



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**

Edward Bray  
Complainant

Complaint No. 2018-95

v.

County of Salem  
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 voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). However, the GRC declines to order disclosure because the Custodian ultimately disclosed all responsive records on May 23, and June 18, 2018 respectively.
2. The Custodian’s failure to respond in a timely manner resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian ultimately disclosed responsive records on May 23, and June 18, 2018 respectively. 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**

**Edward W. Bray<sup>1</sup>  
Complainant**

**GRC Complaint No. 2018-95**

v.

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

**Records Relevant to Complaint:** Electronic copies via e-mail of:

1. Reports, memorandum, or e-mails summarizing total legal services expenses for the County of Salem (“County”) from January 1, 2015 through May 1, 2018.
2. Bills, expense reports, and invoices submitted for payment of legal services to the County from January 1, 2015 through May 1, 2018.
3. Reports, memorandum, or e-mails detailing payments made to any and all in-house or external counsel, “amounts paid, hours billed, and specific legal matters worked on” from January 1, 2015 through May 1, 2018.
4. Timeslips, hours worked reports, and other supporting documents submitted for any legal services payments from January 1, 2015 through May 1, 2018.<sup>3</sup>

**Custodian of Record:** Stacy Pennington  
**Request Received by Custodian:** May 4, 2018  
**Response Made by Custodian:** May 23, 2018  
**GRC Complaint Received:** May 23, 2018

**Background<sup>4</sup>**

**Request:**

On May 4, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.

**Denial of Access Complaint:**

On May 23, 2018, the Complainant filed a Denial of Access Complaint with the

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

<sup>2</sup> Represented by Michael M. Mulligan, Esq. (Salem, NJ).

<sup>3</sup> The Complainant also sought a Vaughn Index for any redactions made to the responsive records.

<sup>4</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.

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Government Records Council (“GRC”). The Complainant asserted that the Custodian failed to timely respond to his OPRA request. The Complainant noted that he attempted to contact the Custodian via telephone on four (4) occasions prior to filing this complaint.

Response:

On May 23, 2018, the thirteenth (13<sup>th</sup>) business day after receipt of the OPRA request, the Custodian allegedly responded in writing disclosing a spreadsheet summarizing legal expenses. On June 18, 2018, the Custodian allegedly responded in writing disclosing over 950 pages of vendors invoices, activity reports, vouchers, and purchase orders.

Statement of Information:

On June 18, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on May 1, 2018.<sup>5</sup> The Custodian certified that her search included asking the Finance Department to print all current vendor detail reports and associated invoices from the County’s accounting software. The Custodian further affirmed that two (2) staff members spent two (2) days in the County’s storage facility retrieving past vendor account reports and associated invoices. The Custodian certified that all reports were logged and highlighted, and an expense spreadsheet was created. The Custodian certified that she responded in writing on May 23, 2018 and again on June 18, 2018 disclosing over 950 pages of responsive records to the Complainant.<sup>6</sup>

The Custodian argued that her inability to timely respond to the instant OPRA request was the direct result of staffing issues. The Custodian averred that she was currently serving as the County Deputy Director, Director or Payroll/Human Resources (“HR”), Deputy Clerk of the Board, HR Compliance Training Officer, and OPRA custodian of record. The Custodian noted that she was also responsible for serving as the County receptionist through the end of April 2018. The Custodian noted that the Finance Department only employed three (3) individuals. The Custodian thus contended that her actions were not intentional; the County did not have enough manpower to timely comply with instant OPRA request.

**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

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<sup>5</sup> The Complainant’s OPRA request form identified the submission date as May 1, 2018; however, the evidence of record indicates that he submitted the request via e-mail on May 4, 2018. Thus, it appears the Custodian relied on the date contained within the OPRA request, and not the transmitting e-mail, when completing the SOI.

<sup>6</sup> The Custodian did not include copies of her responses as part of the SOI.

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N.J.S.A. 47:1A-5(g).<sup>7</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 the instant complaint, the Complainant argued that the Custodian failed to respond to his OPRA request. In the SOI, the Custodian certified that she received the Complainant's OPRA request on May 4, 2018. The Custodian further affirmed that she did not initially respond to the subject OPRA request until May 23, 2018, or the thirteenth (13<sup>th</sup>) business day after receipt of the subject OPRA request. Thus, the evidence of record supports that a "deemed" denial of access occurred here.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. However, the GRC declines to order disclosure because the Custodian ultimately disclosed all responsive records on May 23, and June 18, 2018 respectively.

Finally, the GRC notes that a portion of the Complainant's OPRA request sought invoices, which are considered "immediate access" records under OPRA. N.J.S.A. 47:1A-5(e). Thus, although not raised by the Complainant, the GRC notes that the Custodian had "an obligation to immediately" respond to the Complainant by granting access, denying access, seeking clarification, or requesting an extension time to this portion of the request. See also Kaplan v. Winslow Twp. Bd. of Educ. (Camden), GRC Complaint No. 2011-237 (Interim Order dated December 18, 2012); Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-330 (Interim Order dated February 26, 2013).

### **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> 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.

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 in a timely manner resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian ultimately disclosed responsive records on May 23, and June 18, 2018 respectively. 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 Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). However, the GRC declines to order disclosure because the Custodian ultimately disclosed all responsive records on May 23, and June 18, 2018 respectively.
2. The Custodian's failure to respond in a timely manner resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian ultimately disclosed responsive records on May 23, and June 18, 2018 respectively. 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

December 10, 2019