



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

FINAL DECISION

March 25, 2014 Government Records Council Meeting

Patricia Elaine Cheatham  
Complainant

Complaint No. 2013-262

v.

Borough of Fanwood Police Department (Union)  
Custodian of Record

At the March 25, 2014 public meeting, the Government Records Council (“Council”) considered the March 18, 2014 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 an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian lawfully denied access to the Complainant’s request for the police report regarding the May 2, 2005 incident because police incident reports, and related documents that summarize information contained in such reports, have been found to be criminal investigatory records exempt from disclosure under OPRA. See N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; Feggans v. City of Newark (Essex), GRC Complaint No. 2007-238 (October 2008); Morgano v. Essex County Prosecutor’s Office, GRC Complaint No. 2007-156 (February 2008); Nance v. Scotch Plains Township Police Department, GRC Complaint No. 2003-125 (January 2005).
3. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), he provided the Complainant with all records she contested in her denial of access complaint, even when disclosure was not required because police incident reports are considered exempt under N.J.S.A. 47:1A-1.1. 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 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 March, 2014

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 27, 2014**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
March 25, 2014 Council Meeting**

**Patricia Elaine Cheatham<sup>1</sup>  
Complainant**

**GRC Complaint No. 2013-262**

v.

**Borough of Fanwood Police Department (Union)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** The Complainant seeks a copy of:

1. "All complaints including Police Reports called in by the Markowitzes. Dates Requested 1998 thru the present 2005 . . .
2. May 2, 2005 Complaint by [O]fficer Greco
3. June 2, 2005 Call-Complaint [O]fficer Espinosa"

**Custodian of Record:** Chief Richard Trigo

**Request Received by Custodian:** June 6, 2005

**Response Made by Custodian:** June 16, 2005

**GRC Complaint Received:** September 13, 2013

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

**Request and Response:**

On June 6, 2005, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On June 16, 2005, eight (8) business days later, the Custodian responded in writing denying the Complainant's request based on OPRA's exemptions for criminal investigatory and victim records. *See N.J.S.A. 47:1A-1.1.*

**Denial of Access Complaint:**

On September 13, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserts that she was denied access to the police report regarding the May 2, 2005 allegation of "a Barking Dog where a summons was issued" because the report "was considered criminal investigatory records and victim records."

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

<sup>2</sup> The Custodian is represented by Dennis Estes, Esq., Woodbridge, NJ.

<sup>3</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

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The Complainant states that on May 2, 2005, a police officer issued her a summons based on allegations that her dog was barking. The Complainant further states that on June 6, 2005, she faxed a request for “the May 2, 2005 Complaint (Police Report)” to the Custodian so that she could prepare for her June 16, 2005 court appearance. The Complainant emphasizes that she received the Custodian’s reply denying her request for a copy of the May 2, 2005 police report on June 16, 2005, and that she has otherwise received no documents responsive to her request. The Complainant contends that the exemptions cited by the Custodian do not apply to the present case.

#### Statement of Information:

On September 27, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that he is unsure of the date the Complainant’s original OPRA request was received, but that he responded to the request on June 16, 2005. The Custodian also certifies that the Borough Attorney and then-current Police Chief instructed him to deny the request based on N.J.S.A. 47:1A-1.1. The Custodian states that the request for “all complaints called in by the Markowitz family” was denied based on OPRA’s exemptions for victims’ and criminal investigatory records, but that the Complainant was advised to make a request for the “barking dog complaint” and related documents.

The Custodian further states that the Complainant did not request information again until she called the Fanwood Police Department in August, 2013 requesting a copy of “the barking dog complaint and the records associated with the complaint.” The Custodian certifies that records responsive to that request were sent to the Complainant by certified mail.

### 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. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Here, the Complainant submitted her OPRA request to the Custodian on June 6, 2005. On June 16, 2005, eight (8) business days later, the Custodian responded in writing denying her request. While the Custodian properly made a written response to the OPRA request, he replied outside of the statutorily mandated seven (7) business day period.

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<sup>4</sup> A custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

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Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request. *See* N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Kelley, GRC 2007-11.

### **Unlawful Denial of Access**

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

OPRA also states that "[a] government record shall not include the following . . . *criminal investigatory records* . . . ." Id. (emphasis added). 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 was examined by the GRC in Janeczko v. New Jersey 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 include[] information that is part and parcel of an investigation, confirmed and unconfirmed." Id.

In Nance v. Scotch Plains Township Police Department, GRC Complaint No. 2003-125 (January 2005), the Council determined that police incident reports are criminal investigatory records exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. *See also* Morgano v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2007-156 (February 2008). Further, in Feggans v. City of Newark (Essex), GRC Complaint No. 2007-238 (October 2008), the custodian provided the complainant with copies of police incident reports but not of incident summaries and results sheets. The Council found that the custodian lawfully denied access because, as the incident reports are exempt from disclosure and the incident summaries and results sheets summarized information contained in the reports, these latter types of documents should also be considered exempt criminal investigatory records under N.J.S.A. 47:1A-1.1. Id.

Here, the Complainant contests the Custodian's initial failure to provide her with the desired "Police Report on the May 2, 2005 allegation of a Barking Dog" that resulted in a summons being issued. However, police incident reports and related documents that summarize information contained in such reports have been found to be criminal investigatory records exempt from disclosure under OPRA. *See* N.J.S.A. 47:1A-1.1; Feggans, GRC 2007-238; Morgano, 2007-156; Nance, GRC 2003-125.

Notwithstanding this, and similar to the underlying facts in Feggans, the Custodian certified that he provided the requested reports to the Complainant after the filing of this complaint. The Complainant, in turn, confirmed her receipt of the “Initial General Complaint Report” stemming from the May 2, 2005 incident and the two (2) incident reports prepared by the responding officers by providing copies to the GRC.

Therefore, the Custodian lawfully denied access to the Complainant’s request for the police report regarding the May 2, 2005 incident because police incident reports, and related documents that summarize information contained in such reports, have been found to be criminal investigatory records exempt from disclosure under OPRA. *See* N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; Feggans, GRC 2007-238; Morgano, 2007-156; Nance, GRC 2003-125.

### **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 that “[i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . . .” N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), he provided the Complainant with all records she contested in her denial of access complaint, even when disclosure was not required because police incident reports are considered exempt under N.J.S.A. 47:1A-1.1. 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 unreasonable denial of access under the totality of the circumstances.

## Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian lawfully denied access to the Complainant's request for the police report regarding the May 2, 2005 incident because police incident reports, and related documents that summarize information contained in such reports, have been found to be criminal investigatory records exempt from disclosure under OPRA. *See* N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; Feggans v. City of Newark (Essex), GRC Complaint No. 2007-238 (October 2008); Morgano v. Essex County Prosecutor's Office, GRC Complaint No. 2007-156 (February 2008); Nance v. Scotch Plains Township Police Department, GRC Complaint No. 2003-125 (January 2005).
3. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), he provided the Complainant with all records she contested in her denial of access complaint, even when disclosure was not required because police incident reports are considered exempt under N.J.S.A. 47:1A-1.1. 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 unreasonable denial of access under the totality of the circumstances.

Prepared By: Robert T. Sharkey, Esq.  
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Senior Counsel

March 18, 2014