



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

Toll Free: 866-850-0511
Fax: 609-633-6337
E-mail: grc@dca.state.nj.us
Web Address:
www.nj.gov/grc

ROBIN BERG TABAKIN, Chair
COMMISSIONER JOSEPH V. DORIA, JR.
COMMISSIONER LUCILLE DAVY
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

October 29, 2008 Government Records Council Meeting

Phyllis Feggans
Complainant

Complaint No. 2007-238

v.

City of Newark (Essex)
Custodian of Record

At the October 29, 2008 public meeting, the Government Records Council ("Council") considered the October 22, 2008 Supplemental 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. Because the requested videotape constitutes evidence adduced as part of a criminal investigation as is signed by Sergeant Cruz, the videotape is exempt from disclosure as a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1. As such, the Custodian has carried her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6.
2. Because police incident reports are exempt from disclosure as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1, Nance v. Scotch Plains Police Department, GRC Complaint No. 2003-125 (January 2005) and Morgano v. Essex County Prosecutor's Office, GRC Complaint No. 2007-156 (February 2008), and because it is concluded that the police incident summary and result sheets summarize the information contained on the incident reports, the summary and result sheets are also exempt from disclosure as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1. As such, the Custodian has carried her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6.
3. Because Detective M. Palermo's Preliminary Investigation Sheets regarding Central Complaints No. 05-124266 and 05-124244 relate to an investigation, said records are exempt from disclosure as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1. As such, the Custodian has carried her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6.



4. Because the Complainant submitted her OPRA request on August 28, 2007 and the OPRA Memorandum dated April 4, 2008 did not exist at the time of the Complainant's request, said record is not at issue in this complaint.
5. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by not granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, the Custodian provided the requested records to the Complainant on the nineteenth (19th) business day following receipt of the request. Additionally, although the Custodian did not identify the records withheld from disclosure or the specific lawful basis for the denial at the time of the Custodian's response to the request, the Custodian was only able to provide as much information as the Police Department informed her regarding this request as the records responsive are located within the Police Department. As such, it is concluded that 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. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.
6. Although the Police Department was not fully cooperative with the Custodian in responding to the Complainant's OPRA request or responding to the GRC's request for information during the investigation of this complaint, the Police Department did not unlawfully deny access to the records withheld from disclosure. As such, it is concluded that the Police Department'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. However, because of the Police Department's lack of cooperation with the Custodian and apparent lack of understanding of OPRA, the Police Department should familiarize itself with OPRA's provisions by way of the various reference materials located on the GRC's website (www.nj.gov/grc).

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 October, 2008

Robin Berg Tabakin, Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records
Council.

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: October 30, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
October 29, 2008 Council Meeting**

**Phyllis Feggans¹
Complainant**

GRC Complaint No. 2007-238

v.

**City of Newark (Essex)²
Custodian of Records**

Records Relevant to Complaint: All police department records concerning Ferrell Hoover (central complaint no. 05-124244 and central complaint no. 05-124266) including all reports, investigations and statements, copy of audio or video tape from Shop N' Bag on 705 Frelinghuysen Avenue. Date of incident: December 8, 2005.

Request Made: August 28, 2007

Response Made: September 14, 2007 and September 25, 2007

Custodian: Joyce Lanier

GRC Complaint Filed: September 22, 2007

Background

June 25, 2008

Government Records Council's ("Council") Interim Order. At its June 25, 2008 public meeting, the Council considered the June 18, 2008 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, found that:

1. 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 results in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Custodian has not yet provided the GRC with a detailed document index identifying **all** records responsive to the Complainant's request that were not provided to the Complainant on the basis that said records are exempt as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1, (or a certification that the videotape is the only such record) and

¹ Represented by Rachel Y. Marshall, Esq. (Jersey City, NJ). However, the Complainant asks that her attorney not be contacted regarding this Denial of Access Complaint.

² Represented by Aney Chandy, Esq. (Newark, NJ).

because the requested information must come from the Police Department, the Council orders the Police Department to provide the document index to the GRC.

3. **The Police Department shall comply with item # 2 above within five (5) business days from receipt of the Council's Interim Order. Such document index must include a certification pursuant to NJ Court Rule 1:4-4.**

July 1, 2008

Council's Interim Order distributed to the parties.

July 9, 2008

GRC resends Interim Order to Custodian.

July 11, 2008

Certification of Detective Adolfo Furtado.³ The Detective certifies that he is assigned to Legal Affairs Office within the Newark Police Department. The Detective certifies that the following records are part of the requested file entitled Central Complaint No. 05-124266:

- Videotape with Authenticity of Videos Evidence signed by Sergeant Antonio Cruz #7700
- Incident Summary and Result Sheet (3 pages)
- Incident Report
- Property Sheet (2 pages)
- Detective M. Palermo's Preliminary Investigation Sheet
- OPRA Memorandum dated April 4, 2008 comprising a list of items within the homicide file of Ferrell Hoover that the Newark Police Department claims to be exempt from disclosure under OPRA.

The Detective also certifies that the following records are part of the requested file entitled Central Complaint No. 05-124244:

- Incident Summary and Result Sheet (2 pages)
- Incident and Continuation Report
- Detective M. Palermo's Preliminary Investigation Sheet

July 15, 2008

Custodian's response to the Council's Interim Order. The Custodian certifies that she was out of the office due to a medical emergency and as such verbally requested that the GRC resend the Council's Interim Order on July 9, 2008. The Custodian certifies that upon receiving the Interim Order on July 9, 2008 she immediately forwarded said Order to the Police Department for a response. The Custodian certifies that she was out of the office on vacation starting July 10, 2008 and returned to work on July 15, 2008.

³The Custodian provided said certification to the GRC with her certification dated July 15, 2008.
Phyllis Feggans v. City of Newark (Essex), 2007-238 – Supplemental Findings and Recommendations of the Executive Director

Additionally, the Custodian certifies that on July 11, 2008, her office received Detective Adolfo Furtado's certification in response to the Council's Interim Order; however, said certification was not signed. The Custodian certifies that her office received the signed certification on July 14, 2008 and forwarded it to the GRC on July 15, 2008.

Analysis

Whether the Custodian and the Police Department complied with the Council's June 25, 2008 Interim Order?

Although the GRC distributed its June 25, 2008 Interim Order on July 1, 2008, the Custodian certified that she was out of the office due to a medical emergency and received said Order on July 9, 2008. On July 15, 2008, the fourth (4th) business day following the Custodian's receipt of said Order, the Custodian provided the GRC with the Police Department's certification which identifies all records responsive to the Complainant's request contained in the central complaint files. It is clear to the GRC which records were provided to the Complainant based on prior submissions to the GRC.⁴ Additionally, in the Custodian's December 14, 2007 letter to the GRC, the Custodian asserts that all records not provided to the Complainant pertaining to Central Complaints No. 05-124244 and 05-124226 are criminal investigatory records which are in the possession of Internal Affairs and are deemed to be confidential pursuant to OPRA.

Therefore, because Detective Adolfo Furtado provided a certification in which he listed all of the records responsive to the Complainant's request (provided and not provided) and because the Custodian provided said certification to the GRC on the fourth (4th) business day after receiving the Council's June 25, 2008 Interim Order, the Custodian and the Police Department have complied with said order.

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*" (Emphasis added.) N.J.S.A. 47:1A-1.

OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ... *A government record shall not include* the following information which is deemed to be confidential... *criminal investigatory*

⁴The Custodian's September 25, 2007 response to the Complainant's request identifies the specific records provided in response to the Complainant's request.

records... ‘Criminal investigatory record’ means a record which is not required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding.” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

The Council partially addressed this issue in its Interim Order dated June 25, 2008. In said Order the Council held that:

“[t]he 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 results in a “deemed” denial pursuant to N.J.S.A. 47:1A-5, e.g., N.J.S.A. 47:1A-5.i and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).”

As such, the present issue is whether the Custodian unlawfully denied access to the records responsive that were not provided to the Complainant on the basis that said records are exempt from disclosure under N.J.S.A. 47:1A-1.1 as criminal investigatory records.

OPRA defines a "criminal investigatory record" as a record which is not required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding (N.J.S.A. 47:1A-1.1).

The status of records purported to fall under the criminal investigatory records exemption pursuant to N.J.S.A. 47:1A-1.1 was examined by the GRC in Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004), affirmed in an unpublished opinion of the Appellate Division of the New Jersey Superior Court in May 2004. The Council found that under OPRA, “criminal investigatory records include records involving all manner of crimes, resolved or unresolved, and includes information that is part and parcel of an investigation, confirmed and unconfirmed.”

As the Council pointed out in Janeczko, supra:

“[the criminal investigatory records exemption] does not permit access to investigatory records once the investigation is complete. The exemption applies to records that conform to the statutory description, without reference to the status of the investigation and the Council does not have a

basis to withhold from access only currently active investigations and release those where the matter is resolved or closed.”

In this instant matter, the records responsive to the Complainant’s request which were not provided to the Complainant on the basis that said records are criminal investigatory records are as follows:

- Central Complaint No. 05-124266:
 - Videotape with Authenticity of Videos Evidence signed by Sergeant Antonio Cruz #7700
 - Incident Summary and Result Sheet (3 pages)
 - Detective M. Palermo’s Preliminary Investigation Sheet
 - OPRA Memorandum dated April 4, 2008 stating a list of items within the homicide file of Ferrell Hoover that the Newark Police Department claims to be exempt from disclosure under OPRA.
- Central Complaint No. 05-124244:
 - Incident Summary and Result Sheet (2 pages)
 - Detective M. Palermo’s Preliminary Investigation Sheet

In regards to the videotape that is part of central complaint No. 05-124266, a Newark Police Department Sergeant authenticated said video as a piece of evidence. The fact that the video is categorized as evidence suggests that some investigation took place.

Therefore, because the requested videotape constitutes evidence adduced as part of a criminal investigation as is signed by Sergeant Cruz, the videotape is exempt from disclosure as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1. As such, the Custodian has carried her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6.

Additionally, regarding police incident reports, the Council held in Nance v. Scotch Plains Police Department, GRC Complaint No. 2003-125 (January 2005) that incident reports are exempt from disclosure under N.J.S.A. 47:1A-1.1 as criminal investigatory records. *See also* Morgano v. Essex County Prosecutor’s Office, GRC Complaint No. 2007-156 (February 2008).

Although the Custodian provided the Complainant with copies of the incident reports, the Custodian denied access to the incident summary and result sheet. Based on the nature of said reports, the GRC concludes that the incident summary and result sheets summarize the information contained on the incident reports. Thus, if incident reports are exempt from disclosure as criminal investigatory records, then the incident summary and result sheets are exempt as well.

Therefore, because police incident reports are exempt from disclosure as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1, Nance, supra, and Morgano, supra, and because it is concluded that the police incident summary and result sheets summarize the information contained on the incident reports, the summary and result sheets are also exempt from disclosure as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1.

As such, the Custodian has carried her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6.

Also at issue are Detective M. Palermo's Preliminary Investigation Sheets regarding Central Complaints No. 05-124266 and 05-124244. Since the records relate to an investigation, the preliminary investigation sheets are exempt from disclosure as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1. As such, the Custodian has carried her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6.

Further, because the Complainant submitted her OPRA request on August 28, 2007 and the OPRA Memorandum dated April 4, 2008 did not exist at the time of the Complainant's request, said record is not at issue in this complaint.

Whether the Custodian's delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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:

"... If 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.

The Custodian in this complaint violated N.J.S.A. 47:1A-5.g and N.J.S.A. 47:1A-5.i by not granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days resulting in a "deemed" denial. The Custodian's initial response to the Complainant's request informed the Complainant that there was a backlog of requests within the Police Department and provided the Complainant with contact information for the Police Department. After the Complainant filed a Denial of Access Complaint, the Custodian granted access to some of the requested records but did not provide the Complainant with the specific lawful basis for the denial of access to the remaining responsive records.

However, it should be noted that the Custodian can only provide the Complainant with information she receives from the Police Department because the Police Department maintains physical custody of the requested records. The evidence of record indicates that the Custodian made several unsuccessful attempts to retrieve information regarding

this OPRA request from the Police Department. The Police Department failed to provide the Complainant with the requested document index identifying all records responsive to the Complainant's request that were withheld from disclosure on the basis that said records are exempt as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1. As such, the Council ordered the Police Department to provide the GRC with said information and the Police Department complied with said order. Additionally, the records withheld from disclosure are exempt as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1.

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 at 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 (Berg); 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 (App. Div. 1996) at 107).

Therefore, although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by not granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, the Custodian provided the requested records to the Complainant on the nineteenth (19th) business day following receipt of the request. Additionally, although the Custodian did not identify the records withheld from disclosure or the specific lawful basis for the denial at the time of the Custodian's response to the request, the Custodian was only able to provide as much information as the Police Department informed her regarding this request as the records responsive are located within the Police Department. As such, it is concluded that 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. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

As to the Police Department's actions in response to this request and complaint, the Police Department failed to inform the Custodian of the specific legal basis for the denial of access to the records withheld from disclosure and failed to list the specific records denied at the time of the Custodian's response to the request. The Police Department also failed to fully respond to the Custodian's various requests for a criminal investigatory records document index as requested by the GRC. The Police Department did not provide said information to the GRC until ordered by the Council on June 25, 2008. However, the records withheld from disclosure were lawfully withheld because said records are exempt as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1.

Therefore, although the Police Department was not fully cooperative with the Custodian in responding to the Complainant's OPRA request or responding to the GRC's request for information during the investigation of this complaint, the Police Department did not unlawfully deny access to the records withheld from disclosure. As such, it is concluded that the Police Department'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. However, because of the Police Department's lack of cooperation with the Custodian and apparent lack of understanding of OPRA, the Police Department should familiarize itself with OPRA's provisions by way of the various reference materials located on the GRC's website (www.nj.gov/grc).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the requested videotape constitutes evidence adduced as part of a criminal investigation as is signed by Sergeant Cruz, the videotape is exempt from disclosure as a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1. As such, the Custodian has carried her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6.
2. Because police incident reports are exempt from disclosure as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1, Nance v. Scotch Plains Police Department, GRC Complaint No. 2003-125 (January 2005) and Morgano v. Essex County Prosecutor's Office, GRC Complaint No. 2007-156 (February 2008), and because it is concluded that the police incident summary and result sheets summarize the information contained on the incident reports, the summary and result sheets are also exempt from disclosure as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1. As such, the Custodian has carried her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6.
3. Because Detective M. Palermo's Preliminary Investigation Sheets regarding Central Complaints No. 05-124266 and 05-124244 relate to an investigation, said records are exempt from disclosure as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1. As such, the Custodian has carried her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6.
4. Because the Complainant submitted her OPRA request on August 28, 2007 and the OPRA Memorandum dated April 4, 2008 did not exist at the time of the Complainant's request, said record is not at issue in this complaint.
5. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by not granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7)

business days, the Custodian provided the requested records to the Complainant on the nineteenth (19th) business day following receipt of the request. Additionally, although the Custodian did not identify the records withheld from disclosure or the specific lawful basis for the denial at the time of the Custodian's response to the request, the Custodian was only able to provide as much information as the Police Department informed her regarding this request as the records responsive are located within the Police Department. As such, it is concluded that 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. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

6. Although the Police Department was not fully cooperative with the Custodian in responding to the Complainant's OPRA request or responding to the GRC's request for information during the investigation of this complaint, the Police Department did not unlawfully deny access to the records withheld from disclosure. As such, it is concluded that the Police Department'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. However, because of the Police Department's lack of cooperation with the Custodian and apparent lack of understanding of OPRA, the Police Department should familiarize itself with OPRA's provisions by way of the various reference materials located on the GRC's website (www.nj.gov/grc).

Prepared By: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

October 22, 2008



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

Toll Free: 866-850-0511
Fax: 609-633-6337
E-mail: grc@dca.state.nj.us
Web Address:
www.nj.gov/grc

ROBIN BERG TABAKIN, Chair
COMMISSIONER JOSEPH V. DORIA, JR.
COMMISSIONER LUCILLE DAVY
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

INTERIM ORDER

June 25, 2008 Government Records Council Meeting

Phyllis Feggans
Complainant

Complaint No. 2007-238

v.

City of Newark (Essex)
Custodian of Record

At the June 25, 2008 public meeting, the Government Records Council (“Council”) considered the June 18, 2008 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’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 results in a “deemed” denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Custodian has not yet provided the GRC with a detailed document index identifying **all** records responsive to the Complainant’s request that were not provided to the Complainant on the basis that said records are exempt as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1, (or a certification that the videotape is the only such record) and because the requested information must come from the Police Department, the Council orders the Police Department to provide the document index to the GRC.
3. **The Police Department shall comply with item # 2 above within five (5) business days from receipt of the Council’s Interim Order. Such document index must include a certification pursuant to NJ Court Rule 1:4-4.**

Interim Order Rendered by the
Government Records Council



On The 25th Day of June, 2008

Robin Berg Tabakin, Chairman
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: July 1, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 25, 2008 Council Meeting**

**Phyllis Feggans¹
Complainant**

GRC Complaint No. 2007-238

v.

**City of Newark (Essex)²
Custodian of Records**

Records Relevant to Complaint:

1. All police department records concerning Ferrell Hoover (central complaint # 05-124244 and central complaint # 05-124266) including all reports, investigations and statements, copy of audio or video tape from Shop N' Bag on 705 Frelinghuysen Avenue. Date of incident: December 8, 2005.

Request Made: August 28, 2007

Response Made: September 14, 2007 and September 25, 2007

Custodian: Joyce Lanier

GRC Complaint Filed: September 22, 2007

Background

August 28, 2007

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

September 14, 2007

Custodian's Response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the twelfth (12th) business day following receipt of such request. The Custodian states that she forwarded the Complainant's request to the Police Department. The Custodian states that there is a backlog of requests due to high volume and that the Complainant may contact Detective Lisa Rodriguez to check the status of this request. The Custodian also attaches a Denial of Access Complaint Form and states that the Complainant may file a complaint with the Government Records Council for not receiving the requested records within the time period required under OPRA.

¹ Represented by Rachel Y. Marshall, Esq. (Jersey City, NJ). However, the Complainant asks that her attorney not be contacted regarding this Denial of Access Complaint.

² Represented by Aney Chandy, Esq. (Newark, NJ).

September 22, 2007

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the following attachments:

- Complainant’s OPRA request dated August 28, 2007
- Custodian’s response to the request dated September 14, 2007³

The Complainant states that she submitted her OPRA request on August 28, 2007 and to date has not received any records responsive to her request.

September 25, 2007

Custodian’s subsequent response to the Complainant’s OPRA request on the nineteenth (19th) business day following the Custodian’s receipt of said request. The Custodian provides the following records:

1. Incident Report and Continuation Report – cc # 05-124244
2. Incident Report and Continuation Report – cc # 05-124226
3. Property and Evidence Report – cc # 05-124226

October 10, 2007

Offer of Mediation sent to both parties.

October 12, 2007

Custodian’s signed Agreement to Mediate received by the GRC. The Custodian states that she mailed the records responsive to the Complainant on September 26, 2007. The Custodian states that she contacted the Complainant by telephone to confirm the Complainant’s receipt of the records. The Custodian states that the Complainant confirmed receipt, but also indicated that she was not satisfied with the Custodian’s response. [The Complainant did not respond to the Offer of Mediation.]

October 25, 2007

Request for the Statement of Information sent to the Custodian.

October 31, 2007

Custodian’s Statement of Information (“SOI”) with the following attachments:

- Complainant’s OPRA request dated August 28, 2007
- Custodian’s response to the request dated September 14, 2007
- Custodian’s subsequent response to the request dated September 25, 2007
- Records responsive to the Complainant’s request

The Custodian certifies to receiving the Complainant’s OPRA request on August 28, 2007 and forwarding same to the Police Department for a response on said date. The Custodian certifies that via letter dated September 14, 2007 she informed the Complainant about the Police Department’s backlog, provided the Police Department’s

³ The Complainant also attaches several additional requests submitted to the Police Department. Said requests are not relevant to the adjudication of this complaint because they are administrative requests for police records.

contact information and stated that she would continue to follow up on the request. The Custodian certifies that records responsive were mailed to the Complainant on September 26, 2007. The Custodian also certifies that she spoke to the Complainant on two (2) occasions between October 1, 2007 and October 12, 2007 in which the Custodian informed the Complainant about the Police Department's backlog and stated that the Custodian would continue to follow up with the request. The Custodian certifies that she provided the Complainant with the telephone numbers to the Police Department and Business Administrator's Office. Additionally, the Custodian certifies that upon receiving the Complainant's Denial of Access Complaint on October 12, 2007, she spoke to the Complainant to confirm receipt of the records responsive and the Complainant indicated that she was not satisfied with said response.

Further, the Custodian certifies that the records she provided to the Complainant were the records the Police Department had on file. The Custodian also certifies that redactions made to the records responsive include address, date of birth and social security number.⁴

November 19, 2007

Letter from GRC to Custodian. The GRC requests that the Custodian provide a legal certification indicating whether the City maintains a video or audio tape concerning Ferrell Hoover, as requested by the Complainant on August 28, 2007. The GRC asks that the Custodian provide the legal basis for the denial of access if said record is maintained on file.

December 3, 2007

Letter from GRC to Custodian. The GRC states that on November 19, 2007 it sent a request for additional information and to date has not received said information. The GRC requests that the Custodian submit the requested certification.

December 3, 2007

E-mail from Custodian to GRC. The Custodian states that she is confirming the facts of the Complainant's OPRA request with the Police Department. The Custodian states that she will submit her certification once all the facts have been confirmed.

December 14, 2007

Letter from Custodian to GRC. The Custodian certifies that the Police Department informed her that it has provided the Complainant with all records responsive that are releasable under OPRA. The Custodian asserts that any additional information pertaining to cc # 05-124244 and cc # 05-124226 are criminal investigatory files which are in the possession of Internal Affairs and are deemed confidential pursuant to OPRA.

January 10, 2008

Letter from GRC to Custodian. The GRC states that because the Custodian's letter dated December 14, 2007 references a denial of access based on OPRA's criminal investigatory records exemption, the GRC requests that the Custodian provide a document index identifying all records responsive to the Complainant's request that were

⁴ The Complainant does not take issue with said redactions.

maintained on file at the time of the request. The GRC also requests that the Custodian explain why said records fall within OPRA's definition of criminal investigatory records.

January 11, 2008

E-mail from Custodian to GRC. The Custodian states that attached is an e-mail she received from the Police Department regarding this matter. The Custodian asks the GRC to advise if this response is acceptable or if more information is needed.

The attached e-mail is from Corinne Montella, Newark Police Department, Internal Affairs, to the Custodian dated January 10, 2008. In said e-mail, Ms. Montella states that the tape was given to Internal Affairs to download and is part of an Internal Affairs investigation. Ms. Montella states that Internal Affairs investigations are excluded from the definition of a government record.

January 11, 2008

E-mail from GRC to Custodian. The GRC states that it appears as though the Police Department's response is regarding the requested video tape. The GRC states that if said tape is the only record responsive to the Complainant's request that was not provided to the Complainant, the Custodian should complete the requested document index at this time. However, the GRC also states that if there are additional records that were not provided to the Complainant, those records should also be included in the requested document index.

February 20, 2008

E-mail from Custodian to Corinne Montella, Newark Police Department, Internal Affairs and Adolfo Furtado. The Custodian requests a certification indicating that the videotape on file is a true and accurate copy of the videotape taken from the crime scene. The Custodian states that once received, she will forward the certification and the videotape to the Complainant and the GRC.

February 21, 2008⁵

Letter from GRC to Custodian. The GRC re-sends its request for a document index identifying all records responsive to the Complainant's request that were withheld from disclosure.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

⁵ Additional correspondence submitted by the parties; however, said correspondence is not relevant to the adjudication of this complaint.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ... *A government record shall not include* the following information which is deemed to be confidential... *criminal investigatory records...* ‘Criminal investigatory record’ means a record which is not required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding.” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA states that:

“[i]f the 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. The custodian shall sign and date the form and provide the requestor with a copy therefor ...” N.J.S.A. 47:1A-5.g.

Additionally, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request ...* In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request ...*” (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

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.

Further, 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. As also prescribed under 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. Further, the custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.⁶ The custodian's failure to respond in writing to the Complainant's OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, as required by N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., results in a "deemed" denial of the complainant's OPRA request. Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

In this complaint, the Custodian certifies to receiving the Complainant's OPRA request on August 28, 2007 and providing a written response on September 14, 2007, the twelfth (12th) business day following receipt of said request, in which the Custodian informed the Complainant that she has forwarded the request to the Police Department but that said department was experiencing a backlog. The Custodian also certifies mailing the Complainant records responsive to her request on September 26, 2007, the nineteenth (19th) business day following the Custodian's receipt of said request.

Therefore, 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 results in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley, supra.

Although the Custodian provided some records responsive to the Complainant via letter dated September 25, 2007, there are additional records responsive that have not been provided to the Complainant. Via letter dated November 19, 2007, the GRC requested that the Custodian certify as to whether the requested videotape was maintained on file at the time of the Complainant's request and provide the legal basis for the denial of access, if applicable. The GRC requested such again from the Custodian via letter dated December 3, 2007. The Custodian indicated in an e-mail to the GRC on said date that she would provide the requested certification after confirming the facts with the Police Department. Via letter dated December 14, 2007, the Custodian certified that the Police Department informed her that all records responsive were provided to the Complainant with the exception of records falling within OPRA's criminal investigatory records exemption which are in the possession of Internal Affairs.

The GRC then requested a document index from the Custodian on January 10, 2008 in which the Custodian was to identify all records responsive to the Complainant's request and explain why she believed said records fell into the criminal investigatory records exemption under OPRA. On January 11, 2008 the Custodian forwarded an e-mail she received from the Police Department to the GRC in which the Police Department informed the Custodian that the requested videotape is part of an Internal Affairs investigation and is exempt from disclosure. Additionally, via e-mail dated February 20, 2008, the Custodian asked the Police Department to provide a certification

⁶ It is the GRC's position that 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.

indicating that the requested videotape is a true and accurate copy of the tape taken from the crime scene so that the Custodian could provide such to the Complainant and the GRC. The Custodian has failed to provide a document index or any certification from the Police Department to the GRC.

The evidence of record indicates that the requested records are in the custody of the Police Department. Upon receiving the Complainant's OPRA request, the Custodian forwarded said request to the Police Department. Additionally, in response to the GRC's requests for additional information the Custodian sought responses from the Police Department. Although the burden of proving a lawful denial of access rests upon the Custodian pursuant to N.J.S.A. 47:1A-6, a Custodian can only provide as much information of which he/she has knowledge. In this matter, the Police Department's responses appear to be inadequate in providing the Custodian with the proper information as requested by the GRC and required for the complete adjudication of this complaint.

Therefore, because the Custodian has not yet provided the GRC with a detailed document index identifying all records responsive to the Complainant's request that were not provided to the Complainant on the basis that said records are exempt as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1, (or a certification that the videotape is the only such record) and because the requested information must come from the Police Department, the Council orders the Police Department to provide the document index to the GRC.

Whether the Custodian's delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Police Department's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. 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 results in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Custodian has not yet provided the GRC with a detailed document index identifying all records responsive to the Complainant's request that were not provided to the Complainant on the basis that said records are exempt as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1, (or a certification that the videotape is the only such record) and because the requested information must come from the Police Department, the

Council orders the Police Department to provide the document index to the GRC.

3. **The Police Department shall comply with item # 2 above within five (5) business days from receipt of the Council's Interim Order. Such document index must include a certification pursuant to NJ Court Rule 1:4-4.**

Prepared By:

Dara Lownie
Senior Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

June 18, 2008