



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

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

**January 7, 2020 Government Records Council Meeting**

Dolores Rebecky  
Complainant

Complaint No. 2018-55

v.

Borough of Wallington (Bergen)  
Custodian of Record

At the January 7, 2020 public meeting, the Government Records Council (“Council”) considered the December 10, 2019 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 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 immediately results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody v. Middletown Twp. Public Schools, GRC Complaint No. 2005-98 (December 2005). See also Harris v. NJ Dep’t of Corr., GRC Complaint No. 2011-65 (August 2012).
2. The Custodian’s response was insufficient because he failed to indicate a specific date upon which the responsive records would be provided. N.J.S.A. 47:1A-5(i); Hardwick v. N.J. Dep’t of Transportation, GRC Complaint No. 2007-164 (February 2008). See also Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011).
3. The Custodian did not unlawfully deny access to the Complainant’s November 20, 2017 request based upon the sufficiency of the disclosed records’ content. See Katinsky v. River Vale Twp., GRC Complaint No. 2003-68 (November 2003). See also Kwanzaa v. Dep’t of Corr., GRC Complaint No. 2004-167 (March 2005), citing N.J.S.A. 47:1A-7(b).
4. Although the Custodian violated N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), and provided an insufficient response to the Complainant’s request pursuant to N.J.S.A. 47:1A-5(i), the Custodian did provide the Complainant with all records responsive to the request. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do

not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the  
Government Records Council  
On The 7<sup>th</sup> Day of January 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: January 9, 2020**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
January 7, 2020 Council Meeting**

**Dolores Rebecky<sup>1</sup>  
Complainant**

**GRC Complaint No. 2018-55**

v.

**Borough of Wallington (Bergen)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** “Provide all borough credit card accounts with corresponding statements for borough officials, borough employees or the town of Wallington for the last 10 (ten) yrs.”<sup>3</sup>

**Custodian of Record:** Witold T. Baginski  
**Request Received by Custodian:** November 20, 2017  
**Response Made by Custodian:** November 30, 2017  
**GRC Complaint Received:** March 29, 2018

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

**Request and Response:**

On November 20, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 30, 2017, the seventh (7<sup>th</sup>) business day following receipt of said request, the Custodian responded in writing informing the Complainant that the request “will be completed in approximately six weeks.”

**Denial of Access Complaint:**

On March 29, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian did not respond to the Complainant’s request by seeking an extension of time “within the first 7 days.” The Complainant further asserted that the Custodian failed to provide a reason, or ask the Complainant’s permission, for the extension of time to fulfill the request.

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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> The request did not specify the desired format or means of delivery of the records.

<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 Executive Director the submissions necessary and relevant for the adjudication of this complaint.

The Complainant stated that on March 22, 2018, the Custodian's secretary telephoned her and informed her that copies of the requested records were ready for pick up. The Complainant stated that she asked the secretary if there was a "cover sheet" confirming that all credit card information was provided. The Complainant stated that the secretary answered her inquiry in the negative, but informed her that there was a copying charge of \$62.00 without further explanation.<sup>5</sup>

The Complainant asserted that she filed the Denial of Access Complaint because the Custodian failed to provide the requested records until four (4) months after he received the OPRA request. The Complainant also stated that when the records were disclosed they did not contain a "cover sheet." The Complainant stated that due to the absence of a "cover sheet" the requested records "cannot be confirmed to be complete."

#### Statement of Information:

On May 1, 2018, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on November 20, 2017, and responded in writing on November 30, 2017, December 14, 2017 and March 22, 2018.<sup>6</sup> The Custodian certified that due to the lengthy nature of the request, he sought an extension of time to respond.

The Custodian certified that the records responsive to the request are "Borough credit card bills/statements for the past 10 years." The Custodian further certified that the Borough's accounts payable/receivable file was searched for the requested records and ten (10) years of Home Depot credit card statements responsive to the request were located. The Custodian certified that all responsive records were disclosed to the Complainant in unredacted form on March 22, 2018. The Custodian also certified that his office is small and Borough employees did "the best they could" to respond to the request.

### 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>7</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).

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<sup>5</sup> There is nothing in the evidence of record regarding whether the copying charge was further pursued and/or was or was not paid by the Complainant.

<sup>6</sup> The Custodian failed to attach any of the alleged responses to the SOI; however, the Complainant did attach a copy of the Custodian's November 30, 2017 response to the complaint.

<sup>7</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.

Likewise, barring extenuating circumstances, a custodian's failure to respond immediately in writing to a complainant's OPRA request for immediate access records, either granting access, denying access, seeking clarification, or requesting an extension of time, also results in a "deemed" denial of the request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i).<sup>8</sup> See Cody v. Middletown Twp. Public Schools, GRC Complaint No. 2005-98 (December 2005) and Harris v. NJ Dep't of Corr., GRC Complaint No. 2011-65 (August 2012). See also Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007), holding that the custodian was obligated to immediately notify the complainant as to the status of immediate access records.

Here, the Complainant requested credit card statements, which the Custodian characterized in the SOI as "bills/statements." These are records for which immediate access ordinarily shall be granted. However, the evidence of record reveals that the Custodian received the Complainant's request for the immediate access records on November 20, 2017 but did not initially respond seeking an extension of time until seven (7) business days later.

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 immediately results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody, GRC 2005-98. See also Harris, GRC 2011-65.

### **Sufficiency of Response**

In Hardwick v. N.J. Dep't of Transportation, GRC Complaint No. 2007-164 (February 2008), the custodian responded by requesting an extension of time to address the request but 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). Subsequently, in Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011), the custodian when seeking a second extension of time merely informed the complainant that the requested records had not yet been received and that he would contact the complainant when he had more information. The Council found that the response was insufficient and violated N.J.S.A. 47:1A-5(i) because the custodian failed to indicate a specific date upon which the responsive records would be provided.

Here, on the seventh (7<sup>th</sup>) business day following receipt of the request the Custodian responded advising the Complainant that the request "will be completed in approximately six weeks." As such, the Custodian's failure to provide a date certain on which the Borough would respond fulfilling the request is an insufficient response. N.J.S.A. 47:1A-5(i).

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<sup>8</sup> OPRA lists immediate access records as "budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information." N.J.S.A. 47:1A-5(e). The Council has also determined that purchase orders and invoices are immediate access records. See Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2012-03 (April 2013).

Accordingly, the Custodian's response was insufficient because he failed to indicate a specific date upon which the responsive records would be provided. N.J.S.A. 47:1A-5(i); Hardwick, GRC 2007-164. See also Bentz, GRC 2008-89 (June 2011).

### **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 the instant complaint, the Complainant alleged that when the Custodian disclosed the responsive records to her the records did not contain a "cover sheet." As such, the Complainant alleged that the records are not complete. Conversely, the Custodian certified that all responsive records were disclosed to the Complainant in unredacted form on March 22, 2018.

In Katinsky v. River Vale Twp., GRC Complaint No. 2003-68 (November 2003), the complainant indicated to the GRC that the records provided to him by the custodian were "incomplete, improper and inaccurate." The custodian certified that copies of the requested documents given to the complainant were complete and correct. The Council determined that:

[t]he facts in this case indicate that the custodian provided the requester with the requested documents, and the custodian certified that they were complete, correct and contained no redactions. Therefore, the request in this case has been satisfied. The integrity of the requested documents is outside of the authority of the [Council]. For these reasons, the Council should dismiss the Complaint.

[Id.]

Subsequently, in Kwanzaa v. Dep't of Corr., GRC Complaint No. 2004-167 (March 2005), the Complainant was dissatisfied with the record that was disclosed. The Council determined that "...[t]he document requested has been disclosed to the Complainant. Pursuant to N.J.S.A. 47:1A-7(b), the content of the document is not in the Council's jurisdiction. Since the requested record has been disclosed, this portion of the complaint should be dismissed."

Accordingly, the Custodian did not unlawfully deny access to the Complainant's November 20, 2017 request based upon the sufficiency of the disclosed records' content. See Katinsky, GRC 2003-68. See also Kwanzaa, GRC 2004-167, citing N.J.S.A. 47:1A-7(b).

### **Knowing & Willful**

OPRA states that "[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . ." N.J.S.A. 47:1A-11(a). OPRA allows the

Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states “. . . [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]. . .” N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Although the Custodian violated N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), and provided an insufficient response to the Complainant’s request pursuant to N.J.S.A. 47:1A-5(i), the Custodian did provide the Complainant with all records responsive to the request. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian 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 immediately results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody v. Middletown Twp. Public Schools, GRC Complaint No. 2005-98 (December 2005). See also Harris v. NJ Dep’t of Corr., GRC Complaint No. 2011-65 (August 2012).
2. The Custodian’s response was insufficient because he failed to indicate a specific date upon which the responsive records would be provided. N.J.S.A. 47:1A-5(i); Hardwick v. N.J. Dep’t of Transportation, GRC Complaint No. 2007-164 (February 2008). See also Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011).

3. The Custodian did not unlawfully deny access to the Complainant's November 20, 2017 request based upon the sufficiency of the disclosed records' content. See Katinsky v. River Vale Twp., GRC Complaint No. 2003-68 (November 2003). See also Kwanzaa v. Dep't of Corr., GRC Complaint No. 2004-167 (March 2005), citing N.J.S.A. 47:1A-7(b).
4. Although the Custodian violated N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), and provided an insufficient response to the Complainant's request pursuant to N.J.S.A. 47:1A-5(i), the Custodian did provide the Complainant with all records responsive to the request. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

Prepared By: John E. Stewart  
Staff Attorney

December 10, 2019