



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
PO Box 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Commissioner

**FINAL DECISION**

**October 25, 2016 Government Records Council Meeting**

Susan Fleming  
Complainant

Complaint No. 2015-65

v.

Greenwich Township (Warren)  
Custodian of Record

At the October 25, 2016 public meeting, the Government Records Council (“Council”) considered the October 18, 2016 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted 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 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(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007). Additionally, the Custodian violated N.J.S.A. 47:1A-5(e) by failing to provide immediate access to the requested invoice.
2. Notwithstanding her “deemed” denial, the Custodian bore her burden of proving that she did not unlawfully deny access to the Complainant’s January 30, 2015 OPRA request. N.J.S.A. 47:1A-6. The record reflects that the Custodian provided the responsive record alongside her SOI on April 9, 2015. In addition, there is no evidence in the record to refute the Custodian’s SOI and certification. *See* Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).
3. Although the Custodian failed to respond timely to the Complainant’s January 30, 2015 OPRA request pursuant to N.J.S.A. 47:1A-5(i), and failed to provide immediate access to the invoice pursuant to N.J.S.A. 47:1A-5(e), she produced the responsive record alongside her SOI on April 9, 2015. 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 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 25<sup>th</sup> Day of October, 2016

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: October 27, 2016**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
October 25, 2016 Council Meeting**

**Susan Fleming<sup>1</sup>  
Complainant**

**GRC Complaint No. 2015-65**

v.

**Greenwich Township (Warren)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Hard copies of “[a]ll fees/monies paid to Atty. Taddeo, Atty. Joseph Wenzel and all other persons in connection with ‘investigation’ and allegations against Susan ‘Sue’ Fleming. Copies of all invoices regarding this matter.”

**Custodian of Record:** Kimberly Viscomi  
**Request Received by Custodian:** January 30, 2015  
**Response Made by Custodian:** N/A  
**GRC Complaint Received:** March 10, 2015

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

**Request and Response:**

On January 30, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. The record does not contain any additional correspondence dated prior to the filing of this complaint.

**Denial of Access Complaint:**

On March 10, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that she did not receive any correspondence from the Custodian after submitting her OPRA request.

**Statement of Information:**

On April 9, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on January 30, 2015. No additional

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

<sup>2</sup> Represented by Francesco Taddeo, Esq. (Somerville, 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.

correspondence was sent to the Complainant prior to the GRC's receipt of the Denial of Access Complaint.

The Custodian certified that she provided a responsive record to the Complainant on April 9, 2015, alongside her SOI. The Custodian claimed that she did not receive the record until after the Complainant submitted her OPRA request, but she did not specify a date.

## 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 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 dated October 31, 2007). Additionally, a custodian must ordinarily provide immediate access to invoices. N.J.S.A. 47:1A-5(e).

In the instant matter, the Custodian conceded that she did not respond to the Complainant's OPRA request within the statutorily mandated seven (7) business days, certifying that she instead responded on April 9, 2015, more than sixty (60) business days after receiving the request. The responsive record was a one (1) page invoice.

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 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(i), and Kelley, GRC 2007-11. Additionally, the Custodian violated N.J.S.A. 47:1A-5(e) by failing to provide immediate access to the requested invoice.

### 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.

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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.

In Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), the custodian produced one (1) responsive record to the complainant's OPRA request and stated that no other responsive records existed. The complainant argued that more responsive records existed. Id. The GRC asked the custodian to certify as to whether all responsive records were produced. Id. The custodian certified that the document provided was the only responsive record. Id. The GRC held that:

“[t]he Custodian certified that the Complainant was in receipt of all contracts and agreements responsive to the request. The Custodian has met the burden of proving that all records in existence responsive to the request were provided to the Complainant. Therefore there was no unlawful denial of access.”

Id.

Here, the Custodian certified, and the record reflects, that she produced an invoice in response to the Complainant's January 30, 2015 OPRA request.

Therefore, notwithstanding her “deemed” denial, the Custodian bore her burden of proving that she did not unlawfully deny access to the records requested in the Complainant's January 30, 2015 OPRA request. N.J.S.A. 47:1A-6. The record reflects that the Custodian provided the responsive record alongside her SOI on April 9, 2015. In addition, there is no evidence in the record to refute the Custodian's SOI and certification. *See* Burns, GRC 2005-68.

### **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 failed to respond timely to the Complainant's January 30, 2015 OPRA request pursuant to N.J.S.A. 47:1A-5(i), and failed to provide immediate access to the invoice pursuant to N.J.S.A. 47:1A-5(e), she produced the responsive record alongside her SOI on April 9, 2015. 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 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 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(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).
2. Notwithstanding her "deemed" denial, the Custodian bore her burden of proving that she did not unlawfully deny access to the Complainant's January 30, 2015 OPRA request. N.J.S.A. 47:1A-6. The record reflects that the Custodian provided the responsive record alongside her SOI on April 9, 2015. In addition, there is no evidence in the record to refute the Custodian's SOI and certification. *See* Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).
3. Although the Custodian failed to respond timely to the Complainant's January 30, 2015 OPRA request pursuant to N.J.S.A. 47:1A-5(i), and failed to provide immediate access to the invoice pursuant to N.J.S.A. 47:1A-5(e), she produced the responsive record alongside her SOI on April 9, 2015. 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 unreasonable denial of access under the totality of the circumstances.

Prepared By: Samuel A. Rosado  
Staff Attorney

October 18, 2016