



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**

**October 29, 2013 Government Records Council Meeting**

Andrew Lombardino  
Complainant

Complaint No. 2013-92

v.

Borough of Ho-Ho-Kus (Bergen)  
Custodian of Record

At the October 29, 2013 public meeting, the Government Records Council (“Council”) considered the October 22, 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. Because Ms. McDonald failed to forward the Complainant’s OPRA request to the appropriate Custodian or direct the Complainant to the Custodian, Ms. McDonald violated N.J.S.A. 47:1A-5(h). See Werner v. NJ Dep’t of Treasury, Div. of Revenue, GRC Complaint No. 2009-95 (April 2010). However, the Council should decline to address OPRA request item Nos. 1, 3 and 13 because same were provided as part of Mr. Guerin’s January 17, 2013 response.
2. Since the Custodian responded in writing and subsequently certified in the Statement of Information that no records responsive to the Complainant’s OPRA request item Nos. 5 through 12 exist, and because the Complainant did not submit any evidence to refute the Custodian’s certification, the Custodian did not unlawfully deny access to the requested records. See Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). The Council should further decline to address OPRA request item Nos. 2, 4 and 14 because the Custodian provided the Complainant responsive records after being made aware of the Complainant’s OPRA request.
3. Ms. McDonald violated N.J.S.A. 47:1A-5(h) by failing to forward the Complainant’s OPRA request to the Custodian or direct the Complainant to the Custodian. However, Ms. McDonald obtained records and forwarded the request to Mr. Guerin to respond, and the Custodian certified in the Statement of Information that she fully responded to the Complainant once she was made aware of the OPRA request. Additionally, the evidence of record does not indicate that Ms. McDonald’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Ms. McDonald’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 29th Day of October, 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 1, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
October 29, 2013 Council Meeting**

**Andrew Lombardino<sup>1</sup>  
Complainant**

**GRC Complaint No. 2013-92**

**v.**

**Borough of Ho-Ho-Kus (Bergen)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint: Copies of:<sup>3</sup>**

1. Complete list of hours worked by Officer Balestrieri for October 29 and 30, 2012.
2. List of summons [sic] issued by Officer Balestrieri for October.
3. List of overtime worked by Officer Balestrieri the week of October 28, 2012.
4. Yearly schedule of speedometer calibration records for patrol car 710, including dates, mileage and frequency of calibration for 2012.
5. Signed contract with Speedometer Service, Inc., including original signed and dated agreement on Borough of Ho-Ho-Kus (“Borough”) stationary.
6. Make and model of Speedometer Service, Inc.’s speedometer testing equipment.
7. Speedometer Service, Inc.’s calibration provider used to validate speedometer measuring equipment.
8. Records detailing date cycles by which Speedometer Service, Inc., validates speedometer testing equipment for 2012.
9. Speedometer Service, Inc., dated invoices with the scope of work completed with their validation company used to calibrate speedometer testing equipment in 2012.
10. Dated cancelled checks between Speedometer Services, Inc., and their validating company used to calibrate speedometer measuring devices for 2012.
11. All standards by which Speedometer Services, Inc., uses to validate testing equipment according to New Jersey State regulation.
12. Location that Speedometer Services, Inc., conducts speedometer calibrations for the Borough Police Department.
13. Borough dated purchase orders, dated invoices and description of work completed with Speedometer Service, Inc., for 2012.
14. All cancelled checks between the Borough and Speedometer Services, Inc., for speedometer calibration services for 2012.

---

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

<sup>2</sup> Represented by David B. Bole, Esq. (Paramus, NJ).

<sup>3</sup> The Complainant requested additional records that are not at issue in this complaint.

**Custodian of Record:** Laura Borchers  
**Request Received by Custodian:** January 14, 2013  
**Response Made by Custodian:** January 17, 2013  
**GRC Complaint Received:** March 21, 2013

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

#### **Request and Response:**

On January 10, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 17, 2013, John S. Guerin, Esq., Municipal Prosecutor, responded addressing the Complainant’s OPRA request as a request for discovery of materials relevant to the Complainant’s municipal court case. Mr. Guerin advised that, on December 4, 2012, the Complainant received a DVD and 22 pages of records and that on January 2, 2013, he provided the Complainant three (3) purchase orders and a calibration certificate. Mr. Guerin further provided Officer Balestrieri’s work hours (OPRA request Item No. 1) and overtime information (OPRA request Item No. 3), denied access to disciplinary records under N.J.S.A. 47:1A-10 and advised that no records responsive to item Nos. 7 through 13 are maintained by the Borough Police Department.

#### **Denial of Access Complaint:**

On March 21, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that he received limited information in response to his OPRA request. The Complainant argues that he left a number of voicemails for Joanne McDonald, Secretary for the Borough Police Department, but received no response. The Complainant states that he believes Mr. Guerin’s January 17, 2013 letter was a response to his OPRA request.

#### **Statement of Information:**

On June 26, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that Ms. McDonald received the request and did not forward same to the Custodian because she believed it was a request for discovery in connection with the Complainant’s pending matter in Ho-Ho-Kus Municipal Court. *See* McDonald cert. at ¶ 4. The Custodian certifies that Ms. McDonald’s confusion was furthered by the unusual format the Complainant used to submit the request. *Id.* at ¶ 3. The Custodian certifies that Ms. McDonald proceeded to contact Mr. Guerin and provide him with records for disclosure. *Id.* at ¶ 5. The Custodian certifies that Mr. Guerin responded on January 17, 2013 providing certain records.

The Custodian certifies that for the above reasons, she was unaware of the Complainant’s OPRA request until she received the Denial of Access Complaint on May 13, 2013. The

---

<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.

Custodian certifies that she responded to the Complainant's OPRA request on June 24, 2013 providing the following responses:

- OPRA request Item No. 1: Provided hours Officer Balestrieri worked (previously provided on January 17, 2013).
- OPRA request Item No. 2: Provided summonses (previously provided by Mr. Guerin as part of the Complainant's discovery request).
- OPRA request Item No. 3: Provided overtime hours worked (previously provided on January 17, 2013).
- OPRA request Item No. 4: Provided yearly schedule of speedometer readings (previously provided on December 4, 2012 in response to a prior OPRA request).
- OPRA request Item No. 13: Provided purchase orders/invoices for 2012 (previously provided on January 17, 2013).
- OPRA request Item No. 14: Provided cancelled checks.
- OPRA request Item Nos. 5, 6, 7, 8, 9, 10, 11 and 12: Advised that no records exist (and that calibrations are conducted in the Police Headquarters parking lot).

The Custodian asserts that her failure to respond did not result in a "deemed" denial because she was never given the opportunity to respond to said request until after the filing of this complaint. The Custodian contends that the Complainant's request overlapped with discovery and other similar OPRA requests; thus, the Borough's failure to respond to the instant request as an OPRA request was simply a mistake and did not rise to the level of a knowing and willful violation.

### Analysis<sup>5</sup>

#### Failure To Forward Request

OPRA provides that "[a]ny officer or *employee* of a *public agency* who receives a request for access to a government record *shall forward* the request to the *custodian of the record* or *direct the requestor* to the *custodian of the record*." N.J.S.A. 47:1A-5(h) (emphasis added). In Werner v. NJ Dep't of Treasury, Div. of Revenue, GRC Complaint No. 2009-95 (April 2010), the complainant submitted an OPRA request on an official OPRA request form. An employee at Revenue received the request and responded to same without forwarding to the custodian. The employee subsequently certified that she processed the request as regular work. The Council held that the employee violated OPRA because "[a]lthough Ms. Harrington's duties do not include responding to requests made pursuant to OPRA, she still has an obligation to ..." comply with N.J.S.A. 47:1A-5(h). Id. at 9. The Council further noted that "[b]ecause the Complainant's request was on the official OPRA request form of the [NJ Dep't] of Law & Public Safety, Ms. Harrington was alerted to the fact that this was a request for records pursuant to OPRA." Id. See also Kossup v. City of Newark Police Dep't, GRC Complaint No. 2006- 174 (February 2007); Morgano v. NJ Office of the Public Defender, Essex Cnty., GRC Complaint No. 2008-79 (July 2008) (*citing Mourning v. Dep't of Corrections*, GRC Complaint No. 2006-75 (August 2006);

---

<sup>5</sup> 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.

Vessio v. NJ Dep't of Community Affairs, Div. of Fire Safety, GRC Complaint No. 2007-63 (May 2007)

Here, Ms. McDonald received the Complainant's OPRA request and, because she believed the request was for discovery related to a pending matter at Ho-Ho-Kus Municipal Court, she forwarded the request to Mr. Guerin for a response. Although the Custodian and Ms. McDonald took issue with the format in which the OPRA request was submitted, a comparison of the Borough's official request form and the request at issue here indicate that the only difference was the list superimposed on the form. The heading of the form as well as the second page of the form remained the same.

Therefore, because Ms. McDonald failed to forward the Complainant's OPRA request to the appropriate Custodian or direct the Complainant to the Custodian, Ms. McDonald violated N.J.S.A. 47:1A-5(h). See Werner, GRC 2009-95. However, the Council should decline to address OPRA request item Nos. 1, 3 and 13 because same were provided as part of Mr. Guerin's January 17, 2013 response.

### **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. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005), the complainant sought a copy of a telephone bill from the custodian in an effort to obtain proof that a phone call was made to him by an official from the Department of Education. The custodian provided a certification in his submission to the GRC that certified that the requested record was nonexistent and the complainant submitted no evidence to refute the custodian's certification. The Council subsequently determined that "[t]he Custodian has certified that the requested record does not exist. Therefore, the requested record cannot (sic) be released and there was no unlawful denial of access."

Regarding OPRA request item Nos. 5 through 12,<sup>6</sup> the Custodian responded to the Complainant on June 24, 2013, stating that no records exist and subsequently certified to such in the SOI. Further, there is no evidence in the record to refute the Custodian's certification.

Thus, since the Custodian responded in writing and subsequently certified in the SOI that no records responsive to the Complainant's OPRA request item Nos. 5 through 12 exist, and because the Complainant did not submit any evidence to refute the Custodian's certification, the Custodian did not unlawfully deny access to the requested records. See Pusterhofer, GRC 2005-49. The Council should further decline to address OPRA request item Nos. 2, 4 and 14 because

---

<sup>6</sup> OPRA request item Nos. 6, 7, 11 and 12 sought information. The GRC notes that requests seeking information or asking questions are not valid under OPRA. Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012).

the Custodian provided the Complainant responsive records after being made aware of the Complainant's OPRA request.

### **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)).

Here, Ms. McDonald violated N.J.S.A. 47:1A-5(h) by failing to forward the Complainant's OPRA request to the Custodian or direct the Complainant to the Custodian. However, Ms. McDonald obtained records and forwarded the request to Mr. Guerin to respond, and the Custodian certified in the SOI that she fully responded to the Complainant once she was made aware of the OPRA request. Additionally, the evidence of record does not indicate that Ms. McDonald's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Ms. McDonald'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. Because Ms. McDonald failed to forward the Complainant's OPRA request to the appropriate Custodian or direct the Complainant to the Custodian, Ms. McDonald violated N.J.S.A. 47:1A-5(h). *See* Werner v. NJ Dep't of Treasury, Div. of Revenue,

GRC Complaint No. 2009-95 (April 2010). However, the Council should decline to address OPRA request item Nos. 1, 3 and 13 because same were provided as part of Mr. Guerin's January 17, 2013 response.

2. Since the Custodian responded in writing and subsequently certified in the Statement of Information that no records responsive to the Complainant's OPRA request item Nos. 5 through 12 exist, and because the Complainant did not submit any evidence to refute the Custodian's certification, the Custodian did not unlawfully deny access to the requested records. *See Pusterhofer v. NJ Dep't of Educ.*, GRC Complaint No. 2005-49 (July 2005). The Council should further decline to address OPRA request item Nos. 2, 4 and 14 because the Custodian provided the Complainant responsive records after being made aware of the Complainant's OPRA request.
3. Ms. McDonald violated N.J.S.A. 47:1A-5(h) by failing to forward the Complainant's OPRA request to the Custodian or direct the Complainant to the Custodian. However, Ms. McDonald obtained records and forwarded the request to Mr. Guerin to respond, and the Custodian certified in the Statement of Information that she fully responded to the Complainant once she was made aware of the OPRA request. Additionally, the evidence of record does not indicate that Ms. McDonald's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Ms. McDonald'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: Frank F. Caruso  
Senior Case Manager

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

October 22, 2013