



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

March 29, 2022 Government Records Council Meeting

Scott Madlinger
Complainant

Complaint No. 2020-190

v.

Berkeley Township Police Department (Ocean)
Custodian of Record

At the March 29, 2022 public meeting, the Government Records Council (“Council”) considered the March 22, 2022 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 August 11, 2020 OPRA request based on unwarranted and unsubstantiated extensions. N.J.S.A. 47:1A-6; Ciccarone v. N.J. Dep’t of Treasury, GRC Complaint No. 2013-280 (Interim Order July 29, 2014). Therefore, the Custodian’s failure to respond in writing to the Complainant’s OPRA request, either granting or denying access within the statutorily mandated seven (7) business days, or a reasonably necessary extension thereof, results in a “deemed” denial of the Complainant’s request pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i).
2. The Custodian did not unlawfully deny access to the internal affairs reports and public synopses for 2017 and 2019 because the Custodian certified that such records do not exist, and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. Notwithstanding the Custodian’s “deemed” denial, she did not unlawfully deny access to the Complainant’s request for the internal affairs report and public synopsis for 2018. N.J.S.A. 47:1A-6. The Custodian certified that she disclosed said record to the Complainant, and there is no credible evidence to refute her certification. See Holland v. Rowan University, GRC Complaint Nos. 2014-63, 2014-64 (March 2015).
4. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to timely respond to the Complainant’s August 11, 2020 OPRA request, she did provide the Complainant with all existing responsive records on September 23, 2020. Additionally, the evidence of record does not indicate that her 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 29th Day of March 2022

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 31, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 29, 2022 Council Meeting**

Scott Madlinger¹
Complainant

GRC Complaint No. 2020-190

v.

Berkeley Township Police Department (Ocean)²
Custodial Agency

Records Relevant to Complaint: Copies via e-mail of “internal affairs report and public synopses disciplinary report [for] 2017, 2018, 2019.”

Custodian of Record: Sandra Brelsford³

Request Received by Custodian: August 11, 2020

Response Made by Custodian: August 20, 2020

GRC Complaint Received: September 23, 2020

Background⁴

Request and Responses:

On August 11, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 20, 2020, the seventh (7th) business day following receipt of said request, the Custodian responded in writing informing the Complainant that she was requesting an extension of time until August 27, 2020. Thereafter, on August 27, 2020, the Custodian e-mailed the Complainant informing him that she was requesting an extension of time until September 8, 2020. On September 8, 2020, the Custodian e-mailed the Complainant informing him that she was requesting an extension of time until September 15, 2020. On September 15, 2020, the Custodian e-mailed the Complainant informing him that the request was “still under attorney review” and for that reason she was requesting an extension of time until September 22, 2020. On September 22, 2020 at 4:50 p.m., the Custodian e-mailed the Complainant informing him that she was requesting an extension of time until September 29, 2020. On September 22, 2020 at 4:54 p.m., the Complainant e-mailed the Custodian, stating that he was not granting any further extensions and deemed the complaint to have been denied.

¹ No legal representation listed on record.

² Represented by Robin La Bue, Esq., of Rothstein, Mandell, Strohm, Halm & Cipriani, P.C. (Lakewood, NJ).

³ The current Custodian of Record for the Police Department is Marcy Novellino.

⁴ 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.

Denial of Access Complaint:

On September 23, 2020, at 8:52 a.m., the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that on August 11, 2020, he submitted the OPRA request to the Custodian seeking the above-mentioned records. The Complainant stated that:

- On August 20, 2020, the Custodian requested an extension of time until August 27, 2020.
- On August 27, 2020, the Custodian requested an extension of time until September 8, 2020.
- On September 8, 2020, the Custodian requested an extension of time until September 15, 2020.
- On September 15, 2020, the Custodian requested an extension of time until September 22, 2020.
- On September 22, 2020, the Custodian requested an extension of time until September 29, 2020

The Complainant stated that he informed the Custodian that he was not granting any further extensions of time and that, per Ciccarone v. N.J. Dep’t of Treasury, GRC Complaint No. 2013-280, he deemed the request denied.

Supplemental Response:

On September 23, 2020, at 3:10 p.m., the Custodian e-mailed the Complainant informing him that in response to his OPRA request she attached the internal affairs report and public synopses for 2018. The Custodian stated that there were no responsive records for the years 2017 and 2019.

Statement of Information:

On October 2, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on August 11, 2020 and responded in writing on August 20, 2020. The Custodian certified that preparation of the synopsis of police internal affairs records is the responsibility of Internal Affairs personnel in consultation with a police executive. The Custodian certified that she requested the subject records from Internal Affairs on August 25, 2020, August 27, 2020, September 14, 2020, September 15, 2020 and September 22, 2020. The Custodian further certified that the requested records, consisting of six (6) pages were e-mailed to the Complainant on September 23, 2020.

The Custodian’s Counsel stated that the GRC allows for extensions of time for a custodian to respond to a requestor’s OPRA request. Counsel cited GRC precedent in which it determined that if a custodian requests an extension of time within the statutorily mandated seven (7) business days and provides a date certain by which the records would be made available, the extension is proper regardless of the requestor’s objection. Counsel summarized the dates of the extensions requested by the Custodian and asserted that the total time consisted of twenty-four (24) days.

The Custodian's Counsel stated that the Complainant relied upon Ciccarone v. N.J. Dep't of Treasury, GRC Complaint No. 2013-280 (Interim Order July 29, 2014), to deny the Custodian's final request for an extension of time. Counsel argued that the circumstances of the instant complaint are distinguishable from those in Ciccarone, where the custodian took more than two months to produce the requested reports and communications. Counsel argued that the records requested in the instant complaint are summaries of discipline of police officers for a three-year period that cannot simply be retrieved, redacted, and produced due to the confidential nature of such records. Counsel argued that the requested records required preparation of the synopses by internal affairs personnel and review by legal counsel. Counsel stated that the Custodian maintained contact with the Complainant and endeavored to produce the records in a timely fashion.

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).⁵ 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).

OPRA provides that a custodian may request an extension of time to respond to the complainant's OPRA request, but the custodian must provide a specific date by which they will respond. Should the custodian fail to respond by that specific date, "access shall be deemed denied." N.J.S.A. 47:1A-5(i).

In Rivera v. City of Plainfield Police Dep't (Union), GRC Complaint No. 2009-317 (May 2011), the custodian responded in writing to the complainant's request on the fourth (4th) business day by seeking an extension of time to respond and providing an anticipated date by which the requested records would be made available. The complainant did not consent to the custodian's request for an extension of time. The Council stated:

The Council has further described the requirements for a proper request for an extension of time. Specifically, in Starkey v. N.J. Dep't of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009), the Custodian provided the Complainant with a written response to his OPRA request on the second (2nd) business day following receipt of said request in which the Custodian requested an extension of time to respond to said request and provided the

⁵ 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.

Complainant with an anticipated deadline date upon which the Custodian would respond to the request. The Council held that because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5(g) [and] N.J.S.A. 47:1A-5(i).

Further, in Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010), the Council held that the custodian did not unlawfully deny access to the requested records, stating in pertinent part that:

[B]ecause the Custodian provided a written response requesting an extension on the sixth (6th) business day following receipt of the Complainant’s OPRA request and providing a date certain on which to expect production of the records requested, and, notwithstanding the fact that the Complainant did not agree to the extension of time requested by the Custodian, the Custodian’s request for an extension of time [to a specific date] to respond to the Complainant’s OPRA request was made in writing within the statutorily mandated seven (7) business day response time.

Moreover, in Werner v. N.J. Civil Serv. Comm’n, GRC Complaint No. 2011-151 (December 2012), the Council again addressed whether the custodian lawfully sought an extension of time to respond to the complainant’s OPRA request. The Council concluded that because the custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated date by which the requested records would be made available, the custodian properly requested the extension pursuant to OPRA.

Therefore, although extensions are rooted in well-settled case law, the Council need not find valid every request for an extension containing a clear deadline. In Ciccarone, GRC 2013-280, the Council found that the custodian could not lawfully exploit the process by repeatedly rolling over an extension once obtained. In reaching the conclusion that the continuous extensions resulted in a “deemed” denial of access, the Council looked to what is “reasonably necessary.”

In the instant complaint, the Custodian did not initially respond to the Complainant’s August 11, 2020 OPRA request until August 20, 2020, which was the seventh (7th) business day following receipt of the request. Thereafter, the Custodian sought five (5) additional extensions. The Custodian’s extensions are as follows:

Date of Request for an Extension of Time	New Deadline for Response	Reason for Extension
August 20, 2020	August 27, 2020	No reason provided
August 27, 2020	September 8, 2020	No reason provided
September 8, 2020	September 15, 2020	No reason provided
September 15, 2020	September 22, 2020	“[The request] is still under attorney review.”
September 22, 2020	September 29, 2020	No reason provided

To determine if the extended time for a response is reasonable, the GRC must first consider the complexity of the request as measured by the number of items requested, the ease in identifying and retrieving requested records, and the nature and extent of any necessary redactions. Ciccarone, GRC 2013-280. The GRC must next consider the amount of time the custodian already had to respond to the request. Id. Finally, the GRC must consider any extenuating circumstances that could hinder the custodian's ability to respond effectively to the request.⁶ Id.

The Complainant requested the internal affairs reports and public synopses for 2017, 2018, and 2019. Based upon the number of items requested, the complexity of the request was very low. Next, the GRC finds that the Custodian promptly identified the records sought by the Complainant because she certified that she initially requested the responsive records from Internal Affairs on August 25, 2020 without obtaining additional information or clarification from the Complainant. The GRC also finds that retrieval of the responsive records was straightforward because the Township had, or should have had, the records readily available for public inspection.

The Attorney General's *Internal Affairs Policy & Procedure* ("IAPP") contains several mandates that, at the Attorney General's direction, every law enforcement agency must implement. Of importance here, is that the IAPP imposes an affirmative duty upon police personnel to disclose certain internal affairs materials to the public.⁷

The Public Reports subsection of the IAPP states, "[o]n an annual basis, every law enforcement agency *shall* publish on its public website a report summarizing the types of complaints received and the dispositions of those complaints . . . and at least once a year, every agency *shall* . . . publish on the agency's public website a brief synopsis of all complaints where a fine or suspension of ten days or more was assessed to an agency member." (Emphasis added.) The IAPP in Appendix U provides an example of such a synopsis. Therefore, for the Township to have complied with the provisions of the IAPP the requested records should have already been prepared for the years requested by the Complainant. It would only have been necessary for police personnel to retrieve and forward copies of the responsive records to the Custodian for subsequent disclosure to the Complainant and/or forward a link to the requested records if they were published on the website as required by the IAPP. It would not have been necessary for Internal Affairs personnel to again prepare the synopses and obtain review by legal counsel, as argued by the Custodian's Counsel, if the records were previously prepared for public disclosure in compliance with the IAPP mandates. Moreover, the Custodian stated that there were no responsive records for the years 2017 and 2019. Thus, if it was indeed necessary to prepare and review the records for disclosure to the Complainant, there would have been no reason not to prepare the records for those two years, which belies the Custodian's certified statement that the records took time to prepare.

⁶ As set forth in Ciccarone, GRC 2013-280, "[s]uch 'extenuating circumstances' would include, but not be limited to, retrieval of records that are in storage or archived (especially if at a remote storage facility), conversion of records to another medium to accommodate the requestor, emergency closure of the custodial agency, or the custodial agency's need to reallocate resources to a higher priority due to *force majeure*."

⁷ All references to the IAPP are to the December 2019 revision of that document which was the edition in effect at the time of the Complainant's OPRA request. See [Internal-Affairs-Policy-Procedures-2019.pdf](#).

In addition to the initial seven (7) business days, the Custodian requested extensions totaling twenty-seven (27) business days, accounting for the Labor Day holiday. The Custodian certified that on September 23, 2020, she disclosed to the Complainant the records for the year 2018. Therefore, the Custodian disclosed records partially responsive to the Complainant's request on the twenty-third (23rd) business day following receipt of the request. The evidence of record reveals that the Custodian's disclosure occurred just over six (6) hours after she was notified a Denial of Access Complaint had been filed with the GRC.

Finally, the GRC must consider any extenuating circumstances that could hinder the Custodian's ability to respond to the request. The GRC did not find any circumstances hampering the Custodian in promptly fulfilling the Complainant's request. In four of the five extensions sought by the Custodian she gave no reason for needing an extension of time. The only reason given for an extension was provided on September 15, 2020, when the Custodian stated that an extension was needed until September 15, 2020, because the request was under attorney review. However, since the 2018 record was, or should have been, made public over a year prior to the Complainant's request, there would have been no reason for further legal review.

The evidence of record here; to wit, the small number of items requested, the very low complexity of the request, the Custodian's ability to readily identify the requested records, coupled with the Custodian's failure to assert any circumstances hindering her ability to effectively respond to the request, persuades the GRC that the Custodian's extension of the response time to the extent exhibited in the instant matter was excessive. Although the Custodian certified that she asked Internal Affairs personnel for the records several times, there is nothing in the evidence of record to indicate she sought supervisory assistance from the Police Department after she failed to receive a timely reply in order to fulfill her statutory obligation. Moreover, the GRC notes that the IAPP required the records to have already been made public, so additional time necessary to prepare and review the records should not have been a contributing factor to the delay.

Accordingly, the Custodian did not bear her burden of proof that she timely responded to the Complainant's August 11, 2020 OPRA request based on unwarranted and unsubstantiated extensions. N.J.S.A. 47:1A-6; Ciccarone, GRC 2013-280. Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting or denying access within the statutorily mandated seven (7) business days, or a reasonably necessary extension thereof, results in a "deemed" denial of the Complainant's request pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i).

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.

Internal affairs reports and public synopses for 2017 and 2019

In Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005), the custodian certified that no records responsive to the complainant's request for billing records existed and the complainant submitted no evidence to refute the custodian's certification regarding said records. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian's certification, there was no unlawful denial of access to the requested records.

Here, the Custodian certified⁸ that the internal affairs reports and public synopses for 2017 and 2019, do not exist because there are "[n]o responsive document[s]" to this portion of the Complainant's request.

As such, the Custodian did not unlawfully deny access to the internal affairs reports and public synopses for 2017 and 2019 because the Custodian certified that such records do not exist, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. See Pusterhofer, GRC 2005-49.

Internal affairs report and public synopsis for 2018

In Holland v. Rowan University, GRC Complaint Nos. 2014-63 and 2014-64 (March 2015), the Council found that the custodian did not unlawfully deny access to one of the complainant's request items based on the custodian's certification that the record was provided to the complainant on a date certain. The Council held that the custodian's certification, in addition to the lack of refuting evidence from the complainant, was sufficient to meet the custodian's burden of proof.

Here, the Custodian certified that the internal affairs report and public synopsis for 2018 was provided to the Complainant on September 23, 2020. Furthermore, there is no credible evidence in the record to refute the Custodian's certification

Therefore, notwithstanding the Custodian's "deemed" denial, she did not unlawfully deny access to the Complainant's request for the internal affairs report and public synopsis for 2018. N.J.S.A. 47:1A-6. The Custodian certified that she disclosed said record to the Complainant, and there is no credible evidence to refute her certification. See Holland, GRC 2014-63, 2014-64.

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],

⁸ Via attachment of the September 23, 2020 response to the SOI.

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) by failing to timely respond to the Complainant’s August 11, 2020 OPRA request, she did provide the Complainant with all existing responsive records on September 23, 2020. Additionally, the evidence of record does not indicate that her 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 her burden of proof that she timely responded to the Complainant’s August 11, 2020 OPRA request based on unwarranted and unsubstantiated extensions. N.J.S.A. 47:1A-6; Ciccarone v. N.J. Dep’t of Treasury, GRC Complaint No. 2013-280 (Interim Order July 29, 2014). Therefore, the Custodian’s failure to respond in writing to the Complainant’s OPRA request, either granting or denying access within the statutorily mandated seven (7) business days, or a reasonably necessary extension thereof, results in a “deemed” denial of the Complainant’s request pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i).
2. The Custodian did not unlawfully deny access to the internal affairs reports and public synopses for 2017 and 2019 because the Custodian certified that such records do not exist, and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. Notwithstanding the Custodian’s “deemed” denial, she did not unlawfully deny access to the Complainant’s request for the internal affairs report and public synopsis for 2018. N.J.S.A. 47:1A-6. The Custodian certified that she disclosed said record to the

Complainant, and there is no credible evidence to refute her certification. See Holland v. Rowan University, GRC Complaint Nos. 2014-63, 2014-64 (March 2015).

4. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to timely respond to the Complainant's August 11, 2020 OPRA request, she did provide the Complainant with all existing responsive records on September 23, 2020. Additionally, the evidence of record does not indicate that her 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

March 22, 2022