



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**

**May 19, 2020 Government Records Council Meeting**

Elouise McDaniel  
Complainant

Complaint No. 2019-92

v.

Township of Irvington (Essex)  
Custodian of Record

At the May 19, 2020 public meeting, the Government Records Council (“Council”) considered the May 12, 2020 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

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 has borne his burden of proof that he lawfully denied access to the Complainant’s OPRA request. Specifically, the Custodian certified that no responsive records existed and there is no competent, credible evidence to refute the Custodian’s certification. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The Custodian’s failure to timely respond 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 certified in the Statement of Information, and the GRC agrees, that the record sought was not made, maintained, kept on file or received in the course of official business. N.J.S.A. 47:1A-1. 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 19<sup>th</sup> Day of May 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: May 20, 2020**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
May 19, 2020 Council Meeting**

**Elouise McDaniel<sup>1</sup>  
Complainant**

**GRC Complaint No. 2019-92**

v.

**Township of Irvington (Essex)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Hardcopy via pickup or U.S. mail, of Jamel Holley's daily work schedule indicating the required starting time and finish time.

**Custodian of Record:** Harold E. Weiner  
**Request Received by Custodian:** April 2, 2019  
**Response Made by Custodian:** None.  
**GRC Complaint Received:** May 16, 2019

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

**Request and Response:**

On April 2, 2019, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On April 16, 2019, the Complainant resubmitted her OPRA request to the Custodian. On May 1, 2019, the Complainant again resubmitted her OPRA request to the Custodian. The Custodian did not respond to any of the Complainant's three (3) OPRA requests.

**Denial of Access Complaint:**

On May 14, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that she submitted the subject OPRA request three (3) times and had not received a response.

**Supplemental Response:**

On May 31, 2019, Mr. Holley e-mailed the Custodian's Counsel copying the Custodian advising he had no written schedule. Mr. Holley stated that the Department of Public Works

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

<sup>2</sup> Represented by Evelyn Akushie-Onyeani, Esq. (Irvington, 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.

(“DPW”) office business hours were 9:00 a.m. to 4:00 p.m. Mr. Holley further stated that his duties went “beyond [DPW’s] office hours” depending on situations that may arise. Mr. Holley noted that he was responsible for other regular duties such as attending meetings and inspections.

#### Statement of Information:

On June 7, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on April 16, 2019<sup>4</sup>. The Custodian certified that he did not formally respond to said request. The Custodian asserted that he believed that he had timely responded denying the OPRA request. The Custodian asserted that his failure to respond was an apparent oversight due to the Complainant’s repeated filing of the same OPRA requests.

The Custodian included in the SOI Mr. Holley’s May 31, 2019 e-mail explaining the details of his work schedule. The Custodian asserted that, per Mr. Holley’s e-mail, the Complainant’s OPRA request sought access to a government record that the Township did not make, maintain, keep on file or receive in the course of official business. N.J.S.A. 47:1A-1.1. The Custodian thus certified that no responsive records existed.

### 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 instant complaint, the Complainant asserted that she filed the subject OPRA request on three (3) separate occasions and did not receive a response. The Custodian certified in the SOI that he received the Complainant’s second submission on April 16, 2019 but did not respond to it. The Custodian further admitted that although he believed he timely responded, his failure to respond was an oversight due to the Complainant frequently filing records requests. Thus, the evidence of record supports a finding that a “deemed” denial of access occurred.

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<sup>4</sup> This date is when the Custodian received the second filing of the Complainant’s OPRA request. The Custodian did not indicate when he received the initial or third (3<sup>rd</sup>) submission of the OPRA request. However, the copy submitted with the Denial of Access Complaint includes received stamps dated April 2, 2019 and May 1, 2019.

<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.

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.

### **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.

The GRC has previously found that, in light of a custodian's certification that no records responsive to the request exist, and where no evidence exists in the record to refute the custodian's certification, no unlawful denial of access occurred. In Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005), the custodian certified that no records responsive to the complainant's request for billing records existed and the complainant submitted no evidence to refute the custodian's certification regarding said records. The GRC determined that because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian's certification, there was no unlawful denial of access to the requested records.

In the matter before the Council, the Complainant's OPRA request sought the daily work schedule of a municipal employee indicating the start and end times of his workday. The Custodian certified in the SOI that his search revealed that no such record not made, maintained, kept on file or received in the course of the Township's official business. N.J.S.A. 47:1A-1. This certification is supported by Mr. Holley's May 31, 2019 e-mail.

Therefore, the Custodian has borne his burden of proof that he lawfully denied access to the Complainant's OPRA request. Specifically, the Custodian certified that no responsive records existed and there is no competent, credible evidence to refute the Custodian's certification. N.J.S.A. 47:1A-6; Pusterhofer, GRC 2005-49.

### **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 timely respond 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 certified in the SOI, and the GRC agrees, that the record sought was not made, maintained, kept on file or received in the course of official business. N.J.S.A. 47:1A-1. 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 has borne his burden of proof that he lawfully denied access to the Complainant's OPRA request. Specifically, the Custodian certified that no responsive records existed and there is no competent, credible evidence to refute the Custodian's certification. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The Custodian's failure to timely respond 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 certified in the Statement of Information, and the GRC agrees, that the record sought was not made, maintained, kept on file or received in the course of official business. N.J.S.A. 47:1A-1. 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: Brandon Garcia  
Case Manager

May 12, 2020