



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**

Joan Banez  
Complainant

Complaint No. 2019-247

v.

City of Garfield (Bergen)  
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 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 Custodian did not unlawfully deny access to the Complainant’s OPRA requests. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that he disclosed to the Complainant with all records that the City of Garfield possessed. Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010); Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005); Holland v. Rowan Univ., GRC Complaint No. 2014-63, *et seq.* (March 2015).
3. The Custodian’s failure to timely respond to the Complainant’ OPRA request 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 all records that existed on December 30, 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**

**Joan Banez<sup>1</sup>  
Complainant**

**GRC Complaint No. 2019-247**

v.

**City of Garfield (Bergen)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Hardcopies via pick-up of “names of all Planning Board [“Board”] members who have completed their required training and received their certification” in “Basic Course in Land Use Law and Planning Training Program.”

**Custodian of Record:** Andrew J. Pavlica  
**Request Received by Custodian:** October 15, 2019  
**Response Made by Custodian:** Various  
**GRC Complaint Received:** December 11, 2019

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

**Request and Response:**

On October 15, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On October 24, 2019, the Complainant e-mailed Deputy Clerk Diane Rosolen seeking a status update on the subject OPRA request and noting that she believed the seven (7) business days ended on that day. Ms. Rosolen responded stating that she left a message with Board Attorney and Secretary Alyssa Cimino regarding the status of the subject OPRA request.

On November 7, 2019, the Complainant e-mailed the Custodian stating that she still had not received a response to the subject OPRA request. On November 8, 2019, Ms. Rosolen forwarded the Complainant’s e-mail to Ms. Cimino. Ms. Cimino responded to Ms. Rosolen stating that each Board member was required to attend a class typically held at Bergen Community College. Ms. Cimino stated that she did not maintain course materials, but that the Custodian may be able to locate a link to them. On November 11, 2019, the Complainant e-mailed Ms. Cimino stating that she did not request training materials, manuals, or class locations. The Complainant provided a list of ten (10) Board members and asked Ms. Cimino to identify which of those

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

<sup>2</sup> Represented by Robert Ferraro, Esq., of Bruno & Ferraro (Rutherford, 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.

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individuals completed training. Ms. Cimino forwarded the Complainant's e-mail to the Custodian and stated that she understood that he maintained a list of all Board members who received their certification.

On December 3, 2019, the Complainant e-mailed Ms. Cimino again seeking a status for the subject OPRA request. The Complainant also asked that the City's response include "some type of verification of certificates." On December 5, 2019, the Complainant forwarded her December 3, 2019 e-mail to the Custodian noting that she had not received a response. On the same day, the Custodian responded to the Complainant stating that he did not maintain any certificates. The Custodian noted that he spoke with Ms. Cimino at an evening function the prior day and was advised that she contacted each Board member for a copy of their certificates. The Custodian noted that it might be easier to obtain the certificates from the "State of New Jersey . . . since they are not issued or maintained by the [City of Garfield ("City").]"

#### Denial of Access Complaint:

On December 11, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant stated that she submitted the subject OPRA request with a final response deadline of October 24, 2019, which was the same day the Board was to vote on the Passaic Street Redevelopment "Site Plan Application" ("Application"). The Complainant noted that per the New Jersey Department of Community Affairs' ("DCA") regulations, members of a planning board must take applicable training within eighteen (18) months after appointment or they will be deemed "ineligible" and "removed" from that board. N.J.A.C. 5:87-1.8(b)-(c).

The Complainant asserted that she engaged in multiple communications with the Custodian, Ms. Rosolen, and Ms. Cimino to get the City to comply with her OPRA request. The Complainant argued that after receiving a response that did not apply to her OPRA request, she was advised that the City did not maintain certificates and that they were "working on it." The Custodian noted that she received a list of certified members from the DCA and discovered that a few members may have voted on the Application even though they did not receive training within eighteen (18) months of appointment.

#### Supplemental Responses:

On December 18, 2019, Ms. Cimino e-mailed the Custodian two (2) certifications received from Board members. On the same day, the Custodian e-mailed Rutgers Center for Government Services ("RCGS") seeking access to any certificates for the Zoning and Planning Boards. RCGS responded stating that none of the individuals took the course they offered. RCGS suggested that the Custodian contact DCA because they issue the actual certificates. On December 20, 2019, the Custodian forwarded Ms. Cimino's December 18, 2019 e-mail, inclusive of the two (2) certificates, to the Complainant.

On December 27, 2019, DCA e-mailed the Custodian stating that it previously provided lists of individuals on the Board and training dates, where applicable. DCA noted that it did not have record for some of the Zoning and Planning Board members, which was likely why the

Complainant submitted an OPRA request to the City. On December 30, 2019, the Custodian forwarded DCA's e-mail to the Complainant.

Statement of Information:<sup>4</sup>

On January 16, 2020, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on October 15, 2019. The Custodian averred that his office responded on several occasions between October 15, 2019 and December 30, 2019, wherein he ultimately provided all requested records.

The Custodian certified that the Complainant originally sought a list of all Board members who completed their required training. The Custodian noted that the Complainant subsequently sought certificates for those Board members. The Custodian averred that notwithstanding that the City did not maintain said records, it went "above and beyond" in its attempt to obtain evidence, or copies of, certificates for the current Board members. The Custodian also noted that when faced with delays from the Board, it endeavored to obtain responsive certificates from RCGS and DCA.

The Custodian argued that despite the City's good faith effort to fulfill the subject OPRA request, the Complainant filed the instant complaint. The Custodian noted that the Complainant even acknowledged the City's efforts in her arguments and correspondence attached to the complaint. The Custodian asserted that the Complainant was personally in City Hall "many times . . . and was continuously advised" of their progress in securing certificates. The Custodian argued that he forwarded those records the City was able to obtain based on its efforts. The Custodian certified that the following information has been provided to the Complainant:

- Class I member Mayor Richard Rigoglioso -Exempt
- Class II member Gerald Walis – Certificate provided
- Class III member Councilwoman Erin N. Delaney – Exempt
- Class IV members
  - James Clark – Course Completed January 2015
  - Michael Wisnovsky – No date available
  - Richard Derrig – Course Completed May 2018 (removed September 2019)
  - Lou Ann Visotcky – Certificate Provided
  - Gracie Williams – Course Completed January 2017
  - Michael Garcia – Course Completed January 2017
- Recently Appointed
  - First Alternative Gioacchino LoBue – Recently appointed and has eighteen (18) months to obtain training.
  - Second Alternative Constantino Conte - Recently appointed and has eighteen (18) months to obtain training.

Additional Submissions:

On January 24, 2020, the Complainant e-mailed the Custodian again asserting that the

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<sup>4</sup> On December 27, 2019, this complaint was referred to mediation. On December 31, 2019, this complaint was referred back to the GRC for adjudication.

subject OPRA request remained “outstanding.” The Complainant contended that the remaining members have been on the Board for “many years” and should have a certificate. The Complainant asserted that she was merely attempting to obtain proof of their certification as “requested in [her] original OPRA [request]. . . .”

On February 13, 2020, the Complainant submitted a response to the SOI. The Complainant contended that as of that date, the City had not provided all responsive certificates. The Complainant further took issue with the fact that she only received training completion dates for two (2) Board members and the training dates/certificates are still outstanding for four (4) members. The Complainant noted that the dates for these individuals were not training dates; rather, they were appointment dates she provided to DCA to obtain the requested information during the pendency of this complaint. The Complainant argued that she made a final attempt to obtain records from the Custodian on January 24, 2020 without a response.

### 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 Custodian certified in the SOI that he received the subject OPRA request on October 15, 2019. The Custodian further certified his office sent multiple responses to the Complainant between the receipt date and culminating with disclosure of two (2) certificates on December 30, 2019. However, the evidence of record does not support that the Custodian responded in writing within the statutory seven (7) business day time frame either granting access, denying access, seeking clarification, or requesting an extension of time. Thus, the evidence of record supports that the Custodian committed a timeliness violation that resulted 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 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.

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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.

## 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 Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010), the Council found that the custodian did not unlawfully deny access to the requested records based on the custodian’s certification that all such records were provided to the complainant. The Council held that the custodian’s certification, in addition to the lack of refuting evidence from the complainant, was sufficient to meet the custodian’s burden of proof. See also Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005); Holland v. Rowan Univ., GRC Complaint No. 2014-63, *et seq.* (March 2015).

In the matter before the Council, the Complainant initially sought the “names” of Planning Board members that completed their required training “Basic Course in Land Use Law and Planning.”<sup>6</sup> Following Ms. Cimino’s response stating that she did not possess course materials, the Complainant reiterated that she was seeking confirmation as to which of ten (10) listed individuals completed the required training. It was not until December 3, 2019 that the Complainant suggested she was seeking copies of actual certificates by asking that the City “include some type of verification of certificates.”<sup>7</sup> Ultimately, the City determined that the actual certificates would satisfy the Complainant’s request and endeavored to obtain those records that existed. Thereafter, the Complainant filed this complaint arguing that the City failed to provide her with responsive certificates.

During the pendency of this complaint, the City made multiple efforts to obtain any certifications that existed and was able to disclose two (2) records to the Complainant. In the SOI, the Custodian argued that the City made a good faith effort to obtain and disclose those certificates that existed. The Custodian also provided a list of Board members and identified their training status. The Complainant disputed the SOI, arguing that the City failed to provide certificates for four (4) members. The Complainant also argued that the dates provided by the Custodian were not certificate dates: they were appointment dates she specifically identified in an e-mail to DCA during the pendency of this complaint.

Upon review of the submissions and evidence presented here, the GRC is persuaded that this complaint is similar to Danis, GRC 2009-156. Initially, the Complainant’s OPRA request only sought “names” of Board members that completed trainings. While the City may have read the Complainant’s December 3, 2019 “verification” inclusion as a request to provide certificates, it is

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<sup>6</sup> The GRC notes that the Complainant’s OPRA request is invalid on its face because sought information and not a specific identifiable “government record.” MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009); Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012).

<sup>7</sup> The addition of “verification of certificates” did not cure the fact that the original request was invalid as noted in FN 6.

ultimately the case that the request in question simply sought “names.”<sup>8</sup> Those names and information regarding certification were provided as part of the SOI and based on information the City obtained by contacting both RCGS and DCA.

Further, to the extent that the “verification” inclusion did require the Custodian to disclose certificates, the evidence provides that two (2) members were exempt from training and one (1) member was no longer with the Planning Board at the time of the request. The evidence further provides that two (2) Board members were recently appointed and still had several months to complete their training. Additionally, the City was able to obtain two (2) certificates and disclose them. The remaining four (4) names were accounted for by a particular training date in the SOI, although with some discrepancy as to whether that date was the appointment dates identified in a separate e-mail. Ultimately, there is no evidence in the record that the City was required to obtain any proof of training via certificates. Further, there is no evidence in the record to corroborate that those individuals maintained responsive certificates.<sup>9</sup> Thus, the GRC is satisfied that the City disclosed all records they were able to obtain based on a reasonable search.

Therefore, the Custodian did not unlawfully deny access to the Complainant’s OPRA requests. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that he disclosed to the Complainant with all records that the City possessed. Danis, GRC 2009-156, *et seq.*; Burns, 2005-68; Holland, 2014-63, *et seq.*

### **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,

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<sup>8</sup> See FN 6.

<sup>9</sup> The GRC notes that it has no authority over the City’s responsibility to track trainings to ensure compliance with any applicable statutes discussed by the Complainant. Instead, the GRC’s sole authority is whether an unlawful denial of access occurred here. N.J.S.A. 47:1A-7.

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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 to the Complainant's OPRA request 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 all records that existed on December 30, 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 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 Custodian did not unlawfully deny access to the Complainant's OPRA requests. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that he disclosed to the Complainant with all records that the City of Garfield possessed. Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010); Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005); Holland v. Rowan Univ., GRC Complaint No. 2014-63, *et seq.* (March 2015).
3. The Custodian's failure to timely respond to the Complainant's OPRA request 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 all records that existed on December 30, 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