



**State of New Jersey**  
**GOVERNMENT RECORDS COUNCIL**

101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

**CHRIS CHRISTIE**  
*Governor*

**KIM GUADAGNO**  
*Lt. Governor*

**RICHARD E. CONSTABLE, III**  
*Commissioner*

**FINAL DECISION**

**January 29, 2013 Government Records Council Meeting**

Quddoos Farra'd  
Complainant

Complaint No. 2011-321

v.

New Jersey Department of Corrections  
Custodian of Record

At the January 29, 2013 public meeting, the Government Records Council ("Council") considered the January 22, 2013 Supplemental 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 timely complied with the Council's December 18, 2012 Order by providing a copy of the requested copy of the Administrator's denial of permission for the Complainant to attend his sister's funeral to the Complainant and provided said certified confirmation of compliance within the five (5) business days.
2. The Custodian violated N.J.S.A. 47:1A-6 because he failed to bear his burden that his denial of access to the requested copy of the Administrator's denial of permission for the Complainant to attend his sister's funeral was lawful. In addition, Mr. Byrd violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by responding to the Complainant's OPRA request on the twelfth (12<sup>th</sup>) business day following receipt thereof. However, the Custodian timely complied with the Council's December 18, 2012 Interim Order and provided the Complainant with a copy of the Administrator's denial of permission for the Complainant to attend his sister's funeral in response to the Complainant's OPRA request. Therefore, it is concluded that the Custodian's and Mr. Byrd'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 29<sup>th</sup> Day of January, 2013

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: February 5, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
January 29, 2013 Council Meeting**

**Quddoos Farra'd<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-321**

v.

**New Jersey Department of Corrections<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** All papers and documents attached to the New Jersey State Prison (“NJSP”) Administrator’s denial for the Complainant to attend his sister’s viewing and funeral at Nesbitt Funeral Home in Englewood, NJ from August 22, 2011 through August 24, 2011 including a copy of the Administrator’s denial.<sup>3</sup>

**Request Made:** September 22, 2011

**Response Made:** October 13, 2011

**Custodian:** John Falvey<sup>4</sup>

**GRC Complaint Filed:** October 24, 2011<sup>5</sup>

**Background**

**December 18, 2012**

Government Records Council’s (“Council”) Interim Order. At its December 18, 2012 public meeting, the Council considered the November 20, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties.<sup>6</sup> The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Mr. Byrd 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, Mr. Byrd’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).

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

<sup>2</sup> No legal representation listed on record.

<sup>3</sup> The Complainant states that he is seeking the reason why he was denied to attend the funeral.

<sup>4</sup> The Custodian at the time of the Complainant’s OPRA request was Deidre Fedkenheuer.

<sup>5</sup> The GRC received the Denial of Access Complaint on said date.

<sup>6</sup> This complaint was prepared and scheduled for adjudication at the Council’s November 27, 2012 meeting; however, said meeting was cancelled due to a lack of a quorum.

2. The Custodian failed to bear his burden that his denial of access to the requested copy of the Administrator's denial of permission for the Complainant to attend his sister's funeral was lawful pursuant to N.J.S.A. 47:1A-6. The Custodian must disclose a copy of this denial to the Complainant or certify that no records responsive exist.
3. **The Custodian shall comply with item #2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions as necessary, including a detailed document index explaining the lawful basis for each redaction, or certify that the requested copy of the Administrator's denial does not exist and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>7</sup> to the Executive Director.<sup>8</sup>**
4. The Council defers analysis of whether the Custodian and Mr. Byrd 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.

#### **December 19, 2012**

Council's Interim Order ("Order") distributed to the parties.

#### **December 19, 2012**

Custodian's response to the Council's Order. The Custodian responds in writing via facsimile to the GRC attaching a certified confirmation of compliance dated December 19, 2012. The Custodian certifies that on December 19, 2012 the New Jersey Department of Corrections ("DOC") received an Order from the GRC ordering the Custodian to disclose a copy of a denial to attend a funeral. The Custodian also certifies that he complied with the Council's Order on December 19, 2012 by mailing a copy of the denial to the Complainant. The Custodian further certifies that DOC waived the copying fee for this record.

### **Analysis**

#### **Whether the Custodian complied with the Council's December 18, 2012 Interim Order?**

At its December 18, 2012 the Council ordered the Custodian to provide a copy of the Administrator's denial of permission for the Complainant to attend his sister's funeral. The Council ordered the Custodian to do so within five (5) business days of

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<sup>7</sup> "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."

<sup>8</sup> 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.

receipt of said Order. The Council disseminated its Order on December 19, 2012. Thus, the Custodian's response was due by close of business on December 27, 2012.

On December 19, 2012, the same business day as receipt of the Council's Order, the Custodian provided certified confirmation of compliance to the Executive Director that the Custodian mailed a copy of the requested denial to the Complainant.

Therefore, the Custodian timely complied with the Council's December 18, 2012 Order by providing a copy of the requested copy of the Administrator's denial of permission for the Complainant to attend his sister's funeral to the Complainant and provided said certified confirmation of compliance within the five (5) business days.

**Whether the Custodian or Mr. Byrd's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

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)).

The Custodian violated N.J.S.A. 47:1A-6 because he failed to bear his burden that his denial of access to the requested copy of the Administrator's denial of permission for the Complainant to attend his sister's funeral was lawful. In addition, Mr. Byrd violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by responding to the Complainant's OPRA request on the twelfth (12<sup>th</sup>) business day following receipt thereof. However, the Custodian timely complied with the Council's December 18, 2012 Interim Order and provided the Complainant with a copy of the Administrator's denial of permission for the Complainant to attend his sister's funeral in response to the Complainant's OPRA request. Therefore, it is concluded that the Custodian's and Mr. Byrd'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 timely complied with the Council's December 18, 2012 Order by providing a copy of the requested copy of the Administrator's denial of permission for the Complainant to attend his sister's funeral to the Complainant and provided said certified confirmation of compliance within the five (5) business days.
2. The Custodian violated N.J.S.A. 47:1A-6 because he failed to bear his burden that his denial of access to the requested copy of the Administrator's denial of permission for the Complainant to attend his sister's funeral was lawful. In addition, Mr. Byrd violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by responding to the Complainant's OPRA request on the twelfth (12<sup>th</sup>) business day following receipt thereof. However, the Custodian timely complied with the Council's December 18, 2012 Interim Order and provided the Complainant with a copy of the Administrator's denial of permission for the Complainant to attend his sister's funeral in response to the Complainant's OPRA request. Therefore, it is concluded that the Custodian's and Mr. Byrd'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: Harlynn A. Lack, Esq.  
Case Manager

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

January 22, 2013



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

INTERIM ORDER

December 18, 2012 Government Records Council Meeting

Quddoos Farra'd  
Complainant

Complaint No. 2011-321

v.

New Jersey Department of Corrections  
Custodian of Record

At the December 18, 2012 public meeting, the Government Records Council ("Council") considered the November 20, 2012 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. Mr. Byrd 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, Mr. Byrd'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. The Custodian failed to bear his burden that his denial of access to the requested copy of the Administrator's denial of permission for the Complainant to attend his sister's funeral was lawful pursuant to N.J.S.A. 47:1A-6. The Custodian must disclose a copy of this denial to the Complainant or certify that no records responsive exist.
3. **The Custodian shall comply with item #2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions as necessary, including a detailed document index explaining the lawful basis for each redaction, or certify that the requested copy of the Administrator's denial does not exist and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>1</sup> to the Executive Director.<sup>2</sup>**

<sup>1</sup> "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."

<sup>2</sup> 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.

4. The Council defers analysis of whether the Custodian and Mr. Byrd 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.

Interim Order Rendered by the  
Government Records Council  
On The 18<sup>th</sup> Day of December, 2012

Robin Berg Tabakin, Chair  
Government Records Council

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

Denise Parkinson Vetti, Secretary  
Government Records Council

**Decision Distribution Date: December 19, 2012**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
December 18, 2012 Council Meeting**

**Quddoos Farra'd<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-321**

v.

**New Jersey Department of Corrections<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** All papers and documents attached to the New Jersey State Prison (“NJSP”) Administrator’s denial for the Complainant to attend his sister’s viewing and funeral at Nesbitt Funeral Home in Englewood, NJ from August 22, 2011 through August 24, 2011 including a copy of the Administrator’s denial.<sup>3</sup>

**Request Made:** September 22, 2011

**Response Made:** October 13, 2011

**Custodian:** John Falvey<sup>4</sup>

**GRC Complaint Filed:** October 24, 2011<sup>5</sup>

**Background**

**September 22, 2011**

Complainant’s Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

**October 13, 2011**

NJSP OPRA Liaison’s, Mr. George Byrd, (“Mr. Byrd”) response to the OPRA request. Mr. Byrd responds in writing via letter to the Complainant’s OPRA request on the twelfth (12<sup>th</sup>) business day following receipt of such request.<sup>6</sup> Mr. Byrd states that access to the requested record is denied because release of the requested records poses potential safety and security issues for the Department of Corrections (“DOC”). Mr. Byrd also states that N.J.S.A. 47:1A-1.1 provides “[t]he following government records or information are specifically exempt from disclosure and should not be provided to requestors of government records: (7) [e]mergency or security information or procedures

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

<sup>2</sup> No legal representation listed on record.

<sup>3</sup> The Complainant states that he is seeking the reason why he was denied to attend the funeral.

<sup>4</sup> The Custodian at the time of the Complainant’s OPRA request was Deidre Fedkenheuer.

<sup>5</sup> The GRC received the Denial of Access Complaint on said date.

<sup>6</sup> The Custodian certifies in the Statement of Information that the Department of Corrections received the Complainant’s OPRA request on September 26, 2011.

which, if disclosed, would jeopardize the security of the building or facility persons therein.”

**October 24, 2011**

Denial of Access Complaint filed with the Government Records Council (“GRC”) attaching a letter from Mr. Byrd to the Complainant dated October 13, 2011.

The Complainant states that he is seeking the reason why the NJSP Administrator denied him the opportunity to attend his sister’s viewing and funeral at Nesbitt Funeral Home in Englewood, NJ. The Complainant asserts that he believes the Administrator’s decision was based on religious discrimination. The Complainant argues that the requested records do not contain security information or procedures. The Complainant also argues that the requested records are personal and should be provided.

The Complainant does not indicate whether he wants to mediate this complaint.

**November 4, 2011**

Offer of Mediation sent to both parties.<sup>7</sup>

**November 15, 2011**

The Custodian agrees to mediate this complaint.

**November 28, 2011**

Request for the Statement of Information (“SOI”) sent to the Custodian.

**December 5, 2011**

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated September 22, 2011
- Letter from Mr. Byrd to the Complainant dated October 13, 2011

The Custodian certifies that DOC received the Complainant’s OPRA request on September 26, 2011. The Custodian also certifies that Mr. Byrd responded to the Complainant’s request on October 13, 2011 denying the request because the records contain emergency or security information or procedures, which, if disclosed, would jeopardize the security of the building or facility and persons therein. The Custodian further certifies that Mr. Byrd noted in the OPRA database that more time was needed to complete the request on October 5, 2011. The Custodian states that Mr. Byrd maintains that he submitted a letter seeking an extension of time to the Complainant; however, a copy of this letter is not on file.

The Custodian certifies that upon receipt of the Denial of Access Complaint, he contacted Mr. Byrd to obtain all the records responsive to the Complainant’s request on November 4, 2011.<sup>8</sup> The Custodian contends that Mr. Byrd’s denial based on the “safety

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<sup>7</sup> The Complainant does not respond to the offer of mediation.

<sup>8</sup> The Custodian did not certify whether any records responsive to the Complainant’s OPRA request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Quddoos Farra’d v. New Jersey Department of Corrections, 2011-321 – Findings and Recommendations of the Executive Director 2

and security” exemption was erroneous. The Custodian also certifies that the available records are not responsive to the Complainant’s request because said records do not provide the reason for the Administrator’s denial for the Complainant to attend his sister’s viewing and funeral.

### **February 24, 2012**

Letter from the Complainant to the GRC responding to the Custodian’s SOI. The Complainant attaches an Inmate Management Progress Notes Report dated November 14, 2011. The Complainant states that on August 22, 2011 the NJSP Administrator received confirmation of the viewing and funeral details from the Nesbitt Funeral Home.<sup>9</sup> The Complainant asserts that pursuant to *N.J.A.C. 10A:18-7.4(b)*, when a correctional facility Administrator is in doubt of allowing an inmate to leave said facility for a viewing or funeral, the Administrator shall consult with the Assistant Commissioner.<sup>10</sup> The Complainant inquires whether there was a request filed with the Assistant Commissioner.<sup>11</sup> The Complainant also argues that, pursuant to *N.J.A.C. 10A:18-7.9*, “all bedside, private viewing, and funeral visits shall be noted in the Administrator’s monthly report.” The Complainant further argues that there must be records responsive to his OPRA request.

### **Analysis**

#### **Whether Mr. Byrd timely responded to the Complainant’s OPRA request?**

OPRA provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g.

Further, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

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Management Services as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).)

<sup>9</sup> The Inmate Management Progress Notes Report indicates that Administrator Warren denied the Complainant’s request to attend his sister’s funeral on August 22, 2011.

<sup>10</sup> *N.J.A.C. 10A:18-7.4(a)* states “[t]he correctional facility Administrator or designee shall determine whether an inmate is eligible to go on a bedside, private viewing, and/or funeral visit.”

<sup>11</sup> The Inmate Management Progress Notes Report does not indicate that Administrator Warren consulted with the Assistant Commissioner on whether to release the Complainant to attend his sister’s funeral.

Quddoos Farra’d v. New Jersey Department of Corrections, 2011-321 – Findings and Recommendations of the Executive Director 3

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

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>12</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 instant complaint the Custodian certified that the DOC received the Complainant’s request on September 26, 2011. Mr. Byrd responded in writing to the Complainant’s request on October 13, 2011, the twelfth (12<sup>th</sup>) business day following receipt of such request. In addition, the Custodian certified that Mr. Byrd noted in the OPRA database that more time was needed to complete the request on October 5, 2011. However, the Custodian stated in the SOI that Mr. Byrd maintained that he submitted a letter seeking an extension of time to the Complainant, but a copy of this letter is not on file.

Therefore, Mr. Byrd 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, Mr. Byrd’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.

### **Whether the Custodian unlawfully denied access to the requested records?**

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions*...” (Emphasis added.) N.J.S.A. 47:1A-1.

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<sup>12</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.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file* ... or *that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

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.

In the instant complaint, the Custodian contends that Mr. Byrd’s original denial to the Complainant’s request based on the “safety and security” exemption pursuant to N.J.S.A. 47:1A-1.1 was erroneous. The Custodian certified in the SOI that the records available are not responsive to the Complainant’s request because said records do not provide the reason for the NJSP Administrator’s denial for the Complainant to attend his sister’s viewing and funeral. Conversely, the Complainant stated in his letter to the GRC dated February 24, 2012, that on August 22, 2011 the NJSP Administrator received confirmation of the viewing and funeral details for his sister. The Complainant attached a copy of the Inmate Management Progress Notes Report along with his letter dated February 24, 2012. The Inmate Management Progress Notes Report indicates that Administrator Warren denied the Complainant’s request to attend his sister’s funeral on August 22, 2011.

Although the Custodian certified that the *records available* are not responsive to the Complainant’s request because the records do not provide a reason for the Administrator’s denial, the Complainant also requested a copy of the denial. Also, a review of the Inmate Management Progress Notes Report indicates that the Administrator denied the Complainant’s request to attend his sister’s funeral on August 22, 2011. The Custodian did not certify in the SOI that a denial does not exist.

Therefore, the Custodian has failed to bear his burden that his denial of access to the requested copy of the Administrator’s denial of permission for the Complainant to attend his sister’s funeral was lawful pursuant to N.J.S.A. 47:1A-6. The Custodian must disclose a copy of this denial to the Complainant or certify that no records responsive exist.

**Whether the Custodian or Mr. Byrd's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

The Council defers analysis of whether the Custodian and Mr. Byrd 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. Mr. Byrd 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, Mr. Byrd'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. The Custodian failed to bear his burden that his denial of access to the requested copy of the Administrator's denial of permission for the Complainant to attend his sister's funeral was lawful pursuant to N.J.S.A. 47:1A-6. The Custodian must disclose a copy of this denial to the Complainant or certify that no records responsive exist.
3. **The Custodian shall comply with item #2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions as necessary, including a detailed document index explaining the lawful basis for each redaction, or certify that the requested copy of the Administrator's denial does not exist and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>13</sup> to the Executive Director.<sup>14</sup>**
4. The Council defers analysis of whether the Custodian and Mr. Byrd 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: Harlynn A. Lack, Esq.

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<sup>13</sup> "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."

<sup>14</sup> 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.

Case Manager

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

November 20, 2012<sup>15</sup>

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<sup>15</sup> This complaint was prepared and scheduled for adjudication at the Council's November 27, 2012 meeting; however, said meeting was cancelled due to a lack of a quorum.  
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