



**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**

**March 31, 2015 Government Records Council Meeting**

Charles B. Freyer  
Complainant

Complaint No. 2014-235

v.

City of Bayonne (Hudson)  
Custodian of Record

At the March 31, 2015 public meeting, the Government Records Council (“Council”) considered the March 24, 2015 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 with the Council’s February 24, 2015 Interim Order because he responded in the prescribed time frame providing the responsive differential pay and stipends and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian’s failure to respond within the extended time frame resulted in a “deemed” denial of access and he unlawfully denied access to Mr. Weaver’s differential pay and stipends. N.J.S.A. 47:1A-6. However, the Custodian timely complied with the Council’s February 24, 2015 Interim Order. 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 31<sup>st</sup> Day of March, 2015

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: April 2, 2015**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
March 31, 2015 Council Meeting**

**Charles B. Freyer<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-235**

v.

**City of Bayonne (Hudson)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Hardcopies via pickup and/or U.S. mail of William Weaver's title, position, salary, any stipends received and reason therefor for, differential payment<sup>3</sup> and reason therefor, and union membership from January 2012 to present.

**Custodian of Record:** Robert F. Sloan

**Request Received by Custodian:** May 16, 2014

**Response Made by Custodian:** May 27, 2014

**GRC Complaint Received:** June 17, 2014

**Background**

**February 24, 2015 Council Meeting:**

At its February 24, 2015 public meeting, the Council considered the February 17, 2015 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, found that:

1. Although the Custodian timely responded to the Complainant's OPRA request in writing requesting an extension of two (2) weeks to respond, the Custodian's failure to respond timely in writing within the extended deadline of June 11, 2014 results in a "deemed" denial of access. N.J.S.A. 47:1A-5(i); Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
2. The Custodian may have unlawfully denied access to differential payments and the reason therefor from January 2012 to the date of the Complainant's OPRA request. Further, the Custodian may have unlawfully denied access to stipends. N.J.S.A.

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

<sup>2</sup> Represented by William P. Opel, Esq. (Bayonne, NJ).

<sup>3</sup> Differential pay relates to additional payment for certain situations, such as working nights or holidays, working in hazardous conditions, or performing duties out of title.

- 47:1A-6. The Custodian must either disclose this information to the Complainant or, as an alternative, legally certify to the nonexistence of same.
3. **The Custodian shall comply with item No. 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,<sup>4</sup> to the Executive Director.<sup>5</sup>**
  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 February 25, 2015, the Council distributed its Interim Order to all parties. On February 26, 2015, the Custodian responded to the Council's Interim Order. The Custodian certified that on this day, the City of Bayonne ("City") contacted the Complainant to advise him that the responsive records ordered to be disclosed were available for pickup.

#### Analysis

##### Compliance

At its February 24, 2015 meeting, the Council ordered the Custodian to disclose to the Complainant differential pay and stipends or certify to the nonexistence of same. Further, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On February 25, 2015, 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 close of business on March 4, 2015.

On February 26, 2015, the first (1<sup>st</sup>) business day after receipt of the Council's Order, the Custodian certified that the City advised the Complainant that the responsive information was available for pickup, per his preferred method of delivery.

Therefore, the Custodian complied with the Council's February 24, 2015 Interim Order because he responded in the prescribed time frame providing the responsive differential pay and stipends and simultaneously provided certified confirmation of compliance to the Executive Director.

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<sup>4</sup> "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."

<sup>5</sup> 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 “. . . [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, the Custodian’s failure to respond within the extended time frame resulted in a “deemed” denial of access, and he unlawfully denied access to Mr. Weaver’s differential pay and stipends. N.J.S.A. 47:1A-6. However, the Custodian timely complied with the Council’s February 24, 2015 Interim Order. 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 February 24, 2015 Interim Order because he responded in the prescribed time frame providing the responsive differential pay and stipends and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian’s failure to respond within the extended time frame resulted in a “deemed” denial of access and he unlawfully denied access to Mr. Weaver’s

differential pay and stipends. N.J.S.A. 47:1A-6. However, the Custodian timely complied with the Council's February 24, 2015 Interim Order. 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  
Communications Specialist/Resource Manager

Approved By: Dawn R. SanFilippo  
Deputy Executive Director

March 24, 2015



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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PO BOX 819  
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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

INTERIM ORDER

February 24, 2015 Government Records Council Meeting

Charles B. Freyer  
Complainant

Complaint No. 2014-235

v.

City of Bayonne (Hudson)  
Custodian of Record

At the February 24, 2015 public meeting, the Government Records Council ("Council") considered the February 17, 2015 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. Although the Custodian timely responded to the Complainant's OPRA request in writing requesting an extension of two (2) weeks to respond, the Custodian's failure to respond timely in writing within the extended deadline of June 11, 2014 results in a "deemed" denial of access. N.J.S.A. 47:1A-5(i); Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
2. The Custodian may have unlawfully denied access to differential payments and the reason therefor from January 2012 to the date of the Complainant's OPRA request. Further, the Custodian may have unlawfully denied access to stipends. N.J.S.A. 47:1A-6. The Custodian must either disclose this information to the Complainant or, as an alternative, legally certify to the nonexistence of same.
3. **The Custodian shall comply with item No. 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,<sup>1</sup> to the Executive Director.<sup>2</sup>**
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.

<sup>1</sup> "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."

<sup>2</sup> 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 24<sup>th</sup> Day of February, 2015

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: February 25, 2015**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
February 24, 2015 Council Meeting**

**Charles B. Freyer<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-235**

v.

**City of Bayonne (Hudson)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Hardcopies via pickup and/or U.S. mail of William Weaver's title, position, salary, any stipends received and reason therefor for, differential payment<sup>3</sup> and reason therefor, and union membership from January 2012 to present.

**Custodian of Record:** Robert F. Sloan  
**Request Received by Custodian:** May 16, 2014  
**Response Made by Custodian:** May 27, 2014  
**GRC Complaint Received:** June 17, 2014

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

**Request and Response:**

On May 16, 2014, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On May 27, 2014, Mary Beth Golden, City of Bayonne ("City") Clerk's Office, responded in writing on behalf of the Custodian advising that an extension of two (2) weeks would be necessary to fulfill the OPRA request.

**Denial of Access Complaint:**

On June 17, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that, although Ms. Golden notified him that the City would need two (2) additional weeks to respond, he never received the responsive information. The Complainant noted that he stopped at the City Clerk's office on June 9, 2014, but did not receive any information at that time.

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

<sup>2</sup> Represented by William P. Opel, Esq. (Bayonne, NJ).

<sup>3</sup> Differential pay relates to additional payment for certain situations, such as working nights or holidays, working in hazardous conditions or performing duties out of title.

<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.

## Supplemental Response

On June 17, 2014, Ms. Golden responded in writing on behalf of the Custodian advising that one (1) page of information is available for disclosure at a cost of \$0.05. Ms. Golden stated that if the Complainant was still interested in obtaining the responsive information, he must remit payment to the City Clerk's Office either in person or by mail. On June 18, 2014, the Complainant remitted payment and was provided with Mr. Weaver's title, salary, union membership and a note that differential varied per pay.

## Statement of Information:

On July 1, 2014, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on May 16, 2014. The Custodian certified that his office initially responded on May 27, 2014 to obtain a two (2) week extension of time. Further, the Custodian certified that the responsive information was made available to the Complainant on June 17, 2014.

## 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>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 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).

Additionally, 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(i).

In Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5<sup>th</sup>) business day after receipt of the

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<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.

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 OPRA request on the sixth (6<sup>th</sup>) business day after receipt of the request seeking an extension of two (2) weeks to respond.<sup>6</sup> Thus, the last day to respond to the Complainant's OPRA request was June 11, 2014, provided that the extended time frame began on May 28, 2014. However, the Custodian failed to respond until June 17, 2014. The GRC notes that even if it were to calculate the extended time frame from the first (1<sup>st</sup>) day after the expiration of the seven (7) business days, or May 29, 2014, the Custodian's June 17, 2014 response still fell beyond the extended time of two (2) weeks.

Therefore, although the Custodian timely responded to the Complainant's OPRA request in writing by requesting an extension of two (2) weeks to respond, the Custodian's failure to respond timely in writing within the extended deadline of June 11, 2014 results in a "deemed" denial of access. N.J.S.A. 47:1A-5(i); Kohn, GRC 2007-124.

### **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.

OPRA provides that "[n]otwithstanding the provisions [OPRA] or any other law to the contrary, the personnel or pension records of any individual in the possession of a public agency . . . shall not be considered a government record . . ." N.J.S.A. 47:1A-10. OPRA begins with a presumption against disclosure and "proceeds with a few narrow exceptions that . . . need to be considered." Kovalcik, 206 N.J. at 594. These include "an individual's name, title, position, salary [and] *payroll record*." Id. (emphasis added).

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<sup>6</sup> The GRC notes that the Complainant did not raise the issue of whether the Custodian failed to immediately respond to his portion of the request seeking "salary." N.J.S.A. 47:1A-5(e).

Further, payroll records are specifically subject to disclosure under OPRA. N.J.S.A. 47:1A-10; Jackson v. Kean Univ., GRC Complaint No. 2002-98 (February 2004)(defining a “payroll record” for purposes of OPRA as records relating to payment of a public employee). Moreover, the Council has repeatedly ordered disclosure of payroll records. Marinaccio v. Borough of Fanwood (Union), GRC Complaint No. 2012-174 (July 2013); Vargas v. Camden City Sch. Dist. (Camden), GRC Complaint No. 2011-315(Interim Order dated January 29, 2013); Roarty v. Secaucus Bd. of Educ. (Hudson), GRC Complaint No. 2009-221 (January 2011).

A review of the record provided to the Complainant shows that the Custodian provided access to Mr. Weaver’s title, position, salary, and union membership. Further, the Custodian noted that differentials varied per pay. However, the Custodian did not include these actual differentials since January 2012, or the reason therefor as it relates to Mr. Weaver’s payroll record. Finally, the Custodian did not indicate whether Mr. Weaver received any stipends. As noted above, to the extent that these records fall within the definition of a “payroll record,” same should have been disclosed or the Custodian should have advised whether records responsive to this portion of the request existed.

Therefore, the Custodian may have unlawfully denied access to differential payments and the reason therefor from January 2012 to the date of the Complainant’s OPRA request. Further, the Custodian may have unlawfully denied access stipends. N.J.S.A. 47:1A-6. The Custodian must either disclose this information to the Complainant or, as an alternative, legally certify to the nonexistence of same.

### **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 OPRA request in writing requesting an extension of two (2) weeks to respond, the Custodian’s failure to respond timely in writing within the extended deadline of June 11, 2014 results in a “deemed” denial of access. N.J.S.A. 47:1A-5(i); Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
2. The Custodian may have unlawfully denied access to differential payments and the reason therefor from January 2012 to the date of the Complainant’s OPRA request. Further, the Custodian may have unlawfully denied access to stipends. N.J.S.A. 47:1A-6. The Custodian must either disclose this information to the Complainant or, as an alternative, legally certify to the nonexistence of same.

3. **The Custodian shall comply with item No. 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,<sup>7</sup> to the Executive Director.<sup>8</sup>**
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: Frank F. Caruso  
Communications Specialist/Resource Manager

Approved By: Dawn R. SanFilippo  
Deputy Executive Director

February 17, 2015

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<sup>7</sup> "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."

<sup>8</sup> 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.