



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 31, 2022 Government Records Council Meeting

Julie Akers
Complainant

Complaint No. 2021-354

v.

City of Estell Manor (Atlantic)
Custodian of Record

At the May 31, 2022 public meeting, the Government Records Council (“Council”) considered the May 24, 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 did not comply satisfactorily with the Council’s March 29, 2022 Interim Order. Specifically, although the Custodian, through Counsel, was able to determine and notify the Complainant that he disclosed the Plan prior to the Council’s Order; this occurred well after the expiration of the compliance time frame. Further, the Custodian failed to submit certified confirmation of compliance to the Executive Director until thirty (30) business days after expiration of the compliance time frame.
2. The Custodian failed to timely respond to the subject OPRA request, which 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 unlawfully denied access to the responsive Plan, which he ultimately disclosed after the Complainant filed this complaint. N.J.S.A. 47:1A-6. The Custodian failed to submit a Statement of Information and thus violated the GRC’s regulations at N.J.A.C. 5:105-2.4(a) and also failed to comply with the Council’s March 29, 2022 Interim Order. Notwithstanding, the Custodian ultimately disclosed all records responsive to the Complainant’s OPRA request and to her satisfaction. Thus, 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 31st Day of May 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: June 2, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
May 31, 2022 Council Meeting**

**Julie Akers¹
Complainant**

GRC Complaint No. 2021-354

v.

**City of Estell Manor (Atlantic)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. Plan dated March 28, 2020 submitted as part of Pinelands Application No. 2004-0474.0002 (“Application”).
2. Plot plan sketch submitted for the City of Estell Manor (“City”) Permit Application No. 21-0773.
3. Restoration/Agricultural Plan (“Plan”) submitted on December 21, 2020 for the Application.
4. “[S]ubsequent pages” of a letter dated April 1, 2019.

Custodian of Record: Judd Moore
Request Received by Custodian: November 1, 2021
Response Made by Custodian: December 13, 2021
GRC Complaint Received: December 20, 2021

Background

March 29, 2022 Council Meeting:

At its March 29, 2022 public meeting, the Council considered the March 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’s failure to provide a completed SOI to the GRC, despite more than one request, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian’s failure to respond additionally obstructed the GRC in its efforts to “receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . .” N.J.S.A. 47:1A-7(b).

¹ No legal representation listed on record.

² Represented by Richard F. DeLucry, Esq., of Cooper, Levenson, P.A. (Atlantic City, NJ). Mr. DeLucry entered his appearance on April 5, 2022.

2. 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).
3. The Custodian may have unlawfully denied access to the Restoration/Agricultural Plan sought in the Complainant's OPRA request item No. 3. N.J.S.A. 47:1A-6. Thus, the Custodian must locate and disclose the requested Plan to the Complainant. If the Custodian already disclosed the Plan during the pendency of this complaint, he must certify to that fact and include documentation evidencing the disclosure. Further, should the Custodian determine that no Plan exists, or came into existence after receiving the Complainant's OPRA request, he must certify to this fact.
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. 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 March 30, 2022, the Council distributed its Interim Order to all parties. On April 5, 2022, Custodian's Counsel e-mailed the Government Records Council ("GRC") seeking a copy of the Council's Order. On the same day, the GRC e-mailed Counsel providing the Order and noting that the compliance deadline expired on April 6, 2022. The GRC noted that requests for and extension of time to comply must be received prior to the expiration of the deadline. On April 12, 2022, the GRC e-mailed Custodian's Counsel advising that the compliance response time frame expired. The GRC requested that Counsel provide a response by April 14, 2022 and that a failure to do so could result in the complaint being adjudicated at the April 2022 meeting absent same.

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.

Later on April 12, 2022, Custodian's Counsel e-mailed the Complainant seeking assistance in identifying the records remaining at issue in this complaint. On April 13, 2022, the Complainant forwarded records she already received in response to the subject OPRA request and noted that the outstanding Plan was referenced therein. On April 28, 2022, Custodian's Counsel e-mailed the Complainant stating that Zoning Officer Wayne Caregnato confirmed that he disclosed all records in the relevant file, inclusive of two (2) partial drawings. Counsel stated that he contacted the New Jersey Pinelands Commission ("Commission") and was able to confirm that the second (2nd) drawing was likely the Plan sought. Counsel sought confirmation as to whether the Complainant was satisfied with the forgoing. On April 29, 2022, the Complainant stated that her OPRA request would be considered satisfied if the Counsel could confirm that no other records existed, which Counsel confirmed in a follow-up e-mail. The Complainant responded advising that she considered her remaining OPRA request item satisfied.

On May 2, 2022, the GRC e-mailed Custodian's Counsel advising that the Custodian had yet to respond to the Council's Interim Order. The GRC further acknowledged receipt of correspondence between the parties indicating the City's attempt to comply with the Order. The GRC noted that notwithstanding this correspondence, the Custodian had not yet submitted certified confirmation of compliance to the Executive Director. Akers v. City of Estell Manor (Atlantic), GRC Complaint No. 2021-354 (Interim Order dated March 29, 2022) at 6. The GRC stated that it was requiring that the certified confirmation of compliance be submitted as soon as possible, noting that this complaint is being scheduled for adjudication at the Council's May 31, 2022 meeting.

On May 19, 2022, the Custodian responded to the Council's Interim Order. Therein, the Custodian certified that on January 12, 2022, he disclosed to the Complainant what he believed to be all records responsive to the subject OPRA request. The Custodian affirmed that said disclosure included an untitled drawing that constituted the outstanding Plan, but that neither he nor the Complainant was aware of this fact at that time. The Custodian certified that after receiving the Interim Order, he engaged Custodian's Counsel to attempt to locate the Plan. The Custodian certified that it was only after contacting the Commission that Custodian's Counsel was able to confirm that the untitled drawing was, in fact, the outstanding Plan. The Custodian averred that Custodian's Counsel advised the Complainant of this fact on April 28, 2022 and that she accepted his explanation as a satisfactory response.

Analysis

Compliance

At its March 29, 2022 meeting, the Council ordered the Custodian to locate and disclose the outstanding Plan, or certify if 1) the record was already disclosed during the pendency of the complaint; or 2) no record existed. The Council also ordered the Custodian to submit certified confirmation of compliance, in accordance with R. 1:4-4, to the Executive Director. On March 30, 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 April 6, 2022.

Thereafter, Custodian's Counsel entered his appearance and subsequently corresponded with the Complainant on the outstanding Plan. Custodian's Counsel was ultimately able to confirm, in consultation with the Commission, that the Complainant already received the Plan. However, despite multiple notices from the GRC about expiring and past compliance deadlines, the Custodian did not submit certified confirmation of compliance to until May 19, 2022, or thirty (30) business days following receipt of the Order. Therein, the Custodian certified that he provided a copy of the Plan to the Complainant during the pendency of this complaint, but prior to the Interim Order. The Custodian noted that it was not until Custodian's Counsel contacted the Commission in April 2022 that the City was able to determine it already disclosed the Plan. The Custodian further certified that the Complainant confirmed her satisfaction with the forgoing.

The Council's Order required that the Custodian locate and disclose the Plan, certify if it was already provided, or certify is none existed. The Council also ordered the Custodian to submit certified confirmation of compliance within five (5) business days after receipt of the Order. The evidence of record supports that the City, through Counsel, engaged in the steps necessary to determine the existence and disclosure status of the Plan. However, the City failed to make this determination and further failed to submit certified confirmation of compliance prior to deadline, nor did the Custodian or Counsel seek an extension of the response time frame. This is notwithstanding the GRC's notification of the deadline date, ability to seek extensions, and two (2) additional post-deadline notifications of Custodian's failure to submit a certification. Notwithstanding, the Complainant indicated her satisfaction with the result and the Custodian ultimately submitted certified confirmation compliance, although over a month after the expired deadline. Thus, the evidence clearly supports the Custodian's failure to comply with the Council's Order.

Accordingly, the Custodian did not comply satisfactorily with the Council's March 29, 2022 Interim Order. Specifically, although the Custodian, through Counsel, was able to determine and notify the Complainant that he disclosed the Plan prior to the Council's Order; this occurred well after the expiration of the compliance time frame. Further, the Custodian failed to submit certified confirmation of compliance to the Executive Director until thirty (30) business days after expiration of the compliance time frame.

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)).

Here, the Custodian failed to timely respond to the subject OPRA request, which 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 unlawfully denied access to the responsive Plan, which he ultimately disclosed after the Complainant filed this complaint. N.J.S.A. 47:1A-6. The Custodian failed to submit a Statement of Information and thus violated the GRC's regulations at N.J.A.C. 5:105-2.4(a) and further failed to comply with the Council's March 29, 2022 Interim Order. Notwithstanding, the Custodian ultimately disclosed all records responsive to the Complainant's OPRA request and to her satisfaction. Thus, 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not comply satisfactorily with the Council's March 29, 2022 Interim Order. Specifically, although the Custodian, through Counsel, was able to determine and notify the Complainant that he disclosed the Plan prior to the Council's Order; this occurred well after the expiration of the compliance time frame. Further, the Custodian failed to submit certified confirmation of compliance to the Executive Director until thirty (30) business days after expiration of the compliance time frame.
2. The Custodian failed to timely respond to the subject OPRA request, which 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 unlawfully denied access to the responsive Plan, which he ultimately disclosed after the Complainant filed this complaint. N.J.S.A. 47:1A-6. The Custodian failed to submit a Statement of Information and thus violated the GRC's regulations at N.J.A.C. 5:105-2.4(a) and also failed to comply with the Council's March 29, 2022 Interim Order. Notwithstanding, the Custodian ultimately disclosed all records responsive to the Complainant's OPRA request and to her satisfaction. Thus, 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

May 24, 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

March 29, 2022 Government Records Council Meeting

Julie Akers
Complainant

Complaint No. 2020-354

v.

City of Estell Manor (Atlantic)
Custodian of Record

At the March 29, 2022 public meeting, the Government Records Council (“Council”) considered the March 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’s failure to provide a completed SOI to the GRC, despite more than one request, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian’s failure to respond additionally obstructed the GRC in its efforts to “receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . .” N.J.S.A. 47:1A-7(b).
2. 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).
3. The Custodian may have unlawfully denied access to the Restoration/Agricultural Plan sought in the Complainant’s OPRA request item No. 3. N.J.S.A. 47:1A-6. Thus, the Custodian must locate and disclose the requested Plan to the Complainant. If the Custodian already disclosed the Plan during the pendency of this complaint, he must certify to that fact and include documentation evidencing the disclosure. Further, should the Custodian determine that no Plan exists, or came into existence after receiving the Complainant’s OPRA request, he must certify to this fact.
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. 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 March 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: March 30, 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
March 29, 2022 Council Meeting**

**Julie Akers¹
Complainant**

GRC Complaint No. 2021-354

v.

**City of Estell Manor (Atlantic)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. Plan dated March 28, 2020 submitted as part of Pinelands Application No. 2004-0474.0002 (“Application”).
2. Plot plan sketch submitted for the City of Estell Manor (“City”) Permit Application No. 21-0773.
3. Restoration/Agricultural Plan (“Plan”) submitted on December 21, 2020 for the Application.
4. “[S]ubsequent pages” of a letter dated April 1, 2019.

Custodian of Record: Judd Moore
Request Received by Custodian: November 1, 2021
Response Made by Custodian: December 13, 2021
GRC Complaint Received: December 20, 2021

Background³

Request and Response:

On October 30, 2021,⁴ the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 12, 2021, the Complainant resubmitted her OPRA request, noting that it was a “SECOND REQUEST.” (Emphasis in original). On December 2, 2021, the Complainant again resubmitted her OPRA request, noting that it was a “THIRD REQUEST.” (Emphasis in original). On December 12, 2021, the Complainant again resubmitted her OPRA request noting that it was a “FOURTH REQUEST.” (Emphasis in original).

¹ No legal representation listed on record.

² “No legal representation listed on record.”

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.

⁴ October 30, 2021 was a Saturday.

On December 13, 2021, twenty-eight (28) business days after receipt of the subject OPRA request, the Custodian responded in writing stating that Zoning Officer Wayne Caregnato sent the Complainant an e-mail the week prior noting that he was working on her OPRA request. On the same day, the Complainant responded advising that she did not receive any correspondence from Mr. Caregnato. In a subsequent e-mail later in the day, the Complainant argued that over six (6) weeks had passed without a response. The Complainant noted that the requested documents should not be hard to locate as they were specifically identified as important attachments to the records already disclosed to her in prior OPRA requests. The Complainant noted that should the City fail to respond by December 17, 2021, she would file a Denial of Access Complaint.

Denial of Access Complaint:

On December 20, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted she previously tried to informally obtain the records sought, which were related to prior OPRA request responses, but that she submitted the subject OPRA request after not receiving a response to those attempts. The Complainant contended that after not initially receiving a response from the Custodian, she resubmitted her OPRA request three (3) additional times. The Complainant argued that over six (6) weeks had passed without disclosure, notwithstanding that the records sought are not difficult to locate. The Complainant noted that the only responses she received from the Custodian were those advising that Mr. Caregnato was “working on it, is very busy and only works one night.”

Supplemental Response:

On December 29, 2021, Mr. Caregnato forwarded a copy of plans to the Custodian for disclosure. Mr. Caregnato also included in his e-mail a direct response to the Complainant stated that the Custodian should have sought an extension and any remediation plans were submitted to the Pinelands Commission instead of the City. Mr. Caregnato noted that he was out due to COVID-19 issues but would continue to work on the OPRA request upon his return. On January 6, 2022, Mr. Caregnato forwarded additional responsive records to the Custodian for disclosure. On January 12, 2022, the Custodian forwarded them to the Complainant noting that he thought Mr. Caregnato had simultaneously copied her on the prior e-mails.

Statement of Information:

On January 20, 2022, the GRC requested a completed Statement of Information (“SOI”) from the Custodian. On January 23, 2022, the Custodian e-mailed the GRC advising that he believed the Denial of Access Complaint may be moot because the Complainant met with Mr. Caregnato on January 19, 2022.

Additional Submissions:

On January 27, 2022, the Complainant e-mailed the GRC advising that the only OPRA request item that remains outstanding is item No. 3 seeking the Plan. On January 31, 2022, the GRC e-mailed the Complainant (and copying the Custodian) confirming receipt of the Complainant’s e-mail and noted that it would be sending a “No Defense” letter to the Custodian.

Statement of Information (Cont'd):

On February 10, 2022, the GRC sent a “No Defense” letter to the Custodian, requesting a completed SOI within three (3) business days of receipt. The GRC noted that the Custodian’s failure to submit an SOI could lead to an adjudication based solely on the Complainant’s submission. N.J.A.C. 5:105-2.4(f).

On February 11, 2022, the Custodian e-mailed the Complainant stating that he was “getting information on [her] complaint to the GRC.” The Custodian noted that he thought she received all responsive records from Mr. Caregnato at a recent meeting. The GRC did not receive any further correspondence from the Custodian thereafter.

Analysis

Failure to Submit SOI

OPRA also provides that “Custodians shall submit a completed and signed statement of information (SOI) form to the Council and the complainant simultaneously that details the custodians' position for each complaint filed with the Council[.]” N.J.A.C. 5:105-2.4(a).

OPRA further provides that:

Custodians shall submit a completed and signed SOI for each complaint to the Council's staff and the complainant not later than five business days from the date of receipt of the SOI form from the Council's staff . . . Failure to comply with this time period may result in the complaint being adjudicated based solely on the submissions of the complainant.

[N.J.A.C. 5:105-2.4(f).]

Finally, OPRA provides that “[a] custodian’s failure to submit a completed and signed SOI . . . may result in the Council’s issuing a decision in favor of the complainant.” N.J.A.C. 5:105-2.4(g). In Alterman, Esq. v. Sussex Cnty. Sheriff’s Office, GRC Complaint No. 2013-353 (September 2014), the custodian failed to provide a completed SOI to the GRC within the allotted deadline. Thus, the Council noted the custodian’s failure to adhere to N.J.A.C. 5:1052.4(a). See also Kovacs v. Irvington Police Dep’t (Essex), GRC Complaint No. 2014-196 (January 2015); Howell v. Twp. of Greenwich (Warren), GRC Complaint No. 2015-249 (November 2016).

In the instant matter, the Custodian did not comply with the GRC’s initial request for an SOI. On January 31, 2022, after the expiration of the five (5) business day deadline and as part of ongoing communications with the parties, the GRC alerted the Custodian to the fact that it would be sending a “No Defense” letter providing him an additional three (3) business days to submit the requested SOI. This occurred on February 10, 2022: the transmission also included a copy of the original SOI letter providing detailed instructions on how to properly submit an SOI. The Custodian responded via e-mail the next day questioning the need for this complaint to continue

due to his belief that the Complainant received all responsive records. However, the GRC never received a completed SOI or any further communication from the Custodian thereafter.

Accordingly, the Custodian's failure to provide a completed SOI to the GRC, despite more than one request, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian's failure to respond additionally obstructed the GRC in its efforts to "receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . ." N.J.S.A. 47:1A-7(b).

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).⁵ Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

In the matter before the Council, the Complainant submitted her OPRA request on October 30, 2021, a Saturday. After the expiration of the seven (7) business day time frame, the Complainant resubmitted her OPRA request three (3) times seeking a response. It was not until December 13, 2021, twenty-eight (28) business days after presumed receipt of the subject OPRA request, that the Custodian finally endeavored to contact the Complainant in writing. This response is clearly well beyond the statutory time frame and thus a "deemed" denial of the subject OPRA request occurred.

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.

⁵ 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.

Initially, the Complainant e-mailed the GRC on January 27, 2022 advising that OPRA request item Nos. 1, 2, and 4 were satisfied and no longer at issue in this complaint. Thus, the GRC will only address as part of this analysis OPRA request item No. 3 seeking access to the Plan based on the above. The Custodian did not provide any definitive responses on OPRA request item No. 3, nor did he submit an SOI addressing same. The only statement made by the Custodian is that he believed the Complainant received all records in the City's possession.

Unfortunately, the record does not contain enough evidence to determine: 1) whether a responsive Plan existed; 2) whether the Plan was already provided to the Complainant; or 3) whether the requested Plan did not exist at the time that the Complainant submitted her OPRA request. At the core of this deficiency is the Custodian's failure provide a detailed response to the Complainant or submit a completed SOI. Further, OPRA request item No. 3 on its face seeks records that do not appear *per say* exempt from disclosure under OPRA. Because of this, the GRC must find in favor of the Complainant and hold that the Custodian may have unlawfully denied access to responsive records that existed at the time of the OPRA request. N.J.S.A. 47:1A-6; N.J.A.C. 5:105-2.4(g).

Accordingly, the Custodian may have unlawfully denied access to the Plan sought in the Complainant's OPRA request item No. 3. N.J.S.A. 47:1A-6. Thus, the Custodian must locate and disclose the requested Plan to the Complainant. If the Custodian already disclosed the Plan during the pendency of this complaint, he must certify to that fact and include documentation evidencing the disclosure. Further, should the Custodian determine that no Plan exists, or came into existence after receiving the Complainant's OPRA request, he must certify to this fact.

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's failure to provide a completed SOI to the GRC, despite more than one request, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian's failure to respond additionally obstructed the GRC in its efforts to "receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . ." N.J.S.A. 47:1A-7(b).
2. 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).

3. The Custodian may have unlawfully denied access to the Restoration/Agricultural Plan sought in the Complainant's OPRA request item No. 3. N.J.S.A. 47:1A-6. Thus, the Custodian must locate and disclose the requested Plan to the Complainant. If the Custodian already disclosed the Plan during the pendency of this complaint, he must certify to that fact and include documentation evidencing the disclosure. Further, should the Custodian determine that no Plan exists, or came into existence after receiving the Complainant's OPRA request, he must certify to this fact.
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**
5. 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

March 22, 2022

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.