



State of New Jersey  
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Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

**April 28, 2020 Government Records Council Meeting**

Donald G. Jackson, Jr.  
Complainant

Complaint No. 2018-151

v.

City of Newark, Department of Public Safety (Essex)  
Custodian of Record

At the April 28, 2020 public meeting, the Government Records Council (“Council”) considered the April 3, 2020 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 extended time frame results in a “deemed” denial of the said 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). See also Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
2. Notwithstanding the Custodian’s “deemed” denial, he lawfully denied access to the Complainant’s May 29, 2018 OPRA request seeking a “personnel order.” N.J.S.A. 47:1A-6. The Custodian certified that the document was a personnel record pertaining to the Complainant’s disciplinary history, and there is no evidence in the record to dispute the Custodian’s certification. N.J.S.A. 47:1A-10; Kovalcik v. Somerset Cnty. Prosecutor’s Office, 206 N.J. 581, 594 (2011); Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004). Furthermore, there is no evidence in the record demonstrating that the Complainant waived his confidentiality rights to his personnel records. McGee v. Twp. of East Amwell, 416 N.J. Super. 602, 615 (App. Div. 2010). Additionally, because the Custodian lawfully denied access under the personnel records exemption, the Council declines to address whether the record was lawfully withheld under the deliberative process privilege.
3. The Custodian’s failure to timely respond 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 requested record because it was a personnel record and exempt under OPRA. N.J.S.A. 47:1A-10. Additionally, the evidence of record does not indicate that Custodian’s violation 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 28<sup>th</sup> Day of April 2020

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 30, 2020**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
April 28, 2020 Council Meeting**

**Donald G. Jackson, Jr.<sup>1</sup>  
Complainant**

**GRC Complaint No. 2018-151**

v.

**City of Newark, Department of Public Safety (Essex)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Hardcopy of via pick up of: “Personnel Order No. 2017-542 . . . Newark Police Department.”

**Custodian of Record:** Kenneth Louis

**Request Received by Custodian:** May 29, 2018

**Response Made by Custodian:** July 23, 2018

**GRC Complaint Received:** July 26, 2018

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

**Request and Response:**

On May 29, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned record. That same day, the Custodian responded to the Complainant in writing, stating that the request was forwarded to the City of Newark’s (“City”) Engineering Department to begin a search for relevant records. The Custodian also stated that a response was anticipated on or before June 18, 2018.

On July 23, 2018, the thirty-eighth (38<sup>th</sup>) business day after receipt of the OPRA request, the Complainant went to the City Clerk’s Office to advise that his OPRA request was sent to the wrong department. That same day, a City employee provided Complainant with a memorandum from Supervising Advocate Nahjah Z. Hatim-Johnson of the City’s Legal Affairs Unit to Supervisor Ana Golinski of the City Clerk’s Office, dated May 30, 2018. Therein, Ms. Hatim-Johnson stated that the requested record could not be provided pursuant to OPRA’s exemption for inter-agency or intra-agency advisory communications. N.J.S.A. 47:1A-1.1.

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

<sup>2</sup> Represented by Kenyatta Stewart, Esq., Acting Corporation Counsel (Newark, 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.

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### Denial of Access Complaint:

On July 26, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”) disputing the Complainant disputed the denial of access to his OPRA request.

### Statement of Information:

On September 19, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on May 29, 2018. The Custodian certified that he responded in writing on May 29, 2018, stating that he forwarded the request to the City’s Engineering Department to conduct a search for records, and that a response was anticipated on or before June 18, 2018. The Custodian then certified that the Complainant received a response on July 23, 2018 when he appeared at the City Clerk’s Office.

The Custodian, through counsel, argued that for a request for personnel records, OPRA begins with a presumption of non-disclosure. N.J.S.A. 47:1A-10; Kovalcik v. Somerset Cnty. Prosecutor’s Office, 206 N.J. 581, 594 (2011). The Custodian asserted that courts tend to favor the presumption of employee confidentiality, citing McGee v. Twp. of East Amwell, 416 N.J. Super. 602, 615 (App. Div. 2010).

The Custodian further asserted that when a requestor is seeking his or her own personnel records, the requestor must explicitly waive his or her confidentiality rights in those records. Randazzo v. City of Vineland, GRC Complaint No. 2010-76 (May 2011). The Custodian asserted that an effective waiver must be made with full knowledge of the individual’s legal rights and their intent to surrender those rights. W. Jersey Title & Guar. Co. v. Indus. Trust Co., 27 N.J. 144, 153 (1958). The Custodian also argued that in Sciara v. Borough of Woodcliff Lake (Bergen), GRC Complaint No. 2011-32 (August 2012), the Council held that requestors seeking access to their own personnel records must be aware of their right to confidentiality and knowingly waive that right when making their request.

The Custodian asserted that the record sought by the Complainant was a one-page inter-office memorandum from Newark Police Division Command to the City’s Director of Public Safety memorializing the Complainant’s disciplinary history. The Custodian argued that such documents were not government records, and that the Complainant did not signed any confidentiality waiver. The Custodian also argued that none of the exceptions to the personnel records exemption were applicable to or asserted by the Complainant. The Custodian contended that although Ms. Hatim misstated that the record was properly withheld under the deliberative process privilege, the record was in fact a personnel record and therefore exempt from OPRA pursuant to N.J.S.A. 47:1A-10.

## 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 Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5<sup>th</sup>) business day after receipt of the complainant's March 19, 2007 OPRA request seeking an extension of time until April 20, 2007. However, the custodian responded again on April 20, 2007, stating that the requested records would be provided later in the week. Id. The evidence of record showed that no records were provided until May 31, 2007. Id. The GRC held that:

The Custodian properly requested an extension of time to provide the requested records to the Complainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) . . . however . . . [b]ecause the Custodian failed to provide the Complainant access to the requested records by the extension date anticipated by the Custodian, the Custodian violated N.J.S.A. 47:1A-5(i) resulting in a "deemed" denial of access to the records.

[Id.]

Here, the Custodian initially responded on May 29, 2018, the same day he received the subject OPRA request, stating that a response was anticipated on or before June 18, 2018. By the Custodian's own admission, neither he nor an employee on his behalf responded within that time frame. The Custodian certified in the SOI that the City provided the Complainant with a response on July 23, 2018, despite the City Clerk's Office receiving Ms. Hatim's memorandum on May 30, 2018. This corroborates with the Complainant's contention that he was unaware of Ms. Hatim's memorandum until appearing at the Clerk's Office on July 23, 2018. Thus, in keeping with Kohn, GRC 2007-124, the Custodian's failure to respond prior to the extension expiration resulted in a "deemed" denial of access under OPRA.

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 extended time frame results in a "deemed" denial of the said request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. See also Kohn, GRC 2007-124.

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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.

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## 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:

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.]

For personnel records, OPRA begins with a presumption against disclosure and “proceeds with a few narrow exceptions that . . . need to be considered.” Kovalcik, 206 N.J. at 594. 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.]

Further, the Council has previously 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).

Additionally, in McGee, 416 N.J. Super. at 618, the Appellate Division held that a complainant’s “act of filing a request for records containing [their] own personnel information may constitute an implied waiver.” However, the court noted that the complainant did not raise the waiver argument at the time the matter was before the GRC. Id. Therefore, the court remanded the case back to the GRC to determine whether the complainant “effectively waived the confidentiality accorded her by the ‘personnel records’ exception or whether there are countervailing concerns or policies that would preclude release of the records.” Id.

Thereafter, in McGee v. Twp. of East Amwell (Hunterdon), GRC Complaint No. 2007-305 (March 2011), the GRC discussed whether the complainant waived her right of confidentiality regarding four (4) records withheld from disclosure under N.J.S.A. 47:1A-10. The Council found that “[a]n effective waiver requires a party to have full knowledge of his legal rights and intend to surrender those rights. Id. (citing W. Jersey Title, 27 N.J. at 153). “The intent to waive need not be stated expressly, provided the circumstances clearly show that the party knew of the right and then abandoned it, either by design or indifference” Id. (citing Merchs. Indem. Corp. of N.Y. v. Eggleston, 68 N.J. Super. 235, 254 (App. Div. 1961), aff’d, 37 N.J. 114 (1962)). “The party waiving a known right must do so clearly, unequivocally, and decisively.” Id. (citing Country Chevrolet, Inc. v. Twp. of New Brunswick Planning Bd., 190 N.J. Super. 376, 380 (App. Div. 1983)). The Council held that there was no evidence in the record demonstrating that the complainant knew of her confidentiality rights and intended to waive them at the time she submitted her OPRA request and when the matter was before the GRC. Id. Therefore, the custodian lawfully denied access to the records. Id.

Here, the Complainant sought a “personnel order” issued by the Newark Police Department. While the Custodian’s initial response relied upon Ms. Hatim’s contention that the record was protected under the deliberative process privilege, the Custodian argued in the SOI that the request sought a personnel record and was therefore not subject access under N.J.S.A. 47:1A-10.

Upon review, the GRC is satisfied that Custodian lawfully denied access to the requested record. The Custodian certified that the requested record was an inter-office memorandum detailing the Complainant’s disciplinary history as part of an on-going disciplinary process. The Council has routinely held that such records are personnel records not subject to disclosure. See Merino, GRC 2003-110. Furthermore, the Complainant has not disputed the Custodian’s certification nor provided any evidence demonstrating that he unequivocally waived his right of confidentiality to his personnel records. See McGee, GRC 2007-305.

Accordingly, notwithstanding the Custodian’s “deemed” denial, he lawfully denied access to the Complainant’s May 29, 2018 OPRA request seeking a “personnel order.” N.J.S.A. 47:1A-6. The Custodian certified that the document was a personnel record pertaining to the Complainant’s disciplinary history, and there is no evidence in the record to dispute the Custodian’s certification. N.J.S.A. 47:1A-10; Kovalcik, 206 N.J. at 594; Merino GRC 2003-110. Furthermore, there is no evidence in the record demonstrating that the Complainant waived his

confidentiality rights to his personnel records. McGee, GRC 2007-305. Additionally, because the Custodian lawfully denied access under the personnel records exemption, the Council declines to address whether the record was lawfully withheld under the deliberative process privilege.

### **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’s failure to timely respond 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 requested record because it was a personnel record and exempt under OPRA. N.J.S.A. 47:1A-10. Additionally, the evidence of record does not indicate that Custodian’s violation 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 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 extended time frame results in a “deemed” denial of the said 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). See also Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).

2. Notwithstanding the Custodian's "deemed" denial, he lawfully denied access to the Complainant's May 29, 2018 OPRA request seeking a "personnel order." N.J.S.A. 47:1A-6. The Custodian certified that the document was a personnel record pertaining to the Complainant's disciplinary history, and there is no evidence in the record to dispute the Custodian's certification. N.J.S.A. 47:1A-10; Kovalcik v. Somerset Cnty. Prosecutor's Office, 206 N.J. 581, 594 (2011); Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004). Furthermore, there is no evidence in the record demonstrating that the Complainant waived his confidentiality rights to his personnel records. McGee v. Twp. of East Amwell, 416 N.J. Super. 602, 615 (App. Div. 2010). Additionally, because the Custodian lawfully denied access under the personnel records exemption, the Council declines to address whether the record was lawfully withheld under the deliberative process privilege.
3. The Custodian's failure to timely respond 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 requested record because it was a personnel record and exempt under OPRA. N.J.S.A. 47:1A-10. Additionally, the evidence of record does not indicate that Custodian's violation 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

April 3, 2020