



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

FINAL DECISION

July 29, 2014 Government Records Council Meeting

Scott Coulson  
Complainant

Complaint No. 2013-322

v.

Town of Kearny Fire Department (Hudson)  
Custodian of Record

At the July 29, 2014 public meeting, the Government Records Council (“Council”) considered the July 22, 2014 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 September 24, 2013 response was legally insufficient because she failed to respond to each item contained in the Complainant’s OPRA request and failed to specify a date certain on which the Complainant could expect access to be granted or denied. *See* N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008); Hardwick v. New Jersey Department of Transportation, GRC Complaint No. 2007-164 (February 2008).
2. The Custodian has borne her burden of proving that she lawfully denied access to the documents requested in Item No. 1 because she certified that no responsive records exist, and there is no evidence in the record to refute such certification. *See* N.J.S.A. 47:1A-6; Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. The Custodian has borne her burden of proving that she did not unlawfully deny access to the record requested in Item No. 2 because she made the records responsive to the request available upon payment of the appropriate copying costs. *See* N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(b); Leak v. Union County Prosecutor’s Office, GRC Complaint No. 2007-148 (June 2009); Ortiz v. N.J. Department of Corrections, GRC Complaint No. 2007-101 (November 2008); Mejias v. New Jersey Department of Corrections, GRC Complaint No. 2007-181 (July 2008); Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).



4. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by providing a legally insufficient response to the Complainant's request, she has disclosed, or otherwise made available upon receipt of payment, the records responsive to the Complainant's request. Further, 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 29<sup>th</sup> Day of July, 2014

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 31, 2014**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
July 29, 2014 Council Meeting**

**Scott Coulson<sup>1</sup>  
Complainant**

**GRC Complaint No. 2013-322**

**v.**

**Town of Kearny Fire Department (Hudson)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

Item No. 1: Copies of checks and/or reimbursement amounts distributed by the town of Kearny's insurance company to the Kearny Fire Department.

Item No. 2: A copy of the insurance policy page showing that the Kearny Fire Department station four (4) at 2 John Millar Way is insured.

**Custodian of Record:** Patricia Carpenter

**Request Received by Custodian:** September 23, 2013

**Response Made by Custodian:** September 24, 2013; October 8, 2013

**GRC Complaint Received:** November 1, 2013

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

**Request and Response:**

On September 23, 2013, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On September 24, 2013, one (1) business day later, the Custodian responded by stating that documents responsive to a portion of the request were ready for retrieval, but that there would be a delay in processing the rest of the request. On October 8, 2013, eleven (11) business days after the complaint was received, the Custodian emailed the Complainant to state that the requested records could be retrieved.

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

<sup>2</sup> Represented by Gregory Castano, Sr., Esq. (Fairfield, N.J.).

<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 November 1, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant states that the initial response from the Custodian did not state when the responsive records would be provided. Additionally, the Complainant asserts that on October 9, 2013, when he retrieved records from the Custodian, he found that he had only been provided with the requested Town of Kearny Fire Department (“Fire Department”) reimbursement checks for the Fire Department’s members, rather than for the Fire Department itself, and that Fire Department insurance policy page had not been provided.

### Statement of Information:

On November 14, 2013, the Custodian filed a Statement of Information (“SOF”). The Custodian certifies that she received the Complainant’s request on September 23, 2013 and responded on both September 24, 2013 and October 8, 2013. Further, the Custodian certified that the Town of Kearny (“Town”) has no copies of the checks sought in Item No. 1. The Custodian states that the insurance policy page responsive to Item No. 2 has not been provided because the Complainant has not paid the requisite copying costs.

## Analysis

### Timeliness & Sufficiency of Response

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 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).

Further, OPRA specifically states that a custodian “shall indicate the specific basis [for denial of access] . . . .” N.J.S.A. 47:1A-5(g). Further, in Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), the GRC held that:

[a]lthough the Custodian responded in writing to the Complainant’s . . . OPRA request . . . pursuant to N.J.S.A. 47:1A-5(i), the Custodian’s response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5(g).

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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.

Id.

A custodian also has an obligation to provide the requestor with an anticipated deadline date upon which the requested records will be provided. In Hardwick v. N.J. Department of Transportation, GRC Complaint No. 2007-164 (February 2008), the custodian requested, in writing, an extension of time to respond but failed to provide an anticipated deadline date upon which the requested records would be provided. The Council subsequently held that the Custodian's request for an extension of time was inadequate under OPRA pursuant to N.J.S.A. 47:1A-5(i). Id.

Here, the Custodian responded, in writing, one (1) business day after receiving the Complainant's request by indicating that a portion of the documents were available for retrieval. However, the Custodian otherwise only stated that there would be a delay in processing the request, and that the Complainant would be informed when the requested documents had been gathered. Thus, the Custodian's response did not address each item contained in the Complainant's OPRA request and failed to specify a date certain on which the Complainant could expect access to be granted or denied.

Therefore, the Custodian's September 24, 2013 response was legally insufficient because she failed to respond to each item contained in the Complainant's OPRA request and failed to specify a date certain on which the Complainant could expect access to be granted or denied. *See* N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Paff, GRC 2007-272); Hardwick, GRC 2007-164.

### **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.

#### **Item No. 1**

The Council has previously found that, in light of a custodian's certification that no records responsive to the request exist, no unlawful denial of access occurred. *See* Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). Here, the Custodian certified that no copies of the reimbursement checks distributed from the Town of Kearny to the Fire Department exist, and there is no evidence in the record to refute such certification.

Therefore, the Custodian has borne her burden of proving that she lawfully denied access to the documents requested in Item No. 1 because she certified that no responsive records exist, and there is no evidence in the record to refute such certification. *See* N.J.S.A. 47:1A-6; Pusterhofer, GRC 2005-49.

## Item No. 2

OPRA further states that

If a public agency can demonstrate that its actual costs for duplication of a government record exceed the foregoing rates, the public agency shall be permitted to charge the actual cost of duplicating the record.

N.J.S.A. 47:1A-5(b).

In Ortiz v. N.J. Department of Corrections, GRC Complaint No. 2007-101 (November 2008), the Council referred to Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006), in reaffirming that the custodian was “not required to release the requested records until payment is received . . . .” Id. The Council subsequently held in Leak v. Union County Prosecutor’s Office, GRC Complaint No. 2007-148 (June 2009), that the custodian had complied in part with the Council’s Interim Order “by advising that the requested records would be provided upon payment of copying costs . . . .” Id. (citing N.J.S.A. 47:1A-5(b); Mejias v. N.J. Dep’t of Corr., GRC Complaint No. 2007-181 (July 2008); Paff, GRC 2006-54).

Here, the Custodian stated, and the record indicates, that she informed that Complainant that the copy of the requested insurance policy page is available for retrieval upon his payment of the copying costs, but that the Custodian has not received such payment.

Therefore, the Custodian has borne her burden of proving that she did not unlawfully deny access to the record requested in Item No. 2 because she made the records responsive to the request available upon payment of the appropriate copying costs. *See* N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(b); Leak, GRC 2007-148; Ortiz, GRC 2007-101; Mejias, GRC 2007-181; Paff, GRC 2006-54.

### **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)).

Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by providing a legally insufficient response to the Complainant's request, she has disclosed, or otherwise made available upon receipt of payment, the records responsive to the Complainant's request. Further, 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's September 24, 2013 response was legally insufficient because she failed to respond to each item contained in the Complainant's OPRA request and failed to specify a date certain on which the Complainant could expect access to be granted or denied. *See* N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008); Hardwick v. New Jersey Department of Transportation, GRC Complaint No. 2007-164 (February 2008).
2. The Custodian has borne her burden of proving that she lawfully denied access to the documents requested in Item No. 1 because she certified that no responsive records exist, and there is no evidence in the record to refute such certification. *See* N.J.S.A. 47:1A-6; Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. The Custodian has borne her burden of proving that she did not unlawfully deny access to the record requested in Item No. 2 because she made the records responsive to the request available upon payment of the appropriate copying costs. *See* N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(b); Leak v. Union County Prosecutor's Office, GRC Complaint No. 2007-148 (June 2009); Ortiz v. N.J. Department of Corrections, GRC Complaint No. 2007-101 (November 2008); Mejias v. New Jersey Department of Corrections, GRC Complaint No. 2007-181 (July 2008); Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).
4. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by providing a legally insufficient response to the Complainant's request, she has

disclosed, or otherwise made available upon receipt of payment, the records responsive to the Complainant's request. Further, 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: Robert T. Sharkey, Esq.  
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.  
Senior Counsel

July 22, 2014