



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**

**July 29, 2014 Government Records Council Meeting**

Elizabeth M. Goeckel  
Complainant

Complaint No. 2013-356

v.

Chatham Borough Police Department (Morris)  
Custodian of Record

At the July 29, 2014 public meeting, the Government Records Council (“Council”) considered the July 22, 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 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). However, the GRC declines to order disclosure because the responsive Incident Verification Report was delivered to the Complainant on October 7, 2013.
2. Although the Custodian’s failure to respond in writing in a timely manner resulted in a “deemed” denial, the Custodian provided the responsive Incident Verification Report to the Complainant on October 7, 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 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 29<sup>th</sup> Day of July, 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: July 31, 2014**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
July 29, 2014 Council Meeting**

**Elizabeth M. Goeckel<sup>1</sup>  
Complainant**

**GRC Complaint No. 2013-356**

v.

**Chatham Borough Police Department (Morris)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Hardcopy via pickup of an Incident Verification Report (“IVR”) relating to a September 18, 2013 incident.

**Custodian of Record:** Mary Beth Ciccarone

**Request Received by Custodian:** September 19, 2013

**Response Made by Custodian:** October 7, 2013

**GRC Complaint Received:** December 6, 2013

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

**Request and Response:**

On September 19, 2013, the Complainant appeared at the Chatham Borough Police Department seeking a copy of a police report concerning an alleged theft that the Complainant reported on September 18, 2013. Both the Custodian and Chief Philip J. Crosson, Jr., advised the Complainant that a police report was not completed because the investigation was on-going. However, Chief Crosson suggested that an IVR could be provided when available. Further, Chief Crosson requested that the Complainant submit an Open Public Records Act (“OPRA”) request.

Thus, the Complainant submitted an OPRA request to the Custodian, however, she did not specify a record sought. The Complainant noted on the form that her preferred method of delivery was “pick-up.” On October 7, 2013, the Custodian had a copy of the IVR delivered to the Complainant’s house.

**Denial of Access Complaint:**

On December 6, 2013, the Complainant filed a Denial of Access Complaint with the

---

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

<sup>2</sup> Represented by James L. Lott, Esq., of Riker, Danzig, Scherer, Hyland & Perretti, LLP (Morristown, 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.

Government Records Council (“GRC”). The Complainant asserted that on September 19, 2013, she went to the Police Department to obtain a copy of the police report concerning an incident she reported on September 18, 2013. The Complainant asserted that although the report was not available, Chief Crosson agreed to have the Custodian complete an IVR for 1:00 p.m. that day. Further, the Complainant stated that Chief Crosson asked her to complete an OPRA request, but to leave the “Record Request Information” box blank and that “they would fill it in.”

The Complainant alleged that she returned at 1:00 p.m. and the Custodian advised that the IVR was not completed. The Complainant noted that she subsequently made a complaint against the Custodian for conduct, and on or about October 7, 2013, she advised Lt. Brian Gibbons that she had not received a copy of the IVR. The Complainant asserted that the IVR was delivered to her house that same day, presumably by hand because it was in an envelope without postage.

The Complainant contended that although she received the IVR, she believed that the Custodian acted with malice and knowingly and willfully withheld access to same.

Statement of Information:

On December 20, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on September 19, 2013 and that the responsive IVR was available for pickup on September 23, 2013. Further, the Custodian certified that no search was necessary because the IVR was made available upon creation.

The Custodian certified that on September 19, 2013, both herself and Chief Crosson advised the Complainant that an IVR could be created that would contain basic information about an incident; however, this record could not be created until the underlying police report was completed. The Custodian certified that the Complainant verbally agreed to accept the IVR and was asked to submit an OPRA request for same. Moreover, the Custodian certified that the Complainant was not told that the IVR would be available that day nor that she should leave the “Record Request Information” box blank. The Custodian certified that the creation of the IVR was delayed because the Morris County Records Management System was off-line for maintenance for several hours on September 19, 2013. The Custodian affirmed that on September 23, 2013, the IVR was made available for pickup; however, the Complainant did not return to her office to obtain same. The Custodian certified that on October 7, 2013, at the direction of Lt. Gibbons, she caused a copy of the IVR to be personally delivered to the Complainant. *See Lt. Gibbons Cert* at ¶ 5-7.

The Custodian first argued that the Complainant’s request was invalid because it failed to identify a record. The Custodian asserted that a verbal request is not contemplated under OPRA and the Complainant failed to indicate the record sought on her form. Further, the Custodian argued that custodians are not required to provide a record that does not exist. Librizzi v. Twp. of Verona Police Dep’t (Essex), GRC Complaint No. 2009-213 (Final Decision date d August 24, 2010).

Next, the Custodian contended that notwithstanding the fact that the request was invalid, she complied with same by making the IVR available for pickup upon its creation on September 23, 2013. Further, the Custodian noted that upon learning that the Complainant had not retrieved the IVR, she had a copy hand-delivered to the Complainant.

Finally, the Custodian asserted that, should the GRC find her in violation of OPRA, said violation did not rise to the level of a knowing and willful violation of OPRA.<sup>4</sup>

## Analysis

### Issues Presented

The Custodian argued two (2) threshold issues in her SOI. For the reasons set forth, the GRC declines to address either issue.

First, the Custodian challenged the validity of the OPRA request because the Complainant did not fill out the “Record Request Information” box. The evidence of record; however, demonstrates that, notwithstanding the Complainant’s failure to complete the “Record Request Information” box, it is clear that the Custodian knew the exact record sought. This fact is substantiated by both parties in their respective filings. Thus, it is irrelevant whether or not the Complainant was advised to leave the “Record Request Information” box blank.

Second, the responsive IVR was clearly not in existence at the time of the OPRA request. The GRC has determined that a custodian was under no obligation to provide a record that had not been created at the time of an OPRA request. Blau v. Union Cnty., GRC Complaint No. 2003-75 (January 2005); Paff v. v. Neptune Twp. Hous. Auth. (Monmouth), GRC Complaint No. 2010-307 (Interim Order dated April 25, 2012); Delbury v. Greystone Park Psychiatric Hosp. (Morris), GRC Complaint No. 2013-240 (Interim Order dated April 29, 2014). However, it is clear here that the Custodian agreed to make said record available and did so for pickup on September 23, 2013.

### 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

---

<sup>4</sup> The Custodian further argued that the Complainant is not a prevailing party entitled to an award of attorney’s fees. However, the GRC notes that the fees are not at issue in complaints where a complainant does have legal representation. Barkley v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2012-34 (May 2013). The GRC further notes that it has no authority to order any other type of compensatory damages. Reid v. NJ Dep’t of Corrections, GRC Complaint No. 2010-83 (Final Decision dated May 24, 2011).

<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.

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 matter, the Custodian certified that she received the Complainant’s OPRA request on September 19, 2013 and made the responsive IVR available for pickup on September 23, 2013. However, there is no evidence demonstrating that the Custodian responded in writing to the Complainant advising her that the IVR was available. Regardless of the method of delivery, OPRA still requires that a custodian respond in writing within seven (7) business days of receipt of an OPRA request. Thus, the Custodian’s failure to respond in writing results in a “deemed” denial.

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, GRC 2007-11. However, the GRC declines to order disclosure of the responsive IVR because it was delivered to the Complainant on October 7, 2013.

### **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's failure to respond in writing in a timely manner resulted in a "deemed" denial, the Custodian provided the responsive IVR to the Complainant on October 7, 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 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). However, the GRC declines to order disclosure because the responsive Incident Verification Report was delivered to the Complainant on October 7, 2013.
2. Although the Custodian's failure to respond in writing in a timely manner resulted in a "deemed" denial, the Custodian provided the responsive Incident Verification Report to the Complainant on October 7, 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 unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Dawn R. SanFilippo, Esq.  
Acting Executive Director

July 22, 2014