



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

August 25, 2020 Government Records Council Meeting

Randall and Lynda Burns
Complainant

Complaint No. 2018-299

v.

Cape May County Sheriff's Office
Custodian of Record

At the August 25, 2020 public meeting, the Government Records Council ("Council") considered the August 18, 2020 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:

1. The Custodian complied with the Council's July 28, 2020 Interim Order because he responded in the prescribed time frame certifying that no responsive surety bond existed and affirming that Mr. Payne was not required to obtain a surety bond. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. Because no denial of access occurred, the Council should decline to address whether the Custodian knowingly and willfully violated OPRA 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 25th Day of August 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: August 27, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
August 25, 2020 Council Meeting**

**Randall and Lynda Burns¹
Complainant**

GRC Complaint No. 2018-299

v.

**Cape May County Sheriff's Office²
Custodial Agency**

Records Relevant to Complaint: Copies of Special Deputy Sheriff Herbert W. Payne's "Oath of Office and Allegiance" (sic), "Anti-Bribery Statement," Foreign Registration Statement," and Fidelity Surety Bond."

Custodian of Record: Sheriff Robert Payne³
Request Received by Custodian: November 16, 2018
Response Made by Custodian: November 21, 2018
GRC Complaint Received: November 30, 2018

Background

July 28, 2020 Council Meeting:

At its July 28, 2020 public meeting, the Council considered the July 21, 2020 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 has borne his burden of proof that he timely responded to the Complainants' OPRA request. N.J.S.A. 47:1A-6. As such, no "deemed" denial of access occurred here. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i).
2. The Custodian may have unlawfully denied access to the portion of Complainants' OPRA request seeking Mr. Payne's surety bond. N.J.S.A. 47:1A-6; Macek v. Bergen Cnty. Sheriff's Office, GRC Complaint No. 2017-156, *et seq.* (Interim Order dated June 25, 2019). The Custodian must locate and disclose Mr. Payne's surety bond to Complainants. The Custodian shall also certify to the GRC whether Mr. Payne is

¹ No legal representation listed on record.

² Represented by Jeffrey Lindsay, Esq. (Cape May Court House, NJ).

³ The Cape May County Sheriff's Office originally identified Antwan McClellan as the "Custodian of Record" in the Statement of Information. However, the Custodian clarified that he was the actual "Custodian of Record" as part of his response to the Council's Interim Order.

required to maintain same for employment. Should a sufficient search result in no responsive records, the Custodian is required to certify to this fact, inclusive of a search description.

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 deliver⁴ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁵ to the Executive Director.⁶**
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 July 29, 2020, the Council distributed its Interim Order to all parties. On the same day, the Custodian responded to the Council's Interim Order. Therein, the Custodian certified that he was not aware of any legal requirement or authority requiring Mr. Payne to obtain a surety bond to maintain his employment. The Custodian further affirmed that the Cape May County Sheriff's Office ("CMCSO") does not require Mr. Payne to obtain a surety bond as a condition of employment. The Custodian thus certified that no responsive surety bond exists.

Analysis

Compliance

At its July 28, 2020 meeting, the Council ordered the Custodian to either disclose Mr. Payne's surety bond or certify that none existed and certify whether Mr. Payne was required to obtain a surety bond as part of his employment. The Council further required the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule, R. 1:4-4, to the Executive Director. On July 29, 2020, 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 August 5, 2020.

On July 29, 2020, the same business day as receipt of the Council's Order, the Custodian responded certifying that no responsive surety bond existed. The Custodian also certified that Mr.

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.

Payne was not required to obtain a surety bond as a condition of his employment with the CMCSO. Finally, the Custodian provided certified confirmation of compliance to the Executive Director.

Therefore, the Custodian complied with the Council's July 28, 2020 Interim Order because he responded in the prescribed time frame certifying that no responsive surety bond existed and affirming that Mr. Payne was not required to obtain a surety bond. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

Finally, because no denial of access occurred, the Council should decline to address whether the Custodian knowingly and willfully violated OPRA 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 July 28, 2020 Interim Order because he responded in the prescribed time frame certifying that no responsive surety bond existed and affirming that Mr. Payne was not required to obtain a surety bond. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. Because no denial of access occurred, the Council should decline to address whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.

Prepared By: Frank F. Caruso
Executive Director

August 18, 2020



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

July 28, 2020 Government Records Council Meeting

Randall and Lynda Burns
Complainant

Complaint No. 2018-299

v.

Cape May County Sheriff's Office
Custodian of Record

At the July 28, 2020 public meeting, the Government Records Council ("Council") considered the July 21, 2020 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 has borne his burden of proof that he timely responded to the Complainants' OPRA request. N.J.S.A. 47:1A-6. As such, no "deemed" denial of access occurred here. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i).
2. The Custodian may have unlawfully denied access to the portion of Complainants' OPRA request seeking Mr. Payne's surety bond. N.J.S.A. 47:1A-6; Macek v. Bergen Cnty. Sheriff's Office, GRC Complaint No. 2017-156, *et seq.* (Interim Order dated June 25, 2019). The Custodian must locate and disclose Mr. Payne's surety bond to Complainants. The Custodian shall also certify to the GRC whether Mr. Payne is required to maintain same for employment. Should a sufficient search result in no responsive records, the Custodian is required to certify to this fact, inclusive of a search description.
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 deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³**

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.

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

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 28th Day of July 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: July 29, 2020

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
July 28, 2020 Council Meeting**

**Randall and Lynda Burns¹
Complainant**

GRC Complaint No. 2018-299

v.

**Cape May County Sheriff's Office²
Custodial Agency**

Records Relevant to Complaint: Copies of Special Deputy Sheriff Herbert W. Payne's "Oath of Office and Allegiance" (sic), "Anti-Bribery Statement," Foreign Registration Statement," and Fidelity Surety Bond."

Custodian of Record: Antwan McClellan
Request Received by Custodian: November 16, 2018
Response Made by Custodian: November 21, 2018
GRC Complaint Received: November 30, 2018

Background³

Request and Response:

On November 9, 2018, Complainants submitted an "Affidavit" request citing the Open Public Records Act ("OPRA") to the Custodian seeking the above-mentioned records. On November 21, 2018, the third (3rd) business day after receipt of the OPRA request, the Custodian responded in writing disclosing Mr. Payne's oath of office.⁴ The Custodian further stated that the "other documents requested are not applicable."

Denial of Access Complaint:

On November 30, 2018, Complainants filed a Denial of Access Complaint with the Government Records Council ("GRC"). Complainants asserted that the Custodian failed to respond to the subject OPRA request, even though they possessed a certified mail return receipt indicating that the Cape May County Sheriff's Office received the subject OPRA request on

¹ No legal representation listed on record.

² Represented by Jeffrey Lindsay, Esq. (Cape May Court House, NJ).

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 The GRC notes that OPRA exempts access to "any copy of an oath of allegiance, oath of office or any affirmation taken upon assuming the duties of any public office . . . except that the full name, title, and oath date of that person contained therein shall not be deemed confidential." N.J.S.A. 47:1A-1.1.

November 13, 2018. Complainants argued that the Custodian's failure to respond resulted in a "deemed" denial. Complainants demanded that the Council order disclosure of the requested records.

Statement of Information:

On January 14, 2019, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainants' OPRA request on November 16, 2018. The Custodian certified that his search included requesting the responsive records from Mr. Payne. The Custodian certified that he responded in writing on November 21, 2018 disclosing Mr. Payne's oath of office. The Custodian also averred that the "Anti-Bribery Statement, Foreign Registration Statement, and Fidelity Surety are [n]ot [a]pplicable."

The Custodian certified that he sent his response via regular mail and certified mail to the address provided by Complainants. The Custodian affirmed that the certified mail was returned to the County mail room on December 30, 2018.

Additional Submissions:

On January 23, 2019, Complainants e-mailed the GRC asserting that they still had not received any responsive records. On January 31, 2019, Complainants e-mailed the GRC asserting that they did not receive the SOI. Complainants noted that they were only seeking oath of offices and surety bonds. On the same day, the GRC forwarded Complainants a copy of the SOI and asked for confirmation that they received same.

On February 1, 2019, Complainants confirmed receipt of the SOI and acknowledged that the Custodian mailed "something." Complainants asserted that the Custodian mailed his response to their "property" address and not their "mailing" address, which was the correct address. Complainants contended that they included their mailing address "on the request." Further, Complainants questioned why the Custodian did not disclose Mr. Payne's surety bond. Complainants noted that they would consider the subject OPRA request satisfied if they received the outstanding surety bond. On the same day, the GRC sought clarification of Complainants' outstanding issues in this complaint. On February 13, 2019, Complainants confirmed that the complaint should proceed to adjudication unless they receive Mr. Payne's surety bond.

On February 27, 2019, the GRC sought additional information from the Custodian. Specifically, the GRC requested that the Custodian answer the following:

1. Does a surety bond for Mr. Payne exist on file with the Sheriff's Office?
2. If the answer to question No. 1 is **NO**, please certify to whether Mr. Payne was required to have a surety bond for employment with the Sheriff's Office as a Special Clerk.
3. If the answer to question No. 1 is **YES**, please certify to the reason why you did not disclose this record to the Complainant.

The GRC requested that the Custodian submit his response in the form of a certification by close of business on March 4, 2019. The GRC did not receive a response to the its request for additional information.

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).⁵ 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 the matter before the Council, Complainants argued that the Custodian failed to respond to her OPRA request. In the SOI, the Custodian certified that he responded via regular mail and certified mail on November 21, 2018. The Custodian noted that the certified mail was returned undeliverable. Following receipt of the SOI, Complainants argued that the Custodian sent his response to the incorrect address. Complainants further contended that their correct address was included in the OPRA request.

A review of the request, however, shows that Complainants identified the town to which the Custodian sent his response. This town differs from the "mailing" address town Complainants provided in the Denial of Access Complaint. There is no other evidence in the record to suggest that Complainants provided the "mailing" address as part of their request and the only identifying contact information within the OPRA request included the "property" address.⁶ Thus, the evidence supports that the Custodian timely responded and that an address issue resulted in same being unsuccessfully delivered.

Accordingly, the Custodian has borne his burden of proof that he timely responded to the Complainants' OPRA request. N.J.S.A. 47:1A-6. As such, no "deemed" denial of access occurred here. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i).

⁵ 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.

⁶ The GRC recognizes that a requestor is not required to submit their OPRA request on an agency's official OPRA request form. Renna v. Cnty. of Union, 407 N.J. Super. 230 (App. Div. 2009). Notwithstanding, utilizing an official OPRA request form here, or at the least a viable contact address included in the Affidavit, would have been useful to ensuring that the Custodian could respond to the proper address.

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.

Initially, the GRC notes that in e-mails dated January 31, and February 13, 2019, Complainants withdrew from consideration the portion of their request seeking Mr. Payne’s oath of office, “Anti-Bribery Statement,” and “Foreign Registration Statement.” However, Complainants are still challenging the existence and/or nondisclosure of Mr. Payne’s surety bond.

In Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), the Council held that a custodian did not unlawfully deny access to a request where they certified, and the record reflected, that they provided all records responsive to a request. However, in Macek v. Bergen Cnty. Sheriff’s Office, GRC Complaint No. 2017-156, *et seq.* (Interim Order dated June 25, 2019), the Council held that evidence contained in the record suggested that additional responsive records may exist. Based on this, the Council ordered the Custodian to perform another search and submit a certification regarding the results of that search.

In the matter before the Council, Complainants contended that the Custodian failed to properly respond to their OPRA request. In the SOI, the Custodian provided evidence that he sent Mr. Payne’s oath of office to Complainants via regular and certified mail. Further, the Custodian asserted in the SOI that Mr. Payne’s surety bond was “[n]ot [a]pplicable.” The GRC presumed that this assertion may be an indication that the oath of office was the only record that existed. To clarify this assumption, the GRC sought additional information from the Custodian. However, the Custodian did not respond to the GRC’s request; thus, the existence of a responsive surety bond remains in controversy. Based on the forgoing, the GRC cannot determine whether the requested surety bond exists. Thus, and like Macek, the evidence of record cannot support a conclusion that the Custodian disclosed the only record that existed and that no surety bond existed.

Therefore, the Custodian may have unlawfully denied access to the portion of Complainants’ OPRA request seeking Mr. Payne’s surety bond. N.J.S.A. 47:1A-6; Macek, GRC 2017-156, *et seq.* The Custodian must locate and disclose Mr. Payne’s surety bond to Complainants. The Custodian shall also certify to the GRC whether Mr. Payne is required to maintain same for employment. Should a sufficient search result in no responsive records, the Custodian is required to certify to this fact, inclusive of a search description.

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 has borne his burden of proof that he timely responded to the Complainants' OPRA request. N.J.S.A. 47:1A-6. As such, no "deemed" denial of access occurred here. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i).
2. The Custodian may have unlawfully denied access to the portion of Complainants' OPRA request seeking Mr. Payne's surety bond. N.J.S.A. 47:1A-6; Macek v. Bergen Cnty. Sheriff's Office, GRC Complaint No. 2017-156, *et seq.* (Interim Order dated June 25, 2019). The Custodian must locate and disclose Mr. Payne's surety bond to Complainants. The Custodian shall also certify to the GRC whether Mr. Payne is required to maintain same for employment. Should a sufficient search result in no responsive records, the Custodian is required to certify to this fact, inclusive of a search description.
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 deliver⁷ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁸ to the Executive Director.⁹**
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

July 21, 2020

⁷ 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.

⁸ "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."

⁹ 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.