



**State of New Jersey**  
GOVERNMENT RECORDS COUNCIL  
101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

**CHRIS CHRISTIE**  
*Governor*

**KIM GUADAGNO**  
*Lt. Governor*

**LORI GRIFA**  
*Commissioner*

**FINAL DECISION**

**October 26, 2010 Government Records Council Meeting**

David H. Weiner  
Complainant

Complaint No. 2010-121

v.

Newark Housing Authority (Essex)  
Custodian of Record

At the October 26, 2010 public meeting, the Government Records Council (“Council”) considered the October 19, 2010 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 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 of receipt of the OPRA request 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. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Although the Custodian’s failure to provide a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days resulted in a “deemed” denial and a violation of N.J.S.A. 47:1A-5.g., because the Custodian provided the Complainant with the requested records twenty (20) business days following the date of receipt of the Complainant’s request, it is concluded that 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 26<sup>th</sup> Day of October, 2010

Robin Berg Tabakin, Chair  
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Charles A. Richman, Secretary  
Government Records Council

**Decision Distribution Date: November 3, 2010**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
October 26, 2010 Council Meeting**

**David H. Weiner<sup>1</sup>  
Complainant**

**GRC Complaint No. 2010-121**

v.

**Newark Housing Authority (Essex)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of the following records:

1. Memorandum of Agreement Purpose entered into by the Newark Housing Authority (“NHA”) to demolish 502 units of public housing at Baxter Terrace.
2. The Dust Mitigation Plan prepared by the NHA that was part of the bidding process for the letting of the MOA/contract for the demolition of Baxter Terrace.

**Request Made:** May 25, 2010<sup>3</sup>

**Response Made:** June 23, 2010

**Custodian:** Arthur N. Martin, Jr.

**GRC Complaint Filed:** June 17, 2010<sup>4</sup>

**Background**

**May 25, 2010**

Complainant’s Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint listed above in a letter referencing OPRA.

**June 17, 2010**

Denial of Access Complaint filed with the Government Records Council (“GRC”) attaching complainant’s OPRA request dated May 25, 2010.

The Complainant states that he faxed and sent his OPRA request via U.S. certified mail to the Custodian. The Complainant also states that as of the time of this Denial of Access Complaint, the Custodian did not respond to the OPRA request.

The Complainant agrees to mediate this complaint.

**June 21, 2010**

Offer of Mediation sent to the Custodian.<sup>5</sup>

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

<sup>2</sup> Represented by Ellen M. Harris, Esq. (Newark, NJ).

<sup>3</sup> The Custodian received the Complainant’s OPRA request on May 26, 2010.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

<sup>5</sup> The Custodian did not respond to the Offer of Mediation.

**June 23, 2010**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the twentieth (20<sup>th</sup>) business day following receipt of such request. The Custodian provides the requested records in their entirety with no redactions to the Complainant.

**July 1, 2010**

Request for the Statement of Information ("SOI") sent to the Custodian.

**July 13, 2010**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated May 25, 2010
- Letter from the Custodian to the Complainant dated June 23, 2010 (with attachments)
- Receipt of OPRA request signed by the Complainant

The Custodian certifies that once the Newark Housing Authority's legal department receives an OPRA request, the appropriate department is notified to retrieve the records. The Custodian certifies that the requested records, the NHA Request for Services/Task under Demolition IDIQ Order Contract and the Yannuzzi Dust Control Plan, were provided to the Complainant in their entirety with no redactions on June 23, 2010. Lastly, the Custodian asserts that the OPRA request was received around Memorial Day weekend and that some staff were on vacation during this time, which might have caused a delay in retrieving these records. The Custodian attaches copies of the records provided to the Complainant and a receipt signed by the Complainant acknowledging receipt of the requested records and payment of \$9.00 in copying costs.

**Analysis**

**Whether the Custodian unlawfully denied access to the requested records?**

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*" (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ..." (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

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 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. As also prescribed under 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. 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>6</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. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

In the present case, the Custodian certifies that he received the Complainant’s OPRA request on May 26, 2010. The Custodian certifies that he provided the requested records in their entirety to the Complainant on June 23, 2010, twenty (20) business days after receipt of the OPRA request. There is no evidence in the record that the Complainant disputes the records sent to him by the Custodian.

Therefore, 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 of receipt of the OPRA request 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. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

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<sup>6</sup> It is the GRC’s position that 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.

**Whether the Custodian’s delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

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:

“... If 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.

The Custodian responded to the Complainant’s OPRA request approximately twenty (20) days after receipt of such OPRA request. The Custodian argues that he received the request over the Memorial Day weekend and the absence of staff might have caused a delay in obtaining the responsive documents. However, the Custodian did provide the documents to the Complainant in their entirety with no redactions on June 23, 2010.

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 (Berg); 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’s failure to provide a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days resulted in a “deemed” denial and a violation of N.J.S.A. 47:1A-5.g., because the Custodian provided the Complainant with the requested records twenty (20) business days following the date of receipt of the Complainant’s request, it is concluded that 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'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 of receipt of the OPRA request 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. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
  
2. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial and a violation of N.J.S.A. 47:1A-5.g., because the Custodian provided the Complainant with the requested records twenty (20) business days following the date of receipt of the Complainant's request, it is concluded that 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: Harlynn A. Lack, Esq.  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

October 19, 2010