



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**

**November 12, 2019 Government Records Council Meeting**

India Cole  
Complainant

Complaint No. 2018-78

v.

City of East Orange (Essex)  
Custodian of Record

At the November 12, 2019 public meeting, the Government Records Council (“Council”) considered the October 30, 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 her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, through Mr. Forde, 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). However, the GRC should decline to order disclosure because the Custodian ultimately disclosed all responsive records on April 26, and May 4, 2018 respectively.
2. The Custodian’s failure to respond in a timely manner, through Mr. Forde, resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian ultimately provided the Complainant access to all records responsive to the subject OPRA request between April 26, and May 4, 2018. N.J.S.A. 47:1A-6. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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



at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819,  
Trenton, NJ 08625-0819.

Final Decision Rendered by the  
Government Records Council  
On The 12<sup>th</sup> Day of November 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: November 15, 2019**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
November 12, 2019 Council Meeting**

**India Cole<sup>1</sup>  
Complainant**

**GRC Complaint No. 2018-78**

**v.**

**City of East Orange (Essex)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Hardcopies via pickup of all “Personnel Action Forms” (“PAF”) for three (3) employees (inclusive of the Complainant) from December 1, 2017 through April 10, 2018.<sup>3</sup>

**Custodian of Record:** Cynthia Brown  
**Request Received by Custodian:** April 10, 2018  
**Response Made by Custodian:** April 20, 2018  
**GRC Complaint Received:** May 7, 2018

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

**Request and Response:**

On April 10, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 20, 2018, the eighth (8<sup>th</sup>) business day after receipt of the subject OPRA request, Deputy Clerk Dale Forde responded in writing on behalf of the Custodian stating that the Law Department required an extension through April 26, 2018.

On the same day, the Complainant disputed the extension of time arguing that the requested PAFs should be readily available for disclosure from the Human Resources Department (“HR”). The Complainant requested that the Custodian provide a lawful basis for the extension. Mr. Forde responded noting that the City of East Orange (“City”) was not denying access to any records. Mr. Forde further noted that PAFs were not “immediate” access items. The Complainant responded again disputing the extension and questioning the Law Department’s involvement in responding to her OPRA request. The Complainant asserted that based on her understanding of the GRC’s

---

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

<sup>2</sup> Represented by Shantika F. Dorsey, Esq. (East Orange, NJ).

<sup>3</sup> The Complainant sought additional records that are not at issue in 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 Executive Director the submissions necessary and relevant for the adjudication of this complaint.

explanation of extensions in the “Handbook for Records Custodians” (Fifth Edition – January 2011), she did not believe that redacting the PAFs could result in a reasonable extension. The Complainant thus requested that the Custodian disclose the responsive PAFs by April 23, 2018. On April 23, 2018, Mr. Forde e-mailed the Complainant advising that he was not yet in receipt of the responsive PAFs. Mr. Forde noted that he would disclose the responsive records upon receipt.

On April 26, 2018, Mr. Forde responded in writing on behalf of the Custodian disclosing one (1) PAF to the Complainant. On April 27, 2018, the Complainant e-mailed Mr. Forde disputing the disclosure. The Complainant noted that she sought all PAFs executed between December 1, 2017 and April 10, 2018 for all three (3) individuals. On April 30, 2018, Mr. Forde advised that he forwarded the Complainant’s e-mail to HR and the Law Department for review. On May 2, 2018, the Complainant sought an update, to which Mr. Forde advised that he was still awaiting a response from HR and the Law Department. Mr. Forde subsequently followed up with HR and Custodian’s Counsel, who directed HR to locate responsive PAFs for disclosure.

On May 4, 2018, Mr. Forde responded to the Complainant disclosing additional PAFs and noting that same were redacted for personal information. On the same day, the Complainant acknowledged receipt of the records but stated that she already filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant noted that she waited two (2) additional days before sending her complaint with no responses from the City. The Complainant asserted that delaying disclosure of personnel records appeared to be “common practice” for HR Director Michele Ralph-Rawls. The Complainant further asserted that maybe the GRC would be “better suited to familiarize [Ms. Ralph-Rawls] with” OPRA.

#### Denial of Access Complaint:

On May 7, 2018, the Complainant filed a Denial of Access Complaint with the GRC. The Complainant asserted that the City continued to delay their disclosure of the responsive PAFs.<sup>5</sup>

#### Supplemental Submissions:

On May 14, 2018, the Complainant e-mailed the GRC additional “proof” that Ms. Ralph-Rawls disregarded OPRA’s requirements deliberately and on a continual basis.<sup>6</sup>

#### Statement of Information:<sup>7</sup>

On August 10, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on April 10, 2018. The Custodian certified that Mr. Forde responded in writing on her behalf on April 20, 2018, eight (8) business days after receipt of the subject OPRA request, extending the response time frame The

---

<sup>5</sup> The Complainant sent her complaint to the GRC prior to receiving Mr. Forde’s May 4, 2018 response; however, the GRC did not receive it until May 7, 2018. Thus, the Complainant could not refer to Mr. Forde’s response in the Denial of Access Complaint.

<sup>6</sup> The Complainant submitted prior OPRA requests for PAFs for which she allegedly received incomplete or delayed responses.

<sup>7</sup> On May 21, 2018, this complaint was referred to mediation. On August 1, 2018, this complaint was referred back to the GRC for adjudication.

Custodian certified that Mr. Forde responded again on April 26, 2018 disclosing the Complainant's PAF to her. The Custodian further affirmed that, following receipt of the Complainant's "clarification," Mr. Forde disclosed additional PAFs to the Complainant on May 4, 2018 with redactions for personal information. N.J.S.A. 47:1A-1.

The Custodian asserted that no denial of access occurred here. The Custodian alleged the Complainant granted the extension request and that the City timely responded on April 26, 2018 disclosing responsive records. The Custodian further contended that after receiving "clarification" from the Complainant on April 27, 2018, the City disclosed additional records on the same day.

#### Additional Submissions:

On August 13, 2018, the Complainant e-mailed the GRC disputing the Custodian's SOI. Therein, the Complainant noted multiple inaccuracies and documentary omissions, notwithstanding that she certified to the SOI "under penalty of perjury." The Complainant noted that she submitted all correspondence between the parties as part of the Denial of Access Complaint. The Complainant also disputed the Custodian's assertion that she agreed to an extension of her "entire" OPRA request: she only allowed for an extension to address the records not at issue here. The Complainant further noted that e-mails between Custodian's Counsel and Mr. Forde contradict the Custodian's certification that the City disclosed all responsive PAFs on April 27, 2018.

### Analysis

#### Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).<sup>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 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).

In the instant complaint, the Complainant argued that the Custodian unnecessarily delayed disclosure of the responsive PAFs. In the SOI, the Custodian certified that she received the Complainant's OPRA request on April 10, 2018. The Custodian further affirmed that Mr. Forde responded on her behalf "eight [(8)] days later," or April 20, 2018, extending the response time frame. However, the response did not encompass eight (8) calendar days. Instead, the time frame between receipt and Mr. Forde's initial response numbered eight (8) business days, or one (1) business day beyond the statutorily-mandated time frame. For this reason, the Custodian response

---

<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.

was untimely and the Complainant's OPRA request was "deemed" denied at the time that Mr. Forde extended the time frame.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, through Mr. Forde, 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. However, the GRC should decline to order disclosure because the Custodian ultimately disclosed all responsive records on April 26, and May 4, 2018 respectively.

Finally, the GRC notes that it does not reach the issue of the extension because the Complainant's OPRA request was already "deemed" denied at the time when the City sought its first extension.

### **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)).

In the matter before the Council, the Custodian's failure to respond in a timely manner, through Mr. Forde, resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian ultimately provided the Complainant access to all records responsive to the subject OPRA request between April 26, and May 4, 2018. N.J.S.A. 47:1A-6. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's

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

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, through Mr. Forde, 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). However, the GRC should decline to order disclosure because the Custodian ultimately disclosed all responsive records on April 26, and May 4, 2018 respectively.
2. The Custodian's failure to respond in a timely manner, through Mr. Forde, resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian ultimately provided the Complainant access to all records responsive to the subject OPRA request between April 26, and May 4, 2018. N.J.S.A. 47:1A-6. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso  
Executive Director

October 30, 2019