



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

**FINAL DECISION**

**July 23, 2013 Government Records Council Meeting**

Harry B. Scheeler, Jr.  
Complainant

Complaint No. 2012-236

v.

City of Millville (Cumberland)  
Custodian of Record

At the July 23, 2013 public meeting, the Government Records Council (“Council”) considered the July 16, 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 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. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian’s failure to respond in writing within the statutorily mandated time frame resulted in a “deemed” denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian’s denial of access is not at issue here based on the Complainant’s September 28, 2012 e-mail. Additionally, 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 “deemed” denial does 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 23rd Day of July 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: July 26, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
July 23, 2013 Council Meeting**

**Harry B. Scheeler, Jr.<sup>1</sup>  
Complainant**

**GRC Complaint No. 2012-236**

v.

**City of Millville (Cumberland)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of any and all job applications submitted by Mr. Timothy Seidel for a police officer position in 2011 or 2012.

**Custodian of Record:** Susan Robostello

**Request Received by Custodian:** July 9, 2012

**Response Made by Custodian:** July 24, 2012

**GRC Complaint Received:** August 8, 2012

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

**Request and Response:**

On July 9, 2012, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian. On July 10, 2012, the Custodian forwarded the Complainant’s OPRA request to the Police Chief and advised that a response was due by close of business on July 18, 2012. On July 20, 2012, the Custodian e-mailed the Police Chief advising that a response is past due. The Custodian also e-mailed the Personnel Office and asked for a response. On the same day, Detective Brian Starcher, Professional Standards Unit, e-mailed the Custodian advising that the responsive records are exempt as part of an on-going investigation per David Galemba, Cumberland County Assistant Prosecutor. N.J.S.A. 47:1A-3(a).

On July 24, 2012, the eleventh (11<sup>th</sup>) business day after receipt of the request, the Custodian responded in writing denying access to the responsive records as exempt personnel records under N.J.S.A. 47:1A-10 and Executive Order No. 26 (Gov. McGreevey, 2002)(“EO 26”).

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

<sup>2</sup> Represented by Richard C. McCarthy, Esq. (Millville, 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.

### Denial of Access Complaint:

On August 8, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant contends that, notwithstanding their selective denial of access under EO 26, the Custodian’s failure to timely respond is a violation of OPRA.

### Statement of Information:

On September 28, 2012, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that she received the Complainant’s OPRA request on July 9, 2012. The Custodian certifies that after distributing the request to the Police Chief and Personnel, it was determined that the responsive records were exempt from disclosure. N.J.S.A. 47:1A-3(a), N.J.S.A. 47:1A-10, EO 26. See also *Toscano v. NJ Dep’t of Human Services, Div. of Health Services*, GRC Complaint No. 2010-147 (May 2011).

The Custodian further certifies that her failure to respond within the statutorily mandated time frame was the result of the sudden death of a on-duty City police officer on July 8, 2012. The Custodian certifies that the following two (2) weeks were consumed with funeral arrangements and a variety of issues that resulted from the officer’s passing. The Custodian certifies that these issues included employees suffering severe grief and the Custodian was charged with managing worker compensation claims for employees affected by the incident.

### Additional Submissions:

On September 28, 2012, the Complainant e-mailed the GRC stating that he is not contesting the denial of access since the denial was valid. The Complainant states that he does not understand how the officer’s death caused a significant delay in responding to his OPRA request. The Complainant states that he contacted the City several times with no response until he complained in writing that he did not receive the records. The Complainant thus states that the basis of this complaint is the Custodian’s failure to respond.

## Analysis<sup>4</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

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<sup>4</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.

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 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).

In the SOI, the Custodian acknowledged that she failed to timely respond to the Complainant's OPRA request. The Custodian certified this failure was due to the effects of the sudden passing of an on-duty police officer.

Although the GRC is sympathetic to the facts at hand, the law requires a custodian to respond requesting an extension of time until a date certain. The evidence indicates that the Custodian attempted to obtain either the responsive records or an explanation as to why the records should not be disclosed and thus needed additional time to respond. However, the Custodian did not respond to the Complainant in writing seeking additional time and thus failed to timely respond.

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, supra.

### **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.

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<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.

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's failure to respond in writing within the statutorily mandated time frame resulted in a "deemed" denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian's denial of access is not at issue here based on the Complainant's September 28, 2012 e-mail. Additionally, 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 "deemed" denial does 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 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. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian's failure to respond in writing within the statutorily mandated time frame resulted in a "deemed" denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian's denial of access is not at issue here based on the Complainant's September 28, 2012 e-mail. Additionally, 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 "deemed" denial does 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: Frank F. Caruso  
Senior Case Manager

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

July 16, 2013