



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

**PHILIP D. MURPHY**  
*Governor*

**LT. GOVERNOR SHEILA Y. OLIVER**  
*Commissioner*

**FINAL DECISION**

**April 28, 2020 Government Records Council Meeting**

Megan McNally  
Complainant

Complaint No. 2018-16

v.

City of Bayonne (Hudson)  
Custodian of Record

At the April 28, 2020 public meeting, the Government Records Council (“Council”) considered the April 21, 2020 Supplemental 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 the Council should accept Honorable Kelly J. Kirk’s, Administrative Law Judge, findings concluding that “. . . veterinarian bills, to the extent any may have existed, were not a government record and no right of access applies.” And further that “. . . the [Custodian] provided the ‘intake records’ in its possession to [Complainant] and that . . . ‘intake records’ similar to an ‘Incident Report’ were not a government record and there was no denial of access.” And additionally, that “. . . no public official, officer, employee, or custodian knowingly and willfully violated OPRA or unreasonably denied access in connection with [Complainant’s] OPRA request. Thus, the Council should adopt the Administrative Law Judge’s Order directing that the complaint be dismissed.

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 28<sup>th</sup> Day of April 2020

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: April 30, 2020**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
April 28, 2020 Council Meeting**

**Megan McNally<sup>1</sup>  
Complainant**

**GRC Complaint No. 2018-16**

**v.**

**City of Bayonne (Hudson)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of the following documents pertaining to NJ Animal Control & Rescue:

1. All intake records for the month of October 2017 for all dogs and all cats.
2. All veterinarian bills for all dogs for October 2017.<sup>3</sup>

**Custodian of Record:** Robert F. Sloan

**Request Received by Custodian:** December 8, 2017

**Response Made by Custodian:** December 8, 2017 and January 12, 2018

**GRC Complaint Received:** February 2, 2018

**Background**

**March 26, 2019 Council Meeting**

At its March 26, 2019 public meeting, the Government Records Council (“Council”) considered the March 19, 2019 Supplemental Findings and Recommendations of the Council Staff 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 has not complied with the terms of the Council’s February 26, 2019 Interim Order because he failed to disclose to the Complainant the records ordered by the Council for disclosure and failed to provide a detailed document index explaining the lawful basis for any redactions. The Council therefore finds the Custodian in violation of the Council’s Order.
2. “The Council shall, pursuant to New Jersey Rules Governing the Courts, *R. 4:67-6*, have the authority to enforce compliance with the orders and decisions issued by the Council.” *N.J.A.C. 5:105-2.9(c)*. The Council’s February 26, 2019 Interim Order

---

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

<sup>2</sup> Represented by Jessica H. Connors, Esq. (Bayonne, NJ).

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

would have been enforceable in the Superior Court if the Complainant chose that option. R. 4:67-6. However, the Council notes that the Court cannot grant the relief provided by the Council's Order because the Custodian certified that the records subject to disclosure were "not maintained."

3. The Custodian failed to respond to the request in a timely manner, thereby violating N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i). Also, the Custodian failed to comply with the Council's February 26, 2019 Interim Order by not disclosing to the Complainant the records ordered by the Council for disclosure along with a detailed document index explaining the lawful basis for any redactions. Further, the Custodian failed to take measures to preserve the requested records during the pendency of the complaint thereby allowing the vendor to dispose of them, raising the question of spoliation of evidence. Therefore, the Custodian's actions may be intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for a proof hearing to determine whether the Custodian and/or any other official knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

#### Procedural History:

On March 28, 2019, the Council distributed its March 26, 2019 Interim Order to all parties. On May 24, 2019, the complaint was transmitted to the Office of Administrative Law ("OAL"). On March 3, 2020, the Honorable Kelly J. Kirk, Administrative Law Judge ("ALJ"), issued an Initial Decision in this matter.<sup>4</sup>

### Analysis

#### Administrative Law Judge's Initial Decision

The ALJ's findings of fact are entitled to deference from the Council because they are based upon the ALJ's determination of the credibility of the parties. "The reason for the rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses and, consequently, is better qualified to judge their credibility." In the Matter of the Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div. 1989), certif. denied 121 N.J. 615 (1990). The Appellate Division affirmed this principle, underscoring that, "under existing law, the [reviewing agency] must recognize and give due weight to the ALJ's unique position and ability to make demeanor-based judgments." Whasun Lee v. Bd. of Educ. of the Twp. of Holmdel, Docket No. A-5978-98T2 (App. Div. 2000), slip op. at 14. "When such a record, involving lay witnesses, can support more than one factual finding, it is the ALJ's credibility findings that control, unless they are arbitrary or not based on sufficient credible evidence in the record as a whole." Cavaliere v. Bd. of Tr. of Pub. Emp. Ret. Sys., 368 N.J. Super. 527, 537 (App. Div. 2004).

---

<sup>4</sup> On April 3, 2020, the GRC requested a forty-five (45) day extension of the statutory period, or until June 1, 2020, to accept, reject or modify the ALJ's Initial Decision. Same was granted on April 3, 2020. The Complainant did not file written objections to the ALJ's Initial Decision in a timely manner.

The ultimate determination of the agency and the ALJ's recommendations must be accompanied by basic findings of fact sufficient to support them. State, Dep't of Health v. Tegnazian, 194 N.J. Super. 435, 442-43 (App. Div. 1984). The purpose of such findings "is to enable a reviewing court to conduct an intelligent review of the administrative decision and determine if the facts upon which the order is grounded afford a reasonable basis therefor." Id. at 443. Additionally, the sufficiency of evidence "must take into account whatever in the record fairly detracts from its weight"; the test is not for the courts to read only one side of the case and, if they find any evidence there, the action is to be sustained and the record to the contrary is to be ignored (citation omitted). St. Vincent's Hosp. v. Finley, 154 N.J. Super. 24, 31 (App. Div. 1977).

In the instant complaint, the ALJ issued an Initial Decision on March 3, 2020. The ALJ, after fairly summarizing the testimony and evidence, and explaining how she weighed the proofs before her and why she credited, or discredited, certain testimony, stated:

I **FIND** that the veterinarian bills requested by McNally were not made, maintained, received, or kept on file in the course of official business by Bayonne. As such, I **CONCLUDE** that veterinarian bills, to the extent any may have existed, were not a government record and no right of access applies. Notwithstanding the foregoing, the record reflects that the Law Department made efforts to nevertheless obtain the veterinarian bills for McNally, but were unsuccessful because Santini and his attorney would not submit such records, either because the records did not exist or because they were not required to do so pursuant to the terms of the Agreement.

Likewise, there was no evidence presented that any "intake records" other than the record provided were required by the health officer under the Agreement. Accordingly, I **FIND** that the City provided the "intake records" in its possession to McNally and that "intake records" similar to an "Incident Report" were not made, maintained, received, or kept on file in the course of official business by Bayonne. As such, I **CONCLUDE** that "intake records" similar to an "Incident Report" were not a government record and there was no denial of access . . .

While McNally's dissatisfaction with the NJACR Agreement may be well-founded, contract negotiation is outside the scope of an OPRA request and this hearing, and under the totality of the circumstances, I **CONCLUDE** that no public official, officer, employee, or custodian knowingly and willfully violated OPRA or unreasonably denied access in connection with McNally's OPRA request.

### **ORDER**

It is **ORDERED** that petitioner's complaint be **DISMISSED** with prejudice.

The ALJ's conclusions are clearly aligned and consistent with the aforementioned credibility determinations. As such, the GRC is satisfied that it can ascertain which testimony the

ALJ accepted as fact, and further, finds that those facts provide a reasonable basis for the ALJ's conclusions.

Therefore, the Council should accept the ALJ's findings concluding that ". . . veterinarian bills, to the extent any may have existed, were not a government record and no right of access applies." And further that ". . . the [Custodian] provided the 'intake records' in its possession to [Complainant] and that . . . 'intake records' similar to an 'Incident Report' were not a government record and there was no denial of access." And additionally, that ". . . no public official, officer, employee, or custodian knowingly and willfully violated OPRA or unreasonably denied access in connection with [Complainant's] OPRA request. Thus, the Council should adopt the ALJ's Order directing that the complaint be dismissed.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the Council should accept Honorable Kelly J. Kirk's, Administrative Law Judge, findings concluding that ". . . veterinarian bills, to the extent any may have existed, were not a government record and no right of access applies." And further that ". . . the [Custodian] provided the 'intake records' in its possession to [Complainant] and that . . . 'intake records' similar to an 'Incident Report' were not a government record and there was no denial of access." And additionally, that ". . . no public official, officer, employee, or custodian knowingly and willfully violated OPRA or unreasonably denied access in connection with [Complainant's] OPRA request. Thus, the Council should adopt the Administrative Law Judge's Order directing that the complaint be dismissed.

Prepared By: John E. Stewart  
Staff Attorney

April 21, 2020



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

PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**INTERIM ORDER**

**March 26, 2019 Government Records Council Meeting**

Megan McNally  
Complainant

Complaint No. 2018-16

v.

City of Bayonne (Hudson)  
Custodian of Record

At the March 26, 2019 public meeting, the Government Records Council (“Council”) considered the March 19, 2019 Supplemental Findings and Recommendations of the Council Staff 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 has not complied with the terms of the Council’s February 26, 2019 Interim Order because he failed to disclose to the Complainant the records ordered by the Council for disclosure and failed to provide a detailed document index explaining the lawful basis for any redactions. The Council therefore finds the Custodian in violation of the Council’s Order.
2. “The Council shall, pursuant to New Jersey Rules Governing the Courts, *R. 4:67-6*, have the authority to enforce compliance with the orders and decisions issued by the Council.” N.J.A.C. 5:105-2.9(c). The Council’s February 26, 2019 Interim Order would have been enforceable in the Superior Court if the Complainant chose that option. R. 4:67-6. However, the Council notes that the Court cannot grant the relief provided by the Council’s Order because the Custodian certified that the records subject to disclosure were “not maintained.”
3. The Custodian failed to respond to the request in a timely manner, thereby violating N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i). Also, the Custodian failed to comply with the Council’s February 26, 2019 Interim Order by not disclosing to the Complainant the records ordered by the Council for disclosure along with a detailed document index explaining the lawful basis for any redactions. Further, the Custodian failed to take measures to preserve the requested records during the pendency of the complaint thereby allowing the vendor to dispose of them, raising the question of spoliation of evidence. Therefore, the Custodian’s actions may be intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for a proof hearing to determine whether the Custodian and/or any other official knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Interim Order Rendered by the  
Government Records Council  
On The 26<sup>th</sup> Day of March, 2019

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: March 28, 2019**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff  
March 26, 2019 Council Meeting**

**Megan McNally<sup>1</sup>  
Complainant**

**GRC Complaint No. 2018-16**

v.

**City of Bayonne (Hudson)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of the following documents pertaining to NJ Animal Control & Rescue:

1. All intake records for the month of October, 2017 for all dogs and all cats.
2. All veterinarian bills for all dogs for October, 2017.<sup>3</sup>

**Custodian of Record:** Robert F. Sloan

**Request Received by Custodian:** December 8, 2017

**Response Made by Custodian:** December 8, 2017 and January 12, 2018

**GRC Complaint Received:** February 2, 2018

**Background**

February 26, 2019 Council Meeting

At its February 26, 2019 public meeting, the Government Records Council (“Council”) considered the February 19, 2019 Findings and Recommendations of the Council Staff 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 did not bear his burden of proof that he 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).

---

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

<sup>2</sup> Represented by Jessica H. Connors, Esq. (Bayonne, NJ).

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

2. The Council has no authority over the accuracy or content of the record provided in response to request item number 1. N.J.S.A. 47:1A-7(b); Gillespie v. Newark Pub. Schools, GRC Complaint No. 2004-105 (November 2004) and Kwanzaa v. Dep't of Corr., GRC Complaint No. 2004-167 (March 2005).
3. The Custodian failed to bear his burden of proving a lawful denial of access to the records responsive to request item number 2, to wit; "veterinarian bills for all dogs for October, 2017." N.J.S.A. 47:1A-6 and Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010). Thus, the Custodian must obtain said records from Animal Cruelty Investigator Geoffrey Santini and disclose them to the Complainant.
4. **The Custodian shall comply with paragraph #3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Council Staff.**
5. The Council defers analysis of whether the Custodian or any other individual 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 February 28, 2019, the Council distributed its February 26, 2019 Interim Order to all parties. On March 6, 2019, the Custodian responded to the Council's Interim Order by providing a certification to the Council Staff.

#### Analysis

#### Compliance

On February 26, 2019, the Council ordered the above-referenced compliance. On February 28, 2019, the Council distributed its Interim Order to the parties. The Order directed the Custodian to obtain veterinarian bills for all dogs for October 2017 from Animal Cruelty Investigator Geoffrey Santini and disclose said records to the Complainant within five (5) business days from receipt of the Council's Order, with any appropriate redactions. Therefore, compliance was due on or before March 7, 2019. The Order further directed the Custodian to provide a detailed document index explaining the lawful basis for any redaction(s) and to provide certified confirmation of compliance to the Council Staff.

On March 6, 2019, the fourth (4<sup>th</sup>) business day after the Custodian received the Interim Order he forwarded a certification to the Council Staff. The Custodian certified that he received an e-mail containing the Council's Interim Order on February 28, 2019. The Custodian further certified that on March 1, 2019, the Custodian's Counsel contacted Mr. Geoffrey Santini, the

former Animal Control Officer for the City of Bayonne, regarding this complaint and that Mr. Santini referred the matter to his attorney, Thomas Wall, Esq.

The Custodian further certified that on March 4, 2019, City of Bayonne Law Director John F. Coffey II, Esq., received an e-mail from Mr. Wall which stated that, “. . . vet bills . . . were not part of the contract and not required to be submitted to the town. We are not subject to opera (sic) requests.” The Custodian certified that on March 5, 2019, Mr. Wall sent a letter to Mr. Coffey wherein he reiterated that the veterinarian bills were not required to be submitted to the City. The Custodian further certified that Mr. Wall further stated that “[the veterinarian] records are not maintained beyond one year” and “[a]s a private company, we are not subject to OPRA.”

Therefore, the Custodian did not comply with the Council’s February 26, 2019 Interim Order because, although the Custodian in a timely manner forwarded a certification to the Council Staff, he averred that “the City of Bayonne cannot produce documents responsive to the Council’s Interim Order as veterinarian bills were not provided to the City upon request. Further, veterinarian bills are not maintained by Mr. Santini beyond one year.”

Accordingly, the Custodian has not complied with the terms of the Council’s February 26, 2019 Interim Order because he failed to disclose to the Complainant the records ordered by the Council for disclosure and failed to provide a detailed document index explaining the lawful basis for any redactions. The Council therefore finds the Custodian to be in violation of the Council’s Order.

### **Council’s February 26, 2019 Interim Order is Enforceable**

“The Council shall, pursuant to New Jersey Rules Governing the Courts, *R. 4:67-6*, have the authority to enforce compliance with the orders and decisions issued by the Council.” *N.J.A.C. 5:105-2.9(c)*. The Council’s February 26, 2019 Interim Order would have been enforceable in the Superior Court if the Complainant chose that option. *R. 4:67-6*. However, the Council notes that the Court cannot grant the relief provided by the Council’s Order because the Custodian certified that the records subject to disclosure were “not maintained.”

### **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)); and 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)).

Here, the Custodian violated OPRA because he failed to respond in a timely manner to the Complainant's request, contrary to the provisions of N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i). The Custodian also violated OPRA because he failed to disclose to the Complainant the records ordered by the Council for disclosure and failed to provide a detailed document index explaining the lawful basis for any redactions. The GRC recognizes that the Custodian's Counsel attempted to obtain the records in compliance with the Council's Order. However, the Custodian certified that the vendor failed to turn over the records, alleging they were not required to be submitted to the City and that they are not maintained after one year.

The evidence of record in this complaint reveals that the request for October 2017 veterinarian bills, the records ordered for disclosure by the Council, was received by the Custodian on December 8, 2017. On January 12, 2018, the Custodian, through counsel, denied the request asserting that veterinary bills are proprietary and confidential information as per the Animal Cruelty Investigator's claim. The instant complaint followed on February 2, 2018.

Here, the Custodian passed along the vendor's reason for denying access without any further inquiry or due diligence, notwithstanding the fact that the law places the burden on the Custodian to prove that the denial is lawful pursuant to N.J.S.A. 47:1A-6. Furthermore, the Custodian took no measures to preserve the requested records during the pendency of the complaint, which was filed approximately three (3) months after the records were created. Moreover, the Custodian knew or should have known that the Council could very well order disclosure of some or all of the requested records. Yet instead of taking steps to safeguard the records, he allowed the vendor to dispose of them before the Council rendered its decision in this matter. This raises the question of whether spoliation of evidence is at issue here.

The Custodian failed to respond to the request in a timely manner, thereby violating N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i). Also, the Custodian failed to comply with the Council's February 26, 2019 Interim Order by not disclosing to the Complainant the records ordered by the Council for disclosure along with a detailed document index explaining the lawful basis for any redactions. Further, the Custodian failed to take measures to preserve the requested records during the pendency of the complaint thereby allowing the vendor to dispose of them, raising the question of spoliation of evidence. Therefore, the Custodian's actions may be intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for a proof hearing to determine whether the Custodian and/or any other official knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

## Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Custodian has not complied with the terms of the Council's February 26, 2019 Interim Order because he failed to disclose to the Complainant the records ordered by the Council for disclosure and failed to provide a detailed document index explaining the lawful basis for any redactions. The Council therefore finds the Custodian in violation of the Council's Order.
2. "The Council shall, pursuant to New Jersey Rules Governing the Courts, *R. 4:67-6*, have the authority to enforce compliance with the orders and decisions issued by the Council." N.J.A.C. 5:105-2.9(c). The Council's February 26, 2019 Interim Order would have been enforceable in the Superior Court if the Complainant chose that option. *R. 4:67-6*. However, the Council notes that the Court cannot grant the relief provided by the Council's Order because the Custodian certified that the records subject to disclosure were "not maintained."
3. The Custodian failed to respond to the request in a timely manner, thereby violating N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i). Also, the Custodian failed to comply with the Council's February 26, 2019 Interim Order by not disclosing to the Complainant the records ordered by the Council for disclosure along with a detailed document index explaining the lawful basis for any redactions. Further, the Custodian failed to take measures to preserve the requested records during the pendency of the complaint thereby allowing the vendor to dispose of them, raising the question of spoliation of evidence. Therefore, the Custodian's actions may be intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for a proof hearing to determine whether the Custodian and/or any other official knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Prepared By: John E. Stewart  
Staff Attorney

March 19, 2019



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

PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**INTERIM ORDER**

**February 26, 2019 Government Records Council Meeting**

Megan McNally  
Complainant

Complaint No. 2018-16

v.

City of Bayonne (Hudson)  
Custodian of Record

At the February 26, 2019 public meeting, the Government Records Council (“Council”) considered the February 19, 2019 Findings and Recommendations of the Council Staff 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 his burden of proof that he 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 Council has no authority over the accuracy or content of the record provided in response to request item number 1. N.J.S.A. 47:1A-7(b); Gillespie v. Newark Pub. Schools, GRC Complaint No. 2004-105 (November 2004) and Kwanzaa v. Dep’t of Corr., GRC Complaint No. 2004-167 (March 2005).
3. The Custodian failed to bear his burden of proving a lawful denial of access to the records responsive to request item number 2, to wit; “veterinarian bills for all dogs for October, 2017.” N.J.S.A. 47:1A-6 and Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010). Thus, the Custodian must obtain said records from Animal Cruelty Investigator Geoffrey Santini and disclose them to the Complainant.
4. **The Custodian shall comply with paragraph #3 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each**



**redaction, if applicable. Further, the Custodian shall simultaneously deliver<sup>1</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>2</sup> to the Council Staff.<sup>3</sup>**

5. The Council defers analysis of whether the Custodian or any other individual 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 26<sup>th</sup> Day of February, 2019

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: February 28, 2019**

---

<sup>1</sup> The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

<sup>2</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>3</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 Council Staff  
February 26, 2019 Council Meeting**

**Megan McNally<sup>1</sup>  
Complainant**

**GRC Complaint No. 2018-16**

**v.**

**City of Bayonne (Hudson)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of the following documents pertaining to NJ Animal Control & Rescue:

1. All intake records for the month of October, 2017 for all dogs and all cats.
2. All veterinarian bills for all dogs for October, 2017.<sup>3</sup>

**Custodian of Record:** Robert F. Sloan

**Request Received by Custodian:** December 8, 2017

**Response Made by Custodian:** December 8, 2017 and January 12, 2018

**GRC Complaint Received:** February 2, 2018

**Background<sup>4</sup>**

**Request and Responses:**

On December 8, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the City of Bayonne seeking the above-mentioned records. On December 8, 2017, the Custodian, through counsel, requested an unopposed thirty (30) calendar day extension of time to respond to the request. On January 12, 2018, the Custodian, through counsel, responded to the Complainant’s request by advising her that the records responsive to request item number 1 were attached. With respect to request item number 2, the Custodian informed the Complainant, “I contacted NJACR and was advised ‘[a]ll veterinary bills are proprietary and confidential information’ as stated by the Animal Cruelty Investigator.”<sup>5</sup>

---

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

<sup>2</sup> Represented by Jessica H. Connors, Esq. (Bayonne, NJ).

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

<sup>4</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.

<sup>5</sup> NJACR is an abbreviation for New Jersey Animal Control and Rescue, LLC. The organization provides animal control and shelter services.



### Denial of Access Complaint:

On February 2, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that she filed her request for the records relevant to the complaint on December 8, 2017, and received a response on that same day from the Custodian seeking a thirty day extension.

The Complainant stated that she expected the response on January 8, 2018, and she followed up on the status of the request by e-mailing the City on January 9, 2018. Thereafter, the Complainant stated that she had a telephone conversation with Jay Coffey in the Law Department on January 10, 2018, and followed that telephone conversation with an e-mailed reminder on January 11, 2018. The Complainant stated that she finally received a response from the City Law Department on January 12, 2018; however, the response did not adequately address her request. The Complainant stated that in response to request item number 1, she received a single monthly report, and not the requested intake records for all animals. The Complainant stated that she is confused by the reason for denial of request item number 2, and is seeking a fuller explanation for the denial.

The Complainant attached to the complaint several documents and e-mails, which were not referenced as exhibits in the complaint. Many of the documents and other correspondence appear to be related to GRC Complaint No. 2017-230, which was adjudicated by the Council in January of 2018.

### Statement of Information:

On March 6, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on December 8, 2017, whereupon on that same date he requested a thirty (30) calendar day extension of time to respond to the request. The Custodian certified that upon receipt, the request was sent to the Health Department, Finance Department and the Animal Cruelty Investigator.

The Custodian certified that the Law Department responded in writing on January 12, 2018, by disclosing the intake records for the month of October 2017 for all dogs and all cats, as well as another record not presently relevant to the complaint. With respect to the veterinarian bills for all dogs for the month of October 2017, the Custodian certified that the City of Bayonne was not in possession of the records; however, the Law Department contacted Animal Cruelty Investigator Geoffrey Santini to try to obtain the bills. The Custodian certified that Mr. Santini replied that “all veterinary bills are proprietary and confidential information.”

## Analysis

### 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>6</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).

Here, on December 8, 2017, the Custodian requested a thirty (30) calendar day extension of time to respond to the request. As such, the response was due no later than January 8, 2018. However, the Custodian did not respond until January 12, 2018.

Therefore, the Custodian did not bear his burden of proof that he 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, 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.

### **Request item number 1 - all intake records for the month of October 2017 for all dogs and all cats**

OPRA delineates the Council's powers and duties. N.J.S.A. 47:1A-7(b). Such powers and duties do not include authority over the content of a record. See Gillespie v. Newark Pub. Schools, GRC Complaint No. 2004-105 (November 2004)(holding that OPRA "concerns access to government records and pursuant to N.J.S.A. 47:1A-7(b) the Council does not have the jurisdiction to determine the validity of a record."), and Kwanzaa v. Dep't of Corr., GRC Complaint No. 2004-167 (March 2005) (holding that the Council "does not oversee the content of documentation" but "does oversee the disclosure and non-disclosure of documents.")

Here, there is no dispute between the Complainant and the Custodian that the Custodian on January 12, 2018, disclosed a record which the Custodian determined was responsive to this request item. Moreover, both the Complainant in the complaint, and the Custodian in the SOI, attached a copy of the record the Custodian disclosed. The record is captioned "New Jersey Animal Control Report" for Bayonne and contains a list of animals with corresponding numbers. The Complainant argued that this record is a single monthly report, and not the requested "intake

---

<sup>6</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.

reports for all animals” that she had requested. This issue therefore, is one of content, for which the Council has no authority.

Accordingly, the Council has no authority over the accuracy or content of the record provided in response to request item number 1. N.J.S.A. 47:1A-7(b); Gillespie, GRC 2004-105 and Kwanzaa, GRC 2004-167.

#### Request item number 2 - all veterinarian bills for all dogs for October 2017

The relationship between the City of Bayonne and the NJACR and/or Animal Cruelty Investigator Geoffrey Santini is unclear. However, what is clear is that there is a working relationship between those entities. This conclusion is supported by the Custodian’s certification that, among others, the request was routed to the Animal Cruelty Investigator. Further, the Custodian certified that the Law Department contacted the Animal Cruelty Investigator in an effort to obtain the requested veterinarian bills. Given the facts set forth in the Custodian’s certification, the City did have an obligation to obtain the veterinarian bills from the Animal Cruelty Investigator.

In Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010) the Appellate Division reviewed the Law Division’s ruling, interpreting Bent v. Twp. of Stafford Police Dep’t, 381 N.J. Super. 30 (App. Div. 2005), holding that the defendant did not have to disclose the records responsive to the plaintiff’s OPRA request because the records were not in the defendant’s possession. The Appellate Division held that the motion judge interpreted Bent too broadly, and held:

[w]e find the circumstances in Bent, *supra*, to be far removed from those existing in the present matter because ... the settlement agreements at issue were made by or on behalf of the [defendants] in the course of its official business. Were we to conclude otherwise, a governmental agency seeking to protect its records from scrutiny could simply ... relinquish possession to [third] parties, thereby thwarting the policy of transparency that underlies OPRA ... We reject any narrowing legal position in this matter that would provide grounds for impeding access to such documents.

[Id. at 517.]

Although the Custodian stated that the City did attempt to obtain the requested veterinarian bills from Animal Cruelty Investigator Santini, Mr. Santini refused to provide the records. The reason the Custodian stated Mr. Santini gave for refusing to provide the records was that “all veterinary bills are proprietary and confidential information.”

OPRA provides that “[a] government record shall not include the following information which is deemed to be confidential . . . proprietary commercial or financial information obtained from any source.” N.J.S.A. 47:1A-1.1. OPRA does not define “proprietary commercial or financial information.”

In Communications Workers of America v. McCormac, 417 N.J. Super. 412, 430 (Law Division, Mercer County March 5, 2008) the court was confronted with the question of what qualifies as proprietary commercial or financial information. Concluding that the term is not defined in OPRA, and that there are no reported decisions in New Jersey interpreting the exemption, the trial court looked to a labor and employment law decision of the New Jersey Supreme Court for guidance. The court found that in LaMorte Burns & Co. v. Walters, 167 N.J. 285, 299-301 (2001), the Court suggested a three-part test to determine whether certain information constitutes proprietary commercial or financial information: (1) a party has expended its resources developing the information; (2) the information is not generally disclosed to the public; and (3) if the information is disclosed, it is disclosed for a limited purpose with a provision for confidentiality.

Applying the three-part test to the instant complaint, “veterinary bills” do not constitute proprietary, commercial or financial information. In fact, the bills would fail to meet the first prong of the test because no monetary or human resource investment was made to develop information. A fee was simply charged for provision of a service which was then reflected in an invoice. Moreover, OPRA specifically lists “bills” as records subject to disclosure. In fact, OPRA provides that bills are subject to *immediate* access. N.J.S.A. 47:1A-5(e).<sup>7</sup>

Therefore, the Custodian failed to bear his burden of proving a lawful denial of access to the records responsive to request item number 2, to wit; “veterinarian bills for all dogs for October, 2017.” N.J.S.A. 47:1A-6 and Burnett, 415 N.J. Super. 506. Thus, the Custodian must obtain said records from Animal Cruelty Investigator Geoffrey Santini and disclose them to the Complainant.

### **Knowing & Willful**

The Council defers analysis of whether the Custodian or any other individual 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 Council Staff respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he 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 Council has no authority over the accuracy or content of the record provided in response to request item number 1. N.J.S.A. 47:1A-7(b); Gillespie v. Newark Pub.

---

<sup>7</sup> The immediate access provision for this record need not be considered here because the Council already concluded that the Custodian did not respond in a timely manner.

Schools, GRC Complaint No. 2004-105 (November 2004) and Kwanzaa v. Dep't of Corr., GRC Complaint No. 2004-167 (March 2005).

3. The Custodian failed to bear his burden of proving a lawful denial of access to the records responsive to request item number 2, to wit; "veterinarian bills for all dogs for October, 2017." N.J.S.A. 47:1A-6 and Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010). Thus, the Custodian must obtain said records from Animal Cruelty Investigator Geoffrey Santini and disclose them to the Complainant.
4. **The Custodian shall comply with paragraph #3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver<sup>8</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>9</sup> to the Council Staff.<sup>10</sup>**
5. The Council defers analysis of whether the Custodian or any other individual 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.

Prepared By: John E. Stewart  
Staff Attorney

February 19, 2019

---

<sup>8</sup> The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

<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.