



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

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

**September 24, 2019 Government Records Council Meeting**

Shaun Clifton-Short  
Complainant

Complaint No. 2017-192

v.

East Orange Police Department (Essex)  
Custodian of Record

At the September 24, 2019 public meeting, the Government Records Council (“Council”) considered the September 17, 2019 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 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 dated October 31, 2007).
2. The requested records in connection with “charge(s)/complaint(s)” raised against Mr. Davis are exempt from disclosure as “personnel records.” N.J.S.A. 47:1A-10; Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004). See also Wares v. Twp. of West Milford (Passaic), GRC Complaint No. 2014-274 (May 2015). Thus, notwithstanding the Custodian’s “deemed” denial, she lawfully denied access to the Complainant’s August 17, 2017 OPRA request. N.J.S.A. 47:1A-6.
3. The Custodian failed to respond to the Complainant’s August 17, 2017 OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian lawfully denied access to the Complainant’s request as any responsive records would be exempt from disclosure as “personnel records.” N.J.S.A. 47:1A-10. Additionally, the evidence of record does not indicate that Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions did 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 24<sup>th</sup> Day of September 2019

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: September 27, 2019**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
September 24, 2019 Council Meeting**

**Shaun Clifton-Short<sup>1</sup>  
Complainant**

**GRC Complaint No. 2017-192**

v.

**East Orange Police Department (Essex)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Hard copies of:

- 1) All documents in regard to charge(s)/complaint(s) filed against an ex-officer from the East Orange Police Department named Hakim Davis.
- 2) All documents in regard to procedure(s)/meeting(s) held against Mr. Hakim Davis.
- 3) All documents in regard to procedure(s) given to Mr. Hakim Davis.

**Custodian of Record:** Cynthia S. Brown

**Request Received by Custodian:** August 17, 2017

**Response Made by Custodian:** N/A

**GRC Complaint Received:** October 2, 2017

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

**Request and Response:**

On August 9, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.

**Denial of Access Complaint:**

On October 2, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that his OPRA request was being deliberately ignored by the Custodian.

The Complainant asserted that the Custodian was required under OPRA to demonstrate that the denial of access was authorized by law. The Complainant argued that the Custodian failed to meet this burden. The Complainant argued that his OPRA request fell under the broad definition

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

<sup>2</sup> Represented by Deputy Khalifah Shabazz, Esq., Corporation Counsel (East Orange, NJ).

<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.

of a government record and there was no provision under OPRA that authorizes a denial of access to his request.

Statement of Information:

On November 15, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on August 17, 2017. The Custodian certified that the request was forwarded to Sergeant James Summers (“Sgt. Summers”) of the City of East Orange’s (“City”) Professional Standards Unit. The Custodian certified that Sgt. Summers provided a response to the Deputy City Clerk on August 23, 2017, stating that no responsive records exist.

The Custodian asserted that she did not possess any responsive records to the Complainant’s request. The Custodian contended that responsive records would likely be held with the Essex County Prosecutor’s Office. The Custodian also argued that if she did possess responsive records, they would likely be exempt from disclosure under N.J.S.A. 47:1A-1.1. Specifically, the Custodian argued that the records would be exempt to protect information generated by public employers in connection with any grievance filed against an individual.

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 dated October 31, 2007).

In the instant matter, the Custodian certified that she received the Complainant’s request on August 17, 2017. The Complainant argued that he never received a response to his OPRA request. The Custodian contended that a response was provided on August 23, 2017.

A review of the record indicates that the Deputy City Clerk received a response from Sgt. Summers on August 23, 2017 stating that no responsive records exist. However, there is no evidence in the record demonstrating that this response was forwarded to the Complainant, whether in writing or by other means.

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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.

Therefore, the Custodian did not bear her burden of proof that she 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.

The Council is permitted to raise additional defenses regarding the disclosure of records pursuant to Paff v. Twp. of Plainsboro, 2007 N.J. Super. Unpub. LEXIS 2135 (App. Div.) (certif. denied, 193 N.J. 292 (2007)).<sup>5</sup> In Paff, the complainant challenged the GRC's authority to uphold a denial of access for reasons never raised by the custodian. Specifically, the Council did not uphold the basis for the redactions cited by the custodian. The Council, on its own initiative, determined that the Open Public Meetings Act prohibited the disclosure of the redacted portions to the requested executive session minutes. The Council affirmed the custodian's denial to portions of the executive session minutes but for reasons other than those cited by the custodian. The complainant argued that the GRC did not have the authority to do anything other than determine whether the custodian's cited basis for denial was lawful. The court held that:

The GRC has an independent obligation to "render a decision as to whether the record which is the subject of the complaint is a government record which must be made available for public access pursuant to' OPRA . . . The GRC is not limited to assessing the correctness of the reasons given for the custodian's initial determination; it is charged with determining if the initial decision was correct."

The court further stated that:

Aside from the clear statutory mandate to decide if OPRA requires disclosure, the authority of a reviewing agency to affirm on reasons not advanced by the reviewed agency is well established. Cf. Bryant v. City of Atl. City, 309 N.J. Super. 596, 629-30 (App. Div. 1998) (citing Isko v. Planning Bd. of Livingston, 51 N.J. 162, 175 (1968) (lower court decision may be affirmed for reasons other than those given below)); Dwyer v. Erie Inv. Co., 138 N.J. Super. 93, 98 (App. Div. 1975) (judgments must be affirmed even if lower court gives wrong reason), certif. denied, 70 N.J. 142 (1976); Bauer v. 141-149 Cedar Lane Holding Co., 42 N.J. Super. 110, 121 (App. Div. 1956) (question for reviewing court is propriety of action reviewed, not the reason for the action) (aff'd, 24 N.J. 139 (1957)).

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<sup>5</sup> On appeal from Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (March 2006).

OPRA provides that:

Notwithstanding the provisions [OPRA] or any other law to the contrary, the 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.]

OPRA begins with a presumption against disclosure and “proceeds with a few narrow exceptions that . . . need to be considered.” Kovalcik v. Somerset Cnty. Prosecutor’s Office, 206 N.J. 581, 594 (2011). These are:

[A]n individual’s name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of any pension received shall be government record;

[P]ersonnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and

[D]ata contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.

[Id.]

The Council has addressed whether personnel records not specifically identified in OPRA were subject to disclosure. For instance, in Guerrero v. Cnty. of Hudson, GRC Complaint No. 2010-216 (December 2011), the complainant sought, among other records, “[a]ny known felony charges.” Id. In the SOI, the custodian argued that he was precluded from acknowledging the existence of felony charges because such information is not included within the excepted personnel information under OPRA. The Council agreed, determining that “. . . even if records of any felony charges were contained within Mr. Spinello’s personnel file, such records are not disclosable under OPRA . . .” Id. at 8. The Council reasoned that “OPRA clearly identifies certain [personnel] information that is subject to disclosure . . . These exceptions do not include any possible felony or criminal charges . . . Thus, OPRA implies that personnel records referencing felony charges are not subject to disclosure . . .” Id.

Further, the Council has determined that records involving employee discipline or investigations into employee misconduct are properly classified as personnel records exempt from disclosure under N.J.S.A. 47:1A-10. In Merino v. Borough of Ho-Ho-Kus, GRC Complaint No.

2003-110 (March 2004), the Council found that records of complaints or internal reprimands against a municipal police officer were properly classified as personnel records encompassed within the provisions of N.J.S.A. 47:1A-10. For this reason, the Council concluded that “. . . records of complaints filed against [the police officer] and/or reprimands [the officer] received are not subject to public access.” Id.; See also Wares v. Twp. of West Milford (Passaic), GRC Complaint No. 2014-274 (May 2015).

Here, each item in the Complainant’s OPRA request sought records in connection with “charge(s)/complaint(s)” filed against a former police officer identified as Hakim Davis. The Custodian failed to respond to the Complainant’s request but was informed by Sgt. Summers that no responsive records exist. However, the Custodian added that should such records exist, they would be exempt from disclosure to protect information generated in connection with grievances filed against an individual. Nevertheless, the facts here parallel those in Merino, GRC 2003-110 and its progeny. Specifically, the records sought here relate to complaints filed against Mr. Davis, as was the case in Merino. For this reason, the GRC is satisfied that the Custodian lawfully denied access to any records responsive to the Complainant’s OPRA request.

Accordingly, the requested records in connection with “charge(s)/complaint(s)” raised against Mr. Davis are exempt from disclosure as “personnel records.” N.J.S.A. 47:1A-10; Merino, GRC 2003-110. See also Wares, GRC 2014-274. Thus, notwithstanding the Custodian’s “deemed” denial, she lawfully denied access to the Complainant’s August 17, 2017 OPRA request. N.J.S.A. 47:1A-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)).

In the matter before the Council, the Custodian failed to respond to the Complainant's August 17, 2017 OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian lawfully denied access to the Complainant's request as any responsive records would be exempt from disclosure as "personnel records." N.J.S.A. 47:1A-10. Additionally, the evidence of record does not indicate that Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions did 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 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 dated October 31, 2007).
2. The requested records in connection with "charge(s)/complaint(s)" raised against Mr. Davis are exempt from disclosure as "personnel records." N.J.S.A. 47:1A-10; Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004). See also Wares v. Twp. of West Milford (Passaic), GRC Complaint No. 2014-274 (May 2015). Thus, notwithstanding the Custodian's "deemed" denial, she lawfully denied access to the Complainant's August 17, 2017 OPRA request. N.J.S.A. 47:1A-6.
3. The Custodian failed to respond to the Complainant's August 17, 2017 OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian lawfully denied access to the Complainant's request as any responsive records would be exempt from disclosure as "personnel records." N.J.S.A. 47:1A-10. Additionally, the evidence of record does not indicate that Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions did 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 17, 2019