



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

January 28, 2014 Government Records Council Meeting

Charles B. Freyer  
Complainant

Complaint No. 2013-110

v.

City of Bayonne (Hudson)  
Custodian of Record

At the January 28, 2014 public meeting, the Government Records Council (“Council”) considered the January 21, 2014 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 requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). Rivera v. City of Plainfield Police Dep’t (Union), GRC Complaint No. 2009-317 (May 2011); Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010); Rivera v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2008-112 (April 2010), O’Shea v. Borough of Hopatcong (Sussex), GRC Complaint No. 2009-223 (December 2010); Starkey v. NJ Dep’t of Transp., GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009).
2. Although the Custodian timely responded (via Counsel) to the Complainant’s January 17, 2013 OPRA request in writing seeking a thirty (30) day extension to respond, the Custodian’s failure to grant or deny access to the requested records within the extended time frame results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(i), and Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
3. The Custodian unlawfully denied access to the requested records by failing to respond to the Complainant’s January 17, 2013 OPRA request in a timely manner. N.J.S.A. 47:1A-6. However, it is unnecessary for the Council to order disclosure of the requested records, because despite a “deemed” denial of the Complainant’s OPRA request, the Custodian disclosed the records to the Complainant on April 30, 2013,



and there is no evidence in the record to refute that all responsive records were delivered to the Complainant.

4. Although the Custodian violated N.J.S.A. 47:1A-5(i), the Custodian provided the Complainant with all records responsive to the request on April 30, 2013. 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, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an 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 28<sup>th</sup> Day of January, 2014

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: January 30, 2014**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
January 28, 2014 Council Meeting**

**Charles B. Freyer<sup>1</sup>  
Complainant**

**GRC Complaint No. 2013-110**

v.

**City of Bayonne (Hudson)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** All overtime paid out for Hurricane Sandy during dates of 10/30/12 till 1/14/13. Payroll 1 + 2 Full + Part time employees name, Department, Hrs + Date paid. Also forms filled out and or any paperwork pertaining to ones overtime, showing employees name, date and hrs worked.

**Custodian of Record:** Robert F. Sloan  
**Request Received by Custodian:** January 17, 2013  
**Response Made by Custodian:** January 24, 2013  
**GRC Complaint Received:** April 18, 2013

**Background<sup>3</sup>**

**Request and Response:**

On January 17, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 24, 2013, four (4) business days later, the Custodian’s counsel responded in writing requesting a thirty (30) day extension of time to respond due to the extensive nature of the request. On April 30, 2013, the Custodian’s counsel delivered the responsive documents to the Complainant.

**Denial of Access Complaint:**

On April 18, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that after filing his OPRA

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

<sup>2</sup> Represented by Peter Cecinni, Esq., Assist. Corp. Counsel for the City of Bayonne.

<sup>3</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.

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request, he received a request for an extension of thirty (30) days to respond. The Complainant states that as of April 18, 2013, he had not received a response from the Custodian.

#### Statement of Information:

On May 1, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that he delivered all responsive records to the Complainant on April 30, 2013. The Custodian states that the delay in response was an oversight, and that once he realized the oversight, he took the necessary steps to resolve the issue quickly.

### Analysis

#### 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). A custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Id. 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Further, OPRA provides that a custodian may request an extension of time to respond to the complainant’s OPRA request, but that a specific date for when the custodian will respond must be provided. N.J.S.A. 47:1A-5(i). OPRA further provides that should the custodian fail to provide a response on that specific date, “access shall be deemed denied.” N.J.S.A. 47:1A-5(i).

In Rivera v. City of Plainfield Police Dep’t (Union), GRC Complaint No. 2009-317 (May 2011), the complainant filed an OPRA request on November 5, 2009. The custodian responded to the request in writing on the fourth (4<sup>th</sup>) business day following receipt of such request, seeking an extension of time to respond to the request and providing an anticipated deadline date when the requested records would be made available. The complainant did not agree to the custodian’s request for an extension of time. The Council stated that:

“The Council has further described the requirements for a proper request for an extension of time. Specifically, in Starkey v. NJ Dep’t of Transp., GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009), the Custodian provided the Complainant with a written response to his OPRA request

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<sup>4</sup> 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.

on the second (2<sup>nd</sup>) business day following receipt of said request in which the Custodian requested an extension of time to respond to said request and provided the Complainant with an anticipated deadline date upon which the Custodian would respond to the request. The Council held that “because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5(g) [and] N.J.S.A. 47:1A-5(i).”

The Council in Rivera noted that the Custodian provided the Complainant with a written response to his OPRA requests on the fourth (4<sup>th</sup>) business day following receipt of said request in which the Custodian sought a two (2) week extension of time to respond to said request. The Council found that because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Starkey, GRC Nos. 2007-315, 2007-316, 2007-317.

Moreover, in Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010), the Council determined in pertinent part that, “because the custodian provided a written response requesting an extension on the sixth (6<sup>th</sup>) business day following receipt of the complainant’s OPRA request and providing a date certain, on which to expect production of the records requested, and, notwithstanding the fact that the complainant did not agree to the extension of time requested by the custodian, the custodian’s request for an extension of time [to a specific date] to respond to the complainant’s OPRA request was made in writing within the statutorily mandated seven (7) business day response time,” the custodian did not unlawfully deny access to the requested records. *See also* Rivera v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2008-112 (April 2010), O’Shea v. Borough of Hopatcong (Sussex), GRC Complaint No. 2009-223 (December 2010).

In the matter now before the Council, the Custodian responded in writing to the Complainant’s OPRA request on the fourth (4<sup>th</sup>) business day following receipt of such request seeking an extension of thirty (30) days to respond to the Complainant’s OPRA request.

Therefore, because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). Rivera, GRC No. 2009-317; Criscione, GRC No. 2010-68; Rivera, GRC No. 2008-112; O’Shea, GRC No. 2009-223; Starkey, GRC Nos. 2007-315, 2007-316 and 2007-317.

Here, however, the Custodian did not respond to the Complainant’s OPRA request within the extended time period to do so.

In Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5<sup>th</sup>) business day after receipt of the complainant's March 19, 2007, OPRA request, seeking an extension of time until April 20, 2007 to fulfill the complainant's OPRA request. However, the custodian responded on April 20, 2007, stating that he would provide the requested records later in the week, and the evidence of record showed that the Custodian provided no records until May 31, 2007. The Council held that:

“[t]he Custodian properly requested an extension of time to provide the requested records to the Complainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) . . . however . . . [b]ecause the Custodian failed to provide the Complainant access to the requested records by the extension date anticipated by the Custodian, the Custodian violated N.J.S.A. 47:1A-5(i) resulting in a “deemed” denial of access to the records.” Id.

In the instant matter, as in Kohn, Custodian's counsel responded in writing to the Complainant's January 17, 2013 OPRA request in a timely manner requesting a thirty (30) day extension to respond. Thus, the Custodian's written response granting or denying access to the requested records was due by March 13, 2013. However, the Custodian failed to respond in writing to the Complainant prior to the expiration of the extended deadline. Instead, Custodian's counsel responded on April 30, 2013, thirty-two (32) business days after expiration of the extended timeframe to respond, delivering the responsive documents to the Complainant.

Therefore, although the Custodian timely responded (via Counsel) to the Complainant's January 17, 2013 OPRA request in writing seeking a thirty (30) day extension to respond, the Custodian's failure to grant or deny access to the requested records within the extended time frame results in a “deemed” denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(i), and Kohn, GRC 2007-124.

### **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's counsel admits that he failed to respond to the Complainant's OPRA request within the extended time period as a result of an “oversight.” The Custodian's counsel certified that upon realizing the oversight, he took measures to correct the error as soon as possible. The Custodian's counsel finally certified that he delivered the responsive documents to the Complainant on April 30, 2013, and stated that said documents encompassed all responsive records to the OPRA request. There is no evidence in the record to dispute the Custodian's certification.

The Custodian unlawfully denied access to the requested records by failing to respond to the Complainant's January 17, 2013 OPRA request in a timely manner. N.J.S.A. 47:1A-6. However, it is unnecessary for the Council to order disclosure of the requested records, because despite a "deemed" denial of the Complainant's OPRA request, the Custodian disclosed the records to the Complainant on April 30, 2013, and there is no evidence in the record to refute that all responsive records were delivered to the Complainant.

### **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 ". . . [i]f 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 (Id.; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); 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 violated N.J.S.A. 47:1A-5(i), the Custodian provided the Complainant with all records responsive to the request on April 30, 2013. 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, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an 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 requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). Rivera v. City of Plainfield Police Dep't (Union), GRC Complaint No. 2009-317 (May 2011); Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010); Rivera v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2008-112 (April 2010), O'Shea v. Borough of Hopatcong (Sussex), GRC Complaint No. 2009-223 (December 2010); Starkey v. NJ Dep't of Transp., GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009).
2. Although the Custodian timely responded (via Counsel) to the Complainant's January 17, 2013 OPRA request in writing seeking a thirty (30) day extension to respond, the Custodian's failure to grant or deny access to the requested records within the extended time frame results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(i), and Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
3. The Custodian unlawfully denied access to the requested records by failing to respond to the Complainant's January 17, 2013 OPRA request in a timely manner. N.J.S.A. 47:1A-6. However, it is unnecessary for the Council to order disclosure of the requested records, because despite a "deemed" denial of the Complainant's OPRA request, the Custodian disclosed the records to the Complainant on April 30, 2013, and there is no evidence in the record to refute that all responsive records were delivered to the Complainant.
4. Although the Custodian violated N.J.S.A. 47:1A-5(i), the Custodian provided the Complainant with all records responsive to the request on April 30, 2013. 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, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

Prepared By: Samuel A. Rosado, Esq.  
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.  
Senior Counsel

January 21, 2014