



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

**June 26, 2018 Government Records Council Meeting**

Thomas Caggiano  
Complainant

Complaint No. 2016-27

v.

NJ State Police  
Custodian of Record

At the June 26, 2018 public meeting, the Government Records Council (“Council”) considered the June 19, 2018 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. The requested recording is exempt from disclosure under N.J.A.C. 13:1E-3.2(a)(4) because it was a record made by the Office of Profession Standards, Intake & Adjudication Bureau, Intake Unit and pertaining to individual employees within New Jersey State Police that initiated a Internal Affairs review, whether open, closed, or inactive. N.J.S.A. 47:1A-9. Thus, the Custodian bore his burden of proof that he lawfully denied access under OPRA. N.J.S.A. 47:1A-6. Finally, because the record is exempt under New Jersey Department of Law & Public Safety’s regulations, the GRC declines to address whether any other asserted exemptions apply.
3. The Custodian’s failure to respond in writing within the seven (7) business day time frame resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian lawfully denied access to the responsive recording. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9; N.J.A.C. 13:1E-3.2(a)(4). 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 26<sup>th</sup> Day of June, 2018

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: June 29, 2018**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff  
June 26, 2018 Council Meeting**

**Thomas Caggiano<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-27**

v.

**New Jersey State Police<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of the recorded conversation the Complainant had with Detective Vargas at 12:20 p.m. (PST) on October 5, 2015 “wherein [the Complainant] reported the Augusta Barracks and Lt[.] Col[.] Latrocia Littles Floyd . . . has known about the corruption for over a decade that continues to increase.”

**Custodian of Record:** DSFC Thomas Preston  
**Request Received by Custodian:** October 5, 2015  
**Response Made by Custodian:** October 19, 2015  
**GRC Complaint Received:** January 26, 2016

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

**Request and Response:**

On October 5, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On October 19, 2015, the ninth (9<sup>th</sup>) business day after receipt of the subject OPRA request, the Custodian responded in writing denying access to the responsive record pursuant to N.J.S.A. 47:1A-1.1 and N.J.A.C. 13:1E-3.2(a)(4). The Custodian noted that the Complainant called the Office of Profession Standards, Intake & Adjudication Bureau, Intake Unit (“Unit”). The Custodian stated the Unit was responsible for intake, documentation, and processing of all complaints and allegations of corruption or misconduct against the New Jersey State Police (“NJSP”). The Custodian further stated that the Unit also determines the proper level of command at which the investigation would be conducted. The Custodian noted that these records, classified as Internal Affairs (“IA”) investigation records, were exempt from disclosure.

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

<sup>2</sup> Represented by Deputy Attorney General Nicole Adams.

<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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

### Denial of Access Complaint:

On January 26, 2016, the Complainant filed a Denial of Access Complaint with the GRC. The Complainant asserted that he was unlawfully denied access to the requested record. The Complainant also noted that his OPRA request was “deemed” denied.

### Statement of Information:

On February 10, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on October 5, 2015. The Custodian certified that he responded in writing on October 19, 2015 denying the responsive records under N.J.S.A. 47:1A-1.1 and N.J.A.C. 13:1E-3.2(a)(4).

The Custodian argued that extensive New Jersey and Federal case law supports the confidentiality interest of internal affairs investigations. State v. Marshall, 148 N.J. 89, 273 (certif. denied Marshall v. N.J., 522 U.S. 850, 118 S. Ct. 140 (1997)). The Custodian further argued that State and Federal judicial privileges favor confidentiality of internal investigations. Groark v. Timel, 989 F. Supp.2d 378, 390 (D.N.J. 2013); N.J.S.A. 2A:84A-27; N.J.R.E. 515. The Custodian asserted that even when the protection is pierced, the courts consistently enter a protective order. Carchietta v. Russo, 2014 U.S. Dist. LEXIS 62344, 20 (D.N.J. May 6, 2014); Groark, 989 F. Supp.2d at 399-400.

The Custodian contended that he properly denied access to the responsive record. The Custodian stated that OPRA provides an exemption for “information generated by or on behalf of public employers or public employees in connection . . . with any grievance filed by or against an individual.” N.J.S.A. 47:1A-1.1. Additionally, the Custodian stated that NJSP’s regulations exempt access to “[r]ecords, specific to an individual employee or employees . . . relating to or which form the basis of discipline, discharge, promotion, transfer, employee performance, employee evaluation, or other related activities, whether open, closed, or inactive . . .” N.J.A.C. 13:1E-3.2(a)(4). The Custodian asserted that this exemption applied to OPRA under N.J.S.A. 47:1A-9(a).

The Custodian certified that the Complainant called the Unit to report alleged misconduct. The Custodian argued that as soon as the Complainant reported conduct to the Unit, the conversation was confidential as part of an IA investigation. N.J.S.A. 47:1A-1.1 and N.J.A.C. 13:1E-3.2(a)(4).

## 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 submitted his OPRA request on October 5, 2015. The Custodian responded to the OPRA request on October 19, 2015. In the Denial of Access Complaint, the Complainant asserted that his OPRA request was "deemed" denied. In the SOI, the Custodian certified that he received the OPRA request on October 5, 2015. The Custodian also certified that he did not respond in writing until October 19, 2015, nine (9) business days after receipt of the OPRA request.<sup>5</sup> Thus, the evidence of record supports that a "deemed" denial occurred.

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.

OPRA also provides that its provisions:

[S]hall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the Legislature; *regulation promulgated under the authority of any statute or Executive Order of the Governor*; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.

[N.J.S.A. 47:1A-9(a) (emphasis added).]

Further, the regulations promulgated by the NJSP, an agency within the New Jersey Department of Law & Public Safety's ("LPS"), provide:

In addition to records designated as confidential pursuant to the provisions of

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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.

<sup>5</sup> This calculation does not include October 12, 2015, the day on which Columbus Day was observed.

[OPRA] . . . the following records shall not be considered government records subject to public access . . . [r]ecords, specific to an individual employee or employees . . . relating to or which form the basis of discipline, discharge, promotion, transfer, employee performance, employee evaluation, or other related activities, whether open, closed, or inactive, except for the final agency determination.

[N.J.A.C. 13:1E-3.2(a)(4).]

Here, the Complainant sought access to a recorded phone call he made to the Unit regarding at least one identified individual within the NJSP. The Custodian denied access to the responsive record under multiple exemptions, to include LPS' regulation prohibiting disclosure of records pertaining to individual employees and related to personnel actions, whether open, closed, or inactive. N.J.S.A. 13:1E-3.2(a)(4). The Complainant subsequently filed this complaint. In the SOI, the Custodian provided additional information concerning the Unit's function within NJSP. The Custodian argued that the Unit's function was to receive complaints and allegations of corruption or misconduct and determine the proper investigation level of IA investigation. Further, the Custodian argued that once the Complainant submitted his complaint orally to the Unit, the recording became exempt in accordance with N.J.A.C. 13:1E-3.2(a)(4), among other asserted exemptions.

The GRC is satisfied that the Custodian lawfully denied access to the responsive recording pursuant to N.J.A.C. 13:1E-3.2(a)(4). Specifically, the Complainant called the Unit for the purposes of reporting "improper conduct for numerous parties in the State Police," alleging "a willful pattern of agreed upon co[d]uct eng[a]ged in racketeering to obstruct the administration of law," and asserting that he was "assaulted . . . to intimidate me and retaliate . . . [for] reporting criminal conduct . . ." Such allegations are directly linked to IA investigations resulting in any of the personnel actions referenced in N.J.A.C. 13:1E-3.2(a)(4). Additionally, the Complainant identified in his OPRA request at least one (1) employee of the NJSP. Based on the forgoing, and in tandem with the Unit's function as intake for potential IA complaints, the GRC is persuaded that the recording is exempt per LPS' regulations. Further, it should be noted that LPS regulations contain no exceptions allowing for a complaining party to obtain access to certain records otherwise exempt under N.J.A.C. 13:1E-3.2(a)(4).

Accordingly, the requested recording is exempt from disclosure under N.J.A.C. 13:1E-3.2(a)(4) because it was a record made by the Unit pertaining to individual employees within NJSP that initiated a IA review, whether open, closed, or inactive. N.J.S.A. 47:1A-9. Thus, the Custodian bore his burden of proof that he lawfully denied access under OPRA. N.J.S.A. 47:1A-6. Finally, because the record is exempt under LPS regulations, the GRC declines to address whether any other asserted exemptions apply.

### **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)).

Here, the Custodian’s failure to respond in writing within the seven (7) business day time frame resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian lawfully denied access to the responsive recording. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9; N.J.A.C. 13:1E-3.2(a)(4). 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 Council Staff 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. The requested recording is exempt from disclosure under N.J.A.C. 13:1E-3.2(a)(4) because it was a record made by the Office of Profession Standards, Intake & Adjudication Bureau, Intake Unit and pertaining to individual employees within New Jersey State Police that initiated a Internal Affairs review, whether open, closed, or inactive. N.J.S.A. 47:1A-9. Thus, the Custodian bore his burden of proof that he lawfully denied access under OPRA. N.J.S.A. 47:1A-6. Finally, because the record is

exempt under New Jersey Department of Law & Public Safety's regulations, the GRC declines to address whether any other asserted exemptions apply.

3. The Custodian's failure to respond in writing within the seven (7) business day time frame resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian lawfully denied access to the responsive recording. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9; N.J.A.C. 13:1E-3.2(a)(4). 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  
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June 19, 2018