



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

RICHARD E. CONSTABLE, III  
Commissioner

FINAL DECISION

May 28, 2013 Government Records Council Meeting

Peter DeRobertis  
Complainant

Complaint No. 2012-185

v.

Township of Lyndhurst (Bergen)  
Custodian of Record

At the May 28, 2013 public meeting, the Government Records Council (“Council”) considered the May 21, 2013 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 failed to prove 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. 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 (Interim Order October 31, 2007).
2. Since the Custodian certified in the SOI that the responsive records to request Item No. 1 and No. 2 do not exist and there is no competent or credible evidence in the record to refute the Custodian’s certification, the Custodian did not unlawfully deny the Complainant access to the requested records. Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.
3. The Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to respond in writing to the Complainant’s OPRA request within seven (7) business days. However, the Custodian certified in the SOI that no responsive records to the Complainant’s June 1, 2012 OPRA request exist. 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 28<sup>th</sup> Day of May, 2013

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: June 11, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
May 28, 2013 Council Meeting**

**Peter DeRobertis<sup>1</sup>  
Complainant**

**GRC Complaint No. 2012-185**

v.

**Township of Lyndhurst (Bergen)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. Copy of the current wrecker services contract provided under 4-13.4 of the general licensing ordinance.
2. Copy of the sealed bids by all wrecker companies that bid under the general licensing ordinances

**Request Made:** June 1, 2012

**Response Made:** July 3, 2012

**GRC Complaint Filed:** June 18, 2012<sup>3</sup>

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

**Request and Response:**

On June 1, 2012 the Complainant submitted an Open Public Records Act (“OPRA”) request seeking the above-listed records. On July 3, 2012, the twenty-second (22<sup>nd</sup>) business day following receipt of said request, the Custodian responded in writing stating that the Township of Lyndhurst (“Township”) does not maintain a wrecker services contract responsive to request Item No. 1. The Custodian also states that it does not maintain copies of sealed bids by wrecker companies in response to request Item No. 2.

**Denial of Access Complaint:**

On June 18, 2012, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that he filed his OPRA request

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

<sup>2</sup> Helen Polito, Custodian of Records. Represented by Gary Cucchiara, Esq. of Scarinci Hollenbeck, LLC (Lyndhurst, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

<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.

with the Township on June 1, 2012. The Complainant also asserts that he spoke with the Custodian on June 11, 2012 and the Custodian indicated that she was waiting to hear from the Legal Department to respond to his OPRA request. Lastly, the Complainant asserts that the Custodian has failed to respond to his OPRA request.

#### Statement of Information:

On July 17, 2012, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that she received the Complainant’s request on June 1, 2012. The Custodian also certifies that she responded to the Complainant’s request on July 3, 2012. The Custodian further certifies that she searched the Clerk’s Office and the Police Department for the responsive records, but neither office was in possession of said records.

The Custodian certifies that when she received the Complainant’s OPRA request, she thought it was a similar request submitted two (2) weeks earlier as it related to the Township’s towing services. The Custodian also certifies that following a telephone conversation with the Complainant, the Complainant’s OPRA request was submitted to Counsel for review. The Custodian further certifies that after Counsel’s review, she informed the Complainant that the Township does not maintain copies of the responsive records to request Item No. 1 and No. 2. The Custodian contends that since the Township does not maintain copies of the responsive records, the Complainant’s Denial of Access Complaint should be dismissed.

#### Additional Information:

On July 26, 2012, the Complainant responded to the Custodian’s SOI via facsimile. The Complainant provides a redacted copy of the State of New Jersey Bidder Data Sheet. The Complainant states that this Data Sheet indicates that Nick’s Towing Service, Inc. has a yearly contract with the Township.

### Analysis<sup>5</sup>

#### 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>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

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<sup>5</sup> There may be other OPRA issues in this matter; however, the Council’s analysis is based solely on the claims made in the Complainant’s Denial of Access Complaint.

<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.

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 (Interim Order October 31, 2007).

Here, the Complainant asserted in his Denial of Access Complaint that he filed his OPRA request on June 1, 2012. The Complainant also asserted that he spoke with the Custodian on June 11, 2012. The Complainant further asserted that at the time of the filing of his Denial of Access Complaint, the Custodian had failed to respond to his OPRA request. Further, the Custodian certified that she responded to the Complainant's OPRA request on July 3, 2012, the twenty-second (22<sup>nd</sup>) business day following receipt of such request.

Therefore, the Custodian failed to prove 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. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, supra.

### **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. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The custodian responded that there was no record of any telephone calls made to the complainant. The custodian subsequently certified that no records responsive to the complainant's request existed. The complainant failed to submit any evidence to refute the custodian's certification. The Council held that the custodian did not unlawfully deny access to the requested records because the custodian certified that no records responsive to the request existed.

Here, the Custodian responded to the Complainant's request stating that the Township does not maintain a wrecker services contract nor does it maintain sealed bids of wrecker companies in response to request Item No. 1 and No. 2. The Custodian also certified in the SOI that a search of the records in the Clerk's Office and the Police Department yielded no responsive records to the Complainant's OPRA request.<sup>7</sup>

Since the Custodian certified in the SOI that the responsive records to request Item No. 1 and No. 2 do not exist and there is no competent or credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny the Complainant access to the

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<sup>7</sup> Although the Complainant has evidence that the Township contracts with a towing company, such evidence is not enough to override the Custodian's certification that no responsive records exist on file.

requested records. Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.

### **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:

“... 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).

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).

The Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to respond in writing to the Complainant’s OPRA request within seven (7) business days. However, the Custodian certified in the SOI that no responsive records to the Complainant’s June 1, 2012 OPRA request exist. 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 failed to prove 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. 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 (Interim Order October 31, 2007).

2. Since the Custodian certified in the SOI that the responsive records to request Item No. 1 and No. 2 do not exist and there is no competent or credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny the Complainant access to the requested records. Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.
3. The Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to respond in writing to the Complainant's OPRA request within seven (7) business days. However, the Custodian certified in the SOI that no responsive records to the Complainant's June 1, 2012 OPRA request exist. 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: Harlynn A. Lack, Esq.  
Case Manager

Approved By: Brandon D. Minde, Esq.  
Executive Director

May 21, 2013