



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**

**January 26, 2021 Government Records Council Meeting**

David Weiner  
Complainant

Complaint No. 2019-227

v.

Township of Ocean (Monmouth)  
Custodian of Record

At the January 26, 2021 public meeting, the Government Records Council (“Council”) considered the January 19, 2021 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 within the extended time frame 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). See also Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). However, the GRC declines to order any further action because the Custodian disclosed those records located as part of the SOI and the Complainant has not challenged that response.
2. The Custodian’s failure to timely respond within the extended time frame resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian ultimately disclosed to the Complainant the only responsive record that existed as part of the Statement of Information. 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 26<sup>th</sup> Day of January 2021

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 28, 2021**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
January 26, 2021 Council Meeting**

**David Weiner<sup>1</sup>  
Complainant**

**GRC Complaint No. 2019-227**

v.

**Township of Ocean (Monmouth)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of the following regarding the “Mayor’s [i]nvolvement with 32 Acre Development, *et al:*”

1. “[A]ny documents delineating” correspondence between the Township of Ocean (“Township”) Mayor’s Office and Paramount Properties or Maurice Zekaria regarding the purchase of the property.
2. “[A]ny documents delineating” the capacity in which the Mayor approached Paramount Properties or Maurice Zekaria to purchase the property known as Stop and Shop Supermarkets: “was it within his official capacity as the Mayor of the [Township] or as a private citizen?”
3. “[A]ny documents delineating if the Gavin Agency [R]ealty [C]ompany was within any fashion a realtor representing the Township in the purchase of the 32 acres parcel of property.”
4. “[A]ny documents delineating whether there was a realtor involved in the transaction between Deal 35, LLC and Stop and Ship, other than Paramount Realty.”
5. “[A]ny documents delineating” the modification of Ordinance No. 2303 to comport with the criteria of the proposed development.
6. “[A]ny documents delineating” correspondence between the Mayor’s Office and/or other Township officials “assuring . . . Paramount Realty, Deal 35, LLC, or Maurice Zekaria” that the development would be approved by the Township Planning Board.

**Custodian of Record:** Vincent Buttiglieri  
**Request Received by Custodian:** October 1, 2019  
**Response Made by Custodian:** October 10, 2019  
**GRC Complaint Received:** November 15, 2019

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

<sup>2</sup> Represented by Martin J. Arbus, Esq., of Arbus, Maybruch & Goode (Hazlet, NJ).

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

### **Request and Response:**

On September 23, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On October 4, 2019, the Custodian responded in writing stating that he received the subject OPRA request upon his return to work from a two (2) week vacation. The Custodian stated that he would respond on or before October 15, 2019. On October 10, 2019, the Complainant e-mailed the Custodian seeking a status update on the subject OPRA request. On the same day, the Custodian again responded stating that he would need an additional day, or until October 16, 2019, to complete the subject OPRA request. The Custodian also requested that the Complainant schedule an in-person meeting to discuss the subject OPRA request.

On October 17, 2019, the Complainant requested that his in-person meeting scheduled for the same day be postponed. On October 18, 2019, the parties agreed reschedule the in-person meeting for October 21, 2019. On October 21, 2019, the parties again rescheduled their in-person meeting for October 22, 2019.

### **Denial of Access Complaint:**

On November 15, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that he and the Custodian had an in-person meeting on October 22, 2019, at which the Custodian advised he would attempt to obtain and disclose any records that existed. The Complainant argued that as of the date of this filing, he has not received a response from the Custodian.

### **Statement of Information:**

On March 10, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on October 1, 2019. The Custodian certified that on October 10, 2019, he e-mailed the Complainant requesting an in-person meeting. The Custodian averred that the in-person meeting with the Complainant occurred on October 22, 2019, wherein he tried to clarify the subject OPRA request as it sought “any documents” referencing multiple events within the Township. The Custodian certified that during the meeting, he advised the Complainant that it was likely no records existed for certain items. The Custodian certified that his search included reviewing the file for Township Ordinance No. 2303, contacting the Mayor, and reviewing e-mails potentially responsive to the OPRA request.

The Custodian averred that after receiving the instant complaint, he engaged in several communications with the Complainant, including telephone calls on March 4 and 6, 2020. The Custodian further certified that he agreed to disclose copies of Township Ordinance Nos. 2303 and 2307, as well as six (6) e-mail chains that “‘may’ pertain to” the subject OPRA request. The

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<sup>3</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Custodian averred that these records were attached to the SOI. The Custodian further affirmed that no records responsive to OPRA request item Nos. 1, 2, 3, 4, and 6 existed.

The Custodian contended that he acted in good faith and continued to work with the Complainant to try and fulfill the subject OPRA request. The Custodian acknowledged that it took much longer than anticipated to address the OPRA request, but that at no time did he “abandon [his] responsibility to be responsive to the request.” The Custodian noted that he was providing a full response to the Complainant “including any of the requested information in the possession of the Township.”

## 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>4</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 Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5<sup>th</sup>) business day after receipt of the complainant’s March 19, 2007 OPRA request seeking an extension of time until April 20, 2007. However, the custodian responded again on April 20, 2007, stating that the requested records would be provided later in the week. Id. The evidence of record showed that no records were provided until May 31, 2007. Id. The GRC held that:

The Custodian properly requested an extension of time to provide the requested records to the Complainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) . . . however . . . [b]ecause the Custodian failed to provide the Complainant access to the requested records by the extension date anticipated by the Custodian, the Custodian violated N.J.S.A. 47:1A-5(i) resulting in a “deemed” denial of access to the records.

[Id.]

In the instant complaint, the Complainant argued that notwithstanding an October 22, 2019 in-person meeting, the Custodian failed to respond to his OPRA request. In the SOI, the Custodian

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<sup>4</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.

confirmed that he conducted an in-person meeting with the Complainant on October 22, 2019. The Custodian also referenced written and multiple verbal communications with the Complainant spanning several months.

In reviewing the evidence of record here, the GRC finds that a “deemed” denial occurred because the Custodian failed to provide a written response within an extended time frame.<sup>5</sup> On October 10, 2019, the Custodian extended the response time frame through October 16, 2019. The parties subsequently decided to meet in-person to address the subject OPRA request. Thus, even if their agreement to meet on October 22, 2019 extended the response time frame to that day, the Custodian still failed to issue a written response granting access, denying access, seeking additional clarification, or requesting an extension of time to respond by close of business on that day. Thus, as in Kohn, GRC 2007-124, the Custodian’s failure to respond in writing within the applicable extended time frame results in a “deemed” denial of access.

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 extended time frame 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. See also Kohn, GRC 2007-124. However, the GRC declines to order any further action because the Custodian disclosed those records located as part of the SOI and the Complainant has not challenged that response.

### **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.

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<sup>5</sup> The GRC notes that the Complainant’s OPRA request is invalid on its face because it fails to identify any specific records sought. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Feiler-Jampel v. Somerset Cnty. Prosecutor’s Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008).

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 timely respond within the extended time frame resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian ultimately disclosed to the Complainant the only responsive records that existed as part of the SOI. 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 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 extended time frame 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). See also Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). However, the GRC declines to order any further action because the Custodian disclosed those records located as part of the SOI and the Complainant has not challenged that response.
2. The Custodian's failure to timely respond within the extended time frame resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian ultimately disclosed to the Complainant the only responsive record that existed as part of the Statement of Information. 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

January 19, 2021