



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

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

**March 30, 2021 Government Records Council Meeting**

Jeremy Alden McMaster  
Complainant

Complaint No. 2019-234

v.

Town of Boonton (Morris)  
Custodian of Record

At the March 30, 2021 public meeting, the Government Records Council (“Council”) considered the March 23, 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 her burden of proof that she 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 Custodian unlawfully denied access to the requested e-mail because it did not contain any information which could reasonably fall within the “inter-agency or intra-agency advisory, consultative, or deliberative material” exemption. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of the e-mail because Custodian’s Counsel did so on December 11, 2019.
3. The Custodian’s failure to timely respond resulted in a “deemed” denial of access and she unlawfully denied access to the responsive e-mail. However, Counsel ultimately disclosed the responsive records to the Complainant on December 11, 2019. 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 30<sup>th</sup> Day of March 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: April 1, 2021**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
March 30, 2021 Council Meeting**

**Jeremy Alden McMaster<sup>1</sup>  
Complainant**

**GRC Complaint No. 2019-234**

v.

**Town of Boonton (Morris)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Hard and electronic copies via pickup and e-mail of a letter written by Officer Daniel Mondino sent to the “Dep’t of Homeland Security” (“DHS”) regarding his arrest on or about June 16, 2019.

**Custodian of Record:** Cynthia Oravits  
**Request Received by Custodian:** October 24, 2019  
**Response Made by Custodian:** November 13, 2019  
**GRC Complaint Received:** November 21, 2019

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

**Request and Response:**

On October 24, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 13, 2019, the thirteenth (13<sup>th</sup>) business day after receipt of the OPRA request, the Custodian responded in writing denying access to the requested letter under the “inter-agency or intra-agency advisory, consultative, or deliberative [(“ACD”)] material” exemption. Paff v. Dir., Office of Attorney Ethics, 399 N.J. Super. 632, 648 (September 28, 2007); McGee v. Twp. of East Amwell, 416 N.J. Super. 602, 619 (App. Div. 2010).

**Denial of Access Complaint:**

On November 21, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that on November 5, 2019, the Custodian verbally advised him that there was no copy of the letter because Officer Mondino

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

<sup>2</sup> Represented by Fred Semrau, Esq., of Dorsey & Semrau, LLC (Boonton, NJ).

<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.

“submitted [it] online.” The Complainant averred that he subsequently received a written response on the thirteenth (13<sup>th</sup>) business day denying the request under the ACD exemption.

The Complainant asserted that the letter in question contained expunged arrest information. The Complainant contended that he believed this was done purposely to allow DHS, his employer, to discipline or fire him. The Complainant asserted that he believed Officer Mondino was not “acting in the interest of public safety” when disclosing the expunged information. The Complainant argued that Officer Mondino attempted to cover-up his actions by not maintaining a copy of the letter. The Complainant further argued that the Custodian attempted to further deny liability by initially asserting that no record existed, only to later state the letter did exist but was exempt from disclosure under OPRA.

#### Statement of Information:

On December 12, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on October 24, 2019. The Custodian certified that her search included sending the OPRA request to the Boonton Police Department (“BPD”), who located a one-page e-mail dated June 20, 2019. The Custodian certified that she responded in writing on November 13, 2019 denying access to the responsive e-mail under the ACD exemption. The Custodian noted that following the filing of this complaint, on December 11, 2019, Custodian’s Counsel disclosed the e-mail to the Complainant.<sup>4</sup>

The Custodian argued that the record in question was considered ACD material. Paff, 399 N.J. Super. at 648; McGee, 416 N.J. Super. at 619. The Custodian noted that Officer Mondino filed a complaint through DHS’s online system on behalf of the Town of Boonton (“Town”) and followed same up with the e-mail sought. The Custodian thus argued that the e-mail constituted a communication between public agencies.

#### Additional Information:

On March 11, 2021, the GRC requested additional information from the Custodian. Specifically, the GRC noted that the disclosed e-mail alluded to the existence of a prior correspondence to DHS filing a complaint. The GRC thus asked that the Custodian respond to the following:

1. Does the Town maintain, in physical form or electronically, a copy of the “letter” submitted to DHS as referenced in the complaint and June 20, 2019 e-mail?
  - a. If yes, please advise whether and when the communication was disclosed or provide a specific lawful basis for denying access to it.
  - b. If no, please provide a detailed explanation of the search conducted to locate the record and also include certifications from those individuals that assisted in the search.

The GRC requested that the Custodian provide the required responses by March 16, 2021.

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<sup>4</sup> Upon request, an associate from Custodian Counsel’s firm sent a copy of this disclosure to the GRC on February 25, 2021.

On March 16, 2021, the Custodian and Officer Mondino responded to the GRC's request for additional information. Therein, the Custodian certified that the Town did not possess a copy of the complaint filed by Officer Mondino. The Custodian further affirmed that her search included forwarding the request to BPD, who advised that the disclosed e-mail was the only record that existed.

Officer Mondino certified that the Town did not maintain a copy of the complaint filed with DHS. Officer Mondino affirmed that he filed the complaint through DHS's online system. Officer Mondino certified that "to the best of [his] recollection," the system did not have an option to print or save a copy of the complaint. Officer Mondino certified that this fact is the reason for his June 20, 2019 e-mail to DHS.

## 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>5</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 matter before the Council, the Complainant argued that the Custodian did not timely respond to the subject OPRA request. In the SOI, the Custodian certified that she received the subject OPRA request on October 24, 2019 and responded denying access on November 13, 2019, or thirteen (13) business days after receipt of the subject OPRA request. Thus, the evidence of record supports a finding that a "deemed" denial of access occurred here.

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, 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

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<sup>5</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.

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.

OPRA provides that the definition of a government record “shall not include . . . [(ACD) material.” N.J.S.A. 47:1A-1.1. When the exception is invoked, a governmental entity may “withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated.” Educ. Law Center, 198 N.J. at 285 (citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975)). The New Jersey Supreme Court has also ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Educ. Law Ctr., 198 N.J. 274.

A custodian claiming an exception to the disclosure requirements under OPRA on that basis must initially satisfy two conditions: 1) the document must be pre-decisional, meaning that the document was generated prior to the adoption of the governmental entity's policy or decision; and 2) the document must reflect the deliberative process, which means that it must contain opinions, recommendations, or advice about agency policies. Id. at 286 (internal citations and quotations omitted). The key factor in this determination is whether the contents of the document reflect “formulation or exercise of . . . policy-oriented judgment or the process by which policy is formulated.” Id. at 295 (adopting the federal standard for determining whether material is “deliberative” and quoting Mapother v. Dep't of Justice, 3 F.3d 1533, 1539 (D.C. Cir. 1993)). Once the governmental entity satisfies these two threshold requirements, a presumption of confidentiality is established, which the requester may rebut by showing that the need for the materials overrides the government's interest in confidentiality. Id. at 286-87.

Here, the Custodian denied access to the responsive e-mail, the only record that existed, under the ACD exemption. The Complainant filed the instant complaint alleging that the Town withheld the record to “cover up” the disclosure of expunged information to DHS in an effort to have him disciplined or fired by his employer. In the SOI, the Custodian maintained her position that the e-mail was exempt as ACD material because it was a communication between public agencies. Notwithstanding, Custodian’s Counsel disclosed the e-mail to the Complainant on December 11, 2019. A copy of that disclosure was subsequently provided to the GRC.

Initially, the GRC notes that where agencies have denied access to e-mails under the ACD material exemption, the GRC has typically ordered those records for an *in camera* review. Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); Ehrenreich v. N.J. Dep't of Trans., GRC Complaint No. 2016-192 (Interim Order dated April 24, 2018). However, no such action is necessary here because the GRC has the benefit of reviewing the e-mail ultimately disclosed.

In reviewing that e-mail, the GRC is not persuaded that same constituted ACD material. Although the Custodian insinuated that the e-mail is ACD material solely because it was a communication between public agencies, that e-mail must meet the two-prong test discussed in Educ. Law Ctr., 198 N.J. at 295. However, there is no evidence in the record to support that the

content of the e-mail meets either prong. Specifically, the Custodian has not asserted, nor does the e-mail indicate, that the topic described was pre-decisional. In fact, it is obvious that a decision to file a complaint with DHS regarding the Complainant already occurred. Additionally, the e-mail does include an opinions or recommendations, but confirms that the complaint was filed. Additionally, the GRC found no support in either Paff, 399 N.J. Super. 632 or McGee, 416 N.J. Super. 602 for the Custodian's denial. It should be noted that those cases did involve personnel actions that were under investigation or being discussed prior to those agencies rendering a decision: the same cannot be said here.

Accordingly, the Custodian unlawfully denied access to the requested e-mail because it did not contain any information which could reasonably fall within the ACD material exemption. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of the e-mail because Custodian's Counsel did so on December 11, 2019.

### **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 instant matter, the Custodian's failure to timely respond resulted in a “deemed” denial of access and she unlawfully denied access to the responsive e-mail. However, Counsel ultimately disclosed the responsive records to the Complainant on December 11, 2019. 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, 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 Custodian unlawfully denied access to the requested e-mail because it did not contain any information which could reasonably fall within the "inter-agency or intra-agency advisory, consultative, or deliberative material" exemption. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of the e-mail because Custodian's Counsel did so on December 11, 2019.
3. The Custodian's failure to timely respond resulted in a "deemed" denial of access and she unlawfully denied access to the responsive e-mail. However, Counsel ultimately disclosed the responsive records to the Complainant on December 11, 2019. 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

March 23, 2021