



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Commissioner

**FINAL DECISION**

**September 29, 2016 Government Records Council Meeting**

Robert D. Castagna  
Complainant

Complaint No. 2014-428

v.

Gloucester Township Police Department  
Custodian of Record

At the September 29, 2016 public meeting, the Government Records Council (“Council”) considered the September 22, 2016 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear her burden of proof that she responded to the Complainant’s November 19, 2014 OPRA request in writing. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g).
2. Notwithstanding her “deemed” denial, the Custodian bore her burden of proving that she did not unlawfully deny access to the Complainant’s November 19, 2014 OPRA request. N.J.S.A. 47:1A-6. The Custodian’s SOI and response to additional information certified that she produced the records on November 26, 2014, and that no other responsive records existed. Furthermore, there is no evidence in the record to refute the Custodian’s SOI and certification. *See Burns v. Borough of Collingswood*, GRC Complaint No. 2005-68 (September 2005).
3. The Custodian has borne her burden of proving that she did not lawfully deny access to the requested records, described in the Complainant’s December 3, 2014 OPRA request, because she certified and the record reflects that no responsive records exist. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep’t of Educ. GRC Complaint No. 2005-49 (July 2005).

Although the Custodian failed to respond to the Complainant’s November 19, 2014 OPRA request in writing pursuant to N.J.S.A. 47:1A-5(g), the Custodian timely produced responsive records to the Complainant. 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, 2016

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, 2016**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
September 29, 2016 Council Meeting**

**Robert D. Castagna<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-428**

v.

**Gloucester Township Police Department<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

November 19, 2014 OPRA Request:

“[C]opies of the following Gloucester Township police vehicles audio/visual on board recordings regarding a police incident on 07/27/2014 with Blackwood resident, Mr. Marc R. Castagna. Case #14-31143. All audio/visual, on board recordings for 07/27/2014 between the hours of 21:15 thru 21:40 from the following Gloucester Township police officers [sic] vehicles:

1. Sgt David long [sic], #171 (time 21:15 to 21[:]40)
2. Ptl. Christopher Gerace #187 (K-9 office[r] & dog, Arrow) (time 21:15 to 21:40)
3. Ptl. T. Knapp (vehicle #1554) (time 21:18 to 21:40)
4. Ptl. Bucci (vehicle #1572) (time 21:19 to 21:40)”

December 3, 2014 OPRA Request:

“[C]opies of the following Gloucester Township Police vehicles audio/visual on board L-3 dash cam video recordings regarding a police incident of 07/27/2014 at approximate time of 21:05 thru 21:22[ ]involving a Blackwood resident Mr. Marc R. Castagna. I am requesting audio/visual recordings of GT police and K9 (Arrow) and their interaction with Mr. Marc R. Castagna. (ref. case # 14-31443):

Officer Christopher Gerace #187 – Veh. #15K1 (K9 “Arrow”) Time 21:05 to 21:40)

Sgt Daniel Long #171, - Vehicle #1552 Time: 21:05 thru 21:22

Ptl. Joseph Eden, Veh. #1584 Time: 21:38:47 to 21:42:46

Note: This information was not contained in furnished CD response to OPRA request previously submitted on Nov 20, 2014.”

**Custodian of Record:** Rosemary Di Josie

**Request Received by Custodian:** November 20, 2014; December 3, 2014

**Response Made by Custodian:** November 26, 2014; December 4, 2014

**GRC Complaint Received:** December 19, 2014

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

<sup>2</sup> Represented by David F. Carlamere, Esq. (Blackwood, NJ).

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

### **Request and Response:**

On November 19, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 26, 2014, the Custodian informed the Complainant via telephone that the records were available for pick up. While at the Clerk’s office, the Custodian directed the Complainant to Lt. Chris Jones (“Lt. Jones”) of the Gloucester Township Police Department (“GTPD”) to assist in locating any responsive records. The Custodian provided the Complainant with two (2) CDs in response to his November 19, 2014 OPRA request.

On December 3, 2014, the Complainant submitted a second OPRA request to the Custodian, seeking additional audio and visual recordings related to his November 19, 2014 OPRA request. The Custodian responded on December 8, 2014, hand delivering a memo she received from the GTPD, which stated that there were no responsive records to the Complainant’s request.

### **Denial of Access Complaint:**

On December 19, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). Initially, the Complainant asserted that he received CDs on December 2, 2014, containing video data and a separate CD containing audio. He then claimed that the video CDs he received did not contain any audio and contained timeline gaps of video recordings. Additionally, the Complainant asserted that the CDs failed to contain video from one of the named officers, Patrolman Christopher Gerace (“Ptl. Gerace”). As a result, the Complainant filed his December 3, 2014 OPRA request to obtain the missing portions of the video recordings, as well as audio data.

On December 8, 2014, the Complainant arrived in person at the Custodian’s office to clarify that he sought the audio data he alleged was missing in the previously provided records. The Complainant asserted that the Custodian gave him a letter from the GTPD, dated December 4, 2014. The letter, addressed to the Complainant, stated that the GTPD provided all available video recordings within the requested time. Further, the letter stated that Ptl. Gerace did not submit a video within the requested time, and therefore are no responsive records to his request. Lastly, the letter indicated that any gaps in the video recordings would be due to recorder error and therefore could not be retrieved.

### **Statement of Information:**

On January 5, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on November 20, 2014. The Custodian certified that she forwarded the request to the GTPD to conduct the search. The

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<sup>3</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Custodian certified that the GTPD provided her with the responsive records on November 26, 2014, and notified the Complainant by telephone that the records were ready to be picked up. In the Item 9 Index, the Custodian referred to the records as “audio tapes.”

On December 8, 2016, the Custodian handed the Complainant a memo from the GTPD in response to his December 3, 2014 OPRA request. The memo stated that Ptl. Gerace did not submit a video recording for the time requested and that there were no other responsive records to the request.

#### Additional Submissions:

On August 8, 2016, the GRC requested additional information from the Custodian, seeking clarification of the record. Specifically, both the Custodian and Complainant asserted they received/provided records that differed in type, format, and dates received/provided.

The Custodian responded to the GRC on September 6, 2016. The Custodian certified that she provided the Complainant with records on November 26, 2014. The records were responsive to the November 19, 2014 OPRA request. She also clarified that the records provided were two (2) CDs that contained audio and video data. The Custodian certified that the original description of the records as “audio tapes” in Item No. 9 of the SOI was in error.

### Analysis

#### Insufficient Response

OPRA mandates that a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).<sup>4</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 dated October 31, 2007).

In the current matter, the Custodian certified that she informed the Complainant via telephone that the records pertaining to the November 19, 2014 OPRA request were available for pick up. There is no evidence in the record demonstrating that the Custodian responded in writing to the OPRA request. Regarding the December 3, 2014 OPRA request, on December 8, 2014, the Custodian hand-delivered a letter to the Complainant, stating that no responsive records exist.

Therefore, the Custodian did not bear her burden of proof that she responded to the Complainant’s November 19, 2014 OPRA request in writing. N.J.S.A. 47:1A-6. As such, the

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<sup>4</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.

Custodian's failure to respond in writing to the Complainant's OPRA request results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g).

### **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.

#### *November 19, 2014 OPRA Request*

In Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), the custodian produced one (1) responsive record to the complainant's March 2, 2005 OPRA request, and stated that no other responsive records existed. The complainant argued that more responsive records existed. Id. The GRC asked the custodian to certify as to whether all responsive records were produced. Id. On August 1, 2005, the custodian certified that the provided document was the only responsive record. Id. The GRC held that:

[t]he Custodian certified that the Complainant was in receipt of all contracts and agreements responsive to the request. The Custodian has met the burden of proving that all records in existence responsive to the request were provided to the Complainant. Therefore there was no unlawful denial of access.

#### Id.

Regarding his November 19, 2014 OPRA request, the Complainant argued that he was denied access to video recordings allegedly omitted from the provided CDs. This led to the Complainant submitting his December 3, 2014 OPRA request. However, the Custodian certified in her SOI and response to the GRC's request for additional information that she provided all records in response to the Complainant's OPRA request on November 26, 2014, and that no additional responsive records exist.

Therefore, notwithstanding her "deemed" denial, the Custodian bore her burden of proving that she did not unlawfully deny access to the Complainant's November 19, 2014 OPRA request. N.J.S.A. 47:1A-6. The Custodian's SOI and response to additional information certified that she produced the records on November 26, 2014, and that no other responsive records existed. Furthermore, there is no evidence in the record to refute the Custodian's SOI and certification. *See* Burns, GRC 2005-68.

#### *December 3, 2014 OPRA Request*

The Council has previously found that, in light of a custodian's certification that no records responsive to the request exist, no unlawful denial of access occurred. *See* Pusterhofer v. N.J. Dep't of Educ. GRC Complaint No. 2005-49 (July 2005). In the instant matter, the Custodian certified that on December 8, 2014, she hand delivered a letter addressed to the

Custodian from the GTPD. The letter stated that all responsive records were provided to the Complainant, and that no responsive records exist pertaining to video recordings from Ptl. Gerace from the date and time sought. While the Complainant disputed this claim in subsequent correspondence, he failed to provide sufficient evidence to refute the Custodian's claim beyond mere conjecture.

Therefore, the Custodian has borne her burden of proving that she did not lawfully deny access to the requested records, described in the Complainant's December 3, 2014 OPRA request, because she certified and the record reflects that no responsive records exist. N.J.S.A. 47:1A-6; Pusterhofer, GRC 2005-49.

### **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)).

Although the Custodian failed to respond to the Complainant's November 19, 2014 OPRA request in writing pursuant to N.J.S.A. 47:1A-5(g), the Custodian timely produced responsive records to the Complainant. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

## Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she responded to the Complainant's November 19, 2014 OPRA request in writing. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g).
2. Notwithstanding her "deemed" denial, the Custodian bore her burden of proving that she did not unlawfully deny access to the Complainant's November 19, 2014 OPRA request. N.J.S.A. 47:1A-6. The Custodian's SOI and response to additional information certified that she produced the records on November 26, 2014, and that no other responsive records existed. Furthermore, there is no evidence in the record to refute the Custodian's SOI and certification. *See Burns v. Borough of Collingswood*, GRC Complaint No. 2005-68 (September 2005).
3. The Custodian has borne her burden of proving that she did not lawfully deny access to the requested records, described in the Complainant's December 3, 2014 OPRA request, because she certified and the record reflects that no responsive records exist. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep't of Educ. GRC Complaint No. 2005-49 (July 2005).
4. Although the Custodian failed to respond to the Complainant's November 19, 2014 OPRA request in writing pursuant to N.J.S.A. 47:1A-5(g), the Custodian timely produced responsive records to the Complainant. 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: Samuel A. Rosado  
Staff Attorney

September 22, 2016