



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

**January 7, 2020 Government Records Council Meeting**

Darren Nance  
Complainant

Complaint No. 2018-49

v.

City of Newark (Essex)  
Custodian of Record

At the January 7, 2020 public meeting, the Government Records Council (“Council”) considered the December 10, 2019 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. Although the Custodian properly sought an extension of time on November 16, 2017 to respond to the Complainant’s OPRA request, the request is “deemed” denied because the Custodian failed to respond timely within the extended timeframe. N.J.S.A. 47:1A-5(i), and Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-326 (February 2013).
2. Notwithstanding the Custodian’s “deemed” denial, he lawfully denied access to the Complainant’s request item No. 1 seeking documents related to the identified litigation, including payment vouchers and authorizations. N.J.S.A. 47:1A-6. Specifically, the Court Order permits attorneys to designate documents related to the Brown v. City of Newark litigation as confidential. N.J.S.A. 47:1A-1.1; “Consent Confidentiality/Protective Order” at 2-4.
3. Notwithstanding the Custodian’s “deemed” denial, he has borne his burden of proof that he lawfully denied access to the Complainant’s OPRA request Item No. 2 seeking invoices for legal services provided by Ms. Brown’s attorney in relation to litigation between Ms. Brown and the City. N.J.S.A. 47:1A-6. Specifically, the Custodian certified in the SOI, and the record reflects, that no responsive records exist. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
4. Although the Custodian violated N.J.S.A. 47:1A-5(i), he lawfully denied access to the Complainant’s November 16, 2017 OPRA request. 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 7<sup>th</sup> Day of January 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: January 9, 2020**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
January 7, 2020 Council Meeting**

**Darren Nance<sup>1</sup>  
Complainant**

**GRC Complaint No. 2018-49**

**v.**

**City of Newark (Essex)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Hard copies of:

- 1) Any/all City documents relating to any legal settlement concerning the matter of Karen Brown v. City of Newark. Said documents shall include any payment voucher(s) issued by the City of Newark [(“City”)] and any City Council vote which authorized said payment to Karen Brown and/or her attorney.
- 2) The legal invoice(s) for legal services in the matter of Karen Brown v. City of Newark.

**Custodian of Record:** Kenneth Louis  
**Request Received by Custodian:** November 16, 2017  
**Response Made by Custodian:** February 15, 2018  
**GRC Complaint Received:** March 22, 2018

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

**Request and Response:**

On November 16, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 16, 2017, the Custodian responded in writing, acknowledging receipt of the request and anticipating a response date of December 8, 2017.

On December 20, 2017, the eighth (8<sup>th</sup>) business day after the anticipated return date, the Custodian forwarded a letter received from the City’s Law Department, stating that an extension of time was needed to respond to the request, setting a new return date of January 26, 2018. On

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

<sup>2</sup> Represented by Samora F. Noguera, Esq. (Newark, 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.

January 26, 2018, the Custodian forwarded another letter from the Law Department seeking an additional extension to February 23, 2018.

On February 15, 2018, the Custodian forwarded a response from the Law Department. Therein, Avion M. Benjamin, First Assistant Corporation Counsel, stated that for Item No. 1, the records were deemed “Confidential Information” pursuant to a court order. Regarding Item No. 2, Mr. Benjamin stated that the Law Department was not in possession of any responsive records.

Denial of Access Complaint:

On February 22, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted initially that the Custodian failed to meet its obligation to respond by the December 8, 2017 deadline.

The Complainant then argued that the Custodian, as part of her February 15, 2018 response, failed to include a copy of the court order that allegedly deemed responsive records as confidential. The Complainant asserted that he requested the financial expenditure records and did not seek any details pertaining to the litigation itself. The Complainant also argued that the City has no legitimate or lawful claim to confidentiality based upon the financial disclosure of taxpayer monies.

The Complainant argued that the requested records are public records as defined under N.J.S.A. 47:1A-1.1, and subject to full disclosure. The Complainant asserted that the City has purposefully refused to provide the records in violation of OPRA. The Complainant also contended that information concerning the financial settlement agreement between the litigation parties was a matter of legitimate public concern, and that any purported interest in confidentiality was outweighed by the public interest in gaining access to said information.

Statement of Information:

On April 23, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on November 16, 2017. The Custodian certified that he responded in writing on February 15, 2018, forwarding a letter from Mr. Benjamin stating that records responsive to Item No. 1 are denied pursuant to a court order, and that the Law Department does not possess records responsive to Item No. 2.

The Custodian argued that under OPRA, “a government records shall not include . . . information which is to be kept confidential pursuant to a court order.” N.J.S.A. 47:1A-1.1. The Custodian argued that the Complainant seeks a settlement agreement stemming from litigation between Karen Brown and the City. The Custodian asserted that the agreement was sealed pursuant to a “Consent Confidentiality/Protective Order” (“CO”) dated April 7, 2016 and signed by the Hon. Garry Furnari. The Custodian included a copy of the CO in the SOI.

The Custodian noted that the order states in relevant part:

The following documents shall be deemed “Confidential Information” and thus subject to the within Consent Confidentiality/Protective Order, however Defendants have not and will not waive the right to assert attorney client privilege and/or work-product privilege with regard to Confidential Information referred to an/or produced in the context of this litigation:

...

d. Documents designated by the attorneys in this litigation as “Confidential.”

The Custodian asserted that attorneys for the City designated that the settlement agreement and other related documents would be confidential. The Custodian therefore forwarded the letter he received from Mr. Benjamin reciting this designation on February 18, 2018. Accordingly, the Custodian requested that the GRC deny the complaint.

### Analysis

#### Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Id. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).<sup>4</sup> Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).

OPRA provides that a custodian may request an extension of time to respond to the Complainant’s OPRA request but that a specific date by which the Custodian will further respond must be provided. N.J.S.A. 47:1A-5(i). OPRA also provides that, should the custodian fail to provide a response by that specific date, “access shall be deemed denied.” N.J.S.A. 47:1A-5(i). In Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-326 (February 2013), the custodian timely responded in writing on the fifth (5<sup>th</sup>) business day after receiving the complainant’s OPRA request, seeking five (5) additional days to respond. However, the custodian failed to respond within the additional time requested. Therefore, the Council held that there was a “deemed” denial of access under N.J.S.A. 47:1A-5(i).

In the instant matter, the Complainant stated that he submitted the OPRA request on November 16, 2017. That same day, the Custodian responded in writing acknowledging receipt of the request, but sought an extension of time to respond to until December 8, 2017. However, the

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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.

Custodian did not respond to the Complainant until December 20, 2017, eight (8) business days after the anticipated return date.

Therefore, although the Custodian properly sought an extension of time on November 16, 2017 to respond to the Complainant's OPRA request, the request is "deemed" denied because the Custodian failed to timely respond within the extended timeframe. N.J.S.A. 47:1A-5(i), and Kohn, GRC 2011-326.

### **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.

### **Documents Related to Legal Settlement/Payment Vouchers/City Council Vote**

OPRA also provides that "a government record shall not include . . . information which is to be kept confidential pursuant to a court order." N.J.S.A. 47:1A-1.1. Here, the Custodian provided a copy of the CO in relation to the litigation identified by the Complainant. The CO states in part:

The following documents shall be deemed "Confidential Information" and thus subject to the within Consent Confidentiality/Protective Order, however Defendants have not and will not waive the right to assert attorney client privilege and/or work-product privilege with regard to Confidential Information referred to an/or produced in the context of this litigation:

...

d. Documents designated by the attorneys in this litigation as "Confidential."

[CO at 2-3.]

In the current matter, the Complainant asserted that item No. 1 of his request was for financial expenditure records stemming from the litigation, and not the details of same nor resulting settlement agreement. The Complainant maintained that the records are not subject to any lawful claim to confidentiality. Conversely, the Custodian maintained that any documents related to the litigation, including payment vouchers and payment authorizations, are subject to the CO, relying on Mr. Benjamin's contention.

Upon reviewing the submissions and the attached CO, the GRC is satisfied that the Custodian lawfully denied access to the Complainant's request for documents related to the litigation, including payment vouchers and authorizations. The CO allows for the attorneys to designate related documents as confidential and includes "invoices" among other financial records

under the definition of “documents.” CO at 4.

Therefore, notwithstanding the Custodian’s “deemed” denial, he lawfully denied access to the Complainant’s request item No. 1 seeking documents related to the identified litigation, including payment vouchers and authorizations. N.J.S.A. 47:1A-6. Specifically, the CO permits attorneys to designate documents related to the *Brown v. City of Newark* litigation as confidential. N.J.S.A. 47:1A-1.1; CO at 2-4.

### Legal Invoices

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See *Pusterhofer v. N.J. Dep’t of Educ.*, GRC Complaint No. 2005-49 (July 2005). Here, the Complainant’s request Item No. 2 sought invoices for legal services provided by Ms. Brown’s attorney in relation to the identified litigation. In the SOI, the Custodian certified that no responsive records exist. Additionally, the Complainant did not provide evidence to refute the Custodian’s certification.

Therefore, notwithstanding the Custodian’s “deemed” denial, he has borne his burden of proof that he lawfully denied access to the Complainant’s OPRA request Item No. 2 seeking invoices for legal services provided by Ms. Brown’s attorney in relation to litigation between Ms. Brown and the City. N.J.S.A. 47:1A-6. Specifically, the Custodian certified in the SOI, and the record reflects, that no responsive records exist. See *Pusterhofer*, GRC 2005-49.

### 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)).

Although the Custodian violated N.J.S.A. 47:1A-5(i), he lawfully denied access to the Complainant's November 16, 2017 OPRA request. 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. Although the Custodian properly sought an extension of time on November 16, 2017 to respond to the Complainant's OPRA request, the request is "deemed" denied because the Custodian failed to respond timely within the extended timeframe. N.J.S.A. 47:1A-5(i), and Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-326 (February 2013).
2. Notwithstanding the Custodian's "deemed" denial, he lawfully denied access to the Complainant's request item No. 1 seeking documents related to the identified litigation, including payment vouchers and authorizations. N.J.S.A. 47:1A-6. Specifically, the Court Order permits attorneys to designate documents related to the Brown v. City of Newark litigation as confidential. N.J.S.A. 47:1A-1.1; "Consent Confidentiality/Protective Order" at 2-4.
3. Notwithstanding the Custodian's "deemed" denial, he has borne his burden of proof that he lawfully denied access to the Complainant's OPRA request Item No. 2 seeking invoices for legal services provided by Ms. Brown's attorney in relation to litigation between Ms. Brown and the City. N.J.S.A. 47:1A-6. Specifically, the Custodian certified in the SOI, and the record reflects, that no responsive records exist. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
4. Although the Custodian violated N.J.S.A. 47:1A-5(i), he lawfully denied access to the Complainant's November 16, 2017 OPRA request. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Samuel A. Rosado  
Staff Attorney

December 10, 2019