of the request on June 21, 2011, and because the Complainant did not submit any evidence to refute the Custodian's certification in this regard, the Custodian did not unlawfully deny access to the requested records. See Pusterhofer, *supra*.

The GRC notes that under MAG Entertainment, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), NJ Builders Assoc. v. NJ Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), and Bent v. Stafford Twp. Police Dep't, 381 N.J. Super. 30 (App. Div. 2005), a custodian is not required to conduct research from among its records and correlate data from various government records in its possession, and is not required to create records that do not otherwise exist. The evidence of record is clear in this complaint that the Custodian created records that did not otherwise exist in order to accommodate the Complainant. Moreover, the evidence is clear that the Complainant received such records on September 8, 2011.

### **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:

"... If 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 (Berg); 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's failure to timely respond to the Complainant's OPRA request resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian bore her burden of proving that no records responsive to the request existed at the time of the request. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's untimely response did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the 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. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Because the Custodian certified in the Statement of Information that no records responsive to the Complainant's request existed at the time of the request on June 21, 2011, and because the Complainant did not submit any evidence to refute the Custodian's certification in this regard, the Custodian did not unlawfully deny access to the requested records. See Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Although the Custodian's failure to timely respond to the Complainant's OPRA request resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian bore her burden of proving that no records responsive to the request existed at the time of the request. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's untimely response did 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  
And Approved By: Karyn Gordon, Esq.  
Acting Executive Director

March 15, 2013