



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Commissioner

**FINAL DECISION**

**December 15, 2015 Government Records Council Meeting**

John F. Huegel  
Complainant

Complaint No. 2014-412

v.

City of Newark (Essex)  
Custodian of Record

At the December 15, 2015 public meeting, the Government Records Council (“Council”) considered the November 10, 2015 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that the Complainant has failed to establish in his request for reconsideration of the Council’s September 29, 2015, Final Decision, that either: 1) the Council's decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant failed to establish that the complaint should be reconsidered based on fraud or illegality. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the Complainant failed to provide competent credible evidence refuting Detective Olga Perez’s legal certification that no additional records existed. Thus, the Complainant’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

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 15<sup>th</sup> Day of December, 2015

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: December 17, 2015**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***Reconsideration*  
Supplemental Findings and Recommendations of the Executive Director  
December 15, 2015 Council Meeting**

**John F. Huegel<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-412**

**v.**

**City of Newark (Essex)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Hardcopies via pickup of all accrued compensatory time bank accounts for every active member of the Police Superior Officers Association (“PSOA”) and Newark Police Deputy Chief’s Association (“NPDCA”) from 2007-2013, to include vacation, on-call, overtime, service years credits, and any other tracked category.<sup>3</sup>

**Custodian of Record:** Kenneth Louis<sup>4</sup>

**Request Received by Custodian:** July 2, 2014

**Response Made by Custodian:** July 14, 2014

**GRC Complaint Received:** December 3, 2014<sup>5</sup>

**Background**

**September 29, 2015, Council Meeting:**

At its September 29, 2015, public meeting, the Council considered the September 22, 2015, Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

1. Neither the Custodian nor Detective Perez fully complied with the Council’s July 28, 2015, Interim Order. Specifically, both the Custodian and Detective Perez failed to respond within the prescribed time frame and simultaneously provide certified confirmation of compliance to the Executive Director. However, the Custodian did not unlawfully deny access to additional records because Detective Perez certified that no such additional records existed.

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

<sup>2</sup> Represented by Willie Parker, Esq. (Newark, NJ).

<sup>3</sup> The Complainant sought additional records that are not at issue in this complaint.

<sup>4</sup> The original custodian of record was Robert P. Marasco.

<sup>5</sup> The complaint was referred to mediation but was referred back on January 6, 2015.

2. Although the Custodian's failure to respond within the extended deadline resulted in a "deemed" denial of the Complainant's OPRA request and he did not fully comply with the Council's Order, Detective Perez certified that no additional responsive records regarding Mr. DeMaio's time existed. Accordingly, there was no unlawful denial of access to any additional records. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

### Procedural History:

On October 5, 2015, the Council distributed its Final Decision to all parties. On October 7, 2015, the Complainant e-mailed the Government Records Council ("GRC"), disputing the Final Decision. The Complainant asserted that additional responsive records exist because the City of Newark ("City") was required to maintain same per its records retention schedule. The Complainant contended that the City could not withhold or destroy records that may uncover potential criminal activity. The Complainant stated that he would submit a request for reconsideration to indicate why disclosure of additional records is important to all residents of New Jersey and Essex County. The Complainant requested that the GRC initiate a criminal investigation into this complaint if it could not compel the City to comply fully with the subject OPRA request.

On October 8, 2015, the Complainant filed a request for reconsideration of the Council's September 29, 2015, Final Decision based on a fraud and illegality. Therein, the Complainant disputed the City's certification that no additional records existed. The Complainant argued that records existed on March 1, 2014, at the time that Mr. Samuel DeMaio received a lump sum payment for unused vacation, holiday, overtime compensation, sick and injured leave, and "FLSA" compensation. The Complainant noted that Detective Olga Perez indicated in her response to the Council's July 28, 2015, Interim Order that the responsive records were in archives, which indicates that they exist.

The Complainant contended that the records are extremely important in allowing the public to determine how much the City actually paid Mr. DeMaio upon his leaving employment. The Complainant requested that the GRC initiate a criminal investigation with the appropriate authority if the City continued to refuse disclosing records.

### Analysis

#### Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council, and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following

receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, the Complainant filed the request for reconsideration of the Council's September 29, 2015, Final Decision, on October 8, 2015, three business (3) days from the issuance of the Council's Order.

Applicable case law holds that:

“A party should not seek reconsideration merely based upon dissatisfaction with a decision.” D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a “palpably incorrect or irrational basis;” or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, . . . 242 N.J. Super. at 401. “Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.” Ibid.

In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

The Complainant's request for reconsideration amounts to a disagreement with Detective Olga Perez's legal certification that no other records existed. The Complainant argued that, based on the City's admission that records are in archives, additional records must exist. However, the Complainant provided no definitive evidence that additional records, in fact, existed. *See* Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-76 (Interim Order dated June 26, 2012). The Council's limited authority to adjudicate denial of access complaints is statutorily defined and mandated by N.J.S.A. 47:1A-7(b). To this end, the Council's inability to adjudicate an agency's requirement to create or maintain records is based on long-standing precedent. *See* Anonymous v. Twp. of Monroe, GRC Complaint No. 2006-160 (April 2008); Van Pelt v. Edison Twp. Bd. of Educ., GRC Complaint No. 2007-179 (January 2008); LoBosco v. NJ Dep't of Health & Senior Serv., Div. of Certificate of Need & Healthcare Facility Licensure, GRC Complaint No. 2010-64 (October 2010); Moore v. Twp. of Nutley (Essex), GRC Complaint No. 2010-125 (January 2011). Based on the foregoing, the Complainant failed to provide any competent, credible evidence refuting Detective Perez's certification that no additional records existed.

Further, the Complainant requested that the Council initiate a criminal investigation if the City refused to comply with his OPRA request. The GRC does not have the authority to initiate criminal investigations. N.J.S.A. 47:1A-7(b); Roundtree v. NJ Dep't of State, Div of Elections, GRC Complaint No. 2014-155 (February 2015).

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above, either: 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See Cummings*, 295 N.J. Super. at 384. The Complainant failed to establish that the complaint should be reconsidered based on fraud or illegality. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. *See D'Atria*, 242 N.J. Super. at 401. Specifically, the Complainant failed to provide competent credible evidence refuting Detective Perez's legal certification that no additional records existed. Thus, the Complainant's request for reconsideration should be denied. *Cummings*, 295 N.J. Super. at 384; *D'Atria*, 242 N.J. Super. at 401; *Comcast*, 2003 N.J. PUC at 5-6.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the Complainant has failed to establish in his request for reconsideration of the Council's September 29, 2015, Final Decision, that either: 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant failed to establish that the complaint should be reconsidered based on fraud or illegality. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the Complainant failed to provide competent credible evidence refuting Detective Olga Perez's legal certification that no additional records existed. Thus, the Complainant's request for reconsideration should be denied. *Cummings v. Bahr*, 295 N.J. Super. 374 (App. Div. 1996); *D'Atria v. D'Atria*, 242 N.J. Super. 392 (Ch. Div. 1990); *In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J.*, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Prepared By: Frank F. Caruso  
Communications Specialist/Resource Manager

Reviewed By: Joseph D. Glover  
Executive Director

November 10, 2015<sup>6</sup>

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<sup>6</sup> This complaint was prepared for adjudication at the Council's November 17, 2015, meeting, but could not be adjudicated due to lack of quorum.



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CHRIS CHRISTIE  
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**FINAL DECISION**

**September 29, 2015 Government Records Council Meeting**

John F. Huegel  
Complainant

Complaint No. 2014-412

v.

City of Newark (Essex)  
Custodian of Record

At the September 29, 2015 public meeting, the Government Records Council (“Council”) considered the September 22, 2015 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Neither the Custodian nor Detective Perez fully complied with the Council’s July 28, 2015, Interim Order. Specifically, both the Custodian and Detective Perez failed to respond within the prescribed time frame and simultaneously provide certified confirmation of compliance to the Executive Director. However, the Custodian did not unlawfully deny access to additional records because Detective Perez certified that no such additional records existed.
2. Although the Custodian’s failure to respond within the extended deadline resulted in a “deemed” denial of the Complainant’s OPRA request and he did not fully comply with the Council’s Order, Detective Perez certified that no additional responsive records regarding Mr. DeMaio’s time existed. Accordingly, there was no unlawful denial of access to any additional records. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.



Final Decision Rendered by the  
Government Records Council  
On The 29<sup>th</sup> Day of September, 2015

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 5, 2015**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
September 29, 2015 Council Meeting**

**John F. Huegel<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-412**

v.

**City of Newark (Essex)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Hardcopies via pickup of all accrued compensatory time bank accounts for every active member of the Police Superior Officers Association (“PSOA”) and Newark Police Deputy Chief’s Association (“NPDCA”) from 2007-2013, to include vacation, on-call, overtime, service years credits, and any other tracked category.<sup>3</sup>

**Custodian of Record:** Kenneth Louis<sup>4</sup>

**Request Received by Custodian:** July 2, 2014

**Response Made by Custodian:** July 14, 2014

**GRC Complaint Received:** December 3, 2014<sup>5</sup>

**Background**

July 28, 2015 Council Meeting:

At its July 28, 2015, public meeting, the Council considered the July 21, 2015, Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

1. Although the original Custodian timely responded to the Complainant’s OPRA request in writing by twice requesting an extension of time to respond, his failure to respond timely in writing within the extended deadline of August 29, 2014, results in a “deemed” denial. N.J.S.A. 47:1A-5(i); Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009); Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-328 *et seq.* (Interim Order dated October 28, 2014).

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

<sup>2</sup> Represented by Willie Parker, Esq. (Newark, NJ).

<sup>3</sup> The Complainant sought additional records that are not at issue in this complaint.

<sup>4</sup> The original custodian of record was Robert P. Marasco.

<sup>5</sup> The complaint was referred to mediation but was referred back on January 6, 2015.

2. The Custodian or individuals within Newark City Police Department may have unlawfully denied access to responsive records. N.J.S.A. 47:1A-6. The Custodian and/or individuals from the Newark City Police Department who conducted the search must locate and provide any remaining records for vacation, holiday, and compensatory time. However, if upon searching for additional records it is determined that none exist, the Custodian *and* individuals from Newark City Police Department must certify to this fact.
3. **The Custodian shall comply with item No. 2 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, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>6</sup> to the Executive Director.<sup>7</sup>**
4. 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 July 29, 2015, the Council distributed its Interim Order to all parties. On August 11, 2015, four (4) business days after the expiration of the time frame to comply, Ms. Cheryl Coxson from the Office of the City Clerk’s OPRA Unit, sought an extension of time until August 14, 2015, to respond to the Council’s Order. The GRC responded, advising Ms. Coxson of the expiration of the compliance time frame, but allowed for an extension until August 14, 2015.

On August 12, 2015, Detective Olga Perez responded to the Council’s Interim Order. Detective Perez certified that she is assigned to the OPRA Unit of the Newark Police Department (“NCPD”) and is responsible for searching for and providing any records that exist in response to OPRA requests. Detective Perez affirmed that she received the Council’s Order and performed another search for responsive records in the Human Resources and the Finance Sections. Detective Perez noted that her search was hampered by the fact that Mr. Samuel DeMaio had retired on March 1, 2014, and that his files had been archived.

Detective Perez certified that she provided to the Complainant all of Mr. DeMaio’s vacation, compensation, “FLSA” compensation, and sick or injured leave records in NCPD’s possession. She also acknowledged that those records were not complete, but nonetheless represented all records that existed. Detective Perez also certified that the person who prepared the package of records for disclosure added page numbers but stressed that those numbers are not indicative of missing pages.

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<sup>6</sup> "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."

<sup>7</sup> 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.

## Analysis

### Compliance

At its July 28, 2015 meeting, the Council ordered the Custodian or individuals in the NCPD to conduct another search to locate additional responsive records and either to provide same or certify that no other records exist. Additionally, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On July 29, 2015, 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 August 5, 2015.

On August 11, 2015, four (4) business days after the expiration of the time frame to comply with the Council's Order, Ms. Coxson sought an extension of time until August 14, 2015. The GRC granted said extension but noted that the compliance time frame had expired on August 5, 2015. On August 12, 2015, Detective Perez provided a legal certification, which memorialized her search and affirmed that no additional records existed. However, as prescribed by the order, the Custodian did not submit any additional certifications. Upon review, the GRC is satisfied that the Custodian did not unlawfully deny access to additional records because Detective Perez's certification adequately indicates that no additional records exist.

Therefore, the Custodian and Detective Perez did not fully comply with the Council's July 28, 2015 Interim Order. Specifically, both the Custodian and Detective Perez failed to respond within the prescribed time frame and simultaneously provide certified confirmation of compliance to the Executive Director. However, the Custodian did not unlawfully deny access to additional records because Detective Perez certified that no such additional records existed.

### 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)).

The Custodian's failure to respond within the extended deadline resulted in a "deemed" denial of the Complainant's OPRA request, and he did not fully comply with the Council's Order. However, Detective Perez certified that no additional responsive records regarding Mr. DeMaio's time existed. Accordingly, there was no unlawful denial of access to any additional records. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Neither the Custodian nor Detective Perez fully complied with the Council's July 28, 2015, Interim Order. Specifically, both the Custodian and Detective Perez failed to respond within the prescribed time frame and simultaneously provide certified confirmation of compliance to the Executive Director. However, the Custodian did not unlawfully deny access to additional records because Detective Perez certified that no such additional records existed.
2. Although the Custodian's failure to respond within the extended deadline resulted in a "deemed" denial of the Complainant's OPRA request and he did not fully comply with the Council's Order, Detective Perez certified that no additional responsive records regarding Mr. DeMaio's time existed. Accordingly, there was no unlawful denial of access to any additional records. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso  
Communications Specialist/Resource Manager

Reviewed By: Joseph D. Glover  
Executive Director

September 22, 2015



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
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CHRIS CHRISTIE  
Governor  
  
KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Commissioner

INTERIM ORDER

July 28, 2015 Government Records Council Meeting

John F. Huegel  
Complainant

Complaint No. 2014-412

v.  
City of Newark (Essex)  
Custodian of Record

At the July 28, 2015 public meeting, the Government Records Council (“Council”) considered the July 21, 2015 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1.

Although the original Custodian timely responded to the Complainant’s OPRA request in writing by twice requesting an extension of time to respond, his failure to respond timely in writing within the extended deadline of August 29, 2014, results in a “deemed” denial. N.J.S.A. 47:1A-5(i); Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009); Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-328 *et seq.* (Interim Order dated October 28, 2014).

2.

The Custodian or individuals within Newark City Police Department may have unlawfully denied access to responsive records. N.J.S.A. 47:1A-6. The Custodian and/or individuals from Newark City Police Department that conducted the search must locate and provide any remaining records for vacation, holiday, and compensatory time. However, if upon searching for additional records it is determined that none exist, the Custodian *and* individuals from Newark City Police Department must certify to this fact.

3.

**The Custodian shall comply with item No. 2 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, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>1</sup> to the Executive Director.<sup>2</sup>**

<sup>1</sup> "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."

<sup>2</sup> 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



4. 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 28<sup>th</sup> Day of July, 2015

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: July 29, 2015**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
July 28, 2015 Council Meeting**

**John F. Huegel<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-412**

v.

**City of Newark (Essex)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Hardcopies via pickup of all accrued compensatory time bank accounts for every active member of the Police Superior Officers Association (“PSOA”) and Newark Police Deputy Chief’s Association (“NPDCA”) from 2007-2013, to include vacation, on-call, overtime, service years credits, and any other tracked category.<sup>3</sup>

**Custodian of Record:** Kenneth Louis<sup>4</sup>

**Request Received by Custodian:** July 2, 2014

**Response Made by Custodian:** July 14, 2014

**GRC Complaint Received:** December 3, 2014

**Background<sup>5</sup>**

**Request and Response:**

On July 2, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On the same day, the original Custodian responded in writing, acknowledging receipt of the request and advising that he would respond to same on or before July 14, 2014. On that date, the original Custodian responded in writing advising that an extension until August 15, 2014, was necessary due to the voluminous nature of the OPRA request. On August 12, 2014, the original Custodian again extended the time frame until August 29, 2014, to process the Complainant’s OPRA request.

On August 13, 2014, the Complainant e-mailed the original Custodian to advise that he would not allow for any more extensions after August 29, 2014. The Complainant noted that he believed the original Custodian was being delayed by the Newark City Police Department (“NCPD”) but that he would file a complaint for accountability purposes if the original

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

<sup>2</sup> Represented by Vivian Sanks King, Esq. (Newark, NJ).

<sup>3</sup> The Complainant sought additional records that are not at issue in this complaint.

<sup>4</sup> The original custodian of record was Robert P. Marasco.

<sup>5</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

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Custodian failed to provide records by the final date. On August 14, 2014, the original Custodian responded in writing, advising that a response would be forthcoming by August 29, 2014.

On September 6, 2014, the Complainant e-mailed Cheryl Coxson, Office of the City Clerk, OPRA Unit, stating that he telephoned the City of Newark (“City”) on September 2, 2014, and was told that someone would contact him on September 5, 2014. The Complainant stated that he did not receive a return call. On September 12, 2014, Ms. Coxson advised the Complainant that records responsive to his OPRA request were available but that he may want to inspect same and identify copies due to the voluminous nature of the records. Ms. Coxson requested that the Complainant provide dates and times for inspection. On September 25, 2014, the Complainant inspected the responsive records.

On November 5, 2014, Ms. Coxson provided time records for Samuel DeMaio and averred that this disclosure completed the Complainant’s OPRA request. On the same day, the Complainant e-mailed Ms. Coxson, asserting that the records were incomplete. Specifically, he only received one (1) out of twelve (12) pages each for vacation and holiday accounts but nothing responsive to compensatory time. The Complainant stated that he could not understand why NCPD would “continue to try and hide RETIRED Police Director DeMaio’s records” (emphasis in original). On November 6, 2014, Ms. Coxson assured the Complainant that NCPD conducted a thorough search and provided all responsive records.

On November 12, 2014, the Complainant e-mailed Ms. Coxson, asking if the NCPD located the alleged missing pages. On November 14, 2014, Ms. Coxson e-mailed the Complainant, advising that NCPD conducted a thorough search and provided all relevant records for disclosure. On November 15, 2014, the Complainant advised Ms. Coxson that he would file a complaint with the Government Records Council (“GRC”) to dispute the City of Newark’s (“City”) failure to provide all of Director DeMaio’s records.

#### Denial of Access Complaint:

On December 3, 2014, the Complainant filed a Denial of Access Complaint with the GRC. The Complainant asserted that the City’s response to his OPRA request was incomplete. The Complainant asserted that he only received one (1) out of twelve (12) pages each for vacation and holiday accounts. Additionally, the Complainant asserted that he received no compensatory account records.

#### Statement of Information:

On February 10, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on July 2, 2014, and that he forwarded the OPRA request to NCPD for a response. The Custodian certified that, after two (2) extensions, the Complainant reviewed approximately 6,000 pages of records.

The Custodian asserted that NCPD maintained the records sought by the Complainant and that NCPD initially provided those records they felt were responsive. The Custodian affirmed that after the Complainant raised concerns about missing records, NCPD performed a second search and was able to locate additional records that they felt were responsive.



## Analysis

### Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).<sup>6</sup> Thus, a custodian's failure to respond in writing to a complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Moreover, OPRA provides that:

If the . . . record is in storage or archived, the requestor shall be so advised within seven business days after the custodian receives the request. The requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied.

N.J.S.A. 47:1A-5(i).

In Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5th) business day after receipt of the complainant's March 19, 2007, OPRA request seeking an extension of time until April 20, 2007. However, the custodian responded again on April 20, 2007, stating that the requested records would be provided later in the week. Id. The evidence of record showed that no records were provided until May 31, 2007. Id. The GRC held that:

The Custodian properly requested an extension of time to provide the requested records to the Complainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) . . . however . . . [b]ecause the Custodian failed to provide the Complainant access to the requested records by the extension date anticipated . . . the Custodian violated N.J.S.A. 47:1A-5(i) resulting in a "deemed" denial of access to the records.

Id.

Here, the original Custodian timely responded to the Complainant's OPRA request by seeking an extension of time until August 15, 2014. Prior to the expiration of the extended time frame, the original Custodian again sought additional time until August 29, 2014. However, the

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<sup>6</sup> A custodian's written response, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

original Custodian failed to respond within the extended time frame. This fact is supported by the e-mail exchange that commenced on September 6, 2014, and the absence of a written request to extend the time frame a third time.

Therefore, although the original Custodian timely responded to the Complainant's OPRA request in writing by twice requesting an extension of time to respond, his failure to respond timely in writing within the extended deadline of August 29, 2014 results in a "deemed" denial. N.J.S.A. 47:1A-5(i); Kohn, GRC 2007-124. *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009); Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-328 *et seq.* (Interim Order dated October 28, 2014).

### **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 threshold issue here is whether the alleged missing vacation and holiday records and compensatory records for Senior Director DeMaio exist and should have been provided. Specifically, there is sufficient evidence on record to indicate that the two (2) pages of holiday and vacation time provided to the Complainant were part of a larger record comprised of twelve (12) pages each.

Ms. Coxson repeatedly advised, and the Custodian later certified in the SOI, that all records were provided; however, their statements were based on assertions of the individual or individuals at NCPD. Additionally, the Custodian stated that NCPD staff provided whatever records they "felt were responsive." However, the evidence of record reveals that NCPD did not provide the one (1) page each of vacation and holiday time until after conducting a second search. Moreover, as the Complainant noted in his Denial of Access Complaint, page numbers at the bottom of the vacation and holiday records reveal that they were part of a larger record. Based on the forgoing, the GRC is not satisfied that it has enough evidence to conclude that the Custodian provided all records that exist for vacation, holiday, and compensatory time.

Accordingly, the Custodian or individuals within NCPD may have unlawfully denied access to responsive records. N.J.S.A. 47:1A-6. The Custodian and/or individuals from NCPD that conducted the search must locate and provide any remaining records for vacation, holiday, and compensatory time. However, if upon searching for additional records, NCPD determines that none exist, the Custodian *and* individuals from NCPD 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. Although the original Custodian timely responded to the Complainant's OPRA request in writing by twice requesting an extension of time to respond, his failure to respond timely in writing within the extended deadline of August 29, 2014, results in a "deemed" denial. N.J.S.A. 47:1A-5(i); Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009); Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-328 *et seq.* (Interim Order dated October 28, 2014).
2. The Custodian or individuals within Newark City Police Department may have unlawfully denied access to responsive records. N.J.S.A. 47:1A-6. The Custodian and/or individuals from Newark City Police Department that conducted the search must locate and provide any remaining records for vacation, holiday, and compensatory time. However, if upon searching for additional records it is determined that none exist, the Custodian *and* individuals from Newark City Police Department must certify to this fact.
3. **The Custodian shall comply with item No. 2 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, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>7</sup> to the Executive Director.<sup>8</sup>**
4. 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  
Communications Specialist/  
Resource Manager

Reviewed by: Joseph D. Glover  
Executive Director

July 21, 2015

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<sup>7</sup> "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."

<sup>8</sup> 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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