



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

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

**August 25, 2020 Government Records Council Meeting**

James Lopez  
Complainant

Complaint No. 2019-217

v.

City of Newark (Essex)  
Custodian of Record

At the August 25, 2020 public meeting, the Government Records Council (“Council”) considered the August 18, 2020 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 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 another extension of time within the extended time frame, 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 Kelly v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007). Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). See also Thompson v. Twp. of Mansfield (Warren), GRC Complaint No. 2015-309 (April 2016).
2. The Custodian has borne his burden of proof that no unlawful denial of access occurred because he certified, 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 2005-49 (July 2005).
3. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) resulting in a “deemed” denial of access, the Custodian certified in the Statement of Information that a search conducted by the City Personnel Department, as well as two searches by the City Police Department, resulted in no responsive records to the Complainant’s OPRA 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 25<sup>th</sup> Day of August 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: August 27, 2020**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
August 25, 2020 Council Meeting**

**James Lopez<sup>1</sup>  
Complainant**

**GRC Complaint No. 2019-217**

v.

**City of Newark (Essex)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Hardcopies for in-office pickup of letters from the City of Newark (“City”), Department of Public Safety and Newark Police Division to New Jersey Civil Service Commission (“CSC”) requesting an extension or “not to be included” in the next testing cycle for the titles of “Police Captain” (Symbol: PM1345U) or “Police Deputy Chief” (Symbol: PM1596U).

**Custodian of Record:** Kenneth Louis  
**Request Received by Custodian:** July 29, 2019  
**Response Made by Custodian:** September 5, 2019  
**GRC Complaint Received:** October 24, 2019

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

**Request and Response:**

On July 29, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 4, 2019, the Custodian responded in writing stating that the subject request was forwarded to Newark’s Police Division, City Law Department, and the Office of Information Technology (“OIT”). The Custodian quoted an anticipated response date of August 23, 2019. On September 5, 2019, the Custodian responded in writing stating that the Complainant’s OPRA request had been “re-routed” to the Division of Personnel.

**Denial of Access Complaint:**

On October 24, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant contended that the Custodian failed to

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

<sup>2</sup> Represented by Samora F. Noguera, Esq., Counsel to the Clerk, (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.

respond by the expiration of the extended time frame, or August 23, 2019.

Supplemental Response:

On November 18, 2019, the Department of Administration sent a memorandum to the Custodian advising that no records existed. On November 25, 2019, the Police Division advised Ms. Ana Golinski that it located no responsive records.

Statement of Information:

On December 16, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on July 29, 2019. The Custodian certified that he made a “good faith determination” to forward said OPRA request to the City Police Division. The Custodian certified that he then received inter-office correspondence from the Police Division stating that letters to the Civil Service Commission were maintained by the Personnel Department. The Custodian certified that he responded in writing on September 5, 2019 advising the Complainant that his OPRA request was forwarded to the Personnel Department.

The Custodian certified that he received the subject Denial of Access Complaint on November 14, 2019. The Custodian certified that his office received an inter-office letter dated November 18, 2019 from the Personnel Department stating no responsive records were found. The Custodian certified that the Police Division completed a second search. The Custodian certified that his office received a second inter-office letter dated November 25, 2019 from the Police Division stating no responsive records were found.

The Custodian cited Kelly v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007) acknowledging that his failure to respond in writing to a Complainant’s OPRA request, either granting or denying access, seeking clarification, or requesting an extension of time within the statutorily mandated (7) business days, results in a “deemed” denial of access. N.J.S.A. 47:1A-1(g); N.J.S.A. 47:1A-5(i). The Custodian asserted however that a “deemed” denial did not violate OPRA when the requested records exist. Kasko v. Town of Westfield, GRC Complaint No. 2011-06 (March 2012). The Custodian further asserted that searches were completed by two different City departments and no responsive records were recovered. The Custodian contended that he did not receive a response from the Personnel Department until a date subsequent to the filing of the subject Denial of Access Complaint.

The Custodian further averred that no denial of access occurred because he certified that after a reasonable search, no responsive records were found. Pusterhofer v. N.J. Dep’t of Educ., GRC 2005-49 (July 2005); Akers v. Buena Vista Twp., GRC 2014-190 (November 2014); Rivera v. Union City Bd. of Educ., GRC 2008-112 (April 2010).

## 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, GRC 2007-11.

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, to fulfill the complainant's OPRA request. However, the custodian responded on April 20, 2007, stating that the requested records would be provided later in the week, and the evidence of record showed that no records were provided until May 31, 2007. The Council 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 Complainant submitted an OPRA request on July 29, 2019. The Custodian responded in writing on August 4, 2019 acknowledging receipt of the subject OPRA request and extending the time frame through August 23, 2019. Thereafter, the Custodian did not respond in writing to the Complainant prior to the expiration of the extension of time. Thus, the Custodian's failure to respond in the extended time frame resulted in a "deemed" denial of access. Kelley, GRC 2007-11; Kohn, GRC 2007-124. The GRC also notes that the Custodian's citation to Kasko, GRC 2011-06 is not appropriate here because there was no timeliness issue there.

Accordingly, 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

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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.

clarification, or requesting another extension of time within the extended time frame, 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. See also Kohn, GRC 2007-124. See also Thompson v. Twp. of Mansfield (Warren), GRC Complaint No. 2015-309 (February 2016).

### **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, in light of a custodian’s certification that no records responsive to the request exist, no unlawful denial of access occurred. See Pusterhofer, GRC 2005-49. Here the Custodian certified in the SOI that he received an internal response from the City Personnel Division on November 18, 2019, stating no responsive records existed. The Custodian further certified that the City Police Department conducted two searches, and in both instances notified that him in writing that no records existed. Also, the Complainant did not present any evidence to contradict the Custodian’s certifications. Thus, no unlawful denial of access occurred pursuant to Pusterhofer, GRC 2005-49.

Accordingly, the Custodian has borne his burden of proof that no unlawful denial of access occurred because he certified, 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 (Felder 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) resulting in a "deemed" denial of access, the Custodian certified in the SOI that a search conducted by the City Personnel Department, as well as two searches by the City Police Department, resulted in no responsive records to the Complainant's OPRA 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 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 another extension of time within the extended time frame, 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 Kelly v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007). Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). See also Thompson v. Twp. of Mansfield (Warren), GRC Complaint No. 2015-309 (April 2016).
2. The Custodian has borne his burden of proof that no unlawful denial of access occurred because he certified, 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 2005-49 (July 2005).
3. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) resulting in a "deemed" denial of access, the Custodian certified in the Statement of Information that a search conducted by the City Personnel Department, as well as two searches by the City Police Department, resulted in no responsive records to the Complainant's OPRA 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: Brandon Garcia  
Case Manager

August 18, 2020