



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

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

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

Al-Qaadir Green  
Complainant

Complaint No. 2018-219

v.

Newark Police Department (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’s response was insufficient because he failed to definitively state that the records responsive to the Complainant’s OPRA request did not exist. N.J.S.A. 47:1A-5(g); Shanker v. Borough of Cliffside Heights (Bergen), GRC Complaint No. 2007-245 (March 2009).
2. The Custodian has borne his burden of proof that he lawfully denied access to the Complainant’s August 14, 2018 OPRA request. Specifically, the Custodian certified in the SOI, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The Custodian’s failure to definitely state whether responsive records existed resulted in an insufficient response. N.J.S.A. 47:1A-5(g). However, the Custodian lawfully denied access to the subject OPRA request because no records existed. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). Further, 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 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**

**Al-Qaadir Green<sup>1</sup>  
Complainant**

**GRC Complaint No. 2018-219**

**v.**

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

**Records Relevant to Complaint:** Hardcopies via U.S. mail of the following related to State v. Green, Indictment No. 01-10-4345:

1. Any and all reports by Detective Keith Sheppard of the Newark Police Department (“NPD”) and Investigator Robert D. Harris of the Essex County Prosecutor’s Office (“ECPO”) regarding statements obtained “from the person(s) that provided information that [led] to learning the name and location of Kysheal Andrell Ivery . . .”
2. Notes, e-mails, arrest warrants, search warrants, affidavits, criminal juvenile background checks, and requests to unseal records through “Essex County Juvenile Courts” of Mr. Ivery by Detective Sheppard and Investigator Harris, or anyone in either the NPD or ECPO, on or before January 29, 2002.

**Custodian of Record:** Kenneth Louis  
**Request Received by Custodian:** August 28, 2018  
**Response Made by Custodian:** September 4, 2018  
**GRC Complaint Received:** October 9, 2018

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

**Request and Response:**

On August 14, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 4, 2018, the Custodian responded in writing stating that he forwarded the subject OPRA request to the Department of Public Safety, Legal Affairs Unit, to begin a search. The Custodian stated that he anticipated responding to the subject OPRA request on or before September 18, 2018.

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

<sup>2</sup> Represented by Samora Noguera, Esq. (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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On September 14, 2018, Najah Z. Hatim-Johnson sent a memorandum to Ana Golinski advising that the investigation referenced by the Complainant was handled by the ECPO. Ms. Hatim-Johnson thus stated that the requested records could be obtained from the ECPO. On September 24, 2018, the Custodian responded to the Complainant attaching Ms. Hatim-Johnson's memorandum. The Custodian stated that the Complainant should submit his OPRA request to the ECPO for responsive records.

#### Denial of Access Complaint:

On October 9, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC") disputing the Custodian's denial of access. The Complainant argued that Detective Sheppard worked the investigation with the ECPO but created an NPD file. The Complainant noted that Detective Sheppard wrote reports on NPD's letterhead. The Complainant thus argued that both the NPD and ECPO possessed records responsive to the subject OPRA request. The Complainant noted that the investigation was closed and that his OPRA request did not require research.<sup>4</sup>

The Complainant further contended that the Custodian failed to provide a specific lawful basis for denying his OPRA request, that should have included a statement as to whether records existed.

#### Supplemental Responses:

On October 19, 2018, Ms. Hatim-Johnson sent a memorandum to Ms. Golinski stating that the records sought were exempt from access under N.J.S.A. 47:1A-3(b). Ms. Hatim-Johnson noted, however, that the ECPO handled the investigation and that Detective Sheppard was assigned to that agency while the investigation was in progress. Ms. Hatim-Johnson thus reiterated that records could be obtained from the ECPO. On November 16, 2018, Ms. Hatim-Johnson sent another memorandum to Ms. Golinski that reiterating the information contained in the first memoranda. Ms. Hatim-Johnson added that a diligent search of NPD's record yielded no responsive records under the subject's name, date of incident, and location.

#### Statement of Information:

On November 16, 2018, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on August 28, 2018. The Custodian certified that he responded in writing on September 4, 2018 acknowledging receipt of the request and advising that he would respond by September 18, 2018. The Custodian certified that he subsequently responded on September 25, 2018 advising the Complainant that he should

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<sup>4</sup> The Complainant noted that he should have been given access to the records under the "[c]ommon [l]aw 'right to access public records'." (Emphasis in original). However, the GRC does not have the authority to address a requestor's common law right to access records. N.J.S.A. 47:1A-7(b); Rowan, Jr. v. Warren Hills Reg'l Sch. Dist. (Warren), GRC Complaint No. 2011-347 (January 2013); Kelly v. N.J. Dep't of Transp., GRC Complaint No. 2010-215 (November 2011) at 2. Thus, the GRC cannot address any common law right of access to the requested records. Al-Qadir Green v. Newark Police Department (Essex), 2018-219 – Findings and Recommendations of the Executive Director

contact the ECPO for responsive records. The Custodian noted that Ms. Hatim-Johnson twice clarified the City's response on October 19, 2018 and November 16, 2018.<sup>5</sup>

The Custodian affirmed that the NPD did not possess any records responsive to the Complainant's OPRA request. The Custodian affirmed that Detective Sheppard was working for the ECPO at the time of the investigation and not the City of Newark. The Custodian thus averred that the ECPO may possess the records the Complainant sought in the subject OPRA request. The Custodian contended that because no records existed, no unlawful denial of access occurred here. Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). The Custodian noted that the Council recently adjudicated Brown v. City of Newark (Essex), GRC Complaint No. 2016-289 (July 2018) wherein the facts were "almost identical" to the instant complaint. The Custodian noted that there, the Council held that no unlawful denial occurred, citing Pusterhofer, GRC 2005-49.

The Custodian also argued that the Complainant's request was invalid because it required "research and speculation." The Custodian contended that the Complainant failed to provide the name of the "mystery witness" that identified Mr. Ivery. The Custodian contended that even if the Complainant's supposition was true, he would have to read every report Detective Sheppard and Investigator Harris authored to locate mentions of Mr. Ivery. The Custodian asserted that he would then have to sort through the reports chronologically to identify the "mystery witness." The Custodian argued that such actions constituted research.

### Analysis

#### Sufficiency of Response

OPRA provides that if a ". . . custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor . . . on the request form and promptly return it to the requestor." N.J.S.A. 47:1A-5(g) (emphasis added). The Council has held that for a denial of access to be in compliance with OPRA, the custodian must definitively state that records did not exist at the time of the initial response. See Shanker v. Borough of Cliffside Heights (Bergen), GRC Complaint No. 2007-245 (March 2009). See also Paff v. City of Union City (Hudson), GRC Complaint No. 2012-262 (August 2013).

Here, the Custodian initially responded to the Complainant stating that he should submit his OPRA request to the ECPO. In the Denial of Access Complaint, the Complainant contended that the Custodian failed to provide a specific lawful basis for the denial, inclusive of a statement as to whether responsive records existed. Subsequent to the filing of the Denial of Access Complaint, the Custodian certified in the SOI that the NPD did not possess any responsive records because the ECPO conducted the investigation central to State v. Green, Indictment No. 01-10-4345. Obviously, the Custodian's SOI response definitively indicated the fact that no records existed, where his initial response only directed the Complainant to the ECPO without stating that no records existed.

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<sup>5</sup> It is unclear whether the Custodian sent the follow-up memoranda to the Complainant prior to submission of the SOI.

Therefore, the Custodian's response was insufficient because he failed to definitively state that the records responsive to the Complainant's OPRA request did not exist. N.J.S.A. 47:1A-5(g); Shanker, GRC 2007-245.

### **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 has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer, GRC 2005-49. In the instant complaint, the Complainant contended in the SOI that although Detective Sheppard was working for the ECPO, he created a file for the NPD. The Complainant also asserted that Detective Sheppard used NPD letterhead for a few of his reports. In the SOI, the Custodian certified that no records existed because Detective Sheppard was working the investigation relevant to State v. Green for the ECPO and not the NPD. The Custodian also attached to the SOI memoranda from Ms. Hatim-Johnson repeatedly stressing this point and noting that a search was conducted yielding no responsive records. The Custodian thus asserted that no unlawful denial of access occurred.

A review of the evidence of record submitted by the parties here supports a conclusion that no responsive records existed. The Custodian responded to the Complainant on multiple occasions directing him to the ECPO, because that agency, and not the NPD, conducted the investigation and may have responsive records. Further, Ms. Hatim-Johnson's multiple memoranda sent to Ms. Golinski corroborate that no records existed. Further, the GRC does not find any competent, credible evidence in the record to refute the Custodian's certification.

Accordingly, the Custodian has borne his burden of proof that he lawfully denied access to the Complainant's August 14, 2018 OPRA request. Specifically, the Custodian certified in the SOI, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

### **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 definitely state whether responsive records existed resulted in an insufficient response. N.J.S.A. 47:1A-5(g). However, the Custodian lawfully denied access to the subject OPRA request because no records existed. N.J.S.A. 47:1A-6; Pusterhofer, GRC 2005-49. Further, 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’s response was insufficient because he failed to definitely state that the records responsive to the Complainant’s OPRA request did not exist. N.J.S.A. 47:1A-5(g); Shanker v. Borough of Cliffside Heights (Bergen), GRC Complaint No. 2007-245 (March 2009).
2. The Custodian has borne his burden of proof that he lawfully denied access to the Complainant’s August 14, 2018 OPRA request. Specifically, the Custodian certified in the SOI, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; *see* Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The Custodian’s failure to definitely state whether responsive records existed resulted in an insufficient response. N.J.S.A. 47:1A-5(g). However, the Custodian lawfully denied access to the subject OPRA request because no records existed. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). Further, 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  
Executive Director

April 3, 2020