



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 28, 2014 Government Records Council Meeting

Wanda R. Stevenson
Complainant

Complaint No. 2013-153

v.

City of Newark (Essex)
Custodian of Record

At the January 28, 2014 public meeting, the Government Records Council (“Council”) considered the January 21, 2014 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s November 19, 2013 Interim Order because he responded in the prescribed extended time frame providing records and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian violated N.J.S.A. 47:1A-5(i), he provided the Complainant with all records responsive to the 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 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 28th 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**

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

**Wanda R. Stevenson¹
Complainant**

GRC Complaint No. 2013-153

v.

**City of Newark (Essex)²
Custodial Agency**

Records Relevant to Complaint: A copy of employee listing for January 2011, July 2011, December 2011, January 2012, July 2012, December 2012, January 2013, and April 12, 2013.

Custodian of Record: Robert P. Marasco

Request Received by Custodian: April 12, 2013

Response Made by Custodian: April 12, 2013

GRC Complaint Received: May 22, 2013

Background

November 19, 2013 Council Meeting:

At its November 19, 2013 public meeting, the Council considered the November 12, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted by a majority to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Although the Custodian timely responded to the Complainant's April 24, 2013 amended OPRA request in writing requesting an extension of time to respond, the Custodian's failure to timely respond in writing within the extended deadline of May 3, 2013 results in a "deemed" denial of these OPRA requests. N.J.S.A. 47:1A-5(i); Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). *See also Verry v. Borough of S. Bound Brook (Somerset)*, GRC Complaint No. 2008-253 (September 2009). Thus, in light of the Custodian's certification that he informed the Complainant that the requested documents were available for pick-up, the Custodian shall provide such documents to the Complainant if he has not already done so.

2. **The Custodian shall comply with item number one (1) above within five (5) business days from receipt of the Council's Interim Order with appropriate**

¹ No legal representation listed on record.

² The Custodian is represented by Guenther Waldow, Esq. (Newark, NJ).

redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,³ to the Executive Director.⁴

3. The Council defers analysis of whether the Custodian 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.

Procedural History:

On November 20, 2013, the Council distributed its Interim Order to all parties. On November 26, 2013, the Custodian requested, and the GRC granted, a request for an extension of time to respond until December 3, 2013. On December 3, 2013, the Custodian responded to the Council's Interim Order. The Custodian certifies that he provided true copies of the documents responsive to the Complainant's request.

Analysis

Compliance

At its November 19, 2013 meeting, the Council ordered the Custodian to disclose, if he had not already done so, a copy of the "employee listing for January 2011, July 2011, December 2011, January 2012, July 2012, December 2012, January 2013, and April 12, 2013 . . . within five (5) business days from receipt of the Council's Interim Order . . . and simultaneously provide certified confirmation of compliance . . . to the Executive Director." On November 20, 2013, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by the close of business on November 27, 2013.

On November 26, 2013, the fourth (4th) business day after receipt of the Council's Order, the Custodian requested an extension of time to respond until December 3, 2013. The GRC granted that extension. On December 3, 2013, the Custodian provided certified confirmation of compliance that he was disclosing true copies of the requested employee listings, including salary information, to the Complainant.

Therefore, the Custodian complied with the Council's November 19, 2013 Interim Order because he responded in the prescribed extended time frame providing records and simultaneously provided certified confirmation of compliance to the Executive Director.

³ "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."

⁴ 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.

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 that “[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 the Council to determine that a custodian “knowingly and willfully” violated OPRA: the custodian’s actions must have been much more than negligent conduct; the custodian must have had some knowledge that his actions were wrongful; the custodian’s actions must have had a positive element of conscious wrongdoing; the custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden; and the custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. *See Alston v. City of Camden*, 168 N.J. 170, 185 (2001); *Fielder v. Stonack*, 141 N.J. 101, 124 (1995); *Berg v. Reaction Motors Div.*, 37 N.J. 396, 414 (1962); *ECES v. Salmon*, 295 N.J. Super. 86, 107 (App. Div. 1996).

Although the Custodian violated N.J.S.A. 47:1A-5(i), he provided the Complainant with all records responsive to the 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 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 complied with the Council’s November 19, 2013 Interim Order because he responded in the prescribed extended time frame providing records and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian violated N.J.S.A. 47:1A-5(i), he provided the Complainant with all records responsive to the 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 unreasonable denial of access under the totality of the circumstances.

Prepared By: Robert T. Sharkey, Esq.
Staff Attorney

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

January 21, 2014



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

November 19, 2013 Government Records Council Meeting

Wanda R. Stevenson
Complainant

Complaint No. 2013-153

v.

City of Newark (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, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Although the Custodian timely responded to the Complainant's April 24, 2013 amended OPRA request in writing requesting an extension of time to respond, the Custodian's failure to timely respond in writing within the extended deadline of May 3, 2013 results in a "deemed" denial of these OPRA requests. N.J.S.A. 47:1A-5(i); Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). *See also Verry v. Borough of S. Bound Brook (Somerset)*, GRC Complaint No. 2008-253 (September 2009). Thus, in light of the Custodian's certification that he informed the Complainant that the requested documents were available for pick-up, the Custodian shall provide such documents to the Complainant if he has not already done so.
2. **The Custodian shall comply with item number one (1) above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**
3. The Council defers analysis of whether the Custodian 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.

¹ "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."

² 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.



Interim Order Rendered by the
Government Records Council
On The 19th 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 20, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Wanda R. Stevenson¹
Complainant**

GRC Complaint No. 2013-153

v.

**City of Newark (Essex)²
Custodial Agency**

Records Relevant to Complaint: A copy of employee listing for January 2011, July 2011, December 2011, January 2012, July 2012, December 2012, January 2013, and April 12, 2013.

Custodian of Record: Robert P. Marasco

Request Received by Custodian: April 12, 2013

Response Made by Custodian: April 12, 2013

GRC Complaint Received: May 22, 2013

Background³

Request and Response:

On April 12, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On that same date, the Custodian responded in writing acknowledging receipt of the request and stating that he anticipated a response “on or before April 22, 2013.” On April 23, 2013, seven (7) business days after receipt of the request, the Custodian notified the Complainant that the responsive records could be picked up. On April 24, 2013, the Complainant amended her request to include title and salary information. On that same date, the Custodian requested an extension of time to “locate and compile the documents,” noting that “[w]e anticipate a response on or before May 3, 2013.”

Denial of Access Complaint:

On May 22, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant states that the Custodian responded to her April 12, 2013 OPRA request on April 22, 2013, stating that the Custodian could not provide the requested documents within the timeframe required by N.J.S.A. 47:1A-5(i) but that he would

¹ No legal representation listed on record.

² The Custodian is represented by Guenther Waldow, Esq. (Newark, NJ).

³ 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.

do so on or before May 3, 2013. The Complainant notes that, as of the filing of her Denial of Access Complaint, she had received no response from the Custodian.

Statement of Information:

On May 31, 2013, the Custodian submitted a Statement of Information (“SOI”). The Custodian certifies that he received the Complainant’s OPRA request on April 12, 2013 and replied that day advising an anticipated response date of April 22, 2013. The Custodian additionally certifies that he notified the Complainant on April 23, 2013, that the responsive documents could be picked up, but that when the Complainant came to collect the documents the next day she decided to amend her request.

The Custodian states that he received the Complainant’s amended OPRA request on April 24, 2013. The Custodian certifies that he responded in writing on that date requesting an extension of time until May 3, 2013. The Custodian further certifies that on May 23, 2013, he sought a second extension of time until May 30, 2013. The Custodian also certifies that he notified the Complainant on May 30, 2013, that the requested documents were available. The Custodian states that the Complainant picked up the requested documents on May 31, 2013.

Additional Submissions

On October 24, 2013, the GRC emailed the Complainant, with a copy to the Custodian, seeking clarification as to whether the documents the Custodian purports to have provided after the Complainant filed her Denial of Access Complaint: (1) were in fact provided; and (2) are responsive to the OPRA request at issue here. The GRC received no reply from either party.

Analysis⁴

Failure to Respond in Extended Time

OPRA mandates that a custodian either grant or deny access to requested records as soon as possible, but no later than seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian that does not comply with a request must indicate on the request form a specific basis for not doing so and promptly return a signed and dated copy of said form. N.J.S.A. 47:1A-5(g). Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁵ 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 time period results in a “deemed” denial of the complainant’s OPRA request pursuant. *See* N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

⁴ There may be other OPRA issues in this matter; however, the Council’s analysis is based solely on the claims made in the Complainant’s Denial of Access Complaint.

⁵ 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.

Moreover, OPRA provides that:

If the government record is in storage or archived, the requestor shall be so advised within seven business days after the custodian receives the request. The requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied.

N.J.S.A. 47:1A-5(g).

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

The [c]ustodian properly requested an extension of time to provide the requested records to the [c]omplainant 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 [c]ustodian failed to provide the [c]omplainant access to the requested records by the extension date anticipated by the [c]ustodian, the [c]ustodian violated N.J.S.A. 47:1A-5(i) resulting in a "deemed" denial of access to the records.

Id.

Here, the Custodian timely responded to the Complainant's April 24, 2013 amended OPRA request but failed to further respond within the extended time frame he requested in that response. Thus, the Complainant's OPRA requests are "deemed" denied. Id.

Therefore, although the Custodian timely responded to the Complainant's April 24, 2013 amended OPRA request in writing requesting an extension of time to respond, the Custodian's failure to timely respond in writing within the extended deadline of May 3, 2013 results in a "deemed" denial of these OPRA requests. N.J.S.A. 47:1A-5(i); Kohn, GRC 2007-124. *See also* Verry v. Borough of S. Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009). Thus, in light of the Custodian's certification that he informed the Complainant that the requested documents were available for pick-up, the Custodian shall provide such documents to the Complainant if he has not already done so.

Knowing & Willful

The Council defers analysis of whether the Custodian 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. Although the Custodian timely responded to the Complainant's April 24, 2013 amended OPRA request in writing requesting an extension of time to respond, the Custodian's failure to timely respond in writing within the extended deadline of May 3, 2013 results in a "deemed" denial of these OPRA requests. N.J.S.A. 47:1A-5(i); Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). *See also Verry v. Borough of S. Bound Brook (Somerset)*, GRC Complaint No. 2008-253 (September 2009). Thus, in light of the Custodian's certification that he informed the Complainant that the requested documents were available for pick-up, the Custodian shall provide such documents to the Complainant if he has not already done so.
2. **The Custodian shall comply with item number one (1) above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁶ to the Executive Director.⁷**
3. The Council defers analysis of whether the Custodian 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: Robert T. Sharkey
Staff Attorney

Approved By: Brandon D. Minde, Esq.
Executive Director

November 12, 2013

⁶ "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."

⁷ 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.