



**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**

**September 26, 2017 Government Records Council Meeting**

Ranjeet Singh  
Complainant

Complaint No. 2017-148

v.

Borough of Carteret (Middlesex)  
Custodian of Record

At the September 26, 2017 public meeting, the Government Records Council (“Council”) considered the September 19, 2017 Supplemental 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 complied with the Council’s August 29, 2017 Interim Order because the Custodian timely certified that the requested photographs do not exist.
2. Although the Custodian failed to respond to the Complainant’s OPRA request within the statutorily mandated time period, which resulted in a “deemed” denial of the request, the Custodian did timely comply with the Council’s August 29, 2017 Interim Order. Moreover, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian’s actions did 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 26<sup>th</sup> Day of September, 2017

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 29, 2017**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
September 26, 2017 Council Meeting**

**Ranjeet Singh**<sup>1</sup>  
**Complainant**

**GRC Complaint No. 2017-148**

v.

**Borough of Carteret (Middlesex)**<sup>2</sup>  
**Custodial Agency**

**Records Relevant to Complaint:** Copies via e-mail of “[a]ll ... documents relating to any and all improvements at 5 Monroe Avenue, Carteret, NJ, from January 1, 2015 to [May 15, 2017], including, but not limited to ... pictures ...”<sup>3</sup>

**Custodian of Record:** Kathleen M. Barney  
**Request Received by Custodian:** May 16, 2017  
**Response Made by Custodian:** May 26, 2017  
**GRC Complaint Received:** July 18, 2017

**Background**

**August 29, 2017 Council Meeting:**

At its August 29, 2017 public meeting, the Government Records Council (“Council”) considered the August 22, 2017 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, found that:

1. The Custodian’s response was insufficient because she failed to respond in writing to each request item contained in the request individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. 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).

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

<sup>2</sup> Represented by Robert J. Bergen, Esq. (Carteret, NJ).

<sup>3</sup> There were other records requested that are not relevant to this complaint.

3. Because the Custodian failed to bear her burden of proving that the denial of access was authorized by law, the Custodian must disclose to the Complainant the requested pictures, *viz.*, photographs relating to improvements at 5 Monroe Avenue, Carteret, New Jersey, from January 1, 2015, to May 15, 2017. If no records responsive to the Complainant's OPRA request exist, the Custodian must provide a certification to the GRC to that effect. N.J.S.A. 47:1A-6. *See also* Andrews v. Township of Irvington (Essex), GRC Complaint No. 2009-111 (Interim Order November 4, 2009).
4. **The Custodian shall comply with paragraph number 3 above within five (5) business days from receipt of the Council's Interim Order, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, pending the Custodian's compliance with the Council's Interim Order.

#### Procedural History:

On August 30, 2017, the Council distributed its August 29, 2017 Interim Order to all parties. The evidence of record reveals that the Custodian did not receive a copy of the Interim Order until September 11, 2017.<sup>4</sup> On September 18, 2017, the Custodian submitted a certification to the GRC in compliance with the Council's Interim Order.

#### Analysis

#### Compliance

On August 29, 2017, the Council ordered the above-referenced compliance. On September 11, 2017, the Custodian received a copy of the Interim Order, which provided the Custodian five (5) business days to comply with the terms of said Order. Therefore, compliance was due on or before September 18, 2017. On September 18, 2017, the Custodian forwarded to the GRC a certification in compliance with the Council's August 29, 2017 Interim Order wherein the Custodian averred that "no such [photographs] exist."

The Custodian also certified that due to the wording of the Complainant's request, she could not provide a finite list of identified records. The Custodian therefore takes exception to the Council's finding in paragraph 1 of the Interim Order that she failed to respond in writing to each requested item individually. The Custodian further certified that her office did timely respond to the Complainant's request; however the Custodian states that "for some reason the email by which Mr. Falt sent the records to the Complainant is dated May 26, 2017 . . . I would

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<sup>4</sup> The GRC did not have the correct e-mail address for the Custodian. Although the GRC did not receive a return of the e-mail communications sent to the Custodian as "undeliverable," it is clear to the GRC that the Custodian did not receive any of the notices sent from the GRC to the Custodian via e-mail. For that reason, there was a significant delay in the Custodian receiving a copy of the Interim Order in this matter. The Custodian's Counsel informed the GRC that the Interim Order was the agency's first notification regarding the matter.

just like to point out that Mr. Falt's email was sent at 8:20 am on the 26<sup>th</sup>, prior even to the official start of Mr. Falt's work day."<sup>5</sup> The Custodian believes the delay of the response was "inadvertent and extremely slight." For that reason, the Custodian takes exception to the Council's finding in paragraph 2 of the Interim Order that there was a "deemed" denial of the Complainant's OPRA request. Although the GRC duly notes the Custodian's protestations, it stands on the evidence of record in support of the Council's findings contained in paragraphs 1 and 2 of the August 29, 2017 Interim Order.

Accordingly, the Custodian complied with the Council's August 29, 2017 Interim Order because the Custodian timely certified that the requested photographs do not exist.

### **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 (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)).

Although the Custodian failed to respond to the Complainant's OPRA request within the statutorily mandated time period, which resulted in a "deemed" denial of the request, the Custodian did timely comply with the Council's August 29, 2017 Interim Order. Moreover, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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<sup>5</sup> The Custodian certified that Mr. Everett Falt was a subordinate in her office.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's August 29, 2017 Interim Order because the Custodian timely certified that the requested photographs do not exist.
2. Although the Custodian failed to respond to the Complainant's OPRA request within the statutorily mandated time period, which resulted in a "deemed" denial of the request, the Custodian did timely comply with the Council's August 29, 2017 Interim Order. Moreover, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions did 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: John E. Stewart

September 19, 2017



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

**INTERIM ORDER**

**August 29, 2017 Government Records Council Meeting**

Ranjeet Singh  
Complainant

Complaint No. 2017-148

v.

Borough of Carteret (Middlesex)  
Custodian of Record

At the August 29, 2017 public meeting, the Government Records Council (“Council”) considered the August 22, 2017 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 response was insufficient because she failed to respond in writing to each request item contained in the request individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. 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).
3. Because the Custodian failed to bear her burden of proving that the denial of access was authorized by law, the Custodian must disclose to the Complainant the requested pictures, *viz.*, photographs relating to improvements at 5 Monroe Avenue, Carteret, New Jersey, from January 1, 2015 to May 15, 2017. If no records responsive to the Complainant’s OPRA request exist, the Custodian must provide a certification to the GRC to that effect. N.J.S.A. 47:1A-6. *See also* Andrews v. Township of Irvington (Essex), GRC Complaint No. 2009-111 (Interim Order November 4, 2009).
4. **The Custodian shall comply with paragraph number 3 above within five (5) business days from receipt of the Council’s Interim Order, and simultaneously**



**provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4<sup>1</sup>, to the Executive Director.<sup>2</sup>**

5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 29<sup>th</sup> Day of August, 2017

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: August 30, 2017**

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<sup>1</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>2</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
August 29, 2017 Council Meeting**

**Ranjeet Singh**<sup>1</sup>  
**Complainant**

**GRC Complaint No. 2017-148**

v.

**Borough of Carteret (Middlesex)**<sup>2</sup>  
**Custodial Agency**

**Records Relevant to Complaint:** Copies via e-mail of “[a]ll ... documents relating to any and all improvements at 5 Monroe Avenue, Carteret, NJ, from January 1, 2015 to [May 15, 2017], including, but not limited to ... pictures ...”<sup>3</sup>

**Custodian of Record:** Kathleen M. Barney  
**Request Received by Custodian:** May 16, 2017<sup>4</sup>  
**Response Made by Custodian:** May 26, 2017  
**GRC Complaint Received:** July 18, 2017

**Background**<sup>5</sup>

**Request and Response:**

On May 16, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On May 26, 2017, the eighth (8<sup>th</sup>) business day following receipt of said request, the Custodian responded in writing, informing the Complainant “[h]ere are the records you requested.”

**Denial of Access Complaint:**

On July 18, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that he provided his OPRA request to the Custodian on May 16, 2017, and the Custodian responded to the request on July 13, 2017.<sup>6</sup> The Complainant asserts that the Custodian failed to disclose photographs to him. The Complainant attached sixteen (16) pages of documents to the complaint; however, the

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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> There were other records requested that are not relevant to this complaint.

<sup>4</sup> The OPRA request was date stamped by the Clerk’s Office.

<sup>5</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.

<sup>6</sup> The evidence of record reveals the response to the request is dated May 26, 2017.

documents have no relevance to the complaint.<sup>7</sup> The Complainant did not complete the “Detail Summary” (page 3 of the complaint).

#### Statement of Information:

The Custodian did not respond to the GRC’s July 20, 2017 request for the Statement of Information (“SOI”).

#### Additional Submissions:

On July 28, 2017, the GRC e-mailed a notice to the Custodian, informing her that if the SOI was not received by the GRC within three (3) business days, the complaint would proceed to adjudication based only on the information provided in the complaint. The GRC did not receive a reply to the notice.

### Analysis

#### Sufficiency of Response

OPRA provides that a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g). Further, in Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008), the GRC held that “[t]he 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).

Here, the Custodian responded to the Complainant’s request by stating merely “[h]ere are the records you requested.” The records were not identified by description or request item number.

Therefore, the Custodian’s response was insufficient because she failed to respond in writing to each request item contained in the request individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff, GRC 2007-272.

#### Timeliness

Unless a shorter time period is otherwise provided, a custodian must 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 accordingly 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>8</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

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<sup>7</sup> The documents are copies of construction code records, construction permits, etc. The Complainant made no reference in the complaint to the attached documents.

<sup>8</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.

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).

Here, the evidence of record reveals that the request was received by the Custodian on May 16, 2017. The evidence of record also reveals that the Custodian responded to the request on May 26, 2017, which was the eighth (8<sup>th</sup>) business day following the Custodian’s receipt of the request.

Therefore, 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, GRC 2007-11.

### **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 Andrews v. Township of Irvington (Essex), GRC Complaint No. 2009-111 (Interim Order November 4, 2009), the custodian denied the requestor certain records. After the complaint was filed, the GRC requested an SOI, which was not submitted by the custodian. The Council determined that, “the Custodian failed to bear his burden of proving a lawful denial of access to the records . . . pursuant to N.J.S.A. 47:1A-6. Therefore, the Custodian shall disclose the requested records . . . .”

Here, the Complainant requested, *inter alia*, “pictures.” Based upon the content of the complaint, the Complainant considered “pictures” to be photographs, which the Complainant alleged were unlawfully denied. The evidence of record reveals that the Custodian did not attempt to seek clarification of the Complainant’s request. Moreover, the Custodian failed to comply with the GRC’s requests for the SOI. As such, the Custodian failed to bear her burden of proving that the denial of access was authorized by law.

Therefore, because the Custodian failed to bear her burden of proving that the denial of access was authorized by law, the Custodian must disclose to the Complainant the requested pictures, *viz.*, photographs relating to improvements at 5 Monroe Avenue, Carteret, New Jersey, from January 1, 2015, to May 15, 2017. If no records responsive to the Complainant’s OPRA request exist, the Custodian must provide a certification to the GRC to that effect. N.J.S.A. 47:1A-6. *See also* Andrews, GRC 2009-111.

## **Knowing & Willful**

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, pending the Custodian's compliance with the Council's Interim Order.

## **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian's response was insufficient because she failed to respond in writing to each request item contained in the request individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. 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).
3. Because the Custodian failed to bear her burden of proving that the denial of access was authorized by law, the Custodian must disclose to the Complainant the requested pictures, *viz.*, photographs relating to improvements at 5 Monroe Avenue, Carteret, New Jersey, from January 1, 2015 to May 15, 2017. If no records responsive to the Complainant's OPRA request exist, the Custodian must provide a certification to the GRC to that effect. N.J.S.A. 47:1A-6. *See also* Andrews v. Township of Irvington (Essex), GRC Complaint No. 2009-111 (Interim Order November 4, 2009).
4. **The Custodian shall comply with paragraph number 3 above within five (5) business days from receipt of the Council's Interim Order, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4<sup>9</sup>, to the Executive Director.<sup>10</sup>**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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<sup>9</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>10</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Prepared By: John E. Stewart

August 22, 2017