



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

August 30, 2022 Government Records Council Meeting

James J. Creegan III
Complainant

Complaint No. 2021-27

v.

County of Essex
Custodian of Record

At the August 30, 2022 public meeting, the Government Records Council (“Council”) considered the August 23, 2022 Supplemental 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. Olivia Schumann did not fully comply with the Council’s July 26, 2022 Interim Order. Specifically, although Ms. Schumann provided responsive records and simultaneously provided certified confirmation of compliance to the Executive Director, she failed respond to within the prescribed time frame.
2. Christopher Durkin violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to respond to respond to the Complainant’s OPRA request. Mr. Durkin also failed to respond to the GRC’s Statement of Information request. N.J.A.C. 5:105-2.4(a). Additionally, Ms. Schumann failed to fully comply with the Council’s July 26, 2022 Interim Order. However, Ms. Schumann ultimately provided the Complainant with all responsive records to the request in accordance with said Order. Additionally, the evidence of record does not indicate that Mr. Durkin’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Mr. Durkin’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 30th Day of August 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: September 1, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
August 30, 2022 Council Meeting**

**James J. Creegan, III¹
Complainant**

GRC Complaint No. 2021-27

v.

**County of Essex²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of: “all certified payrolls for work being performed at the Weequahic Park New Community Center. The time period being requested is November 1, 2020 through the present. The Project number is 20-152”

Custodian of Record: Christopher J. Durkin³
Request Received by Custodian: January 7, 2021
Response Made by Custodian: N/A
GRC Complaint Received: January 22, 2021

Background

July 26, 2022 Council Meeting:

At its July 26, 2022 public meeting, the Council considered the July 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, found that:

1. The Custodian’s failure to provide a completed Statement of Information to the Government Records Council (“GRC”), despite more than one request, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian’s failure to respond additionally obstructed the GRC in its efforts to “receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . .” N.J.S.A. 47:1A-7(b).
2. 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

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The listed Custodian of Record is Olivia Schumann, Esq.

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).

3. The Custodian may have unlawfully denied access to the Complainant’s January 7, 2021 OPRA request. N.J.S.A. 47:1A-6. Thus, the Custodian must locate and disclose it to the Complainant. If the Custodian already disclosed the request during the pendency of this complaint, he must certify to that fact and include documentation evidencing the disclosure. Further, should the Custodian determine that responsive records do not exist, he must certify to this fact.
4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver⁴ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁵ to the Executive Director.⁶**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Procedural History:

On July 27, 2022, the Council distributed its Interim Order to all parties. On August 4, 2022, Olivia Schumann e-mailed the GRC asserting that the Interim Order was the first correspondence she received regarding the matter. Ms. Schumann also stated that the OPRA request and Statement of Information (“SOI”) request were sent to the Essex County Clerk and were never forwarded to her attention. That same day, the GRC responded to Ms. Schumann, stating that Essex County (“County”) had the option of responding to the Interim Order, requesting reconsideration of the Interim Order by August 10, 2022, or filing an appeal with the Appellate Division. On August 8, 2022, the GRC forwarded the complaint and subsequent correspondence to Ms. Schumann.

On August 9, 2022, Ms. Schumann responded to the Council’s Interim Order, providing responsive records and certifications. Ms. Schumann certified that she was the Custodian of Record for Essex County and was not forwarded the OPRA request at issue. Ms. Schumann

⁴ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁵ “I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.”

⁶ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

certified that once she received the Council’s Interim Order, she began to search her e-mail accounts for a copy of the OPRA request or of the complaint at issue. Ms. Schumann certified that the Complainant improperly submitted his OPRA request to the Essex County Clerk and not the Custodian of Record. Ms. Schumann certified that upon receiving copies of the OPRA request and complaint from the GRC, she conducted a search for responsive records.

Ms. Schumann next certified that on August 5, 2022, she received copies of responsive records from the Essex County Department of Public Works (“DPW”), with redactions made to home addresses, tax identification numbers, and social security numbers.⁷ Ms. Schumann certified that copies of these records were provided to the Complainant on August 9, 2022, and that no other responsive records exist. Ms. Schumann certified that the County’s failure to respond to the OPRA request and the GRC’s SOI request was unintentional and was due to the lack of notice give to same.

Ms. Schumann also included a certification from Nicolas Romano of the County Clerk’s Office. Mr. Romano certified that while the e-mail address “info@essexclerk.com” was active at the time of the request in January 2021, said e-mail address was deactivated on March 1, 2022, and replaced with another e-mail address. Mr. Romano certified that the Clerk’s Office no longer has access to the contents of the e-mail. Mr. Romano certified that while it was unknown whether an employee viewed the e-mail, it was not forwarded to Ms. Schumann due to an inadvertent oversight. Mr. Romano further certified that at the time the GRC submitted its SOI request on February 4, 2021, he was out of town from February 3, 2021 through February 11, 2021, and therefore no one was available to forward the request to Ms. Schumann. Mr. Romano certified to the same regarding the GRC’s “No Defense” letter, asserting that it was also an unintentional oversight that the e-mail was not forwarded to Ms. Schumann.⁸

Ms. Schumann also included a certification from David Antonio, who conducted records searches for DPW. Mr. Antonio certified that he first learned of the Complainant’s OPRA request on August 5, 2022, when he received a phone call from Ms. Schumann. Mr. Antonio then certified that upon conducting a search that same day, he located thirty-nine (39) pages of responsive records and forwarded same to Ms. Schumann. Mr. Antonio further certified that no other responsive records exist.

Analysis

Compliance

At its July 26, 2022 meeting, the Council ordered the Custodian to locate and disclose responsive records to the Complainant’s OPRA request, or certify that none exist. The Council further ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On July 27, 2022, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the

⁷ The GRC declines to address the redactions made to the records since the Complainant has not disputed same.

⁸ Based upon Mr. Romano’s certification, either he or an employee at the Essex County Clerk’s office violated N.J.S.A. 47:1A-5(h) by failing to forward the Complainant’s OPRA request to Ms. Schumann, or in the alternative, return the OPRA request to the Complainant and directing same to Ms. Schumann as the proper Records Custodian.

terms of said Order. Thus, the Custodian's response was due by close of business on August 3, 2022.

On August 4, 2022, Ms. Schumann contacted the GRC, advising that she never received the OPRA request at issue nor the subsequent complaint and SOI request. On August 8, 2022, the GRC forwarded the request and subsequent documentation to Ms. Schumann.

On August 9, 2022, the ninth (9th) business day after receipt of the Council's Order, Ms. Schumann responded to the Council's Order, providing responsive records and certifications from Mr. Romano with the Clerk's Office and Mr. Antonio with DPW. Ms. Schumann also provided certified confirmation of compliance to the Executive Director. Thus, Ms. Schumann did not fully comply with the Interim Order due to a timeliness issue.

Therefore, Ms. Schumann did not fully comply with the Council's July 26, 2022 Interim Order. Specifically, although Ms. Schumann provided responsive records and simultaneously provided certified confirmation of compliance to the Executive Director, she failed respond to within the prescribed time frame.

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 instant matter, Mr. Durkin violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to respond to respond to the Complainant's OPRA request. Mr. Durkin also failed to respond to the GRC's SOI request. N.J.A.C. 5:105-2.4(a). Additionally, Ms. Schumann failed to fully comply with the Council's July 26, 2022 Interim Order. However, Ms. Schumann ultimately

provided the Complainant with all responsive records to the request in accordance with said Order. Additionally, the evidence of record does not indicate that Mr. Durkin's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Mr. Durkin'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. Olivia Schumann did not fully comply with the Council's July 26, 2022 Interim Order. Specifically, although Ms. Schumann provided responsive records and simultaneously provided certified confirmation of compliance to the Executive Director, she failed respond to within the prescribed time frame.
2. Christopher Durkin violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to respond to respond to the Complainant's OPRA request. Mr. Durkin also failed to respond to the GRC's Statement of Information request. N.J.A.C. 5:105-2.4(a). Additionally, Ms. Schumann failed to fully comply with the Council's July 26, 2022 Interim Order. However, Ms. Schumann ultimately provided the Complainant with all responsive records to the request in accordance with said Order. Additionally, the evidence of record does not indicate that Mr. Durkin's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Mr. Durkin'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

August 23, 2022



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

INTERIM ORDER

July 26, 2022 Government Records Council Meeting

James J. Creegan III
Complainant

Complaint No. 2021-27

v.

County of Essex
Custodian of Record

At the July 26, 2022 public meeting, the Government Records Council (“Council”) considered the July 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’s failure to provide a completed Statement of Information to the Government Records Council (“GRC”), despite more than one request, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian’s failure to respond additionally obstructed the GRC in its efforts to “receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . .” N.J.S.A. 47:1A-7(b).
2. 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 dated October 31, 2007).
3. The Custodian may have unlawfully denied access to the Complainant’s January 7, 2021 OPRA request. N.J.S.A. 47:1A-6. Thus, the Custodian must locate and disclose any responsive records to the Complainant. If the Custodian already disclosed records during the pendency of this complaint, he must certify to that fact and include documentation evidencing the disclosure. Further, should the Custodian determine that responsive records do not exist, he must certify to this fact.
4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each**



redaction, if applicable. Further, the Custodian shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³

5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 26th Day of July 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: July 27, 2022

¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

² "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

³ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**James J. Creegan, III¹
Complainant**

GRC Complaint No. 2021-27

v.

**County of Essex²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of: “all certified payrolls for work being performed at the Weequahic Park New Community Center. The time period being requested is November 1, 2020 through the present. The Project number is 20-152”

Custodian of Record: Christopher J. Durkin
Request Received by Custodian: January 7, 2021
Response Made by Custodian: N/A
GRC Complaint Received: January 22, 2021

Background³

Request and Response:

On January 7, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.

Denial of Access Complaint:

On January 22, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that on January 21, 2021 he left a voicemail with the County of Essex (“County”) along with his contact information. The Complainant asserted that as of January 22, 2021, the Custodian has not provided a response to his OPRA request or returned his call.

Statement of Information:

On February 4, 2021, the GRC requested a Statement of Information (“SOI”) from the

¹ No legal representation listed on record.

² No legal representation listed on record.

³ 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.

Custodian. On February 23, 2021, the GRC sent a “No Defense” letter to the Custodian, requesting a completed SOI within three (3) business days of receipt. The GRC noted that the Custodian’s failure to submit an SOI could lead to an adjudication based solely on the Complainant’s submission. N.J.A.C. 5:105-2.4(f). To date, the Custodian has not responded.

Analysis

Failure to Submit SOI

OPRA also provides that “Custodians shall submit a completed and signed statement of information (SOI) form to the Council and the complainant simultaneously that details the custodians' position for each complaint filed with the Council[.]” N.J.A.C. 5:105-2.4(a).

OPRA further provides that:

Custodians shall submit a completed and signed SOI for each complaint to the Council's staff and the complainant not later than five business days from the date of receipt of the SOI form from the Council's staff . . . Failure to comply with this time period may result in the complaint being adjudicated based solely on the submissions of the complainant.

[N.J.A.C. 5:105-2.4(f).]

Finally, OPRA provides that “[a] custodian’s failure to submit a completed and signed SOI . . . may result in the Council’s issuing a decision in favor of the complainant.” N.J.A.C. 5:105-2.4(g). In Alterman, Esq. v. Sussex Cnty. Sheriff’s Office, GRC Complaint No. 2013-353 (September 2014), the custodian failed to provide a completed SOI to the GRC within the allotted deadline. Thus, the Council noted the custodian’s failure to adhere to N.J.A.C. 5:105-2.4(a). See also Kovacs v. Irvington Police Dep’t (Essex), GRC Complaint No. 2014-196 (January 2015); Howell v. Twp. of Greenwich (Warren), GRC Complaint No. 2015-249 (November 2016).

In the instant matter, the Custodian did not comply with the GRC’s initial request for an SOI dated February 4, 2021. On February 23, 2021, well after the expiration of the five (5) business day deadline, the GRC provided the Custodian with a “No Defense” letter providing him an additional three (3) business days to submit the requested SOI. However, the GRC never received a completed SOI or any communication from the Custodian.

Accordingly, the Custodian’s failure to provide a completed SOI to the GRC, despite more than one request, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian’s failure to respond additionally obstructed the GRC in its efforts to “receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . .” N.J.S.A. 47:1A-7(b).

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).⁴ 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).

In the instant matter, the evidence of record demonstrates that the Complainant submitted his OPRA request to the Custodian on January 7, 2021, seeking payroll records. As of January 22, 2021, the ninth (9th) business day after receipt, the Custodian provided no response to the request or any communication to the Complainant. Thus, the evidence of record supports that a "deemed" denial of access occurred here.

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.

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.

OPRA begins with a presumption against disclosure and "proceeds with a few narrow exceptions that . . . need to be considered." Kovalcik v. Somerset Cnty. Prosecutor's Office, 206 N.J. 581, 594 (2011). These are:

[A]n individual's name, title, position, salary, *payroll record*, length of service, date of separation and the reason therefore, and the amount and type of any pension received shall be government record;

[P]ersonnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and

⁴ 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.

[D]ata contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.

[Id. (emphasis added).]

In the instant matter, the Complainant requested payroll records pertaining to a specific project for a certain period. On its face, the request for payroll records is not exempt from disclosure pursuant to N.J.S.A. 47:1A-10. Since the Custodian failed to provide any response to the Complainant or submit a completed SOI, the GRC must find in favor of the Complainant and hold that the Custodian may have unlawfully denied access to the responsive records. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10; Kovalcik, 206 N.J. at 594.

Accordingly, the Custodian may have unlawfully denied access to the Complainant's January 7, 2021 OPRA request. N.J.S.A. 47:1A-6. Thus, the Custodian must locate and disclose any responsive records to the Complainant. If the Custodian already disclosed records during the pendency of this complaint, he must certify to that fact and include documentation evidencing the disclosure. Further, should the Custodian determine that responsive records do not exist, he must also certify to this fact.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to provide a completed Statement of Information to the Government Records Council ("GRC"), despite more than one request, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian's failure to respond additionally obstructed the GRC in its efforts to "receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . ." N.J.S.A. 47:1A-7(b).
2. 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 dated October 31, 2007).

3. The Custodian may have unlawfully denied access to the Complainant's January 7, 2021 OPRA request. N.J.S.A. 47:1A-6. Thus, the Custodian must locate and disclose any responsive records to the Complainant. If the Custodian already disclosed records during the pendency of this complaint, he must certify to that fact and include documentation evidencing the disclosure. Further, should the Custodian determine that responsive records do not exist, he must certify to this fact.
4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver⁵ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁶ to the Executive Director.⁷**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado
Staff Attorney

July 19, 2022

⁵ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁶ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁷ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.