



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

November 12, 2019 Government Records Council Meeting

Peter J. Cresci
Complainant

Complaint No. 2017-173

v.

City of Bayonne (Hudson)
Custodian of Record

At the November 12, 2019 public meeting, the Government Records Council (“Council”) considered the October 30, 2019 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 August 27, 2019 Interim Order because she responded in the extended time frame providing a complete response to the Complainant’s OPRA request, including providing responsive records, and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The original Custodian failed to respond to the Complainant’s OPRA request in violation of N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). The original Custodian also failed to provide a completed SOI to the GRC in violation of N.J.A.C. 5:105-2.4(a). Notwithstanding, the current Custodian complied with the Council’s August 27, 2019 Interim Order and provided a complete response to the Complainant’s OPRA request. Additionally, the evidence of record does not indicate that the original Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original 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 12th Day of November 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: November 15, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
November 12, 2019 Council Meeting**

**Peter J. Cresci¹
Complainant**

GRC Complaint No. 2017-173

v.

**City of Bayonne (Hudson)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of:

1. The City of Bayonne Police Department's ["BPD"] completed form UCR-365 (Monthly Count of Offenses Known to the Police) for the months of January 2011 through the present;
2. The [BPD]'s completed form UCR-370 (Age, Sex, Race and Ethnic Origin of Person Arrested – Ages 18 and Over) for the months of January 2011 through the present;
3. The [BPD]'s completed form UCR-370u18 (Age, Sex, Race and Ethnic Origin of Person Arrested – Under 18 Years of Age) for the months of January 2011 through the present;
4. A list of all lawsuits and cases in which [the] City of Bayonne ["Bayonne"] or [BPD] or any officer of [BPD] is a defendant, which were filed from January 1, 2010 to the present;
5. Copies of the Complainant and any Amended Complaint in any lawsuit or case described in Paragraph 4;
6. Copies of any settlement agreement, consent order, or other document that resolves, any lawsuit or claim brought against [Bayonne] or [BPD], or any officer of the [BPD], from January 1, 2010 to the present. This includes any document in which [Bayonne] or any representative, agent, insurer, JIF (Joint Insurance Fund), Insurance Commission, or Third Party Administrator (TPA) or other party acting on its behalf, made, makes or agrees to make a monetary payment or transfer of other valuable consideration to resolve a lawsuit or claim;
7. All Notices of Tort Claims presented to [Bayonne] under N.J.S.A. 59:8-1 to 11 since January 1, 2010 involving Police Department personnel;
8. A copy of the Internal Affairs Summary Report Form for BPD, as filed with the State or

¹ No legal representation listed on record.

² Represented by Jessica H. Connors, Esq. (Bayonne, NJ). Previously represented by John F. Coffey II, Esq. (Bayonne, NJ).

County Prosecutor, for the years of 2010 to the present. This document is required by pages 47 and 48 of the Attorney General's Internal Affairs Police and Procedure;

9. Copies of all Use of Force Reports filed by members of the BPD from January 1, 2010 to the present;
10. Copies of Employment Contracts for BPD Personnel, including but not limited to: Police Chief, Deputy Police Chief, and Public Safety Director (if any). Likewise, copies of all Employment Contracts (or drafts thereof) for the Chief, Bayonne Fire Department Personnel, including but not limited to Fire Chief, Deputy Fire Chief.
11. Copies of all police rules, regulations, general orders, or Standard Operating Procedures whose subject is any of the following: (a) Internal Affairs; (b) Hiring and Promotion of Police Officers; (c) Early Warning System, Risk Management System, and/or Performance Improvement System, designed to detect and correct potential misconduct by officers;
12. Copies of any accreditations sought, received, or renewed by BPD from January 1, 2011 to the present. These include accreditations from the Commission on Accreditation for Law Enforcement (CALEA), New Jersey Public Safety Accreditation Coalition, or any other accrediting body.
13. Records of Bayonne's city police not to comment on litigation.
14. Records of calculating and certifying "Time Due" for Police Personnel, Fire Personnel, Administration Personnel from January 2010 through Present, May 31, 2017.
15. Records for Payment of "Time Due" by Bayonne from January 2010 through present, May 31, 2017.
16. Records for the Chief of Police's radio and cellular transmissions during the week of February 23, 2017 which took place on the New Jersey Turnpike indicated in the Officer Robert Ryan incident which was confirmed by the N.J. Turnpike and N.J. State Troopers.
17. Records of BPD Personnel "off duty" overtime transmitted and paid through Bayonne for the time period January 1, 2010 – May 31, 2017. Please include records of time worked and payments to each individual officer, records of reimbursement if any by the third-party Vendor (including but not limited to Skansa (Bridge Project), New Jersey Turnpike construction contractors (14A reconfiguration), all PSE&G projects, and specifically the contractors milling Kennedy Boulevard).

Custodian of Record: Madeline Medina³
Request Received by Custodian: June 1, 2017
Response Made by Custodian: N/A
GRC Complaint Received: August 25, 2017

³ The original Custodian was Robert F. Sloan.

Background

August 27, 2019 Council Meeting:

At its August 27, 2019 public meeting, the Council considered the August 20, 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, found that:

1. The Custodian did not bear his burden of proof that he 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.
2. The Custodian's failure to provide a completed SOI to the GRC results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian's failure to respond to the GRC's multiple attempts to obtain the SOI protracted the adjudication process. N.J.S.A. 47:1A-7(b).
3. The Custodian may have unlawfully denied access to the Complainant's June 1, 2017 OPRA request. N.J.S.A. 47:1A-6. Thus, the Custodian shall provide a complete response and provide those records that exist to the Complainant. Should the Custodian not locate any responsive records for a particular item, she must certify to this fact.
4. **The Custodian shall comply with conclusion 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, if applicable. Further, the Custodian shall simultaneously deliver⁴ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁵ to the Executive Director.⁶**
5. 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.

⁴ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁵ "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."

⁶ 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.

Procedural History:

On August 28, 2019, the Council distributed its Interim Order to all parties. On September 3, 2019, Custodian's Counsel ("Counsel") requested an extension of three (3) weeks to comply with the Interim Order and prepare a Statement of Information ("SOI"). That same day, the Complainant responded via e-mail, objecting to a grant of any extension. On September 4, 2019, the GRC granted an extension to until September 19, 2019 to comply with the Council's Interim Order.

On September 19, 2019, the Custodian responded to the Council's Interim Order, providing a completed SOI and a CD containing responsive records. The Custodian also stated that several request items were not maintained by BPD. The Custodian also noted that some responsive records contained redactions and identified them within the Item 9 Index. However, the Custodian sought an additional ten (10) business days to respond to Item No. 17 of the Complainant's request, stating that approximately 1,300 pages of documents needed to be retrieved, scanned, and reviewed prior to disclosure. The GRC granted the extension in consideration of the volume of documents.

On October 3, 2019, the ninth (9th) day into the extension, the Custodian requested an additional ten (10) business days to provide a response to Item No. 17. On October 4, 2019, the GRC granted a final extension of ten (10) business days, to until the end of business on October 18, 2019.

On October 15, 2019, the Custodian responded in writing via eight (8) separate e-mails, attaching responsive records for Item No. 17, thereby completing its response to the Council's Interim Order.

Analysis

Compliance

At its August 27, 2019 meeting, the Council ordered the original Custodian to provide a complete response to the Complainant's OPRA request and provide those records that exist to the Complainant and/or certify that no records exist for a request item. Further, the Council ordered the original Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On August 28, 2019, 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 September 5, 2019, accounting for the holiday break.

On September 3, 2019, the third (3rd) business day after receipt of the Council's Order, Counsel requested an extension of time to respond, which the GRC granted to until September 19, 2019. On September 19, 2019, the Custodian responded to the Council's Order, providing a partial response to the Complainant's OPRA request. The Custodian asserted that an additional ten (10) business days was needed to provide a response to Item No. 17. On October 3, 2019, the Custodian requested an additional extension of ten (10) business days to respond, which the GRC granted to

October 18, 2019. On October 15, 2019, the Custodian provided a response to Item No. 17 via several e-mails with responsive records attached.

Therefore, the Custodian complied with the Council's August 27, 2019 Interim Order because she responded in the extended time frame providing a complete response to the Complainant's OPRA request, including providing responsive records, and simultaneously provided certified confirmation of compliance to the Executive Director.

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 before the Council, the original Custodian failed to respond to the Complainant's OPRA request in violation of N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). The original Custodian also failed to provide a completed SOI to the GRC in violation of N.J.A.C. 5:105-2.4(a). Notwithstanding, the current Custodian complied with the Council's August 27, 2019 Interim Order and provided a complete response to the Complainant's OPRA request. Additionally, the evidence of record does not indicate that the original Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original 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 August 27, 2019 Interim Order because she responded in the extended time frame providing a complete response to the Complainant's OPRA request, including providing responsive records, and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The original Custodian failed to respond to the Complainant's OPRA request in violation of N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). The original Custodian also failed to provide a completed SOI to the GRC in violation of N.J.A.C. 5:105-2.4(a). Notwithstanding, the current Custodian complied with the Council's August 27, 2019 Interim Order and provided a complete response to the Complainant's OPRA request. Additionally, the evidence of record does not indicate that the original Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original 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

October 30, 2019



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

INTERIM ORDER

August 27, 2019 Government Records Council Meeting

Peter J. Cresci
Complainant

Complaint No. 2017-173

v.

City of Bayonne (Hudson)
Custodian of Record

At the August 27, 2019 public meeting, the Government Records Council (“Council”) considered the August 20, 2019 Findings and Recommendations of the Council Staff 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 his burden of proof that he 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.
2. The Custodian’s failure to provide a completed SOI to the GRC results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian’s failure to respond to the GRC’s multiple attempts to obtain the SOI protracted the adjudication process. N.J.S.A. 47:1A-7(b).
3. The Custodian may have unlawfully denied access to the Complainant’s June 1, 2017 OPRA request. N.J.S.A. 47:1A-6. Thus, the Custodian shall provide a complete response and provide those records that exist to the Complainant. Should the Custodian not locate any responsive records for a particular item, she must certify to this fact.
4. **The Custodian shall comply with conclusion 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, if applicable. Further, the Custodian shall simultaneously deliver¹**

¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³

5. 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.

Interim Order Rendered by the
Government Records Council
On The 27th Day of August 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: August 28, 2019

² "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."

³ 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.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 27, 2019 Council Meeting**

**Peter J. Cresci¹
Complainant**

GRC Complaint No. 2017-173

v.

**City of Bayonne (Hudson)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of:

1. The City of Bayonne Police Department's ["BPD"] completed form UCR-365 (Monthly Count of Offenses Known to the Police) for the months of January 2011 through the present;
2. The [BPD]'s completed form UCR-370 (Age, Sex, Race and Ethnic Origin of Person Arrested – Ages 18 and Over) for the months of January 2011 through the present;
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4. A list of all lawsuits and cases in which [the] City of Bayonne ["Bayonne"] or [BPD] or any officer of [BPD] is a defendant, which were filed from January 1, 2010 to the present;
5. Copies of the Complainant and any Amended Complaint in any lawsuit or case described in Paragraph 4;
6. Copies of any settlement agreement, consent order, or other document that resolves, any lawsuit or claim brought against [Bayonne] or [BPD], or any officer of the [BPD], from January 1, 2010 to the present. This includes any document in which [Bayonne] or any representative, agent, insurer, JIF (Joint Insurance Fund), Insurance Commission, or Third Party Administrator (TPA) or other party acting on its behalf, made, makes or agrees to make a monetary payment or transfer of other valuable consideration to resolve a lawsuit or claim;
7. All Notices of Tort Claims presented to [Bayonne] under N.J.S.A. 59:8-1 to 11 since January 1, 2010 involving Police Department personnel;
8. A copy of the Internal Affairs Summary Report Form for BPD, as filed with the State or County Prosecutor, for the years of 2010 to the present. This document is required by

¹ No legal representation listed on record.

² No legal representation listed on record.

pages 47 and 48 of the Attorney General's Internal Affairs Police and Procedure;

9. Copies of all Use of Force Reports filed by members of the BPD from January 1, 2010 to the present;
10. Copies of Employment Contracts for BPD Personnel, including but not limited to: Police Chief, Deputy Police Chief, and Public Safety Director (if any). Likewise, copies of all Employment Contracts (or drafts thereof) for the Chief, Bayonne Fire Department Personnel, including but not limited to Fire Chief, Deputy Fire Chief.
11. Copies of all police rules, regulations, general orders, or Standard Operating Procedures whose subject is any of the following: (a) Internal Affairs; (b) Hiring and Promotion of Police Officers; (c) Early Warning System, Risk Management System, and/or Performance Improvement System, designed to detect and correct potential misconduct by officers;
12. Copies of any accreditations sought, received, or renewed by BPD from January 1, 2011 to the present. These include accreditations from the Commission on Accreditation for Law Enforcement (CALEA), New Jersey Public Safety Accreditation Coalition, or any other accrediting body.
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14. Records of calculating and certifying "Time Due" for Police Personnel, Fire Personnel, Administration Personnel from January 2010 through Present, May 31, 2017.
15. Records for Payment of "Time Due" by Bayonne from January 2010 through present, May 31, 2017.
16. Records for the Chief of Police's radio and cellular transmissions during the week of February 23, 2017 which took place on the New Jersey Turnpike indicated in the Officer Robert Ryan incident which was confirmed by the N.J. Turnpike and N.J. State Troopers.
17. Records of BPD Personnel "off duty" overtime transmitted and paid through Bayonne for the time period January 1, 2010 – May 31, 2017. Please include records of time worked and payments to each individual officer, records of reimbursement if any by the third-party Vendor (including but not limited to Skansa (Bridge Project), New Jersey Turnpike construction contractors (14A reconfiguration), all PSE&G projects, and specifically the contractors milling Kennedy Boulevard).

Custodian of Record: Robert F. Sloan

Request Received by Custodian: June 1, 2017

Response Made by Custodian: N/A

GRC Complaint Received: August 25, 2017

Background³

Request and Response:

On June 1, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 12, 2017, Christina LaGatta, on behalf of the Custodian, responded in writing stating that a full response to the Complainant’s request would be forthcoming later than day.

Denial of Access Complaint:

On August 25, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he did not receive a response to his OPRA request.

Statement of Information:

On September 21, 2017, the GRC sent the Custodian a request for the Statement of Information (“SOI”). The Custodian failed to submit the SOI to the GRC. On October 2, 2017, the GRC sent the Custodian a “No Defense” letter, stating that if the GRC did not receive the SOI within three (3) business days, the complaint would proceed to adjudication based only upon the information contained within the complaint. The Custodian failed to submit the SOI or otherwise respond to the GRC’s notice.

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).⁴ 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).

³ 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.

⁴ 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.

The Complainant submitted his request on June 1, 2017. The Custodian sent an e-mail on June 12, 2017, stating that a complete response would be forthcoming. However, the evidence in the record demonstrates that no further response was made, resulting in a “deemed” denial.

Therefore, the Custodian did not bear his burden of proof that he 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.

Failure to Submit SOI

OPRA also provides that “Custodians shall submit a completed and signed statement of information (SOI) form to the Council and the complainant simultaneously that details the custodians' position for each complaint filed with the Council[.]” N.J.A.C. 5:105-2.4(a).

OPRA further provides that:

Custodians shall submit a completed and signed SOI for each complaint to the Council's staff and the complainant not later than five business days from the date of receipt of the SOI form from the Council's staff . . . Failure to comply with this time period may result in the complaint being adjudicated based solely on the submissions of the complainant.

[N.J.A.C. 5:105-2.4(f).]

Finally, OPRA provides that “[a] custodian’s failure to submit a completed and signed SOI . . . may result in the Council’s issuing a decision in favor of the complainant.” N.J.A.C. 5:105-2.4(g). In Alterman, Esq. v. Sussex Cnty. Sheriff’s Office, GRC Complaint No. 2013-353 (September 2014), the custodian failed to provide a completed SOI to the GRC within the allotted deadline. Thus, the Council noted the custodian’s failure to adhere to N.J.A.C. 5:105-2.4(a). See also Kovacs v. Irvington Police Dep’t (Essex), GRC Complaint No. 2014-196 (January 2015); Howell v. Twp. of Greenwich (Warren), GRC Complaint No. 2015-249 (November 2016).

In the instant matter, the Custodian did not comply with the GRC’s initial request for an SOI. After the expiration of the five (5) business day deadline, the GRC again attempted to obtain a completed SOI from the Custodian by sending a “No Defense” letter and requesting a completed SOI within three (3) business days of receipt. This transmission also included a copy of the original SOI letter providing detailed instructions on how to properly submit an SOI. The Custodian failed to submit an SOI within the three (3) business days or otherwise response to the GRC’s letter.

Accordingly, the Custodian’s failure to provide a completed SOI to the GRC results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian’s failure to respond to the GRC’s multiple attempts to obtain the SOI protracted the adjudication process. N.J.S.A. 47:1A-7(b).

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.

Because the Custodian failed to respond to the Complainant’s OPRA request and failed to provide an SOI, no arguments can be discerned to justify the denial of access. For this reason, the GRC is requiring the Custodian to disclose the requested records, and/or provide certification to their non-existence.

Therefore, the Custodian may have unlawfully denied access to the Complainant’s June 1, 2017 OPRA request. N.J.S.A. 47:1A-6. Thus, the Custodian shall provide a complete response and provide those records that exist to the Complainant. Should the Custodian not locate any responsive records for a particular item, she must certify to this fact.

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. The Custodian did not bear his burden of proof that he 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.
2. The Custodian’s failure to provide a completed SOI to the GRC results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian’s failure to respond to the GRC’s multiple attempts to obtain the SOI protracted the adjudication process. N.J.S.A. 47:1A-7(b).
3. The Custodian may have unlawfully denied access to the Complainant’s June 1, 2017 OPRA request. N.J.S.A. 47:1A-6. Thus, the Custodian shall provide a complete response and provide those records that exist to the Complainant. Should the Custodian not locate any responsive records for a particular item, she must certify to this fact.

4. **The Custodian shall comply with conclusion 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, if applicable. Further, the Custodian shall simultaneously deliver⁵ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁶ to the Executive Director.⁷**
5. 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.

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⁵ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁶ "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."

⁷ 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.