



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**

**November 19, 2013 Government Records Council Meeting**

Genevieve L. Horvath, Esq. (On behalf of Doug Sarini)      Complaint No. 2013-148  
Complainant  
v.  
Newark Parking Authority (Essex)  
Custodian of Record

At the November 19, 2013 public meeting, the Government Records Council (“Council”) considered the November 12, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian’s Counsel certified that the NPA was not directly involved in negotiations or agreements related to the subject matter of the Resolution and therefore would not have any responsive documents therein. Further, the Complainant has not provided any evidence to refute the Counsel’s certification. Thus, the Custodian did not unlawfully deny access to said records pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian ultimately responded to the Complainant stating that there were no responsive documents to the Complainant’s OPRA request. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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 19<sup>th</sup> Day of November, 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: November 21, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
November 19, 2013 Council Meeting**

**Genevieve L. Horvath, Esq.  
(On behalf of Doug Sarini)<sup>1</sup>  
Complainant**

**GRC Complaint No. 2013-148**

v.

**Newark Parking Authority (Essex)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of any and all available Newark Parking Authority documents, files, or reports discussing or related to Newark City Council Resolution No. 7R7-a(s) (dated February 26, 2013) and the Settlement Agreement between the Devils Arena Entertainment LLC, the Newark Housing Authority, and the Newark Parking Authority, which provided for certain legal obligations pursuant to the Prudential Center Lease Agreement dated 2/2/05.

**Custodian of Record:** Merian Oliver-Williams  
**Request Received by Custodian:** April 1, 2013  
**Response Made by Custodian:** April 12, 2013<sup>3</sup>  
**GRC Complaint Received:** May 22, 2013

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

**Request and Response:**

On April 1, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 12, 2013, nine (9) business days after receipt of the request, the Custodian responded in writing that there were no records responsive to the Complainant’s request.

**Denial of Access Complaint:**

On May 22, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that she received a response

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

<sup>2</sup> Represented by Philip G. George, Esq. of Eric M. Bernstein & Assoc., LLC (Warren, NJ).

<sup>3</sup> The Complainant argues that response was received on April 15, 2013.

<sup>4</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

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from the Custodian on April 15, 2013, beyond the seven (7) business day requirement, stating that there were no responsive records. On April 16, 2013, the Complainant sent a reply to the Custodian via email asking whether the Custodian was certain that there were no responsive documents to her OPRA request, but received no response.

The Complainant asserts that the Newark Parking Authority (“NPA”) was a party to discussions or negotiations surrounding a Settlement Agreement executed by the NPA, the City of Newark (“City”), the Newark Housing Authority (“NHA”), the Devils Arena Entertainment, LLC, and the Devils Renaissance Development, LLC (collectively, “Devils”). This Settlement Agreement was authorized under Newark City Council Resolution No. 7R7-a(s) (“Resolution”). The Complainant states that the terms of the Settlement Agreement provide that the NPA would assume certain obligations from the NHA under a lease agreement the NHA had with the Devils. The Complainant includes a copy of the Resolution and the Settlement Agreement in her Denial of Access Complainant.

The Complainant argues that the second clause of the Resolution indicates that the NPA was an active party involved in the arbitration proceedings which produced the Settlement Agreement. Thus, the Complainant made her OPRA request seeking copies of any and all records related to the Resolution. The Complainant believes that the NPA was actively involved in the creation of the Settlement Agreement with the other parties, and therefore concludes that the NPA should have responsive records related to the Resolution which certified the Settlement Agreement.

#### Statement of Information:

On May 29, 2013, the Custodian filed a Statement of Information (“SOI”) along with an accompanying brief and certification from the Custodian’s Counsel (“Counsel”). Counsel certifies that his firm represented the NPA in negotiations with the City pertaining to a lease agreement that was the subject of an arbitration matter between the City, the NHA, the NPA, and the Devils. Counsel also certifies that at no time was the NPA actively involved in the arbitration proceedings or privy to any agreements made between the parties as a result of arbitration.

Counsel then certifies that negotiation sessions took place between himself and the Special Counsel for the City, with the General Counsel for the NHA present at two (2) of the sessions. Counsel attests that the NPA received no documents, resolutions, or proposed agreements related to the arbitration matter between the Devils, the City, and the NHA. Counsel further certifies that no terms of agreement were given to or voted on by the Board of Commissioners for the NPA, any officer or employee of the NPA, or the Counsel’s law firm.

Counsel next certifies that his law firm was never aware of the Resolution until reviewing the attached copy in the Denial of Access Complainant. Counsel states that he sent a copy of the Resolution to the General Counsel for the NPA, who claimed that no NPA employee or officer had ever seen the Resolution or the Settlement Agreement between the Devils, the City, and the NHA.

Finally, Counsel certifies that the reason the response was delivered past the statutorily mandated time was that the Custodian had inadvertently misplaced the response.

## 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>5</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).

The Complainant asserts that she did not receive a response to her OPRA request from the Custodian until April 15, 2013, ten (10) business days after submission. The Custodian contends that it mailed its response on April 12, 2013, nine (9) business days after receiving the OPRA request. The Custodian claims that the response was not submitted within the statutorily mandated seven (7) business days due the Custodian inadvertently misplacing the response. Regardless, in either scenario the response was made beyond the seven (7) day requirement.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley.

### 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.

In Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The custodian responded stating that there was no record of any telephone calls made to the complainant. The custodian subsequently certified that no records

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<sup>5</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.

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responsive to the complainant's request existed and the complainant did not provide any evidence to refute the custodian's certification. The GRC determined that although the custodian failed to respond to the OPRA request in a timely manner, the custodian did not unlawfully deny access to the requested records because the custodian certified that no records responsive to the request existed.

In this case, Counsel certifies that he represented the NPA at the time the arbitration negotiations occurred. Counsel also certifies that the NPA was never involved in any arbitration or Settlement Agreement that is the subject of the Resolution, and therefore would not have any documents relating to the Resolution or the subject matter therein. Notwithstanding the fact that the Resolution and the attached Settlement Agreement name the NPA as a designated party, that in and of itself does not prove that the NPA received and/or maintained any documents regarding or related to the Resolution. Additionally, the Complainant has not sent any response to the Counsel's certification.

The Custodian's Counsel certified that the NPA was not directly involved in negotiations or agreements related to the subject matter of the Resolution and therefore would not have any responsive documents therein. Further, the Complainant has not provided any evidence to refute the Counsel's certification. Thus, the Custodian did not unlawfully deny access to said records pursuant to N.J.S.A. 47:1A-6 and Pusterhofer.

### **Knowing and 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(g) and N.J.S.A. 47:1A-5(i), the Custodian ultimately responded to the Complainant stating that there were no responsive documents to the Complainant's OPRA request. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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 did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian's Counsel certified that the NPA was not directly involved in negotiations or agreements related to the subject matter of the Resolution and therefore would not have any responsive documents therein. Further, the Complainant has not provided any evidence to refute the Counsel's certification. Thus, the Custodian did not unlawfully deny access to said records pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
3. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian ultimately responded to the Complainant stating that there were no responsive documents to the Complainant's OPRA request. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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: Brandon D. Minde, Esq.  
Executive Director

November 12, 2013