



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

**January 31, 2019 Government Records Council Meeting**

William Galtieri  
Complainant

Complaint No. 2016-286

v.

County of Somerset  
Custodian of Record

At the January 31, 2019 public meeting, the Government Records Council (“Council”) considered the January 22, 2019 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 dated October 31, 2007).
2. The Custodian’s failure to locate responsive records until after she conducted an additional search, following receipt of the denial of access complaint, resulted in an insufficient search. Thus, the Custodian unlawfully denied access overtime records that were responsive to the Complainant’s OPRA request. N.J.S.A. 47:1A-6; Schneble v. N.J. Dep’t of Env’tl. Protection, GRC Complaint No. 2007-220 (April 2008); Scheeler, Jr. v. Woodbine Bd. of Educ. (Cape May), GRC Complaint No. 2014-59 (Interim Order dated January 30, 2015). However, the GRC declines to order disclosure of those records because the Custodian disclosed same to the Complainant on November 17, 2016.
3. In the matter currently before the Council, the Custodian’s insufficient search and subsequent delay in disclosure resulted in a “deemed” denial of access. However, the Custodian ultimately provided all located records to the Complainant on November 17, 2016. 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 January, 2019

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 5, 2019**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff  
January 31, 2019 Council Meeting**

**William Galtieri<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-286**

v.

**County of Somerset<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies of: “All overtime records for the Somerset County Sheriff’s Department, law enforcement officers and staff only, for the date of Friday, March 4, 2016.”

**Custodian of Record:** Kathye Quick  
**Request Received by Custodian:** October 3, 2016  
**Response Made by Custodian:** N/A  
**GRC Complaint Received:** November 4, 2016

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

**Request and Response:**

On October 3, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. The evidence in the record indicated that no response was provided by the Custodian prior to the complaint filing.

**Denial of Access Complaint:**

On November 4, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he received an acknowledgment from the Custodian on October 3, 2016 that the OPRA request was received and that the seven (7) time period would not start until October 4, 2016. The Complainant then stated that he did not receive any further correspondence from Custodian. The Complainant asserted that he sent a message to Deputy Counsel Carl Taylor on October 26, 2016, requesting an explanation for why no response was provided.

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

<sup>2</sup> Represented by Theodore Baker, Esq., County Counsel (Bridgeton, 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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

### Statement of Information:

On November 17, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on October 3, 2016. The Custodian certified that an inquiry was made to the relevant County Offices and Departments to determine if any responsive documents existed. The Custodian certified that the inquiry failed to locate responsive records.

The Custodian argued that under Paff v. Galloway, 444 N.J. Super. 495 (App. Div. 2016), government agencies are not required to create government records once an OPRA request was received. The Custodian also argued that OPRA requests were not prospective in nature.

The Custodian then stated that two (2) responsive records were located in a subsequent search and were attached to her SOI. Therefore, the Custodian stated that the matter should be resolved.

### 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 dated October 31, 2007).

Here, the Custodian asserted that her initial search did not locate responsive records. However, the Custodian stated that she did not respond to the Complainant to inform him of such. Although the Custodian claimed that OPRA requests are not prospective in nature, a Custodian is required to respond to the Complainant within the statutorily mandated seven (7) business days, even if the response is to state that no responsive records exist. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

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.

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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.

## **Insufficient Search**

It is the custodian's responsibility to perform a complete search for the requested records before responding to an OPRA request, as doing so will help ensure that the custodian's response is accurate and has an appropriate basis in law. In Schneble v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008), the custodian initially stated that no records responsive to the complainant's OPRA request existed. The custodian certified that after receipt of the complainant's denial of access complaint, which contained e-mails responsive to the complainant's request, the custodian conducted a second search and found records responsive to the complainant's request. The GRC held that the custodian had performed an inadequate search and thus unlawfully denied access to the responsive records. See also Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (January 2011).

Moreover, in Scheeler, Jr. v. Woodbine Bd. of Educ. (Cape May), GRC Complaint No. 2014-59 (Interim Order dated January 30, 2015), the custodian initially responded that no records existed. However, four (4) business days later, the custodian provided responsive records. Applying its prior decisions in Schneble, Lebbing, and Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 24, 2013), the Council held that the custodian performed an insufficient search.

Here, the Custodian stated that an initial search failed to locate responsive records but did not timely respond. Subsequent to the complaint filing, the Custodian stated that an additional search yielded responsive records and attached copies of same to her SOI. Thus, the evidence of record supports that the Custodian's initial search was insufficient and resulted in an unlawful denial of access. Such a finding is consistent with the Council's decision in Scheeler, Jr., GRC 2014-59 and its progeny.

Accordingly, the Custodian's failure to locate responsive records until after she conducted an additional search, following receipt of the denial of access complaint, resulted in an insufficient search. Thus, the Custodian unlawfully denied access overtime records that were responsive to the Complainant's OPRA request. N.J.S.A. 47:1A-6; Schneble, GRC 2007-220; Scheeler, Jr., GRC 2014-59. However, the GRC declines to order disclosure of those records because the Custodian disclosed same to the Complainant on November 17, 2016.

## **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)).

In the matter currently before the Council, the Custodian's insufficient search and subsequent delay in disclosure resulted in a "deemed" denial of access. However, the Custodian ultimately provided all located records to the Complainant on November 17, 2016. 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 Council Staff 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 dated October 31, 2007).
2. The Custodian's failure to locate responsive records until after she conducted an additional search, following receipt of the denial of access complaint, resulted in an insufficient search. Thus, the Custodian unlawfully denied access overtime records that were responsive to the Complainant's OPRA request. N.J.S.A. 47:1A-6; Schneble v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008); Scheeler, Jr. v. Woodbine Bd. of Educ. (Cape May), GRC Complaint No. 2014-59 (Interim Order dated January 30, 2015). However, the GRC declines to order disclosure of those records because the Custodian disclosed same to the Complainant on November 17, 2016.
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Custodian ultimately provided all located records to the Complainant on November 17, 2016. 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: Samuel A. Rosado  
Staff Attorney

January 22, 2018