



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

December 20, 2013 Government Records Council Meeting

Laura Graham  
Complainant

Complaint No. 2013-290

v.

Borough of Haworth (Bergen)  
Custodian of Record

At the December 20, 2013 public meeting, the Government Records Council (“Council”) considered the December 10, 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. Since the Custodian certified there were no responsive records to the Complainant’s OPRA request, and the Complainant submitted no evidence to refute the Custodian’s certification, the Custodian has borne her burden showing that she did not unlawfully deny access to the requested record pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2007-11 (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 certified in her SOI that there were no records responsive to the Complainant’s 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 20th Day of December, 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: December 23, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
December 20, 2013 Council Meeting**

**Laura Graham<sup>1</sup>  
Complainant**

**GRC Complaint No. 2013-290**

v.

**Borough of Haworth (Bergen)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies of: All flow data from sewer meter (High Performance Shared Infrastructure) at the Oradell/Haworth junction point from January 1, 2013 to September 6, 2013.

**Custodian of Record:** Ann E. Fay

**Request Received by Custodian:** September 6, 2013

**Response Made by Custodian:** None

**GRC Complaint Received:** September 31, 2013

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

**Request and Response:**

On September 6, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. To date, the Custodian has not responded to the Complainant’s request.

**Denial of Access Complaint:**

On September 31, 2013, Brian T. Giblin, Esq., Complainant’s Counsel (“Counsel”), filed a Denial of Access Complaint with the Government Records Council (“GRC”). Counsel asserts that the Complainant spoke with both the Haworth mayor and Custodian in early August and was promised a response to her OPRA request the following week. Counsel asserts that the Complainant’s assistant contacted the Custodian on September 19, 2013, nine (9) businesses days later, and was told by the Custodian that they were still working on their response. Counsel asserts that as of the filing of the Denial of Access Complaint, the Custodian has not responded.

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<sup>1</sup> Represented by Brian T. Giblin, Esq. (Oradell, NJ).

<sup>2</sup> Represented by Peter J. Scandariato, Esq., of Phillips Nizer, LLP (Hackensack, NJ).

<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.

### Statement of Information:

On October 16, 2013, the Custodian filed a Statement of Information (“SOI”) with an enclosed letter. The Custodian certifies that after the Complainant submitted her OPRA request, a representative from Boswell Engineering (“Representative”) contacted the Complainant regarding the documents she was seeking. The Borough of Haworth tasked Boswell Engineering with confirming the location and accuracy of sewer flow data in relation to an agreement between the Borough of Haworth and the Borough of Oradell. The Custodian does not state when the representative contacted the Complainant. The Custodian certifies that she assumed the conversation with the Complainant and the Representative constituted a valid response to the OPRA request, thus the Custodian certifies she did not respond further.

The Custodian certifies that on the date of the Complainant’s request, Boswell Engineering was still gathering the data requested, thus the information sought had yet to be ascertained. Further, the Custodian claims that the Representative contacted the Complainant and informed her that the data she seeks was not finalized, and that once compiled she would be provided access.

Nevertheless, the Custodian certifies that she does not have any responsive documents to the Complainant’s OPRA request.

### 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).

In the instant case, the Custodian certifies that she did not respond to the Complainant in writing, but believed that the Complainant’s conversation with the Representative was sufficient. The Custodian concedes that she should have responded to the Complainant.

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

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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.

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, GRC 2007-11.

### **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 records showing a call made to him from the New Jersey Department of Education. The custodian certified that no records responsive to the complainant’s request existed. The Council determined that, because the custodian certified that no records responsive to the request existed, there was no unlawful denial of access to the requested record.

In the instant matter, the Custodian made no response to the Complainant’s OPRA request. However, similar to the custodian in Pusterhofer, the Custodian certifies that no responsive records existed at the time pertaining to the Complainant’s request. GRC 2007-11. Additionally, the Complainant has not provided any evidence to refute the Complainant’s certification.

Since the Custodian certified there were no responsive records to the Complainant’s OPRA request, and the Complainant submitted no evidence to refute the Custodian’s certification, the Custodian has borne her burden showing that she did not unlawfully deny access to the requested record pursuant to N.J.S.A. 47:1A-6 and Pusterhofer, GRC 2007-11.

### **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 (Felder 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 certified in her SOI that there were no records responsive to the Complainant's 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. Since the Custodian certified there were no responsive records to the Complainant's OPRA request, and the Complainant submitted no evidence to refute the Custodian's certification, the Custodian has borne her burden showing that she did not unlawfully deny access to the requested record pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2007-11 (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 certified in her SOI that there were no records responsive to the Complainant's 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

December 10, 2013