



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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TRENTON, NJ 08625-0819

PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

**April 27, 2021 Government Records Council Meeting**

Elouise McDaniel  
Complainant

Complaint No. 2019-184

v.

Township of Irvington (Essex)  
Custodian of Record

At the April 27, 2021 public meeting, the Government Records Council (“Council”) considered the April 20, 2021 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 requests. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s two OPRA requests 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 requests 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).
2. The Custodian did not unlawfully deny access to the Complainant’s two July 10, 2019 OPRA requests because the Custodian certified that the requested records do not exist and the Complainant did not submit any competent, credible evidence to refute the Custodian’s certification. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). However, 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 an 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 27<sup>th</sup> Day of April 2021

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: April 29, 2021**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
April 27, 2021 Council Meeting**

**Elouise McDaniel<sup>1</sup>  
Complainant**

**GRC Complaint No. 2019-184**

v.

**Township of Irvington (Essex)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

Request number 1 dated July 10, 2019

Copies for pick-up of “all of the names of the Township employees who attended the United States Conference of Mayors in Hawaii. I am requesting all expenditures the Township spent for all of the employees including Mayor Vauss, any Board of Education employee, or employees that was (sic) on the trip for hotels, room service, meals, registration and all other expenses spent (sic) that are related to this trip.”

Request number 2 dated July 10, 2019

Copies for pick-up “from Police Director Tracy Bowers the name and location of all the 2019 conferences he attended including the one he mentioned in July 8, 2019 (sic) Director’s meeting. I am requesting the expenditures the Township of Irvington spent for those conferences.”

**Custodian of Record:** Harold E. Wiener

**Requests Received by Custodian:** July 10, 2019 and August 1, 2019

**Response Made by Custodian:** August 9, 2019 (request number 1 only)

**GRC Complaint Received:** August 29, 2019

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

Requests and Response:

On July 10, 2019, the Complainant submitted two (2) Open Public Records Act (“OPRA”) requests to the Custodian seeking the above-mentioned records. The Complainant provided the GRC with copies of the date stamped requests.

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

<sup>2</sup> Represented by Evelyn Onyeani, Esq. (Irvington, 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.

Request number 1 is stamped “Received July 10, 2019” by the municipality. On August 9, 2019, the twenty-second (22<sup>nd</sup>) business day following receipt of said request, Musa Malik on behalf of the Custodian, responded in writing via e-mail informing the Complainant that there are no records responsive to the request.

Request number 2 is stamped “Received August 1, 2019” by the municipality. There is nothing in the evidence of record indicating the Custodian responded to the request.

#### Denial of Access Complaint:

On August 29, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that on July 10, 2019 she filed two (2) OPRA requests: one for information regarding Township employee attendance at the Conference of Mayors, and one for information regarding Police Director Tracy Bowers’ attendance at conferences in 2019. The Complainant stated that she did not receive a response to either request.

#### Statement of Information:

On October 4, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA requests on July 10, 2019, July 26, 2019, and August 1, 2019.<sup>4</sup> The Custodian further certified that he responded in writing on August 9, 2019.

The Custodian certified that no such records requested by the Complainant are maintained by the Township. Further, the Custodian certified that because responsive records do not exist, they would have to be created. As such, the Custodian certified that there are no records responsive to the Complainant’s requests. The Custodian further certified that he “believed that such OPRA request (sic) was responded to with a denial.”

### Analysis

#### Timeliness

Unless a shorter time period is otherwise provided, a custodian must 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 accordingly 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>5</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

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<sup>4</sup> There is nothing in the evidence of record with regard to a request dated or received on July 26, 2019, except for this entry in the SOI.

<sup>5</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.

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).

Here, the evidence of record reveals that the Custodian responded to the Complainant's request number 1 twenty-two (22) business days following receipt of the request. Moreover, the evidence of record reveals that the Custodian failed to respond to the Complainant's request number 2.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's two OPRA requests 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 requests pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

### **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 Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005), the custodian certified that no records responsive to the complainant's request for billing records existed and the complainant submitted no evidence to refute the custodian's certification regarding said records. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian's certification, there was no unlawful denial of access to the requested records.

Here, the Custodian certified that there are no records responsive to the Complainant's requests because the requested records do not exist. Further, the Custodian certified that because responsive records do not exist, they would have to be created.

As such, the Custodian did not unlawfully deny access to the Complainant's two July 10, 2019 OPRA requests because the Custodian certified that the requested records do not exist and the Complainant did not submit any competent, credible evidence to refute the Custodian's certification. 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)).

The Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). However, 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 an 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 requests. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s two OPRA requests 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 requests 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).
2. The Custodian did not unlawfully deny access to the Complainant’s two July 10, 2019 OPRA requests because the Custodian certified that the requested records do not exist and the Complainant did not submit any competent, credible evidence to refute the Custodian’s certification. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). However, 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 an unreasonable denial of access under the totality of the circumstances.

Prepared By: John E. Stewart  
Staff Attorney

April 20, 2021