



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

Tineen Howard
Complainant

Complaint No. 2022-285

v.

NJ Department of Labor & Workforce Development,
Division of Temporary Disability Insurance
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 failed to comply with the Council’s September 29, 2022 Interim Order. Specifically, although Mr. Martin timely certified to his search and the fact that no records within the Division of Temporary Disability Insurance’s possession existed, the Custodian failed to provide certified confirmation of compliance to the Executive Director until thirteen (13) business days after receipt of the Order. The GRC also stresses that this delay was notwithstanding multiple communications with the Division of Temporary Disability Insurance regarding the proper response process for an Interim Order.
2. The Custodian has borne his burden of proof that he lawfully denied access to the Complainant’s OPRA request. Specifically, the Custodian, Mr. Martin, and Director Fish 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 failed to submit a Statement of Information, which resulted in a violation of N.J.A.C. 5:105-2.4(a) and a finding that a “deemed” denial occurred. Additionally, the Custodian failed to comply with the Council’s Interim Order, notwithstanding extensive correspondence between the GRC and Division of Temporary Disability Insurance advising him of the required actions. Notwithstanding the forgoing, the evidence of record also supports that no unlawful denial of access occurred because the record adequately reveals that no records existed. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). Additionally, while the Custodian’s actions here appeared negligent and heedless, the evidence of record does not indicate that his 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 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**

**Tineen Howard¹
Complainant**

GRC Complaint No. 2022-285

v.

**N.J. Department of Labor & Workforce Development,
Division of Temporary Disability Insurance²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of “all documentation pertaining to calculating benefits overpaid in the amount of \$2,700.00.”

Custodian of Record: Brian Burns
Request Received by Custodian: June 2, 2022
Response Made by Custodian: None.
GRC Complaint Received: June 23, 2022

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’s failure to provide a completed [Statement of Information (“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

¹ No legal representation listed on record.

² No legal representation listed on record.

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 Complainant's OPRA request. N.J.S.A. 47:1A-6. The Custodian shall search for, locate, and disclose to the Complainant records responsive to his OPRA request. If certain records or information contained therein is exempt from disclosure, the Custodian shall provide the specific lawful basis for such. Should the Custodian not locate any responsive records, he must certify to this fact and include as part of said certification a detailed search explanation.
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 October 4, 2022, the Council distributed its Interim Order to all parties. On the same day, Administrative Analysis Peter A. Martin e-mailed the Government Records Council ("GRC") asserting that the Interim Order was inaccurate because Administrative Analysis Jessica Volkman responded in writing to the Complainant via e-mail on June 6, 2022, four (4) calendar days after receipt of the subject OPRA request. Mr. Martin further asserted that after the Division of Temporary Disability Insurance ("TDI") received a release from the Complainant, he was advised to contact the Division of Unemployment Insurance ("UEI") directly either online or by telephone.

On October 11, 2022, the GRC e-mailed the Custodian recounting the Council's Order and the actions he was required to take by the last day to respond thereto, which was October 12, 2022. On the same day, the Custodian e-mailed the GRC stating that TDI was not the "custodian of record" for the information sought, as identified by Mr. Martin on prior occasions. The GRC responded advising that the Custodian should review the Council's Order for the "proper way to respond" thereto. Later on the same day, Mr. Martin submitted an unsigned certification setting forth that TDI timely responded and did not have responsive records. Mr. Martin asserted that he

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.

also told the Complainant and GRC on multiple occasions that the records sought were maintained by UEI.

On October 12, 2022, the GRC e-mailed Mr. Martin advising that he failed to sign the certification and that it did not include the Custodian's certified confirmation of compliance required by conclusion No. 4. Mr. Martin resubmitted his legal certification with a signature and again expressed confusion regarding the Custodian's obligation to submit certified confirmation of compliance. In response to the GRC's attempt to further clarify the required submission, TDI Director Jeff Flatley sought a meeting to discuss the Order. The GRC responded advising that it provided sufficient information regarding the Order's requirement and that the Custodian may consider obtaining an extension of time to comply and contact the agency's deputy attorney general for legal advice.

Additional Submissions:

On October 12, 2022, the Complainant e-mailed the parties attaching documents and advising that they may provide clarity on the records sought. The Complainant contended that as of this date, TDI has not disclosed the records sought. On October 13, 2022, Executive Director David Fish sent an e-mail to the GRC seeking clarification on the instant complaint and the current issues related to the Council's Order. Director Fish also sought an extension of time to submit compliance. On October 17, 2022, the GRC provided Director Fish with copies of all submissions from the case file. The GRC further noted that although the compliance time frame had expired, it would grant an extension of time to submit the required certified confirmation of compliance through October 20, 2022.

On October 18, 2022, Director Fish submitted a legal certification. Therein, Director Fish certified that he oversaw OPRA operations for all of N.J. Department of Labor and Workforce Development. Director Fish certified to TDI's receipt of the subject OPRA request and Ms. Volkman's June 6, 2022 response advising that records could not be disclosed without a release. Director Fish averred that upon receipt of the Complainant's release, Mr. Martin advised the Complainant that the overpayment issue was with UEI and not TDI; thus, the Complainant would need to contact UEI directly. Director Fish stated that rather than contact UEI, the Complainant filed this complaint alleging an unlawful denial of access.

Director Fish certified that he was notified of the instant complaint and the Council's Order on October 12, 2022 and contacted UEI directly regarding the refund issue. Director Fish affirmed that he was attaching two (2) computer printouts, one each from UEI and TDI, that address the refund issue. Director Fish noted that the UEI printout, which was maintained by that division, is the record responsive to the Complainant's OPRA request.

Later on October 18, 2022, the Complainant e-mailed the GRC asserting that the Department's response was "disingenuous" and "a denial."

On October 24, 2022, the Custodian responded to the Council's Interim Order. Therein, the Custodian certified that Mr. Martin and Director Fish conducted searches, which revealed that potentially responsive records were held by UEI and not TDI; thus, no records existed. The

Custodian affirmed that Director's Fish's disclosure of the UEI record further supports that TDI did not maintain any records related to the Complainant's refund issue.

Analysis

Compliance

At its September 29, 2022 meeting, the Council ordered the Custodian search for, locate, and disclose to the Complainant records responsive to his OPRA request, provide a specific lawful basis for those records he determined to be exempt, or certify if no records exist and include as part of said certification a detailed search explanation. The Custodian was further required to simultaneously provide 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.

Following distribution, the GRC and Department employees engaged in extensive communication regarding the Custodian's obligation to comply with the Order. Mr. Martin initially responded on October 4, 2022 arguing that the Order was factually incorrect because TDI did timely respond through Ms. Volkman. Mr. Martin subsequently submitted an unsigned, and then a signed, legal certification attesting to this fact and that the Complainant was advised that he had to contact UEI. Director Fish later certified to the above and noted that he was disclosing a record from UEI, and not TDI, that was responsive to the Complainant's OPRA request. However, and notwithstanding multiple attempts and explanations, the GRC still had not received the Custodian's certified confirmation of compliance by October 12, 2022.

Finally, on October 24, 2022, the thirteenth (13th) business day after receipt of the Council's Order, the Custodian submitted certified confirmation of compliance. Therein, the Custodian certified that searches conducted by Mr. Martin and Director Fish revealed that TDI did not possess any records related to the Complainant's refund issue. The Custodian further certified Director Fish disclosed as part of his certification a record from UEI that was responsive to the subject OPRA request, which offered support that no records existed at TDI.

The evidence of record is clear that the Custodian's failure to submit certified confirmation of compliance to the Executive Director until the thirteenth (13th) business day after receipt of the Order. This is notwithstanding multiple communications with TDI prior to the expiration of the compliance time frame and the involvement of Director Fish thereafter.

Therefore, the Custodian failed to comply with the Council's September 29, 2022 Interim Order. Specifically, although Mr. Martin timely certified to his search and the fact that no records within TDI's possession existed, the Custodian failed to provide certified confirmation of compliance to the Executive Director until thirteen (13) business days after receipt of the Order. The GRC also stresses that this delay was notwithstanding multiple communications with TDI regarding the proper response process for an Interim Order.

In closing, the GRC briefly addresses Mr. Martin's allegations by noting that the Custodian was twice advised that his failure to submit an SOI could result in the complaint being adjudicated on based solely on the Complainant's submissions. Notwithstanding this, he failed to submit the SOI, instead opting for informal responses of both himself and Mr. Martin. Additionally, neither the Custodian nor Mr. Martin identified Ms. Volkman's response until after the Council rendered its decision.

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 v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). Here, the Complainant's OPRA request sought "all documentation pertaining to calculating benefits overpaid in the amount of \$2,700.00."⁶ Following the submission of the instant complaint, Mr. Martin asserted that TDI originally denied access absent a release and subsequently directed the Complainant to UEI. However, the Custodian failed to submit an SOI and the Council, considering only the Complainant's submissions, held in its September 29, 2022 Interim Order that a "deemed" denial of access occurred and that the Custodian may have unlawfully denied the subject OPRA request. In response to that Interim Order, the GRC received legal certifications from Mr. Martin, Director Fish, and the Custodian affirming that the refund issue was with UEI and that TDI did not maintain responsive records. Director Fish included in his legal certification documentation supporting this fact. Thus, the evidence of record now supports that no unlawful denial of access occurred because the records sought were not maintained by TDI.

Accordingly, the Custodian has borne his burden of proof that he lawfully denied access to the Complainant's OPRA request. Specifically, the Custodian, Mr. Martin, and Director Fish 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,

⁶ The GRC notes that the Complainant's OPRA request is invalid on its face because it sought "all documentation" pertaining to a benefits overpayment and fails to identify specific records. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Feiler-Jampel v. Somerset Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008).

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. 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 failed to submit an SOI, which resulted in a violation of N.J.A.C. 5:105-2.4(a) and a finding that a “deemed” denial occurred. Additionally, the Custodian failed to comply with the Council’s Interim Order, notwithstanding extensive correspondence between the GRC and TDI advising him of the required actions. Notwithstanding the forgoing, the evidence of record also supports that no unlawful denial of access occurred because the record adequately reveals that no records existed. N.J.S.A. 47:1A-6; Pusterhofer, GRC 2005-49. Additionally, while the Custodian’s actions here appeared negligent and heedless, the evidence of record does not indicate that his 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 failed to comply with the Council’s September 29, 2022 Interim Order. Specifically, although Mr. Martin timely certified to his search and the fact that no records within the Division of Temporary Disability Insurance’s possession existed, the Custodian failed to provide certified confirmation of compliance to the Executive Director until thirteen (13) business days after receipt of the Order. The GRC also stresses that this delay was notwithstanding multiple communications with the Division of Temporary Disability Insurance regarding the proper response process for an Interim Order.
2. The Custodian has borne his burden of proof that he lawfully denied access to the Complainant’s OPRA request. Specifically, the Custodian, Mr. Martin, and Director Fish 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 failed to submit a Statement of Information, which resulted in a violation of N.J.A.C. 5:105-2.4(a) and a finding that a “deemed” denial occurred. Additionally, the Custodian failed to comply with the Council’s Interim Order, notwithstanding extensive correspondence between the GRC and Division of Temporary Disability Insurance advising him of the required actions. Notwithstanding the forgoing, the evidence of record also supports that no unlawful denial of access occurred because the record adequately reveals that no records existed. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). Additionally, while the Custodian’s actions here appeared negligent and heedless, the evidence of record does not indicate that his 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

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

Tineen Howard
Complainant

Complaint No. 2022-285

v.

NJ Department of Labor & Workforce Development,
Division of Temporary Disability Insurance
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’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 Complainant’s OPRA request. N.J.S.A. 47:1A-6. The Custodian shall search for, locate, and disclose to the Complainant records responsive to his OPRA request. If certain records or information contained therein is exempt from disclosure, the Custodian shall provide the specific lawful basis for such. Should the Custodian not locate any responsive records, he must certify to this fact and include as part of said certification a detailed search explanation.
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 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**

**Tineen Howard¹
Complainant**

GRC Complaint No. 2022-285

v.

**N.J. Department of Labor & Workforce Development,
Division of Temporary Disability Insurance²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of “all documentation pertaining to calculating benefits overpaid in the amount of \$2,700.00.”

Custodian of Record: Brian Burns
Request Received by Custodian: June 2, 2022
Response Made by Custodian: None.
GRC Complaint Received: June 23, 2022

Background³

Request and Response:

On June 2, 2022, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.

Denial of Access Complaint:

On June 23, 2022, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian failed to respond to the subject OPRA request.

Statement of Information:

On July 25, 2022, the GRC requested a completed Statement of Information (“SOI”) from the Custodian.

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.

Tineen Howard v. N.J. Department of Labor & Workforce Development, Division of Temporary Disability Insurance, 2022-285 – Findings and Recommendations of the Executive Director

Additional Submissions:

On August 9, 2022, the Custodian e-mailed the parties stating that “someone on [his] staff reviews these requests” and he recently followed up with that individual. The Custodian noted that he would respond once he received “feedback” from the staff-member and by no later than August 10, 2022.

On August 11, 2022, Administrative Analysis Peter A. Martin stated that the subject OPRA request was “denied on the grounds that [the Division of Temporary Disability Insurance (“TDI”)] could not disclose confidential claim records without written authorization from the claimant.” Mr. Martin further stated that it appeared that the refund issue was with an unemployment claim and not a disability claim. Mr. Martin thus directed the Complainant to contact the Division of Unemployment Insurance (“UEI”) directly either online or by telephone. Later on August 11, 2022, the Complainant responded stating that Mr. Martin’s response was “unacceptable.” The Complainant contended that the Custodian failed to formally respond to his OPRA request and never disclosed any responsive records notwithstanding that he is the claimant.

Statement of Information (cont’d):

On August 11, 2022, the GRC sent a “No Defense” letter to the Custodian, requesting a completed SOI within three (3) business days of receipt. The GRC did not receive any response 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 August 11, 2022, after the expiration of the five (5) business day deadline and after correspondence received from both the Custodian and Mr. Martin, the GRC sent a "Letter of No Defense" providing an additional three (3) business days to submit the requested SOI. That transmission also included a copy of the Denial of Access Complaint and the original SOI letter providing detailed instructions on how to properly submit an SOI. 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).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).

Here, the Complainant submitted his OPRA request to the Custodian on June 2, 2022 and filed the instant complaint on June 23, 2022 asserting that he did not receive a response. On August 9, 2022, following the GRC request for an SOI, the Custodian responded asserting that a member of his staff was tasked with addressing OPRA requests and that he would have that individual response by August 10, 2022. However, at the point of the Custodian's e-mail, forty-five (45) business days had already passed. On August 11, 2022, Mr. Martin e-mailed the Complainant alleging that the request was previously denied; however, there is no evidence that such a response was ever proffered to the Complainant in writing. Thus, the evidence of record supports that a "deemed" denial of access occurred here.

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

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.

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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.

In the matter before the Council, the Custodian, through Mr. Martin, advised the Complainant on August 11, 2022 that his request was denied because TDI information was exempt from disclosure “without written authorization from the claimant.” Additionally, the Custodian, through Mr. Martin, advised that the Complainant should contact UEI because the claim in question was an unemployment, and not a disability, claim. However, the Custodian never submitted an SOI; thus, Mr. Martin’s statements remain unverified and unsupported by the evidence of record. Additionally, the GRC notes that the Complainant is obviously the claimant in question here as his OPRA request sought records related to his own claim. Based on these factors, the GRC finds that it is possible that an unlawful denial of access may have occurred here.

Accordingly, the Custodian may have unlawfully denied access to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. The Custodian shall search for, locate, and disclose to the Complainant records responsive to his OPRA request. If certain records or information contained therein is exempt from disclosure, the Custodian shall provide the specific lawful basis for such. Should the Custodian not locate any responsive records, he must certify to this fact and include as part of said certification a detailed search explanation.

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 Complainant's OPRA request. N.J.S.A. 47:1A-6. The Custodian shall search for, locate, and disclose to the Complainant records responsive to his OPRA request. If certain records or information contained therein is exempt from disclosure, the Custodian shall provide the specific lawful basis for such. Should the Custodian not locate any responsive records, he must certify to this fact and include as part of said certification a detailed search explanation.
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 deliver⁵ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁶ to the Executive Director.⁷**
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

September 22, 2022

⁵ 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.

⁶ "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."

⁷ 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.

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