



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
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TRENTON, NJ 08625-0819

PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

**September 28, 2021 Government Records Council Meeting**

David Weiner  
Complainant

Complaint No. 2020-154

v.

County of Essex  
Custodian of Record

At the September 28, 2021 public meeting, the Government Records Council (“Council”) considered the September 21, 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’s written response was legally insufficient because she failed to respond to each item contained in the Complainant’s OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008). See also Lenchitz v. Pittsgrove Twp. (Salem), GRC Complaint No. 2012-265 (Interim Order dated August 27, 2013). However, the GRC declines to order any further action because the Custodian ultimately disclosed all records that existed as part of the Statement of Information. Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).
2. The Custodian’s response was insufficient; however, she ultimately was able to provide a responsive record to the Complainant as part of the Statement of Information. Further, the evidence of record supports that said record was only the one that existed. 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 28<sup>th</sup> Day of September 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: September 30, 2021**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
September 28, 2021 Council Meeting**

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

**GRC Complaint No. 2020-154**

v.

**County of Essex<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of:

1. “[A]ny documents delineating” the Request for Proposal (“RFP”) issued by the County of Essex (“County”) for all furniture, fixtures, and a television purchased for Division of Family Assistance and Benefits (“DFAB”) Director Kecia Burnett’s office at 320-321 University Avenue in Newark, NJ.
2. “[A]ny documents delineating” receipts issued by the County to those vendors that furnished Director Burnett’s office at 320-321 University Avenue.

**Custodian of Record:** Olivia Schumann, Esq.  
**Request Received by Custodian:** June 10, 2020  
**Response Made by Custodian:** March 10, 2020  
**GRC Complaint Received:** August 6, 2020

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

**Request and Response:**

On June 10, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On the same day, the Custodian responded in writing stating that an extension of time to respond through July 1, 2020 was necessary due to the lack of in-office DFAB staff due to the ongoing public health emergency. On July 1, 2020, the Custodian responded in writing stating that an extension of time to respond through July 22, 2020 was necessary due to the lack of in-office DFAB staff due to the ongoing public health emergency.

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

<sup>2</sup> No legal representation listed on record.

<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.

On July 22, 2020, the Custodian responded in writing stating Sylvia Raines of the Department of Purchasing has advised that the Complainant would need to inspect the responsive “documents due to the large size of the plans and specifications for this project.” The Custodian noted that although she was closing the OPRA request, the Complainant should contact Ms. Raines to schedule his inspection.

#### Denial of Access Complaint:

On August 3, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian did not disclose any records in response to the subject OPRA request.

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

On February 16, 2021, the Custodian filed a Statement of Information (“SOI”) attaching multiple certifications. The Custodian certified that she received the Complainant’s OPRA request on June 10, 2020. The Custodian certified that her search included sending the OPRA request to DFAB, the Department of Public Works (“DPW”), and the Office of Purchasing. The Custodian certified that DPW returned 194 pages of responsive records for disclosure. The Custodian certified that following multiple extensions, she responded in writing on July 22, 2020 advising the Complainant that he would need to make an appointment to inspect the responsive records due to the over-sized nature of the plans and specifications included therein.

The Custodian argued that no unlawful denial of access occurred here; instead, the Complainant never scheduled an inspection. The Custodian noted that said inspection was necessary because portions of the records responsive to OPRA request item No. 1 were maintained in a “physically large size.” The Custodian affirmed that following the filing of this complaint, the Complainant clarified that he only sought a copy of the RFP (ninety-six (96) pages), which is attached to the SOI.<sup>5</sup> The Custodian further certified that no records responsive to OPRA request item No. 2 existed, as corroborated by DFAB, DPW and the Office of Purchasing. See Fusco Cert. ¶ 4; Antonio Cert. ¶ 5; Coltre Cert. ¶ 5. The Custodian noted that the absence of receipts was because the County contracted out a third-party vendor to conduct all business associated with fixture purchase and installation. Antonio Cert. ¶ 5-6; Coltre Cert. ¶ 5-6.

The Custodian contended that because she ultimately provided all records that existed, the facts here are like those addressed in Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005) and Owens v. Mt. Holly Twp. (Burlington), GRC Complaint No. 2013-233 (February 2014) (holding that no unlawful denial occurred because all records were provided). The Custodian further asserted that her position is reinforced by the fact that all three (3)

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<sup>4</sup> On September 14, 2020, this complaint was referred to mediation. On January 15, 2021, this complaint was referred back to the GRC for adjudication.

<sup>5</sup> The Custodian included a mediation communication as part of the SOI. The GRC notes that pursuant to the Uniform Mediation Act, N.J.S.A. 2A:23C-1 et seq., communications that take place during the mediation process are not deemed to be public records subject to disclosure under OPRA. N.J.S.A. 2A:23C-2. All communications that occur during the mediation process are privileged from disclosure and may not be used in any judicial, administrative, or legislative proceeding, or in any arbitration, unless all parties and the mediator waive the privilege. N.J.S.A. 2A:23C-4.

departments also confirmed that no additional records beyond those provided exist. See Fusco Cert. ¶ 5; Antonio Cert. ¶ 7; Coltre Cert. ¶ 7.

## Analysis

### Sufficiency of Response

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 Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008), the Council held that “. . . [t]he Custodian’s response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5(g).” See also Lenchitz v. Pittsgrove Twp. (Salem), GRC Complaint No. 2012-265 (Interim Order dated August 27, 2013).

Here, the Custodian responded to the subject OPRA request stating that the Complainant would need to inspect responsive records due to the physical size of the certain documents included in the response. However, the Custodian’s response did not identify whether those records were responsive to one of the OPRA request items or both. The Complainant subsequently filed the instant complaint contending that the Custodian failed to disclose any responsive records. In the SOI, the Custodian noted that disclosures occurred based on the Complainant’s clarification of his original OPRA request. The Custodian also addressed OPRA request item No. 2 for the first time by certifying that no records existed.

The evidence of record here supports that the Custodian did not address each of the two (2) request items; instead, the Custodian did not formally address both OPRA request items until the SOI, where she certified that no records responsive to OPRA request item No. 2 existed. Thus, the Custodian’s initial response to the subject OPRA request was insufficient in accordance with Paff, GRC 2007-272.

As such, the Custodian’s written response was legally insufficient because she failed to respond to each item contained in the Complainant’s OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Paff, GRC 2007-272. See also Lenchitz, 2012-265. However, the GRC declines to order any further action because the Custodian ultimately disclosed all records that existed as part of the SOI. Burns, GRC 2005-68.

### 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 this matter, the Custodian's response was insufficient; however, she ultimately was able to provide a responsive record to the Complainant as part of the SOI. Further, the evidence of record supports that said record was only the one that existed. 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's written response was legally insufficient because she failed to respond to each item contained in the Complainant's OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008). See also Lenchitz v. Pittsgrove Twp. (Salem), GRC Complaint No. 2012-265 (Interim Order dated August 27, 2013). However, the GRC declines to order any further action because the Custodian ultimately disclosed all records that existed as part of the Statement of Information. Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).
2. The Custodian's response was insufficient; however, she ultimately was able to provide a responsive record to the Complainant as part of the Statement of Information. Further, the evidence of record supports that said record was only the one that existed. 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

September 21, 2021