



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**

**December 15, 2020 Government Records Council Meeting**

Anonymous  
Complainant

Complaint No. 2019-162

v.

Borough of Haledon (Passaic)  
Custodian of Record

At the December 15, 2020 public meeting, the Government Records Council (“Council”) considered the December 8, 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 did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). However, the GRC declines to order any further action because the Custodian cured this issue on August 29, 2019 and the Complainant has not challenged that response.
2. The Custodian’s failure to timely respond 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 cured the response issue on August 29, 2019. 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 15<sup>th</sup> Day of December 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: December 17, 2020**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
December 15, 2020 Council Meeting**

**Anonymous<sup>1</sup>  
Complainant**

**GRC Complaint No. 2019-162**

**v.**

**Borough of Haledon (Passaic)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of the following for Michelle Young from January 1, 2013 through December 31, 2014:

1. Every oath of office.
2. Every attendance record, timesheet, and any similar records.
3. Paychex payroll summary for 2013 and 2014 showing amounts earned for each title held.

**Custodian of Record:** Allan R. Susen

**Request Received by Custodian:** July 29, 2019

**Response Made by Custodian:** August 1, 2019

**GRC Complaint Received:** August 12, 2019

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

**Request and Response:**

On July 29, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 1, 2019, the third (3<sup>rd</sup>) business day after receipt of the OPRA request, the Custodian responded in writing stating that no records responsive for item Nos. 1 and 2 exist. The Custodian noted that bi-weekly hours for payroll “were submitted in summary as a list.” The Custodian further stated that a special service charge applied to item No. 3.

**Denial of Access Complaint:**

On August 12, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian failed to

---

<sup>1</sup> legal representation listed on record.

<sup>2</sup> Represented by Andrew Oddo, Esq., of Law Office of Andrew P. Oddo (Oradell, 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.

respond to the subject OPRA request, thus resulting in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).

#### Supplemental Response:

On August 29, 2019, Deputy Clerk Vanessa Nienhouse e-mailed the Complainant a copy of the Custodian’s August 1, 2019 response. Ms. Nienhouse noted that the e-mail address entered into GovPilot, the Borough of Haledon’s (“Borough”) OPRA processing system, contained “a parenthesis causing it not to be delivered.” Ms. Nienhouse apologized for the mistake and noted that the Borough was working on “ways to be notified when a request is undeliverable.”

#### Statement of Information:

On August 29, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on July 29, 2019. The Custodian certified that his search included sending the subject OPRA request to the Police and Payroll Departments. The Custodian certified that he also searched employee files for the requested oaths of office. The Custodian certified that he responded in writing on August 1, 2019 advising that no records existed for item Nos. 1 and 2, while a special service charge applied to item No. 3.

The Custodian contended that when the subject OPRA request was entered into GovPilot, the applicable e-mail was misspelled. The Custodian averred that this misspelling prevented his August 1, 2019 response from going to the Complainant. The Custodian stated that upon notification of the instant complaint, the Borough discovered the error. The Custodian certified that the Borough resent his response on August 29, 2019. The Custodian noted that he is working with GovPilot to find a way for the system to produce an undeliverable notice when applicable.

### 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).

---

<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.

In the matter before the Council, the Complainant contended that the Custodian failed to respond to his OPRA request. In the SOI, the Custodian certified that he initially sent a response to the Complainant on August 1, 2019. The Custodian further certified that upon receipt of the complaint, the Borough discovered that the Complainant's e-mail address was entered into GovPilot improperly. The Custodian averred that the Borough corrected that issue by resending the response simultaneously with the SOI on August 29, 2019. Notwithstanding the Custodian's timely attempt to respond, the misspelled e-mail address resulted in a delivery failure and a "deemed" denial of access.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. However, the GRC declines to order any further action because the Custodian cured this issue on August 29, 2019 and the Complainant has not challenged that response.

### **Knowing & Willful**

OPRA states that "[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . ." N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states ". . . [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . ." N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (id.; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

In the matter before the Council, the Custodian's failure to timely respond 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 cured the response issue on August 29, 2019. 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 his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). However, the GRC declines to order any further action because the Custodian cured this issue on August 29, 2019 and the Complainant has not challenged that response.
2. The Custodian's failure to timely respond 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 cured the response issue on August 29, 2019. 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 8, 2020