



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

April 25, 2017 Government Records Council Meeting

Vaughn Simmons
Complainant

v.

City of Newark (Essex)
Custodian of Record

Complaint No. 2015-329

At the April 25, 2017 public meeting, the Government Records Council (“Council”) considered the April 18, 2017 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 January 31, 2017 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. In the instant matter, the Complainant failed to establish that the complaint should be reconsidered. The Complainant has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. Specifically, the Complainant advanced no new arguments for disclosure. The Complainant also erroneously argued that responsive records should be disclosed because “records available under one approach may be available through another.” The Council only reviews complaints within the purview of OPRA, and does not have authority to address the disclosability of records under any other process. N.J.S.A. 47:1A-7(b). 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 25th Day of April, 2017

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: April 27, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration

**Supplemental Findings and Recommendations of the Executive Director
April 25, 2017 Council Meeting**

**Vaughn Simmons¹
Complainant**

GRC Complaint No. 2015-329

v.

**City of Newark (Essex)²
Custodial Agency**

Records Relevant to Complaint: Copies of “the complaint and disciplinary history of Detective Angel Perez, Robbery/Homicide Squad, 22 Franklin St., Newark. In addition, any promotions and demotions of this same law enforcement agent under the color of authority in the city of Newark or elsewhere.”

Custodian of Record: Kenneth Louis

Request Received by Custodian: August 19, 2015

Response Made by Custodian: August 28, 2015; September 11, 2015; October 13, 2015; November 10, 2015

GRC Complaint Received: October 26, 2015

Background

January 31, 2017 Council Meeting:

At its January 31, 2017 public meeting, the Council considered the January 24, 2017 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. 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).

¹ No legal representation listed on record.

² Represented by Guenther Waldow, Jr., Esq. (Newark, NJ).

2. Based on the foregoing, the Custodian did not unlawfully deny access to the Complainant's request for personnel records, including internal affairs complaints, because such records are exempt from public access pursuant to the IAPP, which classifies these records as confidential. *See* Wares v. Township of West Milford (Passaic), GRC Complaint No. 2014-274 (May 2015), Blaustein v. Lakewood Police Dep't (Ocean), GRC Complaint No. 2011-102 (June 2012), and Rivera v. Borough of Keansburg Police Dep't (Monmouth), GRC Complaint No. 2007-222 (June 2010). N.J.S.A. 47:A1-6.
3. Although the Custodian unlawfully denied access to the requested records by responding to the Complainant after the seven business days mandated by OPRA, thereby resulting in a deemed denial, he ultimately responded to the Complainant's August 19, 2015 OPRA request by conducting a search and determining that the requested records were exempt as personnel records. Additionally, he certified that during the time period in which the request was being processed, his office was in contact with the Newark Police Department, who conducted the search for responsive records. Upon receipt of a response from the Newark Police Department, the Custodian did issue a response to the Complainant on November 10, 2015. 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 February 3, 2017, the Council distributed its Final Decision to all parties.

On February 27, 2017, the Complainant filed a request for reconsideration of the Council's January 31, 2017 Final Decision.³ Therein, the Complainant stated that he received the Council's Final Decision on February 9, 2017. The Complainant argued that he should be given access to the requested records because of alleged criminal conduct within the City of Newark Police Department ("NPD"). *See* Groark v. Timek, 2013 U.S. Dist. LEXIS 168716 (2013)(holding that plaintiff was entitled to internal affairs reports as part of discovery). Further, the Complainant contended that he had a constitutional right to the requested records through the 14th Amendment. The Complainant's additional arguments, submitted in response to the Custodian's Statement of Information ("SOI"), included his contention that "[r]ecords available under one approach may be available through another."

On March 16, 2017, the Custodian's Counsel submitted objections to the request for reconsideration. Therein, Counsel first noted that the Complainant failed to specify a valid reason for reconsideration. Counsel further argued that Groark, 2013 U.S. Dist. LEXIS 168716, did not apply here because that case addressed discovery and not OPRA. Counsel contended that

³ The Complainant did not include a copy of the appropriate reconsideration form, arguing that he did not have access to same because of his incarceration. The Complainant noted that, should the GRC not accept his filing as valid request for reconsideration, he sought a copy of the appropriate form and an extension of time to submit same.

the Complainant failed to provide any case law or legitimate arguments to support a successful reconsideration. Counsel contended that the Complainant's apparent attempts to re-litigate actions filed in Superior Court are not properly before the Council.

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 January 31, 2017 Final Decision on February 27, 2017, ten (10) business days from the Complainant's asserted receipt of the decision, or on February 9, 2017.

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).

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. In the instant, matter, the Complainant failed to establish that the complaint should be reconsidered. 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 advanced no new arguments for disclosure. The Complainant also erroneously argued that responsive records should be disclosed because

“[r]ecords available under one approach may be available through another.” The Council only reviews complaints within the purview of OPRA, and does not have authority to address the disclosability of records under any other process. N.J.S.A. 47:1A-7(b). 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 January 31, 2017 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. In the instant matter, the Complainant failed to establish that the complaint should be reconsidered. The Complainant has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. Specifically, the Complainant advanced no new arguments for disclosure. The Complainant also erroneously argued that responsive records should be disclosed because “records available under one approach may be available through another.” The Council only reviews complaints within the purview of OPRA, and does not have authority to address the disclosability of records under any other process. N.J.S.A. 47:1A-7(b). 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

April 18, 2017



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PO Box 819
TRENTON, NJ 08625-0819

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FINAL DECISION

January 31, 2017 Government Records Council Meeting

Vaughn Simmons
Complainant

v.

City of Newark (Essex)
Custodian of Record

Complaint No. 2015-329

At the January 31, 2017 public meeting, the Government Records Council (“Council”) considered the January 24, 2017 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. 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).
2. Based on the foregoing, the Custodian did not unlawfully deny access to the Complainant’s request for personnel records, including internal affairs complaints, because such records are exempt from public access pursuant to the IAPP, which classifies these records as confidential. *See* Wares, GRC No. 2014-274, Blaustein, GRC No. 2011-102, and Rivera, GRC No. 2007-222. N.J.S.A. 47:A1-6.
3. Although the Custodian unlawfully denied access to the requested records by responding to the Complainant after the seven business days mandated by OPRA, thereby resulting in a deemed denial, he ultimately responded to the Complainant’s August 19, 2015 OPRA request by conducting a search and determining that the requested records were exempt as personnel records. Additionally, he certified that during the time period in which the request was being processed, his office was in contact with the Newark Police Department, who conducted the search for responsive records. Upon receipt of a response from the Newark Police Department, the Custodian did issue a response to the Complainant on November 10, 2015. 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 31st Day of January, 2017

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: February 3, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 31, 2017 Council Meeting**

**Vaughn Simmons¹
Complainant**

GRC Complaint No. 2015-329

v.

**City of Newark (Essex)²
Custodial Agency**

Records Relevant to Complaint: Copies of “the complaint and disciplinary history of Detective Angel Perez, Robbery/Homicide Squad, 22 Franklin St., Newark. In addition, any promotions and demotions of this same law enforcement agent under the color of authority in the city of Newark or elsewhere.”

Custodian of Record: Kenneth Louis

Request Received by Custodian: August 19, 2015

Response Made by Custodian: August 28, 2015; September 11, 2015; October 13, 2015; November 10, 2015

GRC Complaint Received: October 26, 2015

Background³

Request and Response:

On August 13, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 28, 2015, the Custodian responded in writing, advising that the Newark Police Department had begun a search of all relevant records pertaining to the request. The Custodian anticipated a response “on or before” September 16, 2015.

The Custodian wrote to the Complainant on September 11, 2015, requesting an additional extension to respond, until September 30, 2015. On September 30, 2015, the Complainant wrote to the Custodian, seeking a status update. On October 13, 2015, the Custodian wrote to the Complainant, requesting an additional extension to respond to the request, until October 27, 2015.

¹ No legal representation listed on record.

² Represented by Guenther Waldow, Jr., Esq. (Newark, NJ).

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.

On November 10, 2015, the Custodian wrote to the Complainant, attaching a response from the Newark Police Department. The enclosure, dated November 6, 2015, stated that the request was “unable to be completed” because Internal Affairs files are privileged and confidential. The response also noted that after a search of the officer’s file, no records were found of “demotions or promotions.”

Denial of Access Complaint:

On October 26, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that as of the filing of his Denial of Access Complaint, he had received no response to his request. On November 23, 2015, the Complainant submitted an update to his Complaint, advising that he received a denial letter from the Newark Legal Affairs Unit on November 18, 2015.

Statement of Information:

On December 18, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on August 19, 2015. The Custodian certified that he responded in writing on August 28, 2015, acknowledging receipt of the request and informing the Complainant that he should anticipate a response on September 16, 2015. The Custodian averred that on August 29, 2015, his office forwarded the request to the Newark Police Department, requesting that they review their files and provide any responsive records. The Custodian certified that he wrote to the Complainant on September 11, 2015, requesting an additional extension to respond, until September 30, 2015.

He averred that “on or about” October 13, 2015, he sent a letter to the Complainant, requesting an additional extension until October 27, 2015. He certified that his office then, on November 3, 2015, and November 4, 2015, sent follow-up e-mails to the Police Department, inquiring as to the status of their search for responsive records. He certified that Sergeant Beatrice Golden of the Police Department wrote his office on November 6, 2015, advising that the Police Department had conducted a search for the records requested and found no records regarding demotions or promotions of Detective Angel Perez. The Custodian averred that Sgt. Golden also informed him she was unable to complete the remainder of the OPRA request, as Internal Affairs files are privileged and confidential. He certified that he responded in writing to the Complainant on November 10, 2015, providing a copy of the response from the Police Department.

The Custodian argued that the Complainant’s request sought records of internal affairs records/investigations, which are exempt from public access, pursuant to the Attorney General’s Internal Affairs Policies & Procedures (“IAPP”). The IAPP classifies those records as confidential. *See Blaustein v. Lakewood Police Department (Ocean)*, GRC Complaint No. 2011-102 (June 2012) and *Rivera v. Borough of Keansburg Police Department (Monmouth)*, GRC Complaint No. 2007-22 (June 2010). He therefore contended that there was no unlawful denial of access. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9.

The Custodian additionally argued that records of complaints and disciplinary history regarding law enforcement officers are exempt from disclosure as personnel records. N.J.S.A. 47:1A-10. See also Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (Interim Order dated March 2004); Vaughn v. City of Trenton (Mercer), GRC Complaint No. 2009-177 (June 2010).

The Custodian also raised the argument that while the Complainant's OPRA request specifically identified the subject matter, the request failed to include a date or range of dates and is thus overly broad. See MAG Ent'mt, LLC v. Div. of Alcohol Beverage Control, 375 N.J. Super. 534, 549 (App. Div. 2005), Burke v. Brandes, 429 N.J. Super. 169, 176 (App. Div. 2012), and Love v. Spotswood Police Dep't (Middlesex), GRC Complaint No. 2014-223 (Interim Order dated March 31, 2015).

Additional Submissions:

On January 28, 2016, the Complainant responded to the Custodian's SOI. The Complainant argued that the Custodian's reliance on the cases cited in the SOI was misplaced and argued that the U.S. Constitution and NJ Constitution guaranteed his right to the requested detective's Internal Affairs file and Human Resources file. He argued that the cited OPRA exemption, N.J.S.A. 47:1A-10, stated that personnel records were accessible "when required to be disclosed by another law."

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).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).

In the instant matter, the Custodian first responded to the Complainant's request on August 28, 2015, the seventh (7th) business day after receipt on August 19, 2015, seeking an extension to September 16, 2015. Prior to the end of the extension time period, the Custodian wrote to the Complainant on September 11, 2015, requesting a second extension to respond until September 30, 2015. However, the Custodian's next communication with the Complainant did not occur until October 13, 2015, ten (10) business days after the September 30, 2015 extended deadline. In that October letter, the Custodian then quoted a date of October 27, 2015 to the

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.

Complainant. However, the Custodian's next and final communication with the Complainant did not occur until November 10, 2015, ten (10) business days after the October 27, 2015 date provided to the Complainant.

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 Access⁵

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 Custodian argued in his certification that the request was denied because records involving employee discipline or investigations into employee misconduct are property classified as personnel records that are exempt from disclosure pursuant to N.J.S.A. 47:1A-10. The Custodian additionally noted that Attorney General Guidelines provide that, "the nature and source of internal allegations, progress of internal affairs investigations and the resulting materials are confidential information."

Regarding requests for personnel information, OPRA mandates that:

[T]he personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access[.]

N.J.S.A. 47:1A-10.

The GRC recently noted that, with respect to personnel records and specifically internal affairs complaints, such records are not public records pursuant to the Attorney General's Internal Affairs Policy & Procedure ("IAPP").⁶ See Wares v. Township of West Milford (Passaic), GRC Complaint No. 2014-274 (May 2015), Blaustein v. Lakewood Police Dep't (Ocean), GRC Complaint No. 2011-102 (June 2012). Moreover, the GRC has held that the IAPP and other Attorney General Guidelines have the force of law. See Id. (citing O'Shea v. Twp. of West Milford, 410 N.J. Super. 371, 382 (App. Div. 2009)).

⁵ The GRC declines to address the Custodian's argument that the OPRA request was overly broad and therefore invalid, because the Custodian was able to identify records. Burke v. Brandes, 429 N.J. Super. 169 (App.Div. 2012).

⁶ The IAPP was promulgated via the Division of Criminal Justice in the New Jersey Department of Law and Public Safety. All GRC references to the IAPP are to the July 2014 revision of the document.

Nevertheless, the IAPP exempts internal affairs records from disclosure, providing that “[t]he nature and source of internal allegations, the progress of internal affairs investigations, and the resulting materials are confidential information.”⁷ In Rivera v. Borough of Keansburg Police Dep’t (Monmouth), GRC Complaint No. 2007-222 (June 2010), the Administrative Law Judge, relying upon the IAPP guidelines, held that internal affairs reports are confidential records not subject to OPRA.

Based on the foregoing, the Custodian did not unlawfully deny access to the Complainant’s request for personnel records, including internal affairs complaints, because such records are exempt from public access pursuant to the IAPP, which classifies these records as confidential. See Wares, GRC No. 2014-274, Blaustein, GRC No. 2011-102, and Rivera, GRC No. 2007-222. N.J.S.A. 47:A1-6.

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 unlawfully denied access to the requested records by responding to the Complainant after the seven business days mandated by OPRA, thereby resulting in a deemed denial, he ultimately responded to the Complainant’s August 19, 2015 OPRA request by conducting a search and determining that the requested records were exempt as personnel records. Additionally, he certified that during the time period in which the request was being

⁷ IAPP, Internal Affairs Records, pg. 42.

processed, his office was in contact with the Newark Police Department, who conducted the search for responsive records. Upon receipt of a response from the Newark Police Department, the Custodian did issue a response to the Complainant on November 10, 2015. 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 v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Based on the foregoing, the Custodian did not unlawfully deny access to the Complainant's request for personnel records, including internal affairs complaints, because such records are exempt from public access pursuant to the IAPP, which classifies these records as confidential. *See* Wares, GRC No. 2014-274, Blaustein, GRC No. 2011-102, and Rivera, GRC No. 2007-222. N.J.S.A. 47:A1-6.
3. Although the Custodian unlawfully denied access to the requested records by responding to the Complainant after the seven business days mandated by OPRA, thereby resulting in a deemed denial, he ultimately responded to the Complainant's August 19, 2015 OPRA request by conducting a search and determining that the requested records were exempt as personnel records. Additionally, he certified that during the time period in which the request was being processed, his office was in contact with the Newark Police Department, who conducted the search for responsive records. Upon receipt of a response from the Newark Police Department, the Custodian did issue a response to the Complainant on November 10, 2015. 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

January 24, 2017