



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**

**November 15, 2016 Government Records Council Meeting**

Theodore Allen Shaw  
Complainant

Complaint No. 2015-157

v.

Palisades Interstate Parkway Police Department  
Custodian of Record

At the November 15, 2016 public meeting, the Government Records Council (“Council”) considered the November 9, 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 his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.
2. In the instant matter, the Custodian ultimately responded to the request on June 2, 2015, when he mailed the responsive records to the Complainant. Accordingly, the Custodian did not unlawfully deny access to the requested records. Additionally, the Complainant did not contest that the records provided did not satisfy his request. The GRC therefore declines to order disclosure in this instance because the evidence of record reflects, and the Complainant did not demonstrate to the contrary, that the Custodian released all responsive records on June 2, 2015.
3. Although the Custodian unlawfully denied access to the requested records by failing to respond in the seven (7) business days mandated by OPRA, thereby resulting in a deemed denial, he ultimately responded to the Complainant’s May 8, 2015 OPRA request by disclosing the responsive 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 15<sup>th</sup> Day of November, 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: November 17, 2016**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
November 15, 2016 Council Meeting**

**Theodore Allen Shaw<sup>1</sup>  
Complainant**

**GRC Complaint No. 2015-157**

v.

**Palisades Interstate Parkway Police Department<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copy of “an accident report related to an accident I was involved with on Henry Hudson Drive on 05/18/15. Case file: PL-15-008618. Officer Lamboy was on the scene.”

**Custodian of Record:** Sergeant Joseph Mourao  
**Request Received by Custodian:** May 11, 2015  
**Response Made by Custodian:** June 2, 2015; June 9, 2015  
**GRC Complaint Received:** June 2, 2015

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

**Request and Response:**

On May 8, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.

On June 2, 2015, following the filing of a Denial of Access Complaint, the Custodian mailed the requested report to the Complainant. On June 9, 2015, the Custodian sent the records via e-mail.

**Denial of Access Complaint:**

On June 2, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that, after submitting his request, he contacted the agency on multiple occasions seeking a response. The Complainant noted that he called the police department on May 21, 2015, and “the officer answering [the] main number” informed him that the “officer responsible for discovery” was not in the office but

---

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

<sup>2</sup> No legal representation listed on record.

<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.

Theodore Allen Shaw v. Palisades Interstate Parkway Police Department (Bergen), 2015-157 – Findings and Recommendations of the Executive Director

“would be responding to open OPRA’s by 3 PM the following day.” The Complainant then called on the morning of May 26, 2015, and was again told that the officer responsible for discovery was not in but was expected later that day. The officer answering the phone that day furthermore told the Complainant that the requested accident report had been filed and was available.

The Complainant phoned again the next day and spoke to Officer Clancy, who said that the officer responsible for discovery was not in and that he could not confirm when that individual would be in. The Complainant thereafter explained that he tried numerous times to obtain a response to his OPRA request and requested if there were other individuals with whom he could speak. Officer Clancy said he would leave an e-mail message for the individual. The Complainant additionally left a voice mail message.

#### Statement of Information:

On June 12, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian did not specify a date but certified that he received the request “through discovery request but missed it.” With respect to his response, the Custodian certified that Officer Clancy made him aware of the request and that he “mailed the reports immediately.” The Custodian attached the responsive documents to his GRC submission, on which the Complainant was copied. That same day, in a separate e-mail to the GRC, the Custodian classified his delayed response as a “case of custodial oversight” and not a denial of access. He additionally specified that he mailed the responsive records to the Complainant on June 2, 2015. The Custodian additionally attached the records to his June 12, 2015 SOI submission. The Custodian made no other legal arguments.

#### Additional Submissions:

On June 10, 2015, prior to the Custodian’s SOI, the Complainant wrote to the GRC and indicated that, prior to the Custodian’s June 9, 2015 e-mail attaching responsive records, he had not received the mailed response as of that date.

On October 17, 2016, the GRC wrote to the Custodian, seeking clarification as to the exact date he received the Complainant’s OPRA request. The Custodian responded that same day but did not provide the specific date he received or became aware of the OPRA request. Instead, he reiterated his message of June 12, 2015, that he “apparently received the OPRA request through DISCOVERY.ORG and missed the request.”

### Analysis

#### Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Id. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to

N.J.S.A. 47:1A-5(g).<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 October 31, 2007).

Here, the Complainant's request was electronically made on May 8, 2015, a Friday, and the Custodian did not specify the exact date of receipt, stating only that he "missed" the request coming in through discovery.org. Assuming that the Complainant's OPRA request was transmitted that same Friday, the agency's system would have been in receipt on Monday, May 11, 2015, making the seven day deadline for response May 20, 2015. The Custodian certified that he did not respond to the Complainant's OPRA request until June 2, 2015, the eighth (8th) business day following receipt.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

### **Unlawful Denial of Access**

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In the instant matter, the Custodian ultimately responded to the request on June 2, 2015, when he mailed the responsive records to the Complainant. Accordingly, the Custodian did not unlawfully deny access to the requested records. Additionally, the Complainant did not contest that the records provided did not satisfy his request. The GRC therefore declines to order disclosure in this instance because the evidence of record reflects, and the Complainant did not demonstrate to the contrary, that the Custodian released all responsive records on June 2, 2015.

### **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

---

<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.

Theodore Allen Shaw v. Palisades Interstate Parkway Police Department (Bergen), 2015-157 – Findings and Recommendations of the Executive Director

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 unlawfully denied access to the requested records by failing to respond in the seven (7) business days mandated by OPRA, thereby resulting in a deemed denial, he ultimately responded to the Complainant’s May 8, 2015 OPRA request by disclosing the responsive 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. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.
2. In the instant matter, the Custodian ultimately responded to the request on June 2, 2015, when he mailed the responsive records to the Complainant. Accordingly, the Custodian did not unlawfully deny access to the requested records. Additionally, the Complainant did not contest that the records provided did not satisfy his request. The GRC therefore declines to order disclosure in this instance because the evidence of record reflects, and the Complainant did not demonstrate to the contrary, that the Custodian released all responsive records on June 2, 2015.

3. Although the Custodian unlawfully denied access to the requested records by failing to respond in the seven (7) business days mandated by OPRA, thereby resulting in a deemed denial, he ultimately responded to the Complainant's May 8, 2015 OPRA request by disclosing the responsive 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: Husna Kazmir  
Staff Attorney

November 9, 2016