



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Acting Commissioner

**FINAL DECISION**

**April 25, 2012 Government Records Council Meeting**

Robert Dudley Burdge  
Complainant

Complaint No. 2011-48

v.

New Jersey Department of Treasury,  
Division of Administration  
Custodian of Record

At the April 25, 2012 public meeting, the Government Records Council (“Council”) considered the April 18, 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. The Custodian’s failure to immediately respond in writing to the Complainant’s OPRA request for immediate access records, 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). *See also* Campbell v. Township of Downe (Cumberland), GRC Complaint No. 2009-219 (Interim Order dated January 25, 2011). Further, the Custodian’s failure to provide immediate access to copies of the requested contracts violated N.J.S.A. 47:1A-5.e. However, the Council declines to order disclosure of the requested records because the Custodian’s February 24, 2011 e-mails to the Complainant and the Custodian’s certified statement in the Statement of Information establish that the Complainant was provided with copies of all of the records responsive to his request on February 24, 2011.
2. Although the Custodian failed to immediately respond in writing to the Complainant’s OPRA request for immediate access records, *i.e.*, contracts, and failed to immediately provide copies of the requested contracts to the Complainant, in violation of N.J.S.A. 47:1A-5.e., the Custodian did provide copies of the requested records to the Complainant via e-mail on the twelfth (12<sup>th</sup>) business day following receipt of the OPRA request. Accordingly, 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 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 25<sup>th</sup> Day of April, 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: April 27, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
April 25, 2012 Council Meeting**

**Robert Dudley Burdge<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-48**

v.

**New Jersey Department of Treasury,  
Division of Administration<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

Complete copies of the contracts for statewide janitorial services from July 1, 2010 to June 30, 2015 (contract #77110 and index # T-1480) with the vendor being ACCSES NJ/CNA Services.

**Request Made:** February 8, 2011

**Response Made:** February 17, 2011

**Custodian:** Joseph Yeghen

**GRC Complaint Filed:** February 18, 2011<sup>3</sup>

**Background**

**February 8, 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.

**February 17, 2011**

Custodian's response to the OPRA request. The Custodian responds in writing via letter to the Complainant's OPRA request on the seventh (7<sup>th</sup>) business day following receipt of such request. The Custodian states that the requested records are not available today, but the agency is still processing the Complainant's request. The Custodian further asserts that the records have been gathered and that Counsel for the Division of Purchase and Property is reviewing same. The Custodian states that he expects to have the requested records ready on or before March 4, 2011.

**February 18, 2011**

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

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

<sup>2</sup> Represented by DAG Melissa Haas, on behalf of the NJ Attorney General.

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

- Complainant's OPRA request dated February 8, 2011
- Custodian's response to the OPRA request dated February 17, 2011

The Complainant states that he already discovered that the requested statewide janitorial contract is available because he discussed the contract with two employees of the New Jersey Division of Purchase and Property ("the Division"). The Complainant asserts that most state contracts are posted online but the Division's contracts are not posted online. The Complainant states that the lack of a posted contract caused him to file an OPRA request with the New Jersey Department of Treasury in order to find out the information contained in the contract.

The Complainant argues that the contract should be made available to the public without delay and in no case should disclosure take more than seven (7) days. The Complainant states that he has received the Custodian's response to his request and argues that the Custodian is not providing him the records within the statutorily mandated time frame that OPRA requires. The Complainant alleges that the Custodian and the Department of Treasury are intentionally delaying responses to OPRA requests and do not facilitate communications with requestors.

The Complainant does not agree to mediate this complaint.

**February 24, 2011**

E-mail from the Custodian to the Complainant. The Custodian states that the Division has completed gathering and reviewing the records responsive to the Complainant's OPRA request. The Custodian asserts that the requested records are attached to this e-mail. The Custodian requests that the Complainant confirm receipt of this letter.

**February 24, 2011**

E-mail from the Custodian to the Complainant. The Custodian states that the previous e-mail omitted a responsive record (a copy of the Specification of Elmwood Park). The Custodian states that he has attached the omitted record to this e-mail and apologizes for the inconvenience.

**March 8, 2011**

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

**March 16, 2011**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated February 8, 2011
- Custodian's response to the OPRA request dated February 17, 2011
- E-mail from the Custodian to the Complainant dated February 24, 2011
- E-mail from the Custodian to the Complainant dated February 24, 2011

The Custodian certifies that a search for responsive records yielded 14 contracts for Janitorial Services. The Custodian certifies that these contracts have a seven (7) year retention schedule and have not been destroyed or redacted. The Custodian certifies that the requested records are not maintained on the Department of Treasury's website pursuant to Department policy. The Custodian certifies that upon receipt of the Complainant's OPRA request, the Custodian was concerned that some of the records would have to be redacted or were otherwise exempt from disclosure. The Custodian certifies that he therefore asked for an extension of time to fulfill the request because the responsive records would need to be reviewed by legal counsel.

The Custodian argues that the courts have acknowledged that a reasonable delay in the production of a document may necessitate time beyond the statutory seven (7) business day timeline for response. See Garnett N.J. Partners, LP v. County of Middlesex, 379 N.J. Super. 205 (App. Div. 2005) (holding that a custodian's delay may be appropriate where a requested document involves a third party's privacy rights, trade secrets, proprietary information, or financial information and the custodian is unable to ascertain a reason for denial within the statutory time period.).

The Custodian further argues that the Supreme Court has held that OPRA is designed both to "promote prompt access to government records and to encourage requestors and agencies to work together toward that end by accommodating one another." Mason v. City of Hoboken, 196 N.J. 51, 78 (2008). The Custodian further states that the GRC has held that providing an anticipated date by which ongoing document review will be completed is timely when such date is proper. See Paff v. Township of Springfield, GRC Complaint No. 2008-77 (August 2009) (requiring "an anticipated deadline date upon which the requested records will be provided" for extension requests.) The Custodian maintains that he acted within the law and appropriately to ensure that OPRA and other applicable laws were correctly **filed** followed during the processing of the Complainant's request. The Custodian contends that the requested records were provided timely and in their entirety. The Custodian argues that the Complainant's arguments are baseless and without merit and accordingly, the Complaint should be dismissed with prejudice.

### **Analysis**

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

OPRA provides that:

*"Immediate access ordinarily shall be granted to budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information."* (Emphasis added.) N.J.S.A. 47:1A-5.e.

OPRA also 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.

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>4</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 matter, the Complainant requested copies of “the contracts for statewide janitorial services from July 1, 2010 to June 30, 2015 (contract #77110 and index # T-1480) with the vendor being ACCSES NJ/CNA Services.” Accordingly, the requested contracts are “immediate access” records pursuant to N.J.S.A. 47:1A-5.e. (“Immediate access ordinarily shall be granted to ... contracts....”).

In Herron v. Township 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.

OPRA requires a written response to an OPRA request. N.J.S.A. 47:1A-5.g. Although N.J.S.A. 47:1A-5.i. speaks directly to the seven (7) business day time frame, the provision carries a caveat for “shorter time [periods] ... otherwise provided by statute

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<sup>4</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, the Legislature clearly intended that all OPRA requests be responded to in writing by providing that custodians “... shall indicate the specific basis [for a denial of access] on the request form and promptly return it to the requestor.” N.J.S.A. 47:1A-5.g. Had the Legislature intended to allow custodians to simply grant access to immediate access records without providing a written response, it would have included such language within N.J.S.A. 47:1A-5.e. Moreover, N.J.S.A. 47:1A-5.g. provides for no exceptions when responding to immediate access records.

When a Denial of Access Complaint is filed, a custodian of record bears the burden of proving a denial of access was lawful. N.J.S.A. 47:1A-6. As previously discussed, if a custodian fails to respond in writing within the statutorily mandated time frame, said failure results in a “deemed” denial of access. In complaints where it appears that a “deemed” denial may have occurred, the burden rests on the custodian to prove that he or she responded in writing in a timely manner. *See Gonzales v. City of Gloucester (Camden)*, GRC Complaint No. 2008-255 (November 2009) (holding that the custodian failed to bear his burden of proof that he properly responded to the OPRA request.)

In Campbell v. Township of Downe (Cumberland), GRC Complaint No. 2009-219 (Interim Order dated January 25, 2011), the complainant requested, among other records, immediate access records. The GRC determined that immediate access records required an immediate response in writing:

“There is no evidence in the record to indicate that the original Custodian provided any written response to the Complainant’s March 24, 2009 OPRA request for electric bills ... within the statutorily mandated time frame, which in this instance would be immediately upon receipt of the Complainant’s OPRA request because the requested electric bills are immediate access records pursuant to N.J.S.A. 47:1A-5.e. As in Herron, supra, the original Custodian had a duty to respond immediately because the Complainant’s OPRA request sought immediate access records, *i.e.*, bills, pursuant to N.J.S.A. 47:1A-5.e.” *Id.* at pg. 12-13.

The Council held that the Custodian’s response “... [resulted] in a ‘deemed’ denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, supra, ... [and] violated N.J.S.A. 47:1A-5.e.” *Id.* at pg. 13.

Thus, a custodian’s response to an OPRA request for immediate access records must be in writing and made immediately upon receipt of said request in order to constitute a lawful response under OPRA. If a custodian fails to do so, said request is “deemed” denied. N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Campbell, supra.

In the matter before the Council, the evidence of record indicates that the Custodian failed to provide an immediate response to the Complainant’s February 8, 2011 request for immediate access records; instead, the Custodian provided a written response on February 17, 2011, the seventh (7<sup>th</sup>) day following the receipt of said request. Further, the Custodian failed to provide immediate access to copies of the requested records; instead, the Custodian provided copies of the requested contracts to the

Complainant on February 24, 2011 via e-mail, twelve (12) business days after receipt of the Complainant's OPRA request.

Thus, the Custodian's failure to immediately respond in writing to the Complainant's OPRA request for immediate access records, 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). *See also* Campbell v. Township of Downe (Cumberland), GRC Complaint No. 2009-219 (Interim Order dated January 25, 2011). Further, the Custodian's failure to provide immediate access to copies of the requested contracts violated N.J.S.A. 47:1A-5.e. However, the Council declines to order disclosure of the requested records because the Custodian's February 24, 2011 e-mails to the Complainant and the Custodian's certified statement in the Statement of Information establish that the Complainant was provided with copies of all of the records responsive to his request on February 24, 2011.

**Whether the Custodian'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).

Although the Custodian failed to immediately respond in writing to the Complainant's OPRA request for immediate access records, *i.e.*, contracts, and failed to immediately provide copies of the requested contracts to the Complainant, in violation of N.J.S.A. 47:1A-5.e., the Custodian did provide copies of the requested records to the Complainant via e-mail on the twelfth (12<sup>th</sup>) business day following receipt of the OPRA request. Accordingly, 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 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's failure to immediately respond in writing to the Complainant's OPRA request for immediate access records, 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). *See also* Campbell v. Township of Downe (Cumberland), GRC Complaint No. 2009-219 (Interim Order dated January 25, 2011). Further, the Custodian's failure to provide immediate access to copies of the requested contracts violated N.J.S.A. 47:1A-5.e. However, the Council declines to order disclosure of the requested records because the Custodian's February 24, 2011 e-mails to the Complainant and the Custodian's certified statement in the Statement of Information establish that the Complainant was provided with copies of all of the records responsive to his request on February 24, 2011.
2. Although the Custodian failed to immediately respond in writing to the Complainant's OPRA request for immediate access records, *i.e.*, contracts, and failed to immediately provide copies of the requested contracts to the Complainant, in violation of N.J.S.A. 47:1A-5.e., the Custodian did provide copies of the requested records to the Complainant via e-mail on the twelfth (12<sup>th</sup>) business day following receipt of the OPRA request. Accordingly, 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 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: Darryl C. Rhone  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

April 18, 2012