



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**

**February 26, 2020 Government Records Council Meeting**

Stacie Percella  
Complainant

Complaint No. 2018-20

v.

City Bayonne (Hudson)  
Custodian of Record

At the February 26, 2020 public meeting, the Government Records Council (“Council”) considered the January 21, 2020 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The current Custodian complied with the Council’s November 12, 2019 Interim Order because she responded in the extended time frame (through Counsel) disclosing the responsive e-mail logs to the Complainant. The current Custodian also 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. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to the requested e-mail logs. N.J.S.A. 47:1-6. However, the current Custodian timely complied with the Council’s November 12, 2019 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 26<sup>th</sup> Day of February 2020

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: March 3, 2020**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
February 26, 2020 Council Meeting**

**Stacie Percella<sup>1</sup>  
Complainant**

**GRC Complaint No. 2018-20**

**v.**

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

**Records Relevant to Complaint:** Electronic copies via e-mail of e-mail logs for the following City of Bayonne (“City”) Law Department employees from January 1, 2016 through present:

1. John Coffey, II, Esq.
2. Donna Russo, Esq.
3. Karla Garcia, Esq.

**Custodian of Record:** Robert F. Sloan<sup>3</sup>

**Request Received by Custodian:** January 4, 2018

**Response Made by Custodian:** January 5, 2018

**GRC Complaint Received:** February 9, 2018

**Background**

November 12, 2019 Council Meeting:

At its November 12, 2019 public meeting, the Council considered the October 30, 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 extended time frame results in a “deemed” denial of said 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). See also Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).

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

<sup>2</sup> Represented by Jessica H. Connors, Esq. (Bayonne, NJ).

<sup>3</sup> The current custodian of record is Madelene C. Medina. Mr. Sloan retired effective May 31, 2019.

2. The Custodian unlawfully denied access to the e-mail logs responsive to the Complainant's January 4, 2018 OPRA request. N.J.S.A. 47:1A-6. Specifically, the Custodian was required to extract basic e-mail information from the three (3) identified accounts for the applicable time frame and disclose it to the Complainant. Paff v. Galloway Twp., 229 N.J. 340, 353 (2017). Thus, the Custodian must disclose the responsive e-mail logs to the Complainant, with redactions where applicable.
3. **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 deliver<sup>4</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>5</sup> to the Executive Director.<sup>6</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 November 14, 2019, the Council distributed its Interim Order to all parties. On November 20, 2019, Custodian's Counsel sent a letter to the Government Records Council ("GRC") stating that its new contractor, Integrated Microsystems Inc. ("Integrated"), advised that it could produce the requested e-mail logs. Counsel noted that because they were relying on Integrated, and due to the upcoming holiday, the City needed an extension of time until December 4, 2019 to comply with the Order. On the same day, the Complainant objected to any extensions of time. On November 21, 2019, the GRC responded granting an extension through December 4, 2019 in light of the circumstances presented by Counsel.

On December 4, 2019, the current Custodian responded to the Council's Interim Order attaching the City's response to the Complainant and a certification from Donna M. Russo, Esq. The current Custodian certified that on December 4, 2019, she received Custodian Counsel's letter response to the Complainant attaching five (5) e-mail logs with redactions under multiple exemptions. Therein, Custodian's Counsel acknowledged that the former contractor misunderstood the request, and that the City was waiving any potential special service charge based on the misunderstanding. Counsel further numbered each exemption and noted that the redactions included the number corresponding to the appropriate exemption.

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<sup>4</sup> 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.

<sup>5</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>6</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.

Ms. Russo also provided a legal certification regarding the reasons for her inability to produce “To” column information from her American Online (“AOL”) account. Therein, Ms. Russo certified to the extensive contact she had with AOL technicians and experts, who advised that its interface did not support displaying the “To” column in an e-mail log. Ms. Russo certified that AOL advised her that the only way to ascertain “To” column information was to open each individual e-mail.

## Analysis

### Compliance

At its November 12, 2019 meeting, the Council ordered the Custodian to disclose the responsive e-mail logs to the Complainant, with redactions where applicable. Further, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On November 14, 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 November 21, 2019.

On November 20, 2019, the (fourth) (4<sup>th</sup>) business day after receipt of the Council’s Order, Custodian’s Counsel sought and received an extension through December 4, 2019. On December 4, 2019, the final day of the extension, the current Custodian responded to the Council’s Order. Therein, the current Custodian certified that Counsel responded to the Complainant via e-mail on the same day copying her. That response comprised of approximately thirteen (13) e-mails transmitting a cover letter, multiple e-mail logs, and Mr. Russo’s certification.<sup>7</sup> Based on a review of the material provided in the compliance submission, the GRC is satisfied that the current Custodian complied with the Council’s Order.

Therefore, the current Custodian complied with the Council’s November 12, 2019 Interim Order because she responded in the extended time frame (through Counsel) disclosing the responsive e-mail logs to the Complainant. The current Custodian also 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).

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<sup>7</sup> The Complainant did not take issue with the redactions made to the responsive logs.

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 Custodian's failure to respond within the extended time frame resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to the requested e-mail logs. N.J.S.A. 47:1-6. However, the current Custodian timely complied with the Council's November 12, 2019 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 current Custodian complied with the Council's November 12, 2019 Interim Order because she responded in the extended time frame (through Counsel) disclosing the responsive e-mail logs to the Complainant. The current Custodian also 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. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to the requested e-mail logs. N.J.S.A. 47:1-6. However, the current Custodian timely complied with the Council's November 12, 2019 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  
Executive Director

January 21, 2020<sup>8</sup>

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<sup>8</sup> This complaint was prepared for adjudication at the Council's January 28, 2020 meeting, but could not be adjudicated due to lack of quorum.



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
PO BOX 819  
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PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**INTERIM ORDER**

**November 12, 2019 Government Records Council Meeting**

Stacie Percella  
Complainant

Complaint No. 2018-20

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 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 extended time frame results in a “deemed” denial of said 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). See also Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
2. The Custodian unlawfully denied access to the e-mail logs responsive to the Complainant’s January 4, 2018 OPRA request. N.J.S.A. 47:1A-6. Specifically, the Custodian was required to extract basic e-mail information from the three (3) identified accounts for the applicable time frame and disclose it to the Complainant. Paff v. Galloway Twp., 229 N.J. 340, 353 (2017). Thus, the Custodian must disclose the responsive e-mail logs to the Complainant, with redactions where applicable.
3. **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 deliver<sup>1</sup>**

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<sup>1</sup> 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,<sup>2</sup> to the Executive Director.<sup>3</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.

Interim Order Rendered by the  
Government Records Council  
On The 12<sup>th</sup> 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 14, 2019**

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<sup>2</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>3</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.

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Stacie Percella<sup>1</sup>  
Complainant**

**GRC Complaint No. 2018-20**

v.

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

**Records Relevant to Complaint:** Electronic copies via e-mail of e-mail logs for the following City of Bayonne (“City”) Law Department employees from January 1, 2016 through present:

1. John Coffey, II, Esq.
2. Donna Russo, Esq.
3. Karla Garcia, Esq.

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

**Request Received by Custodian:** January 4, 2018

**Response Made by Custodian:** January 5, 2018

**GRC Complaint Received:** February 9, 2018

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

**Request and Response:**

On January 4, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 5, 2018, Mr. Coffey responded in writing on behalf of the Custodian stating that the a thirty (30) calendar day extension “from the date of this letter” was required due to “the lack of available staff to answer” the OPRA request.

**Denial of Access Complaint:**

On February 9, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the City failed to respond to her OPRA request within the extended time frame to do so. The Complainant contended that

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

<sup>2</sup> Represented by Jessica H. Connors, Esq. (Bayonne, NJ).

<sup>3</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

“after 15 complaints . . . after one full year,” the GRC should find that the Custodian and Mr. Coffey knowingly and willfully violated OPRA. The Complainant contended that the City would continue to violate OPRA unless and until the GRC held them accountable by assessing a civil penalty.

Statement of Information:

On March 6, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on January 4, 2018. The Custodian certified that he forwarded the subject OPRA request to the Law Department for review. The Custodian certified that Mr. Coffey responded in writing on his behalf on January 5, 2018 extending the time frame thirty (30) calendar days. The Custodian certified that thereafter, he forwarded the OPRA request to the City’s Information Technology (“IT”) vendor to generate responsive records. The Custodian noted that the Law Department did not have the ability to generate e-mail logs; thus, the City had to rely on its IT vendor.

The Custodian averred that to date, he was still waiting for the IT vendor to address the OPRA request. The Custodian noted that on this day, he verbally confirmed that the IT vendor was still researching their ability to generate responsive records. The Custodian asserted that if there was an associated fee, he would notify the Complainant of same as soon as he receives it. The Custodian additionally sought an additional fourteen (14) calendar days to “address the [C]omplainant’s OPRA request.”

Additional Submissions:

On March 6, 2018, the Complainant e-mailed the GRC arguing that the City provided “false information.” The Complainant asserted that the IT vendor was a contracted position; thus, there could be no associated cost to produce the responsive e-mail logs. The Complainant further questioned how it could take over forty-four (44) days to produce e-mail logs given today’s technological environment. The Complainant contended that the City was not short-handed: they purportedly hired over 250 more employees under the current administration.

On March 15, 2018, Custodian’s Counsel submitted a letter brief and legal certification from Senior Systems Engineer Vladimir Rodriguez. Therein, Counsel stated that the City received a response from its IT vendor reflecting the non-existence of responsive e-mail logs. Rodriguez Cert. ¶ 3-4. Counsel stated that the IT vendor could not generate e-mail logs for two (2) reasons. Counsel stated that first, the maximum date range for e-mail audit logs was ninety (90) days. Rodriguez Cert. ¶ 4. Counsel stated that second, the audit logging function was not enabled on the computers of each identified Law Department employee. Id.

Counsel contended that this complaint differed from Paff v. Galloway Twp., 229 N.J. 340 (2017) because there, the requested log was between two (2) employees over two (2) weeks. Counsel asserted that here, the Complainant sought logs from three (3) accounts spanning two (2) years; these logs could not be created “with a few key strokes.” Counsel further argued that manually creating responsive files would substantially disrupt agency operations.

Counsel argued that the City complied with OPRA by directing its IT vendor to generate responsive records. Counsel asserted that this was a reasonable solution; however, the vendor could not create responsive logs. Counsel further argued that because no records exist, the City was not required to create same. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 537 (App. Div. 2005).

On March 20, 2018, the Complainant e-mailed the GRC disputing Counsel's March 15, 2018 letter brief. The Complainant noted that Jersey City "just had to hand their [e-mail logs] over" in response to an OPRA request. The Complainant argued that if Mr. Rodriguez was incapable of generating responsive logs, then the City should allow her to bring her own IT expert in to perform the job.

The Complainant contended that the City's refusal to provide responsive logs clearly amounted to a knowing and willful violation. The Complainant argued that the City could not hide behind Mr. Rodriguez's certification. The Complainant argued that she submitted this complaint because of the City's history of "NON-TRANSPARENCY." (Emphasis in original). The Complainant requested that the GRC not allow the City to "let their lie of not having [the responsive e-mail logs] be the final say in this matter."

### 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 October 31, 2007).

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 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 Custodian properly requested an extension of time to provide the requested records to the Complainant 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

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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.

N.J.S.A. 47:1A-5(i) . . . however . . . [b]ecause the Custodian failed to provide the Complainant access to the requested records by the extension date anticipated by the Custodian, the Custodian violated N.J.S.A. 47:1A-5(i) resulting in a “deemed” denial of access to the records.

[Id.]

Here, the Custodian initially responded on January 5, 2018, the first (1<sup>st</sup>) business day after receipt of the subject OPRA request, obtaining a thirty (30) day extension of time “from the date of this letter.” Because the extension reasonably began on January 6, 2018, the final day to respond was February 5, 2018. The Custodian did not respond within that time frame. In fact, the Custodian did not provide a definitive response to the Complainant denying access to her OPRA request until March 15, 2018. Thus, in keeping with Kohn, GRC 2007-124, the Custodian’s failure to respond prior to the extension expiration resulted 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 extended time frame results in a “deemed” denial of said request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. See also Kohn, GRC 2007-124.

Finally, in Wolosky v. Borough of Washington (Warren), GRC Complaint No. 2016-29 (Interim Order dated February 27, 2018), the Council cautioned custodians on the risk of utilizing a time frame for extensions, as opposed to identifying a definitive deadline date:

[T]he GRC notes that the risk that the time frame may expire on a holiday or weekend is inherent when a custodian provides a general time frame as opposed to an actual deadline date for the extension. Thus, best practices would dictate that a custodian provide a specific date, as opposed to a time frame, when seeking an extension of the statutory response time.

[Id. at 11].

### **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 Paff, 229 N.J. 340, the Supreme Court of New Jersey addressed a custodian’s obligation to coalesce information stored electronically into a single record. There, the Court accepted plaintiff’s appeal from the Appellate Division’s decision that the defendant municipality was not required to coalesce basic information into an e-mail log and disclose same. The Appellate Court

reached its conclusion by determining that such an action was akin to creating a record, which OPRA did not require (notwithstanding that the e-mail log would have taken a few key strokes to create). The Supreme Court reversed and remanded, holding that basic e-mail information stored electronically is a “government record” under OPRA, unless an exemption applies to that information. The Court reasoned that:

A document is nothing more than a compilation of information -- discrete facts and data. By OPRA’s language, information in electronic form, even if part of a larger document, is itself a government record. Thus, electronically stored information extracted from an email is not the creation of a new record or new information; it is a government record.

....

With respect to electronically stored information by a municipality or other public entity, we reject the Appellate Division's statement that “OPRA only allows requests for records, not requests for information.” Paff, 444 N.J. Super. at 503, (quoting Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005)). That position cannot be squared with OPRA's plain language or its objectives in dealing with electronically stored information.

[Id. at 353, 356.]

In the matter before the Council, the Complainant sought an e-mail log for three (3) individuals over an approximate two (2) year period. In the SOI, the Custodian certified that the City contacted its IT vendor and was awaiting confirming on whether the responsive logs could be created. Thereafter, on March 15, 2018, Custodian’s Counsel submitted Mr. Rodriguez’s certification, in which he certified that he could not produce “audit” logs as requested. Mr. Rodriguez certified that “audit logs” were only maintained for ninety (90) days and that the “audit logging function” was not enabled on the computers in question. Counsel also argued that Paff did not apply here because the subject OPRA request was more complicated and creating a record would take more than “a few key strokes.” The Complainant disputed the City’s responses, arguing that another agency recently disclosed e-mail logs without issue. The Complainant also argued that she should be allowed to use her own IT professional if Mr. Rodriguez could not generate the records.

At the core of this complaint is whether the City could produce e-mail logs from the accounts and time frames identified. Upon review of the evidence of record before it, the GRC believes that the City and its IT vendor may have misunderstood the record the Complainant sought. The Complainant’s OPRA request plainly sought an e-mail log like that at issue in Paff: a list showing the “To,” “From,” “Date/Time,” and “Subject” of all e-mails sent from January 1, 2016 through the date of the request. Notwithstanding, the City and its IT vendor continually referred to its inability to create an “audit log.”

According to Microsoft®,<sup>5</sup> Office 365 offers an “audit log” feature that shows user and administrative access activity through its many programs. Microsoft notes that this log is only available for ninety (90) days and must be turned on in order to initiate a search. A review of the sample audit log included on Microsoft’s website does not resemble a basic e-mail log. Instead, the “audit log” shows “Date,” “User,” “Activity” (*i.e.* “downloaded file,” “Accessed file”), “Item,” and “Detail” fields. Based on the foregoing, it is clear that the City attempted to access and produce a record different from what the Complainant sought in her OPRA request.

Ultimately, the GRC must follow the plain-reading of the Court’s decision in Paff, 229 N.J. 340 because it is precedential on this issue. Basic e-mail information contained within an e-mail account is stored “electronically,” and is thus a “government record” required to be extracted and disclosed under OPRA. Id. 353. For this reason, the GRC must require the City to produce the responsive e-mail logs sought by the Complainant. Further, the GRC is not persuaded by the Custodian’s argument that the Complainant’s OPRA request here was invalid simply because it was different from the one at issue in Paff.

Accordingly, the Custodian unlawfully denied access to the e-mail logs responsive to the Complainant’s January 4, 2018 OPRA request. N.J.S.A. 47:1A-6. Specifically, the Custodian was required to extract basic e-mail information from the three (3) identified accounts for the applicable time frame and disclose it to the Complainant. Paff, 229 N.J. at 353. Thus, the Custodian must disclose the responsive e-mail logs to the Complainant, with redactions where applicable.

### **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 extended time frame results in a “deemed” denial of said 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). See also Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
2. The Custodian unlawfully denied access to the e-mail logs responsive to the Complainant’s January 4, 2018 OPRA request. N.J.S.A. 47:1A-6. Specifically, the Custodian was required to extract basic e-mail information from the three (3) identified

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<sup>5</sup> <https://docs.microsoft.com/en-us/microsoft-365/compliance/search-the-audit-log-in-security-and-compliance> (accessed October 18, 2019).

accounts for the applicable time frame and disclose it to the Complainant. Paff v. Galloway Twp., 229 N.J. 340, 353 (2017). Thus, the Custodian must disclose the responsive e-mail logs to the Complainant, with redactions where applicable.

3. **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 deliver<sup>6</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 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  
Executive Director

October 30, 2019

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<sup>6</sup> 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.

<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.