



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  
Acting Commissioner

FINAL DECISION

April 25, 2012 Government Records Council Meeting

Shakim Shallah El  
Complainant

Complaint No. 2011-83

v.

Township of Hillside (Union)  
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 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 the Custodian informed the Complainant that the requested records were available for pickup on February 9, 2011, and further certified in the Statement of Information that the Complainant retrieved the requested records on April 4, 2011, and because there is no evidence in the record to refute said certification, the Custodian did not unlawfully deny access to the records responsive to the Complainant’s two (2) OPRA requests pursuant to Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).
3. Although the Custodian failed to provide the Complainant with a written response within the statutorily mandated seven (7) business days and therefore violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Custodian did make the requested records available and provided the Complainant with said records once the Complainant came to retrieve the records. 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**

**Shakim Shallah El<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-83**

v.

**Township of Hillside (Union)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

The oaths and bond insurance number of all magistrate judges and prosecutors in the Township of Hillside.

**Request Made:** February 1, 2011 and February 8, 2011<sup>3</sup>

**Response Made:** February 9, 2011

**Custodian:** Janet Vlasisavljevic

**GRC Complaint Filed:** March 28, 2011<sup>4</sup>

**Background**

**February 1, 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 8, 2011**

Complainant's second (2<sup>nd</sup>) Open Public Records Act ("OPRA") request. The Complainant submits a second (2<sup>nd</sup>) OPRA request seeking the records relevant to this complaint listed above on an official OPRA request form.

**February 9, 2011**

Custodian's response to the OPRA requests. The Custodian verbally responds to both of the Complainant's OPRA requests on the sixth (6<sup>th</sup>) and first (1<sup>st</sup>) business days following receipt of the respective requests. The Custodian states the records responsive to the request are available for pickup.

---

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

<sup>2</sup> Represented by Christine Burgess, Esq. (Montclair, NJ).

<sup>3</sup> The Complainant's OPRA requests are identical.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

**March 28, 2011**

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

- Complainant’s OPRA request dated February 1, 2011
- Complainant’s OPRA request dated February 8, 2011

The Complainant makes no assertions in support of his Denial of Access Complaint. The Complainant does not agree to mediate this Complaint.

**April 8, 2011**

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

**April 14, 2011**

Letter from the Custodian to the GRC. The Custodian certifies that the Complainant submitted the February 1, 2011 OPRA request to the Township while the Custodian was on vacation. The Custodian certifies that she assembled the responsive records and telephoned the Complainant on February 9, 2011 to inform him that the records were available for pickup. The Custodian further certifies that on April 4, 2011, the Complainant came to the office and picked up the responsive records. The Custodian certifies the Complainant was charged \$0.30 for the records.

**May 2, 2011<sup>5</sup>**

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated February 1, 2011
- Complainant’s OPRA request dated February 8, 2011
- Letter from the Custodian to the GRC dated April 14, 2011<sup>6</sup>

The Custodian certifies that the Complainant submitted the February 1, 2011 OPRA request while the Custodian was on vacation. The Custodian certifies that she assembled the responsive records and called the Complainant on February 9, 2011 to inform him that the records were available for pickup. The Custodian further certifies that on April 4, 2011, the Complainant came in to the office and picked up the responsive records.

---

<sup>5</sup> The Custodian did not certify to the search undertaken to locate the records responsive or whether any records responsive to the Complainant’s OPRA request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).

<sup>6</sup> The Custodian attached additional documentation that is not relevant to the adjudication of this complaint. Shakim Shallah El v. Township of Hillside (Union), 2011-83 – Findings and Recommendations of the Executive Director

## Analysis

### **Whether the Custodian's failure to respond in writing to the Complainant's OPRA request results in a "deemed" denial?**

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>7</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 Custodian verbally responded to both the February 1, 2011 and February 8, 2011 OPRA requests on February 9, 2011. The Custodian's failure to provide a written response to the Complainant's OPRA request is a violation of N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

Therefore, 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.,

---

<sup>7</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.

N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

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

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.

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.

As previously stated above, when a Denial of Access Complaint is filed, a custodian bears the burden of proving a denial of access was lawful. N.J.S.A. 47:1A-6. See Rivera v. City of Plainfield Police Department (Union), GRC Complaint No. 2009-317 (May 2011) (holding that the custodian failed to provide any “... competent, credible evidence that the records requested ... were part of any ongoing investigation...” and thus failed to bear his burden of proving a lawful denial of access). Similarly, a complainant disputing a custodian’s legal certification must provide competent, credible evidence to refute same. See Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2010-174 (September 2011) (holding that the complainant’s legal certification did “... not rise to the level of competent, credible evidence sufficient to refute the [c]ustodian’s certification...” thus the custodian did not unlawfully deny access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005)).

Here, the Custodian certified in the SOI that she informed the Complainant on February 9, 2011 that the requested records were available for pickup. The Custodian further certified in the SOI that, following the filing of the Complainant's March 28, 2011 Denial of Access Complaint, the Complainant retrieved the requested records from the Custodian on April 4, 2011. The Complainant has not provided any arguments or evidence asserting otherwise.

Thus, the evidence of record indicates that the Complainant was provided with the records on April 4, 2011. In Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), the custodian stated in the SOI that one (1) record responsive to the complainant's March 2, 2005, OPRA request was provided and that no other records responsive existed. The complainant contended that she believed more records responsive did, in fact, exist. The GRC requested that the custodian certify as to whether all records responsive had been provided to the complainant. The custodian subsequently certified on August 1, 2005 that the record provided to the complainant was the only record responsive. The GRC held that:

“[t]he Custodian certified that the Complainant was in receipt of all contracts and agreements responsive to the request. The Custodian has met the burden of proving that all records in existence responsive to the request were provided to the Complainant. Therefore there was no unlawful denial of access.”

Because the Custodian certified in the SOI that the Custodian informed the Complainant that the requested records were available for pickup on February 9, 2011, and further certified in the SOI that the Complainant retrieved the requested records on April 4, 2011, and because there is no evidence in the record to refute said certification, the Custodian did not unlawfully deny access to the records responsive to the Complainant's two (2) OPRA requests pursuant to Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).

**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 provide the Complainant with a written response within the statutorily mandated seven (7) business days and therefore violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Custodian did make the requested records available and provided the Complainant with said records once the Complainant came to retrieve the records. 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 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 the Custodian informed the Complainant that the requested records were available for pickup on February 9, 2011, and further certified in the Statement of Information that the Complainant retrieved the requested records on April 4, 2011, and because there is no evidence in the record to refute said certification, the Custodian did not unlawfully deny access to the records responsive to the Complainant’s two (2) OPRA requests pursuant to Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).



3. Although the Custodian failed to provide the Complainant with a written response within the statutorily mandated seven (7) business days and therefore violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Custodian did make the requested records available and provided the Complainant with said records once the Complainant came to retrieve the records. 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