



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**

**April 26, 2022 Government Records Council Meeting**

Scott Madlinger  
Complainant

Complaint No. 2020-214

v.

Berkeley Township (Ocean)  
Custodian of Record

At the April 26, 2022 public meeting, the Government Records Council (“Council”) considered the April 19, 2022 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).
2. The Custodian did not unlawfully deny access to the current NJNG shut off list because the Custodian certified that such a record does not exist, and the Complainant failed to 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. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to timely respond to the Complainant’s OPRA request, she did respond on the ninth (9th) business day following receipt of the request. Additionally, the evidence of record does not indicate that her 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 26<sup>th</sup> Day of April 2022

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 28, 2022**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
April 26, 2022 Council Meeting**

**Scott Madlinger**<sup>1</sup>  
**Complainant**

**GRC Complaint No. 2020-214**

v.

**Berkeley Township (Ocean)**<sup>2</sup>  
**Custodial Agency**

**Records Relevant to Complaint:** Copies via e-mail of “current NJNG shutoff list notification.”<sup>3</sup>

**Custodian of Record:** Beverly M. Carle  
**Request Received by Custodian:** October 6, 2020  
**Response Made by Custodian:** October 20, 2020  
**GRC Complaint Received:** October 20, 2020

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

**Request and Response:**

On October 6, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On October 16, 2020, the Complainant e-mailed Lauren Staiger, Esq., stating that he did not receive a response to his OPRA request.<sup>5</sup> On October 20, 2020, the ninth (9<sup>th</sup>) business day following receipt of said request, the Custodian responded in writing informing the Complainant that Governor Murphy mandated no shut off of utilities, so she would not have a shut off list until the ban is lifted.

**Denial of Access Complaint:**

On October 20, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that on October 5, 2020, he submitted an OPRA request for the above-mentioned records. The Complainant stated that on October 16, 2020, he notified Lauren Staiger, Esq. that a response was due him, but he had not yet received it. The Complainant further stated that on October 20, 2020, he received a shut off list

---

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

<sup>2</sup> No legal representation listed on record.

<sup>3</sup> NJNG is the abbreviation for New Jersey Natural Gas.

<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.

<sup>5</sup> In the Statement of Information, the Custodian listed Lauren Staiger, Esq. as her legal counsel; however, the GRC did not receive a letter of representation or comparable communication from Ms. Staiger.

from March 2020.<sup>6</sup> The Complainant stated that there should be a recent shut off list. The Complainant stated that utilities were scheduled to be shut off on October 15, 2020, but Governor Murphy made a last-minute decision to halt shut offs. The Complainant asserted that shut off notices were sent to customers pending the October 15, 2020 shut off.

### Statement of Information:

On October 22, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on October 6, 2020 and responded in writing on October 20, 2020.

The Custodian certified that there are no records responsive to the Complainant’s request. The Custodian certified that the Complainant was provided with the March 2020 shut off notices on September 22, 2020, and the Township has not received any newer notices because NJNG announced that it would temporarily suspend service disconnections beginning March 16, 2020.<sup>7</sup> The Custodian certified that NJNG shut offs are e-mailed the day after the shut off occurs. The Custodian certified that Alexandra Aldarelli of NJNG, upon request of the Township, confirmed via e-mail that there is no shut off list for October 2020. The Custodian attached a copy of Ms. Aldarelli’s e-mail to the SOI.

The Custodian further certified that on October 15, 2020, Governor Murphy signed Executive Order 190 stating, “[n]o gas or electric public or municipal utility or privately or publicly owned water system shall discontinue any gas, electric, or water service to New Jersey residents, which includes all residential accounts and any accounts primarily serving residential customers, due to nonpayment unless the disconnection is to prevent or ameliorate a risk to public health or safety.” The Custodian certified that the Executive Order would remain in effect until March 2021.

## 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>8</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

---

<sup>6</sup> There is nothing in the evidence of record to indicate that the Complainant received a shut off list from March 2020 on October 20, 2020.

<sup>7</sup> Because the OPRA request for the instant complaint was received by the Custodian on October 6, 2020. The March 2020 shut off notices that were provided to the Complainant on September 22, 2020, were disclosed presumably in response to an earlier request.

<sup>8</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 Complainant stated that he sent a reminder to the Township on the last day of the statutorily mandated time frame for a response. Despite the reminder, the Complainant asserted that the Custodian did not respond until two (2) business days later on October 20, 2020. The Custodian certified that she received the OPRA request on October 6, 2020 and responded on October 20, 2020. The Custodian therefore responded to the Complainant's request on the ninth (9<sup>th</sup>) business day following receipt of the request.

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.

### **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 the current NJNG shut off list does not exist because NJNG temporarily suspended service disconnections beginning March 16, 2020. The Custodian certified that thereafter, on October 15, 2020, the Governor issued an Executive Order which banned utilities from disconnecting service to New Jersey residents. Moreover, the Custodian attached to the SOI an e-mail from Alexandra Aldarelli of NJNG dated October 20, 2020, stating that there is no shut off list for October 2020, which would be the "current" NJNG shut off list.

As such, the Custodian did not unlawfully deny access to the current NJNG shut off list because the Custodian certified that such a record does not exist, and the Complainant failed to 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)).

Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to timely respond to the Complainant’s OPRA request, she did respond on the ninth (9th) business day following receipt of the request. Additionally, the evidence of record does not indicate that her 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 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).
2. The Custodian did not unlawfully deny access to the current NJNG shut off list because the Custodian certified that such a record does not exist, and the Complainant failed to

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. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to timely respond to the Complainant's OPRA request, she did respond on the ninth (9th) business day following receipt of the request. Additionally, the evidence of record does not indicate that her 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 19, 2022