



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

November 9, 2022 Government Records Council Meeting

Adam Ponsi
Complainant

Complaint No. 2021-178

v.

Long Branch Housing Authority (Monmouth)
Custodian of Record

At the November 9, 2022 public meeting, the Government Records Council (“Council”) considered the October 27, 2022 Supplemental 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 complied with the Council’s September 29, 2022 Interim Order because she responded in the prescribed time frame certifying that no responsive records existed and providing a detailed explanation of the search conducted to arrive at this conclusion. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. the Custodian has borne her burden of proof that she lawfully denied access to the portion of the Complainant’s OPRA request seeking e-mails. Specifically, the Custodian certified, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
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). Further, the Custodian performed an insufficient search for records responsive to the subject OPRA request. However, the Custodian lawfully denied the OPRA request because no responsive e-mails existed and the Form was exempt from disclosure as a communication between a public entity and its insurance carrier. N.J.S.A. 47:1A-6. Additionally, the evidence of record does not indicate that the Custodian’s violations 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 9th Day of November 2022

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: November 15, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
November 9, 2022 Council Meeting**

**Adam Ponsi¹
Complainant**

GRC Complaint No. 2021-178

v.

**Long Branch Housing Authority (Monmouth)²
Custodial Agency**

Records Relevant to Complaint: Hard copies via U.S. mail of incident reports and “any documents related to those incidents,” including e-mails between Long Branch Housing Authority (“LBHA”) employees regarding his sister, noting that there should be at least one report related to a slip and fall on February 13, 2021.

Custodian of Record: Gloria J. Wright

Request Received by Custodian: July 19, 2021

Response Made by Custodian: August 19, 2021

GRC Complaint Received: August 2, 2021

Background

September 29, 2022 Council Meeting:

At its September 29, 2022 public meeting, the Council considered the September 22, 2022 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, found 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’s failure to locate the responsive Form until after conducting a more reasonable search following receipt of the Denial of Access Complaint resulted in an

¹ No legal representation listed on record.

² Represented by Daryl J. Howard, Esq., of Manfredi & Pellechio (Colts Neck, NJ).

insufficient search. N.J.S.A. 47:1A-6; Schneble v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008).

3. The Custodian's failure to identify the existence of responsive e-mails indicates an insufficient search. The Custodian shall thus conduct a reasonable search to locate and disclose those e-mails responsive to the subject OPRA request. Should the Custodian locate only e-mails composed by or sent directly to the Complainant, or if no e-mails exist, the Custodian shall certify to this fact and include a detailed explanation of her search.
4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver³ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁴ to the Executive Director.⁵**
5. Because the evidence of record supports that the Form constituted a communication between a public entity and its insurance carrier, the Custodian lawfully denied access to the responsive record. N.J.S.A. 47:1A-1.1. and Rivera v. City of Passaic (Passaic), GRC Complaint No. 2011-214 (Interim Order dated July 31, 2012).
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On October 4, 2022, the Council distributed its Interim Order to all parties. On October 11, 2022, the Custodian responded to the Council's Interim Order. The Custodian certified that upon receipt of the Council's Order, she conducted her own search and sent an e-mail to all LBHA employees instructing them to search for e-mails responsive to the subject OPRA request. The Custodian averred that she also asked those employees to immediately advise whether any potentially responsive records were located and to provide copies for review by October 6, 2022.

The Custodian certified that she received and reviewed hundreds of pages of e-mails and determined that none were responsive to the subject OPRA request because: 1) they were composed by or sent to the Complainant; 2) they did not relate to the slip and fall incident; and 3)

³ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁴ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁵ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

they were composed after submission of the OPRA request. The Custodian further averred that no e-mails associated with the responsive Form existed. The Custodian noted that because no additional records existed, she was not providing a document index to the Government Records Council (“GRC”).

Additional Submissions:

On October 20, 2022, the Complainant e-mailed the GRC stating that he has not received a response from the Custodian and asking for a status update. On October 21, 2022, the GRC e-mailed the Complainant a copy of the Custodian’s compliance submission; the Complainant responded asking whether he could submit a response because he believed the Custodian’s “certification is false.” The GRC responded providing the Complainant until October 26, 2022 to submit a rebuttal. Custodian’s Counsel subsequently e-mailed the GRC asserting that the Complainant “baselessly claimed [the Custodian] filed a false certification” and asked for an opportunity to respond to said claim.

Later in the day on October 21, 2022, the Complainant submitted a letter rebuttal. Therein, the Complainant disputed that no responsive e-mails existed as “highly questionable” because he sent at least three (3) e-mails to LBHA employee Takia Walker. The Complainant surmised that “one of two things is more than likely true:” 1) the certification is true and LBHA “purposefully ignored a health and safety concern of a disabled [resident];” or 2) the certification is false. The Complainant asserted that either option, when viewed in light of the violations already found by the Council, raises definite concern that the Custodian did not complete a thorough search and the certification is false. The Complainant thus requested that the GRC required a new search conducted under its supervision to verify that the Custodian’s certification is true or, if this is not possible, employee any other available remedy to address his concerns.

Following receipt of the Complainant’s rebuttal, the GRC advised Custodian’s Counsel that he may submit a response by close of business on October 26, 2022. On October 26, 2022, Custodian’s Counsel submitted a letter response reiterating the Custodian’s certification points and arguing that the Complainant failed to submit any competent, credible evidence that records did exist. Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). Counsel argued that instead, the Complainant speculated that LBHA had to have responsive records because he sent e-mails to Ms. Walker. Counsel further disputed the speculative “possible outcomes” as a “false binary.” Counsel argued that the Complainant’s argument fails to consider the possibility that verbal conversations between LBHA employees about the issue occurred. Counsel further asserted that the Complainant’s argument assumes that e-mails are always addressed via additional e-mails. Counsel also took issue with the Complainant’s harkening back to the Council’s violation findings from its Interim Order; the compliance process would be useless if the GRC could use these findings to “undermine the certification.” Counsel thus argued that the Custodian’s legal certification “amply demonstrates compliance” with the Order and requested that the GRC find that the Complainant failed to submit any evidence to contradict same.⁶

⁶ The Complainant submitted a response on October 26, 2022 that reasserts or slightly reframes those arguments advanced in his October 21, 2022 rebuttal response. Custodian’s Counsel responded asking that the submission be disregarded as unauthorized by the GRC or, alternatively, that he be given a chance to respond on behalf of the LBHA. Adam Ponsi v. Long Branch Housing Authority (Monmouth), 2021-178 – Supplemental Findings and Recommendations of the Executive Director 3

Analysis

Compliance

At its September 29, 2022 meeting, the Council ordered the Custodian to conduct a search for potentially responsive e-mails except for those composed by or sent to the Complainant and either disclose them or certify if none existed, inclusive of a detailed search explanation. The Council also ordered the Custodian to submit certified confirmation of compliance, in accordance with R. 1:4-4, to the Executive Director. On October 4, 2022, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on October 12, 2022.

On October 11, 2022, the fourth (4th) business day after receipt of the Council's Order, the Custodian responded certifying that an extensive search yielded no responsive e-mails. The Custodian included in her certification a detailed explanation of LBHA's search, her review of those e-mails located, and the reasons why she determined that no records existed. The Custodian further certified that she did not submit a document index because no records existed. Upon review of the Custodian's certified confirmation of compliance, the GRC is satisfied that she adequately addressed the Council's Order.

Therefore, the Custodian complied with the Council's September 29, 2022 Interim Order because she responded in the prescribed time frame certifying that no responsive records existed and providing a detailed explanation of the search conducted to arrive at this conclusion. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

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 Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. Pusterhofer, GRC 2005-49. Here, the Complainant's OPRA request sought in part e-mails between LBHA employees regarding his sister's accident on February 13, 2021. The Council, not satisfied with the lack of sufficient evidence on the record, ordered the Custodian to conduct a search and disclose those e-mails located or certify that none existed with a detailed search explanation. Following submission of the certification, the Complainant submitted a rebuttal alleging the likelihood that e-mails did exist, and that the Custodian's certification was false. Custodian's Counsel responded alleging that the Complainant failed to provide competent, credible evidence refuting the Custodian's certification.

Upon review of all available submissions, the GRC is persuaded that the Custodian's legal certification warrants a finding that a lawful denial of access. Specifically, the Custodian certified

to her search with sufficient detail. Moreover, the Complainant's allegations are mere suppositions without any supporting competent, credible evidence to overcome the veracity of the legal certification.⁷ Thus, a finding consistent with Pusterhofer is appropriate here.

Accordingly, the Custodian has borne her burden of proof that she lawfully denied access to the portion of the Complainant's OPRA request seeking e-mails. Specifically, the Custodian certified, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

Knowing & Willful

OPRA states that “[a] public official, officer, employee or custodian who knowingly and 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 (Felder 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. 1983)); 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 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). Further, the Custodian performed an insufficient search for records responsive to the subject OPRA request. However, the Custodian lawfully denied the OPRA request because no responsive e-mails existed and the Form was exempt from disclosure as a communication between a public entity and its insurance carrier. N.J.S.A. 47:1A-6. Additionally, the evidence of record does not indicate that the Custodian's violations 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.

⁷ The GRC notes that it does not have the authority, either through OPRA or its own regulations, to perform an on-site review or inspection oversight of a “public agency” to ensure compliance with an Interim Order. N.J.S.A. 47:1A-7; N.J.A.C. 5:105, *et seq.*

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's September 29, 2022 Interim Order because she responded in the prescribed time frame certifying that no responsive records existed and providing a detailed explanation of the search conducted to arrive at this conclusion. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. the Custodian has borne her burden of proof that she lawfully denied access to the portion of the Complainant's OPRA request seeking e-mails. Specifically, the Custodian certified, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
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). Further, the Custodian performed an insufficient search for records responsive to the subject OPRA request. However, the Custodian lawfully denied the OPRA request because no responsive e-mails existed and the Form was exempt from disclosure as a communication between a public entity and its insurance carrier. N.J.S.A. 47:1A-6. Additionally, the evidence of record does not indicate that the Custodian's violations 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

October 27, 2022



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

INTERIM ORDER

September 29, 2022 Government Records Council Meeting

Adam Ponsi
Complainant

Complaint No. 2021-178

v.

Long Branch Housing Authority (Monmouth)
Custodian of Record

At the September 29, 2022 public meeting, the Government Records Council (“Council”) considered the September 22, 2022 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’s failure to locate the responsive Form until after conducting a more reasonable search following receipt of the Denial of Access Complaint resulted in an insufficient search. N.J.S.A. 47:1A-6; Schneble v. N.J. Dep’t of Env’tl. Protection, GRC Complaint No. 2007-220 (April 2008).
3. The Custodian’s failure to identify the existence of responsive e-mails indicates an insufficient search. The Custodian shall thus conduct a reasonable search to locate and disclose those e-mails responsive to the subject OPRA request. Should the Custodian locate only e-mails composed by or sent directly to the Complainant, or if no e-mails exist, the Custodian shall certify to this fact and include a detailed explanation of her search.
4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each**

redaction, if applicable. Further, the Custodian shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³

5. Because the evidence of record supports that the Form constituted a communication between a public entity and its insurance carrier, the Custodian lawfully denied access to the responsive record. N.J.S.A. 47:1A-1.1. and Rivera v. City of Passaic (Passaic), GRC Complaint No. 2011-214 (Interim Order dated July 31, 2012).
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 29th Day of September 2022

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: October 4, 2022

¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

² "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

³ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 29, 2022 Council Meeting**

**Adam Ponsi¹
Complainant**

GRC Complaint No. 2021-178

v.

**Long Branch Housing Authority (Monmouth)²
Custodial Agency**

Records Relevant to Complaint: Hard copies via U.S. mail of incident reports and “any documents related to those incidents,” including e-mails between Long Branch Housing Authority (“LBHA”) employees regarding his sister, noting that there should be at least one report related to a slip and fall on February 13, 2021.

Custodian of Record: Gloria J. Wright
Request Received by Custodian: July 19, 2021
Response Made by Custodian: August 19, 2021
GRC Complaint Received: August 2, 2021

Background³

Request and Response:

On July 19, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 20, 2021, LBHA employee Takia Walker e-mailed the Complainant stating that his OPRA request was sent to the Custodian. On July 31, 2021, the Complainant e-mailed Ms. Walker stating that the statutory response time framed expired and asking when he could expect a response. On the same day, Ms. Walker e-mailed the Complainant stating that the subject OPRA request was sent to the Custodian.

Denial of Access Complaint:

On August 2, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that his sister was involved in a slip and fall incident at her housing complex on February 13, 2021. The Complainant stated that he, having power of attorney for his sister, contacted LBHA via e-mail to create an incident report.

¹ No legal representation listed on record.

² Represented by Daryl J. Howard, Esq., of Manfredi & Pellechio (Colts Neck, NJ).

³ 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.

The Complainant stated that thereafter, he sought the completed report multiple times between February 28, 2021 and the date of the subject OPRA request without success. The Complainant stated that upon filing the OPRA request, he received a few e-mails from Ms. Walker but with no indication as to when the LBHA would respond to same. The Complainant argued that the lack of a response resulted in this complaint.

Supplemental Response:

On August 19, 2021, the twenty-third (23rd) business day after receipt of the OPRA request, the Custodian responded in writing denying the Complainant's OPRA request because the complex owner, Woodrow Wilson Urban Renewal Associates II, LP ("Woodrow Wilson"), is not and "public agency" for purposes of OPRA and is thus not required to disclose records pursuant thereto. The Custodian further stated that the LBHA does not own Woodrow Wilson.

Statement of Information:

On September 14, 2021, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on July 19, 2021. The Custodian affirmed that she reviewed the OPRA request and determined that it involved records pertaining to Woodrow Wilson that "did not appear to be in [LBHA's] possession." The Custodian certified that, due to the impact of the COVID-19 public health emergency ("PHE"), she did not respond in writing until August 19, 2021 denying the subject OPRA request.

The Custodian argued that while she initially believed that LBHA did not maintain any responsive records, "additional due diligence" resulted in her locating a one-page "Incident Reporting Form" ("Form") completed on March 1, 2021 by Ms. Walker. The Custodian contended that this form classified as an insurance claim form and was thus exempt under OPRA's insurance carrier communication exemption. N.J.S.A. 47:1A-1.1. The Custodian noted that the housing complex is owned by Woodrow Wilson, but that Pennrose Management Company insures the property and the LBHA is an additional insured. The Custodian contended that the Form contains a section for recipients, which includes the insured parties and M.F. Irvine Companies, the insurance company. The Custodian thus contended that she lawfully denied access to the Form because it was an insurance communication exempt from disclosure under OPRA.

Additional Submissions:

On September 14, 2021, the Complainant submitted a response to the SOI. Therein, the Complainant first argued that ownership of the complex has no impact on the disclosability of the responsive record. The Complainant asserted that LBHA managed the complex and any records stemming from that management are subject to disclosure under OPRA.

The Complainant next argued that the insurance carrier communication exemption did not apply to the Form. The Complainant asserted that no financial claim against LBHA existed and, unless the relationship between them and the insurance company is different than that with a joint insurance fund, "there is no communication." The Complainant noted that the SOI does not identify any e-mails between the insurance company and LBHA; thus, either the Custodian

incorrectly completed the SOI or no such communications exist. The Complainant asked whether the GRC had the authority to conduct a review of the Form to independently determine if it constituted an insurance carrier communication.

The Complainant noted that because the Custodian failed to identify responsive e-mails, he questioned whether the LBHA conducted a search to locate same. The Complainant surmised that because there were multiple e-mails between him and Ms. Walker, it is highly likely that additional e-mails between her and others existed (even if only forwards). The Complainant contended that the forgoing appears to be another failure to comply with his OPRA request.

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).⁴ 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).

On March 20, 2020, in response to the COVID-19 PHE, P.L. 2020, c.10 amended N.J.S.A. 47:1A-5(i) to hold in abeyance the statutory response time frame during "a state of emergency, public health emergency, or state of local disaster emergency," but requiring custodians to adhere to the time frame "as the circumstance permit . . ." Id. However, Governor Murphy signed P.L. 2021 c.104 on June 4, 2021 providing that:

While the state of emergency declared in Executive Order No. 103 of 2020 shall remain in effect, the deadlines in paragraph (1) of subsection i. of section 6 of P.L. 2001, c.404 (C.47:1A-5) shall apply to any request made under [OPRA] after the effective date of this act, with the exception of requests made for records related to the COVID-19 response, which shall continue to be governed by paragraph (2) of subsection i. of section 6 of P.L. 2001, c.404 (C.47:1A-5).

[Id. at 4.]

P.L. 2021, c.104 thus provides that, notwithstanding a continued state of emergency, OPRA's statutory time frames immediately apply to all OPRA requests received by a "public agency" as defined in N.J.S.A. 47:1A-1.1. However, should a "public agency" receive an OPRA request

⁴ 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.

seeking access to “records related to the COVID-19 response,” a custodian is permitted to abide by the abeyance of the time frame set forth in N.J.S.A. 47:1A-5(i)(2).

Here, the Custodian submitted his OPRA request on July 19, 2021 and was notified by Ms. Walker the next day that she forwarded same to the Custodian. The Complainant e-mailed Ms. Walker on July 31, 2021 stating that the statutory response time frame expired and seeking a status update. Ms. Walker e-mailed the Complainant advising that the Custodian was addressing the OPRA request. This complaint ensued, where the Complainant contended that he did not receive a response to same. The Custodian ultimately responded on August 19, 2021, or twenty-three (23) business days after receipt of same. In the SOI, the Custodian contended that her response was delayed to the PHE.

The evidence of record submitted in this complaint supports that a “deemed” denial of access has occurred. Specifically, the Custodian did not respond until twenty-three (23) business days after submission of the OPRA request, which is clearly beyond the statutory time frame to do so. Additionally, the abeyance of the statutory response time frame due to the COVID-19 PHE ended on June 4, 2021 and the request at issue here did not seek records “related to the COVID-19 response.” Thus, the Custodian was required to adhere to normal statutory response process set forth in OPRA. Notwithstanding the forgoing, the Custodian failed to respond to the Complainant in writing within the seven (7) business day time frame granting access, denying access, seeking clarification, or obtaining an extension of time to respond.

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.

Insufficient Search

It is the custodian’s responsibility to perform a complete search for the requested records before responding to an OPRA request, as doing so will help ensure that the custodian’s response is accurate and has an appropriate basis in law. In Schneble v. N.J. Dep’t of Envntl. Protection, GRC Complaint No. 2007-220 (April 2008), the custodian initially stated that no records responsive to the complainant’s OPRA request existed. The custodian certified that after receipt of the complainant’s denial of access complaint, which contained e-mails responsive to the complainant’s request, the custodian conducted a second search and found records responsive to the complainant’s request. The GRC held that the custodian had performed an inadequate search and thus unlawfully denied access to the responsive records. See also Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (January 2011).

Here, the Custodian responded to the Complainant’s OPRA request denying same on the basis that LBHA did not own the complex where the incident occurred and that the owner, Woodrow Wilson, was not subject to OPRA. The Complainant did not address the portion of the

OPRA request seeking e-mails.⁵ Following the filing of this complaint, the Custodian stated that Ms. Walker conducted an additional search and located the Form, which she asserted was exempt from disclosure as an insurance communication. N.J.S.A. 47:1A-1.1. The Complainant responded to the SOI questioning whether LBHA conducted a search. The Complainant based this argument on that fact the Custodian was silent on whether any responsive e-mails existed. The Complainant contended that he had multiple e-mail communications with Ms. Walker; thus, it was unlikely that no e-mails existed.

The facts here are on point with those in Schneble, GRC 2007-220; thus, it follows that an insufficient search occurred in the instant complaint. That is, it is reasonable to conclude that LBHA assumed that no records existed based on its ownership claim; thus, no meaningful search for responsive records was conducted prior to this complaint filing.

Accordingly, the Custodian's failure to locate the responsive Form until after conducting a more reasonable search following receipt of the Denial of Access Complaint resulted in an insufficient search. N.J.S.A. 47:1A-6; Schneble, GRC 2007-220.

Additionally, the evidence of records also indicates an insufficient search to the portion of the OPRA request seeking access to e-mails. Specifically, the Custodian provided no indication of whether responsive e-mails existed. The omission of such an explanation supports the lack of a search for potentially responsive e-mails. Thus, the Custodian should be required to conduct same to determine if responsive records exist. The GRC notes that to the extent that those e-mails located were sent directly by or directly to the Complainant (not to include forwards of his e-mails or responses thereto from others), the Custodian is not required to redisclose them to him. See Caggiano v. Office of the Governor, GRC Complaint No. 2014-408 (Final Decision dated July 28, 2015).

Therefore, the Custodian's failure to identify the existence of responsive e-mails indicates an insufficient search. The Custodian shall thus conduct a reasonable search to locate and disclose those e-mails responsive to the subject OPRA request. Should the Custodian locate only e-mails composed by or sent directly to the Complainant, or if no e-mails exist, the Custodian shall certify to this fact and include a detailed explanation of her search.

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.

OPRA provides that a "government record shall not include . . . information which is a communication between a public agency and its insurance carrier. . ." N.J.S.A. 47:1A-1.1 In Michelson v. Wyatt, 379 N.J. Super. 611 (App. Div. 2005), a requestor filed an OPRA request for

⁵ Said response is also insufficient because it failed to address each of the records the Complainant sought in his OPRA request. Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008)

several records including records regarding health insurance coverage provided to employees and their families, and the claims history under that coverage. In addressing whether those records were subject to disclosure, the court observed, “[i]nformation that is deemed confidential is not considered a government record [under OPRA] . . . one such category is information which is a communication between a public agency and its insurance carrier. . .” The Council subsequently noted the Michelson court’s observation in holding that insurance claim reports for officer injury, as well as property and vehicle damage, were exempt from disclosure under this exemption. Rivera v. City of Passaic (Passaic), GRC Complaint No. 2011-214 (Interim Order dated July 31, 2012) at 13-14.

Here, the Custodian identified in the SOI the Form as the record responsive to the subject OPRA request. The Custodian contended that the Form was exempt from disclosure as a communication between LBHA and its insurance carrier. N.J.S.A. 47:1A-1.1. The Custodian noted that M.F. Irvine Companies, the complex’s insurance broker, and LBHA, who is an additional insured on the property, were identified as recipients on the Form. The Complainant responded to the SOI contending that the Custodian misapplied the exemption because there was no financial claim in the incident in question and “no communication[s]” have been identified. The Complainant also referenced the relationship between a “public agency” and a joint insurance fund but did not elaborate on the potential differences that may exist in a situation where a private insurance company is brokering a policy.

The insurance communication exemption has not been widely reviewed by New Jersey’s Courts or the GRC. Additionally, the exemption does not include a definition narrowing its scope to a particular type of record or specific content within certain records exchanged between public agencies and their insurance companies. Thus, the GRC must look to Rivera, GRC 2011-214 for guidance on whether the exemption could be reasonably applied here. In doing so, the GRC notes that Rivera does not support that the simple inclusion of an insurance company on a particular record meets the necessary threshold for this exemption to apply.

However, the facts present in Rivera support that a lawful denial of access occurred here. Specifically, the record at issue both here and in Rivera are claim forms submitted to the insurance agency stemming from incidents that could be covered by an insurance policy. Further, the exemption does not limit the term “communications” to those involving a financial claim. The GRC also relies on the facts presented by the parties that the February 13, 2021 incident was reported to LBHA by the Complainant and resulted in the creation of the Form for insurance purposes. LBHA’s status as an additional insured on the complex’s insurance policy clearly exhibits that a insured/insurer relationship exists and that the Form was a specific communication within that relationship. Thus, and when applying the Council’s decision in Rivera, the GRC is persuaded that the Custodian lawfully denied access to the Form as a communication with its insurance company.

Therefore, because the evidence of record supports that the Form constituted a communication between a public entity and its insurance carrier, the Custodian lawfully denied access to the responsive record. N.J.S.A. 47:1A-1.1. and Rivera, GRC 2011-214.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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's failure to locate the responsive Form until after conducting a more reasonable search following receipt of the Denial of Access Complaint resulted in an insufficient search. N.J.S.A. 47:1A-6; Schneble v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008).
3. The Custodian's failure to identify the existence of responsive e-mails indicates an insufficient search. The Custodian shall thus conduct a reasonable search to locate and disclose those e-mails responsive to the subject OPRA request. Should the Custodian locate only e-mails composed by or sent directly to the Complainant, or if no e-mails exist, the Custodian shall certify to this fact and include a detailed explanation of her search.
4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver⁶ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁷ to the Executive Director.⁸**

⁶ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁷ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁸ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

5. Because the evidence of record supports that the Form constituted a communication between a public entity and its insurance carrier, the Custodian lawfully denied access to the responsive record. N.J.S.A. 47:1A-1.1. and Rivera v. City of Passaic (Passaic), GRC Complaint No. 2011-214 (Interim Order dated July 31, 2012).
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Executive Director

September 22, 2022