



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

PHILIP D. MURPHY  
Governor

Lt. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

**February 26, 2019 Government Records Council Meeting**

Rebecca Anne Panico  
Complainant

Complaint No. 2018-03

v.

Elizabeth Police Department (Union)  
Custodian of Record

At the February 26, 2019 public meeting, the Government Records Council (“Council”) considered the February 19, 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, as extended, 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)2007-11.
2. Because the Custodian certified that all records relevant to the complaint were disclosed to the Complainant, and because the Complainant failed to provide any competent, credible evidence to refute the Custodian’s certification, the Custodian did not unlawfully deny the Complainant access to said records. N.J.S.A. 47:1A-6. See also Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).
3. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian did provide the Complainant with all records responsive to the request. 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 an 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 February, 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: March 1, 2019**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff  
February 26, 2019 Council Meeting**

**Rebecca Anne Panico**<sup>1</sup>  
**Complainant**

**GRC Complaint No. 2018-3**

v.

**Elizabeth Police Department (Union)**<sup>2</sup>  
**Custodial Agency**

**Records Relevant to Complaint:** “Any and all Elizabeth Police body camera footage related to a motor vehicle accident involving Angela Garretson which occurred on Dec. 4, 2017 around 3 p.m. on Morris Avenue.”<sup>3</sup>

**Custodian of Record:** Yolanda M. Roberts

**Request Received by Custodian:** December 6, 2017

**Response Made by Custodian:** December 14, 2017, December 15, 2017, December 27, 2017, and January 8, 2018

**GRC Complaint Received:** January 9, 2018

**Background**<sup>4</sup>

**Request and Responses:**

On December 6, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 14, 2017, the sixth (6<sup>th</sup>) business day following receipt of said request, the Custodian responded in writing informing the Complainant that the information she requested, reference body cameras, was enclosed. The evidence of record reveals that two attachments totaling 229 KB were disclosed.

On December 15, 2017, the seventh (7<sup>th</sup>) business day following receipt of said request, the Custodian again wrote to the Complainant seeking a seven (7) business day extension of time to fulfill the OPRA request. On December 27, 2017, which was seven (7) business days later, the Custodian disclosed to the Complainant additional records responsive to her request.<sup>5</sup> Thereafter,

---

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

<sup>2</sup> Represented by Rocco DiPaola, Esq. (Elizabeth, NJ).

<sup>3</sup> There were other records requested that are not relevant to this complaint. The Complainant did not specify a method of delivery.

<sup>4</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.

<sup>5</sup> These records are not relevant to the complaint.

on January 8, 2018, the Custodian forwarded to the Complainant additional records responsive to her request.

Denial of Access Complaint:

On January 9, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that on December 6, 2017, she submitted her OPRA request to the Custodian. The Complainant further asserted that on December 14, 2017, the Custodian disclosed to her a four-minute video which was a partial recording of the body camera footage she had requested.

The Complainant stated that she contacted the municipality to inquire about other records she requested (which are not presently relevant to the complaint), and that the Custodian disclosed the records to her on December 27, 2017; however, the Custodian did not disclose the remainder of the body camera recording she requested. The Complainant stated that she telephoned the municipality on January 3, 2018, and again on January 5, 2018, to inquire about the remaining body camera footage. Thereafter, on January 8, 2018, the Complainant stated that she received additional body camera footage; however, she asserted that there appeared to be a gap between the December 14, 2017 and the January 8, 2018 disclosures of the body camera recordings. As such, the Complainant did not believe she received all the body camera video responsive to her request.

Statement of Information:

On January 17, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on December 6, 2017, and responded in writing on December 14, 2017, December 15, 2017, December 27, 2017, and January 8, 2018. The Custodian further certified that she disclosed to the Complainant all body camera videos responsive to the request in unredacted form. The Custodian included with the SOI a compact disc containing the body camera video that was disclosed to the Complainant.

Additional Submissions:

On October 26, 2018, the GRC e-mailed the Complainant and advised her that the GRC reviewed the body camera recording submitted with the Custodian’s SOI. The GRC informed the Complainant that the recording did not appear to have any obvious redactions or erasures, and that the Custodian certified that the recording was disclosed to the Complainant in unredacted form. The GRC informed the Complainant that the GRC wanted to provide her with an opportunity to respond with any evidence she had refuting the Custodian’s certification, and in particular, any evidence which revealed that there was a denial of any portions of the recording which deprived her of the entire record she requested. The Complainant never responded to the GRC.

## Analysis

### Timeliness

Unless a shorter time period is otherwise provided, a custodian must 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 accordingly 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>6</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 Custodian responded in a timely manner, properly sought an extension of time, and then responded within the extended time frame disclosing responsive records on December 27, 2017. Then, seven (7) business days later on January 8, 2018, without first seeking any further extensions of time, the Custodian again responded to the Complainant disclosing additional records relevant to the complaint.

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, as extended, 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.

Here, the Complainant confirmed that she received two disclosures from the Custodian which contained segments of the body camera video responsive to her request: one on December 14, 2017, and one on January 8, 2018. The Complainant argued, however, that there appears to be a gap between the two segments of the recordings. Therefore, the Complainant does not believe she received all of the body camera video responsive to her request.

Conversely, the Custodian certified that she disclosed to the Complainant all body camera videos responsive to the request in unredacted form. Further, the Custodian provided the GRC

---

<sup>6</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.

with a copy of the body camera video that was disclosed to the Complainant, and upon examination the GRC did not discern any obvious redactions or erasures. Moreover, the GRC provided the Complainant with an opportunity to provide any evidence she had refuting the Custodian's certification; however, the Complainant never responded with such evidence.

OPRA provides that a custodian must bear the burden of proving that a denial of access is authorized by law. N.J.S.A. 47:1A-6. Here, the Custodian certified that she provided access to all of the body camera video that was responsive to the request. Additionally, there is no evidence in the record to refute the Custodian's certification.

The instant complaint is not unlike Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005). In Burns, the complainant requested all agreements between the Borough and a towing company. Although the custodian disclosed one record and certified there were no other records responsive to the request, the complainant did not believe that she was provided with all of the responsive records. The Council held that the custodian did not unlawfully deny access to the request because the custodian certified she provided all records that existed; therefore, there was no unlawful denial of access.

Accordingly, because the Custodian certified that all records relevant to the complaint were disclosed to the Complainant, and because the Complainant failed to provide any competent, credible evidence to refute the Custodian's certification, the Custodian did not unlawfully deny the Complainant access to said records. N.J.S.A. 47:1A-6. See also Burns, GRC 2005-68.

### **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 violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian did provide the Complainant with all records responsive to the request. 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 an 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 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, as extended, 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)2007-11.
2. Because the Custodian certified that all records relevant to the complaint were disclosed to the Complainant, and because the Complainant failed to provide any competent, credible evidence to refute the Custodian's certification, the Custodian did not unlawfully deny the Complainant access to said records. N.J.S.A. 47:1A-6. See also Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).
3. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian did provide the Complainant with all records responsive to the request. 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 an unreasonable denial of access under the totality of the circumstances.

Prepared By: John E. Stewart  
Staff Attorney

February 19, 2019