



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

September 24, 2013 Government Records Council Meeting

Katalin Gordon
Complainant

Complaint No. 2013-189

v.

City of Orange (Essex)
Custodian of Record

At the September 24, 2103 public meeting, the Government Records Council (“Council”) considered the September 17, 2013 Supplemental 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 complied in a timely manner with the Council’s August 27, 2013 Interim Order because she disclosed the requested records to the Complainant on September 6, 2013, three (3) business days following receipt of the Council’s Order, and on that same date provided certified confirmation of compliance to the Executive Director.
2. The Custodian’s failure to respond in writing within the extended time frame resulted in a “deemed” denial. N.J.S.A. 47:1A-5(g) and 5(i). Furthermore, the Custodian failed to provide a lawful reason for denying access to the records. N.J.S.A. 47:1A-6. However, the Custodian did fully comply in a timely manner with the Council’s August 27, 2013 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions did 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 24th Day of September, 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: September 26, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
September 24, 2013 Council Meeting**

**Katalin Gordon¹
Complainant**

GRC Complaint No. 2013-189

v.

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

Records Relevant to Complaint: Electronic copies of City Clerk Dwight Mitchell's time sheets from January 1, 2013 to June 10, 2013.

Custodian of Records: Dwight Mitchell³
Request Received by Custodian: June 10, 2013
Response Made by Custodian: None
GRC Complaint Received: July 1, 2013

Background

August 27, 2013 Council Meeting:

At its August 27, 2013 public meeting, the Government Records Council ("Council") considered the August 20, 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, found that:

1. The Custodian did not bear his burden of proof that he 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. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The requested time sheets are government records subject to disclosure, and because the Custodian failed to provide a lawful reason for denying access to the records said

¹ No legal representation listed on record.

² No legal representation listed on record.

³ Laressa Bradshaw certified that she is acting as the Custodian while Custodian of Records Dwight Mitchell is on medical leave. Ms. Bradshaw is therefore identified herein as the Custodian.

records shall be disclosed to the Complainant. N.J.S.A. 47:1A-10. See also Havlusch v. Borough of Allenhurst (Monmouth), GRC Complaint No. 2011-243 (January 2013).

3. **The Custodian shall comply with paragraph 2 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, to the Executive Director.**
4. 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 August 28, 2013, the Council distributed its Interim Order to the parties.

Analysis

Compliance

On August 27, 2013, the Council ordered the above-referenced compliance. On August 28, 2013, the Council distributed its Interim Order to the parties, providing the Custodian five (5) business days to comply with the terms of said Order. The Custodian certified that she received the Council's Order on September 3, 2013. On September 6, 2013, three (3) business days following receipt of the Council's Order, the Custodian disclosed the requested records to the Complainant in unredacted form.⁴ On September 6, 2013, the Custodian also provided certified confirmation of compliance to the Executive Director.

Accordingly, the Custodian complied in a timely manner with the Council's August 27, 2013 Interim Order because she disclosed the requested records to the Complainant on September 6, 2013, three (3) business days following receipt of the Council's Order, and on that same date provided certified confirmation of compliance to the Executive Director.

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

⁴ The Custodian certified that she had also disclosed the requested records to the Complainant on July 11, 2013.

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)).

The Custodian’s failure to respond in writing within the extended time frame resulted in a “deemed” denial. N.J.S.A. 47:1A-5(g) and 5(i). Furthermore, the Custodian failed to provide a lawful reason for denying access to the records. N.J.S.A. 47:1A-6. However, the Custodian did fully comply in a timely manner with the Council’s August 27, 2013 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions did 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 in a timely manner with the Council’s August 27, 2013 Interim Order because she disclosed the requested records to the Complainant on September 6, 2013, three (3) business days following receipt of the Council’s Order, and on that same date provided certified confirmation of compliance to the Executive Director.
2. The Custodian’s failure to respond in writing within the extended time frame resulted in a “deemed” denial. N.J.S.A. 47:1A-5(g) and 5(i). Furthermore, the Custodian failed to provide a lawful reason for denying access to the records. N.J.S.A. 47:1A-6. However, the Custodian did fully comply in a timely manner with the Council’s August 27, 2013 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions did 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: John E. Stewart, Esq.

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

September 17, 2013



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

August 27, 2013 Government Records Council Meeting

Katalin Gordon
Complainant

Complaint No. 2013-189

v.

City of Orange (Essex)
Custodian of Record

At the August 27, 2013 public meeting, the Government Records Council ("Council") considered the August 20, 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. The Custodian did not bear his burden of proof that he 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. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The requested time sheets are government records subject to disclosure, and because the Custodian failed to provide a lawful reason for denying access to the records said records shall be disclosed to the Complainant. N.J.S.A. 47:1A-10. See also Havlusch v. Borough of Allenhurst (Monmouth), GRC Complaint No. 2011-243 (January 2013).
3. **The Custodian shall comply with paragraph 2 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**

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.

4. 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.

Interim Order Rendered by the
Government Records Council
On The 27th Day of August, 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: August 28, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 27, 2013 Council Meeting**

**Katalin Gordon¹
Complainant**

GRC Complaint No. 2013-189

v.

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

Records Relevant to Complaint: Electronic copies of City Clerk Dwight Mitchell's time sheets from January 1, 2013 to June 10, 2013.

Custodian of Records: Dwight Mitchell

Request Received by Custodian: June 10, 2013

Response Made by Custodian: None

GRC Complaint Received: July 1, 2013

Background³

Request and Response:

On June 10, 2013, the Complainant submitted an Open Public Records Act ("OPRA") request seeking the above-listed records. The Custodian failed to respond to the request.

Denial of Access Complaint:

On July 1, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserts that she submitted the OPRA request on June 10, 2013, but never received a response from the Custodian.

Statement of Information:

On July 8, 2013, the GRC sent a request for the Statement of Information ("SOI") to the Custodian. The Custodian failed to respond to the GRC's request for the SOI.

¹ No legal representation listed on record.

² No legal representation listed on record.

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.

Analysis⁴

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).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 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).

The Complainant asserts that she submitted the OPRA request on June 10, 2013 but never received a response from the Custodian.

Therefore, the Custodian did not bear his burden of proof that he 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, supra.

Unlawful Denial of Access

Here, the Complainant requested time sheets for the city clerk from January 1, 2013 to June 10, 2013. The Custodian failed to respond to the OPRA request or submit a SOI to the GRC asserting a legal reason for denying access.

In Havlusch v. Borough of Allenhurst (Monmouth), GRC Complaint No. 2011-243 (January 2013), the Council determined that sign-in sheets detail the number of weeks and dates specifically worked and therefore qualify as "payroll records" as defined in N.J.A.C. 12:16-2.1. Payroll records are government records subject to disclosure. N.J.S.A. 47:1A-10. Time sheets, like sign-in sheets, also detail the number of weeks and dates specifically worked. Moreover, the terms "time sheets" and "sign-in sheets" are often used interchangeably.

Therefore, the requested time sheets are government records subject to disclosure, and because the Custodian failed to provide a lawful reason for denying access to the records said records shall be disclosed to the Complainant. N.J.S.A. 47:1A-10. *See also Havlusch, supra*.

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 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.

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. The Custodian did not bear his burden of proof that he 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. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The requested time sheets are government records subject to disclosure, and because the Custodian failed to provide a lawful reason for denying access to the records said records shall be disclosed to the Complainant. N.J.S.A. 47:1A-10. See also Havlusch v. Borough of Allenhurst (Monmouth), GRC Complaint No. 2011-243 (January 2013).
3. **The Custodian shall comply with paragraph 2 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**
4. 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: John E. Stewart, Esq.

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

August 20, 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.