



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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PHILIP D. MURPHY  
*Governor*

LT. GOVERNOR SHEILA Y. OLIVER  
*Commissioner*

**FINAL DECISION**

**September 25, 2018 Government Records Council Meeting**

Caitlyn Bahrenburg  
Complainant

Complaint No. 2016-198

v.

Borough of Belmar (Monmouth)  
Custodian of Record

At the September 25, 2018 public meeting, the Government Records Council (“Council”) considered the September 18, 2018 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. Although the Custodian timely responded in writing to the Complainant’s OPRA request, said response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Hardwick v. N.J. Dep’t of Transp., GRC Complaint No. 2007-164 (February 2008), because she failed to provide a date certain upon which she would respond to the Complainant. See also Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011); Papiez v. Cnty. of Mercer, Office of Cnty. Counsel, GRC Complaint No. 2012-65 (Interim Order dated April 30, 2013).
2. Notwithstanding the Custodian’s “deemed denial,” she has borne her burden of proof that she lawfully denied access to the Complainant’s OPRA request seeking an investigation report because she certified in the SOI, and the record reflects, that no responsive record exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005)
3. The Custodian violated N.J.S.A. 47:1A-5(i) by failing to provide a date certain upon when she would provide a response to the Complainant’s OPRA request. However, the evidence in the record demonstrates that no responsive record existed. Moreover, the evidence of record does not indicate that either 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 September, 2018

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: September 27, 2018**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff  
September 25, 2018 Council Meeting**

**Caitlyn Bahrenburg<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-198**

v.

**Borough of Belmar (Monmouth)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** “Liquor license investigation report, performed by then-Capt. Andrew Huisman (now Chief Andrew Huisman), for the liquor license transfer application from DCJ Belmar LLC to Dockside Dining LLC [(“Dockside”)] by Timothy and Matthew Harmon.”

**Custodian of Record:** April Claudio

**Requests Received by Custodian:** June 16, 2016

**Response Made by Custodian:** June 27, 2016; July 1, 2016; July 11, 2016; July 13, 2016

**GRC Complaint Received:** July 14, 2016

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

**Request and Response:**

On June 16, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 27, 2016, the seventh (7<sup>th</sup>) business day after receipt, the Custodian informed that Complainant that she had not received the requested record from the Belmar Police Department (“BPD”). The Custodian stated that she hoped to have the record “within the week.” The Complainant then sent follow-up correspondence to the Custodian on July 1, 2016 and July 11, 2016, with the Custodian responding in turn stating that she had not yet received a responsive record from the BPD.

On July 13, 2016, the Custodian e-mailed the Complainant regarding the aforementioned OPRA request. The Custodian informed the Complainant that BPD completed their investigation of Dockside, and provided them and their attorney with a list of restrictions BPD recommended be placed on Dockside’s liquor license. The Custodian stated that no report was created as a result of the investigation, and therefore no responsive record existed. Nonetheless, the Custodian attached a copy of the list of restrictions in the e-mail.

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

<sup>2</sup> Represented by George McGill, Borough Attorney (Belmar, 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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

On July 13, 2016, the Complainant responded to the Custodian, claiming that a recommendation was made by Chief Huisman to the Borough of Belmar (“Borough”) Mayor and Council, which stated that there would be no issues with approving Dockside’s transfer application should the recommended restrictions be added. The Complainant stated that she assumed that the recommendation would be similar to the record she received in response to an separate OPRA request for an investigation report on a different liquor license transfer application. The Complainant asked the Custodian whether she could obtain a copy of the recommendation pertaining to the current matter. The Custodian responded back that same day, stating that the previously provided list was the only document she received from Chief Huisman.

#### Denial of Access Complaint:

On July 14, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that on June 16, 2016, she submitted two (2) OPRA requests to the Custodian seeking investigation reports on applications to transfer liquor licenses. The Complainant stated that on June 20, 2016, the Custodian responded to the request that is not at issue in this matter, providing the requested report. The Complainant added that since then, she had not received the report regarding the OPRA request at issue.

#### Statement of Information:

On July 29, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on June 16, 2016. The Custodian certified that the request was forwarded to the Business Administrator, Colleen Connelly (“Ms. Connelly”) and Chief Huisman. The Custodian certified that she responded in writing on June 27, 2016, stating that she was informed by Ms. Connelly that she did not have a copy of the report from the BPD, but once received she would forward it to the Custodian.

The Custodian then certified that she told the Complainant that she still had not received the report on July 1, 2016 and July 11, 2016. The Custodian then certified that on July 12, 2016, Ms. Connelly spoke with the Complainant via telephone, advising her that there was no investigation report from the police, and that only the list of restrictions would be placed on the liquor license. The Custodian certified that on July 13, 2016, she e-mailed the Complainant, stating that there was no investigation report to provide. When asked to provide a recommendation from Chief Huisman, the Custodian stated that she told the Complainant that no such record existed.

### Analysis

#### Sufficiency of Response

OPRA provides that a custodian may have an extension of time to respond to a complainant’s OPRA request, but the custodian must provide a date certain. N.J.S.A. 47:1A-5(i). OPRA further provides that should the custodian fail to provide a response on that specific date, “access shall be deemed denied.” N.J.S.A. 47:1A-5(i).

In Hardwick v. N.J. Dep't of Transp., GRC Complaint No. 2007-164 (February 2008), the custodian responded in writing seeking an extension of time to respond to said request. However, the custodian failed to provide a date certain upon which the requested records would be provided. The Council 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).

Here, the Custodian responded in writing to the Complainant's June 16, 2016 OPRA request advising that while she did not have the record, she hoped that she would receive it "within the week." Therefore, the Custodian did not provide a date certain on which she would respond. As noted in Hardwick, the Custodian's failure to provide a date certain resulted in a violation of N.J.S.A. 47:1A-5(i).

Therefore, although the Custodian timely responded in writing to the Complainant's OPRA request, said response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Hardwick, GRC 2007-164, because she failed to provide a date certain upon which she would respond to the Complainant. See also Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011); Papiez v. Cnty. of Mercer, Office of Cnty. Counsel, GRC Complaint No. 2012-65 (Interim Order dated April 30, 2013).

### **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.

The Council has previously found that, where a custodian certified that no responsive records 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 Complainant sought an investigation report pertaining to a liquor license transfer application. The Custodian denied access to the request, stating that no investigation report existed. In the SOI, the Custodian certified that she forwarded the request to Ms. Connelly and Chief Huisman, the latter of which was the source of the report provided in the unrelated OPRA. The Custodian also certified that the only record she received was the list of restrictions that she provided to the Complainant. Additionally, there is no evidence in the record to refute that the Custodian did not possess the responsive records.

Accordingly, notwithstanding the Custodian's "deemed denial," she has borne her burden of proof that she lawfully denied access to the Complainant's OPRA request seeking an investigation report because she certified in the SOI, and the record reflects, that no responsive record exist. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

### **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 (E.C.E.S. v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

In the matter before the Council, the Custodian violated N.J.S.A. 47:1A-5(i) by failing to provide a date certain upon when she would provide a response to the Complainant’s OPRA request. However, the evidence in the record demonstrates that no responsive record existed. Moreover, 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 Council Staff respectfully recommends the Council find that:

1. Although the Custodian timely responded in writing to the Complainant’s OPRA request, said response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Hardwick v. N.J. Dep’t of Transp., GRC Complaint No. 2007-164 (February 2008), because she failed to provide a date certain upon which she would respond to the Complainant. See also Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011); Papiez v. Cnty. of Mercer, Office of Cnty. Counsel, GRC Complaint No. 2012-65 (Interim Order dated April 30, 2013).
2. Notwithstanding the Custodian’s “deemed denial,” she has borne her burden of proof that she lawfully denied access to the Complainant’s OPRA request seeking an investigation report because she certified in the SOI, and the record reflects, that no responsive record exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005)

3. The Custodian violated N.J.S.A. 47:1A-5(i) by failing to provide a date certain upon when she would provide a response to the Complainant's OPRA request. However, the evidence in the record demonstrates that no responsive record existed. Moreover, the evidence of record does not indicate that either 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

September 18, 2018