



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**

**November 19, 2013 Government Records Council Meeting**

Genevieve L. Horvath, Esq. (On behalf of Doug Sarini)      Complaint No. 2013-149  
Complainant  
v.  
Newark Housing Authority (Essex)  
Custodian of Record

At the November 19, 2013 public meeting, the Government Records Council (“Council”) considered the November 12, 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian certified that the Newark Housing Authority was not directly involved in negotiations or agreements related to the subject matter of the Resolution and therefore would not have any responsive documents therein. Furthermore, the Complainant has not provided any evidence to refute the Custodian’s certification. Thus, the Custodian did not unlawfully deny access to said records pursuant to N.J.S.A. 47:1A-6 and 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), the Custodian ultimately responded to the Complainant stating that there were no responsive documents to the Complainant’s OPRA request. 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 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 19<sup>th</sup> Day of November, 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: November 21, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
November 19, 2013 Council Meeting**

**Genevieve L. Horvath, Esq.  
(On behalf of Doug Sarini)<sup>1</sup>  
Complainant**

**GRC Complaint No. 2013-149**

v.

**Newark Housing Authority (Essex)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of any and all available Newark Housing Authority records discussing or related to Newark City Council Resolution No. 7R7-a(s) (dated February 26, 2013) and the Settlement Agreement between the Devils Arena Entertainment LLC, the Newark Housing Authority, and the Newark Parking Authority, which provided for certain legal obligations pursuant to the Prudential Center Lease Agreement dated 2/2/05. Please provide any Newark Housing Authority documents drafted pursuant to the terms of the aforementioned settlement agreement.

**Custodian of Record:** Ellen M. Harris, Esq.  
**Request Received by Custodian:** April 3, 2013  
**Response Made by Custodian:** April 16, 2013  
**GRC Complaint Received:** May 22, 2013

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

**Request and Response:**

On April 3, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 16, 2013, nine (9) business days after receipt of the request, the Custodian responded in writing that there were no records responsive to the Complainant’s request.

**Denial of Access Complaint:**

On May 22, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that she received no response

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

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

<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.

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within the statutory seven (7) business day time period, and sought a status update on April 15 and 16, 2013. On April 16, 2013, the Custodian responded via email informing the Complainant that she should expect a response that day. The Complainant then states that on or about April 17, 2013, she received a letter dated April 16, 2013 from the Custodian, informing her that no responsive records existed.

The Complainant asserts that the Newark Housing Authority (“NHA”) was a party to discussions or negotiations surrounding a Settlement Agreement executed by the NHA, the City of Newark (“City”), the Newark Parking Authority (“NPA”), the Devils Arena Entertainment, LLC, and the Devils Renaissance Development, LLC (collectively, “Devils”). This Settlement Agreement was authorized under Newark City Council Resolution No. 7R7-a(s) (“Resolution”). The Complainant states that the terms of the Settlement Agreement provided that the NPA would assume certain obligations from the NHA under a lease agreement NHA had with the Devils. The Complainant includes a copy of the Resolution and the Settlement Agreement in her Denial of Access Complainant.

The Complainant argues that the second clause of the Resolution indicates that the NHA was an active party involved in the arbitration proceedings which produced the Settlement Agreement. Thus, the Complainant made her OPRA request seeking copies of any and all records related to the Resolution. The Complainant believes that because the NHA was a signed party to the Settlement Agreement, the NHA should have responsive records related to the Resolution which certified the Settlement Agreement.

#### Statement of Information:

On May 29, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that as the Chief Legal Officer for the NHA, she is in charge of administering lease agreements with the agency. The Custodian also certifies that any and all documents authored by the NHA would be requested and/or created under her office’s direction. The Custodian further certifies that her office was not involved in the Resolution at issue, and that neither she nor her office received or maintained any documents discussing or relating to the Resolution.

### Analysis

#### 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>4</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>4</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.

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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).

The Complainant asserts that she did not receive a response to her OPRA request from the Custodian until April 16, 2013, nine (9) business days after submission. The Custodian does not dispute the timing of her response to the Complainant.

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.

### **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 complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The custodian responded stating 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 and the complainant did not provide any evidence to refute the custodian's certification. The GRC determined that although the custodian failed to respond to the OPRA request in a timely manner, 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 certifies that her office was not involved in the arbitration proceedings nor had any input in the resulting Settlement Agreement. Notwithstanding the fact that the Resolution and attached Settlement Agreement name the NHA as a designated party, that in and of itself does not prove that the NHA received and/or maintained any documents regarding or relating to the Resolution. Additionally, the Complainant has not sent any rebuttal to the Counsel's certification.

The Custodian certified that the NHA was not directly involved in negotiations or agreements related to the subject matter of the Resolution and therefore would not have any responsive documents therein. Furthermore, the Complainant has not provided any evidence to refute the Custodian's certification. Thus, the Custodian did not unlawfully deny access to said records pursuant to N.J.S.A. 47:1A-6 and Pusterhofer.

## **Knowing and 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), the Custodian ultimately responded to the Complainant stating that there were no responsive documents to the Complainant’s OPRA request. 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 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 certified that the Newark Housing Authority was not directly involved in negotiations or agreements related to the subject matter of the Resolution and therefore would not have any responsive documents therein. Furthermore, the Complainant has not provided any evidence to refute the Custodian's certification. Thus, the Custodian did not unlawfully deny access to said records pursuant to N.J.S.A. 47:1A-6 and 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), the Custodian ultimately responded to the Complainant stating that there were no responsive documents to the Complainant's OPRA request. 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 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: Samuel A. Rosado, Esq.  
Staff Attorney

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

November 12, 2013