



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
PO Box 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Commissioner

**FINAL DECISION**

**January 31, 2017 Government Records Council Meeting**

Robert Kovacs  
Complainant

Complaint No. 2015-218

v.

Town of Kearny Police Department (Hudson)  
Custodian of Record

At the January 31, 2017 public meeting, the Government Records Council (“Council”) considered the January 24, 2017 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 lawfully denied access to the responsive records, which comprised of incident and supplementary reports regarding a juvenile. N.J.S.A. 47:1A-9(a); N.J.S.A. 2A:4A-60; N.J. Court Rules, 1969 R. 5:19-2(b); Rivera v. Cliffside Park Police Dep’t (Bergen), GRC Complaint No. 2010-275 (Interim Order dated April 25, 2012). Further, because it is now clear that the records responsive to the Complainant’s OPRA request are exempt from disclosure, no *in camera* examination is required. Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (January 2013).
2. Neither the Custodian nor the Kearny Police Department Custodian responded to the Complainant’s OPRA request within the statutory time frame, thus resulting in a “deemed” denial of access. However, notwithstanding the Town’s patent hesitance to identify generically the records responsive to the Complainant’s OPRA request, the Custodian’s ultimate response negated the need for an *in camera* review and demonstrated that the Custodian lawfully denied access to the responsive records. Further, the evidence of record does not indicate that either the Custodian’s or Kearny Police Department Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the neither Custodians’ actions did 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 31<sup>st</sup> Day of January, 2017

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: February 3, 2017**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director  
January 31, 2017 Council Meeting**

**Robert Kovacs<sup>1</sup>  
Complainant**

**GRC Complaint No. 2015-218**

v.

**Town of Kearny Police Department (Hudson)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Arrest records, incident reports, statements, or any other reports or documents pertaining to, or containing the names of, the following individuals: 1) Anthony Mugavero, 2) Kathleen or Kathy Mugavero, and 3) Anthony Mugavero, Jr.

**Custodian of Record:** Patricia Carpenter  
**Request Received by Custodian:** Unknown<sup>3</sup>  
**Response Made by Custodian:** None  
**GRC Complaint Received:** July 20, 2015

**Records Submitted for *In Camera* Examination:** N/A

**Background**

April 26, 2016 Council Meeting:

At its April 26, 2016 public meeting, the Council considered the March 22, 2016 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 did not bear her burden of proof that either she or the police records custodian timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's or the Police Department's 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

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

<sup>2</sup> Represented by Gregory J. Castano, Esq., Castano Quigley, LLC (Fairfield NJ).

<sup>3</sup> The Complainant sent the request to the Police Department's Records Custodian. The town's ordinance designates the police chief as the "sub custodian" of police records for OPRA requests. Kearny Code 2-87(h)(1). The Municipal Clerk, who responded to the Complaint as the Town's Custodian, was unable to state when exactly the Police Department received the request.

mandated seven (7) business days, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

2. With the exception of one questionable record, the Custodian here did not unlawfully deny access to the Complainant’s OPRA request for arrest records, incident records, statements, and other records concerning three individuals named by the Complainant because she responded that there were no legally disclosable records and subsequently certified to same in the Statement of Information. Additionally, there is no competent, credible evidence in the record to refute the Custodian’s certification. Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The Custodian did not provide the GRC with adequate information as to the type or nature of one “legally disclosable” record. Therefore, the GRC must conduct an *in camera* review to determine whether or not the Custodian unlawfully denied access by withholding the record that she identified as part of the Police Department’s search. Paff v. NJ Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9.
4. **The Custodian must deliver<sup>4</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 3 above), a document or redaction index identifying the document or the portion of the document upon which the denial was based<sup>5</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>6</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council’s Interim Order.**
5. 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 Custodian’s compliance with the Council’s Interim Order.

#### Procedural History:

On April 28, 2016, the Council distributed its Interim Order to all parties on. On May 4, 2016, the Custodian responded to the Council’s Interim Order.

The Custodian stated that Custodian’s Counsel advised her that providing a copy of the juvenile record to the GRC for an *in camera* review would result in a violation of New Jersey Court Rules 1969, R. 5:19-2(b)(providing that any “application for such records” shall be made

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<sup>4</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

<sup>5</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>6</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

by motion of the court). The Custodian stated that should the GRC make a motion to the appropriate court, the Town of Kearney (“Town”) would not oppose such a motion. Further, the Custodian stated that she would abide by whatever order the court might issue. *See Winberry v. Salisbury*, 5 N.J. 240, 255 (1950)(*certif. denied* 340 U.S. 877 (1950)).

On January 11, 2017, the GRC sought additional information from the Custodian. Specifically, in reviewing the complaint file, the GRC noticed that neither the Custodian nor the individual who handled the OPRA request within Kearny Police Department (“KPD”) identified the record to which she denied access. Based on the foregoing, the GRC requested a legal certification, pursuant to N.J. Court Rule 1:4-4, in response to the following questions:

1. What is the exact record identified, which the Town believes is exempt from disclosure per N.J.S.A. 47:1A-9, N.J.S.A. 2A:4A-60, and N.J. Court Rules, 1969 R. 5:19-2(b)?

The GRC requested that the Custodian provide the requested legal certification by close of business on January 17, 2017.

On January 13, 2017, the Custodian e-mailed the GRC, noting that she submitted her compliance on May 4, 2016, in response to the Council’s Order. On January 18, 2017, the Custodian responded to the GRC’s request for additional information. However, her certification simply recapitulated the facts of the complaint and neglected to answer the GRC’s question.

On January 20, 2017, the GRC e-mailed the Custodian, advising that it had not received a sufficient response to its request for additional information within the prescribed time frame. The GRC stated that, notwithstanding that the Custodian had not requested an extension of time, it would allow for a final deadline of January 23, 2017. The GRC noted that should the Custodian not submit an amended certification, it would proceed with adjudicating this complaint without the requested additional information.

On the same day, the Custodian responded to the GRC’s request for additional information. Therein, the Custodian certified that the “document” referenced in the SOI consisted of eleven (11) incident and supplementary reports. The Custodian additionally certified that the reports all related to the same juvenile. The Custodian affirmed that the matter was referred to the Superior Court, Chancery Division, and Family Part in Hudson County, where it was disposed. The Custodian also apologized for any delay in providing the additional information; however, she stated her belief that she had adequately responded to the complaint from its outset based on R. 5:19-2(b).

## **Analysis**

### **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. N.J.S.A. 47:1A-6.

Further, OPRA provides that its provisions “shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to any other . . . regulation promulgated under the authority of *any statute* or Executive Order of the Governor; Executive Order of the Governor, [or] *Rules of Court* . . .” N.J.S.A. 47:1A-9(a)(emphasis added).

R. 5:19-2(b) provides that:

Social, medical, psychological, legal and other records of the Court, Probation Division and law enforcement agencies pertaining to juveniles charged as delinquents shall be strictly safeguarded from public inspection and shall be made available only pursuant to N.J.S.A. 2A:4A-60 to -62. Any application for such records shall be made by motion to the court.

Id.

The provision referenced in the court rule contains the exact same language but includes several exceptions for law enforcement, parents or guardians, the courts, *etc.* N.J.S.A. 2A:4A-60. The GRC previously applied the statutory exemption to use of force reports related to juveniles in Rivera v. Cliffside Park Police Dep’t (Bergen), GRC Complaint No. 2010-275 (Interim Order dated April 25, 2012) at 10-11.

Additionally, the Council previously reviewed a complaint where it initially ordered an *in camera* review but thereafter did not conduct one based on the submission of additional information. In Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (January 2013), the custodian certified in her response to the interim order that the responsive records were incident reports. The Council held that “an *in camera* review is no longer necessary because the Custodian certified that the records were part of an on-going criminal investigation and that she was not aware of any statutes, regulations or Attorney General guidelines requiring that the reports be made, maintained or kept on file.” Id. at 11.

Here, the Council initially ordered an *in camera* review of the “document” identified as responsive in the SOI because the Custodian failed to provide detailed information as part of her document index. The GRC noted that, absent that information, it was unable to determine whether the Custodian lawfully denied access to the record. Had the Custodian simply identified the record in general terms from the outset, the GRC would not have requested the *in camera* review. After receiving the Council’s Interim Order on April 28, 2016, the Custodian responded to same. Therein, the Custodian stated the Custodian’s Counsel advised her that if the Town complied with the Order, it would be in violation of R. 5:19-2(b). The Custodian stated that she was also advised that the GRC would need to petition the court to compel the Town to comply. Winberry v. Salisbury, 5 N.J. 240, 255 (1950)(*cert. denied* 340 U.S. 877 (1950)). In an effort to ascertain the type of record to which the Custodian denied access, the GRC sent a request for additional information on January 11, 2017. Notwithstanding the Town’s patent hesitance to

provide more detailed, albeit very generic, information about the “document,” the Custodian finally certified on January 20, 2017, that eleven (11) responsive records, consisting of incident and supplementary reports, existed.

Similar to the Council’s decision in Michalak, GRC 2010-220, the Council should decline to conduct an *in camera* review because the Custodian’s recent certification supports that the records are exempt from disclosure. Specifically, the Custodian certified that the records at issue were incident and supplemental reports, which the GRC has typically found are exempt as criminal investigatory records. Id. Further, the Custodian certified that the records related to a juvenile issue sent to and disposed at the Chancery Division, Family Part. Based on the Custodian’s certification, the GRC is satisfied that the records are exempt under R. 5:19-2(b), and by extension N.J.S.A. 2A:4A-60. Such a holding is also consistent with the Council’s decision in Rivera, GRC 2010-275.

Accordingly, the Custodian lawfully denied access to the responsive records, which comprised of incident and supplementary reports regarding a juvenile. N.J.S.A. 47:1A-9(a); N.J.S.A. 2A:4A-60; R. 5:19-2(b); Rivera, GRC 2010-275. Further, because it is now clear that the records responsive to the Complainant’s OPRA request are exempt from disclosure, no *in camera* examination is required. Michalak, GRC 2010-220.

### **Knowing & Willful**

OPRA states that “[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . .” N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states “[i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . .” N.J.S.A. 47:1A-7(e).

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

Here, neither the Custodian nor the KPD Custodian responded to the Complainant's OPRA request within the statutory time frame, thus resulting in a "deemed" denial of access. However, notwithstanding the Town's patent hesitance to identify generically the records responsive to the Complainant's OPRA request, the Custodian's ultimate response negated the need for an *in camera* review and demonstrated that the Custodian lawfully denied access to the responsive records. Further, the evidence of record does not indicate that either the Custodian's or KPD Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the neither Custodians' actions did 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 lawfully denied access to the responsive records, which comprised of incident and supplementary reports regarding a juvenile. N.J.S.A. 47:1A-9(a); N.J.S.A. 2A:4A-60; N.J. Court Rules, 1969 R. 5:19-2(b); Rivera v. Cliffside Park Police Dep't (Bergen), GRC Complaint No. 2010-275 (Interim Order dated April 25, 2012). Further, because it is now clear that the records responsive to the Complainant's OPRA request are exempt from disclosure, no *in camera* examination is required. Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (January 2013).
2. Neither the Custodian nor the Kearny Police Department Custodian responded to the Complainant's OPRA request within the statutory time frame, thus resulting in a "deemed" denial of access. However, notwithstanding the Town's patent hesitance to identify generically the records responsive to the Complainant's OPRA request, the Custodian's ultimate response negated the need for an *in camera* review and demonstrated that the Custodian lawfully denied access to the responsive records. Further, the evidence of record does not indicate that either the Custodian's or Kearny Police Department Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the neither Custodians' actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso  
Communications Specialist/Resource Manager

January 24, 2017





State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
PO Box 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Commissioner

**INTERIM ORDER**

**April 26, 2016 Government Records Council Meeting**

Robert Kovacs  
Complainant

Complaint No. 2015-218

v.

Town of Kearny Police Department (Hudson)  
Custodian of Record

At the April 26, 2016 public meeting, the Government Records Council (“Council”) considered the March 22, 2016 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 either she or the police records custodian timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s or the Police Department’s 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 pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.
2. With the exception of one questionable record, the Custodian here did not unlawfully deny access to the Complainant’s OPRA request for arrest records, incident records, statements, and other records concerning three individuals named by the Complainant because she responded that there were no legally disclosable records and subsequently certified to same in the SOI. Additionally, there is no competent, credible evidence in the record to refute the Custodian’s certification. Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The Custodian did not provide the GRC with adequate information as to the type or nature of one “legally disclosable” record. Therefore, the GRC must conduct an *in camera* review to determine whether or not the Custodian unlawfully denied access by withholding the record that she identified as part of the Police Department’s search. Paff v. NJ Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9.



4. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 3 above), a document or redaction index identifying the document or the portion of the document upon which the denial was based<sup>2</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>3</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
5. 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 Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 26<sup>th</sup> Day of April, 2016

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: April 28, 2016**

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<sup>1</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

<sup>2</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>3</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
April 26, 2016 Council Meeting**

**Robert Kovacs<sup>1</sup>  
Complainant**

**GRC Complaint No. 2015-218**

v.

**Town of Kearny Police Department (Hudson)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Arrest records, incident reports, statements, or any other reports or documents pertaining to, or containing the names of, the following individuals: 1) Anthony Mugavero, 2) Kathleen or Kathy Mugavero, and 3) Anthony Mugavero, Jr.

**Custodian of Record:** Patricia Carpenter  
**Request Received by Custodian:** unknown<sup>3</sup>  
**Response Made by Custodian:** none  
**GRC Complaint Received:** July 20, 2015

**Background<sup>4</sup>**

**Request and Response:**

On June 12, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request, seeking the above-mentioned records. Neither the police department nor the Town of Kearny (“Town”) responded.

**Denial of Access Complaint:**

On July 20, 2015 the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the lack of response demonstrates that he is being discriminated against because he is an inmate in a County Jail.

**Statement of Information:**

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

<sup>2</sup> Represented by Gregory J. Castano, Esq., Castano Quigley, LLC (Fairfield NJ).

<sup>3</sup> The Complainant sent the request to the Police Department’s Records Custodian. The town’s ordinance designates the police chief as the “subcustodian” of police records for OPRA requests. Kearny Code 2-87.h.1. The Municipal Clerk, who responded to the Complaint as the Town’s Custodian, was unable to state when exactly the Police Department received the request.

<sup>4</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.

On August 11, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she did not receive the OPRA request until July 29, 2015, when she was informed that the Complaint had been filed. She certified that the request was made at the time when the “long time records officer . . . was retiring and his successor was becoming accustomed to his new duties.” She contended that the request for records was defective, because it did not “circumscribe the time line by a reasonable period.” Nevertheless, the Kearny Police Department advised her that a search of their records did not yield any “legally disclosable” records, except for one, which “mention[s] . . . a juvenile with a like name . . . .” She argued that she could not provide that name, as Court Rule 5:19-2 requires any individual seeking the disclosure of juvenile records to apply for same by motion to court. *See N.J.S.A. 47:1A-9*. The Custodian further commented that the Complainant had directed his request for the wrong forum.

### **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)*. 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).

Although the Custodian stated that she did not receive the request until after the Complaint was filed, the request appears to have been properly sent by the Complainant to the Police Department’s Records Custodian (or “subcustodian,” as designated by the Town’s Ordinance). The GRC notes that the Custodian does not contend that the request was not received. Instead, she sought to excuse the failure to respond by stating that the Police Department’s new records custodian was not familiar with his duties.

Therefore, the Custodian did not bear her burden of proof that either she or the police records custodian timely responded to the Complainant’s OPRA request. *N.J.S.A. 47:1A-6*. As such, the Custodian’s or the Police Department’s 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 pursuant to *N.J.S.A. 47:1A-5(g)*, *N.J.S.A. 47:1A-5(i)*, and *Kelley*, GRC 2007-11.

#### **Validity of Request**

The Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records “readily accessible for inspection, copying, or examination.” N.J.S.A. 47:1A-1.*

MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005). (emphasis added).

The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

Id. at 549 (emphasis added).

The Court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt . . . . In short, OPRA does not countenance open-ended searches of an agency's files.” Id. at 549 (emphasis added). Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005);<sup>5</sup> NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Additionally, in Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012), the Court held that the defendant “performed a search and was able to locate records responsive . . . which . . . belied any assertion that the request was lacking in specificity or was overbroad.” Id. at 177. *See also* Gannett v. Cnty. of Middlesex, 379 N.J. Super. 205 (App. Div. 2005)(holding that “[s]uch a voluntary disclosure of most of the documents sought . . . constituted a waiver of whatever right the County may have had to deny Gannett's entire OPRA request on the ground that it was improper.” Id. at 213).

Generally, in situations where a request was overly broad on its face, but the custodian was able to locate records, the Council has followed Burke in determining that the request contained sufficient information for record identification. *See* Bond v. Borough of Washington (Warren), GRC Complaint No. 2009-324 (Interim Order dated March 29, 2011); Verry v. Borough of S. Bound Brook (Somerset), GRC Complaint No. 2010-302 (Interim Order dated

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<sup>5</sup> Affirming Bent v. Stafford Police Dep’t, GRC Case No. 2004-78 (October 2004).

January 31, 2012). However, there have been instances where, notwithstanding the custodian's ability to locate certain records, the Council has determined that the request was nonetheless invalid. *See Ciszewski v. Newton Police Dep't (Sussex)*, GRC Complaint No. 2013-90 (October 2013) at 4-5. *See also Gartner v. Borough of Middlesex (Middlesex)*, GRC Complaint No. 2014-203 (February 2015).

Here, the Complainant's request sought any and all arrest records, incident reports,<sup>6</sup> statements, or any other reports or documents pertaining to, or containing the names of, three listed individuals. Despite the Custodian's contention that the Complainant did not "circumscribe the search time," the Custodian did conduct a records search. However, the Custodian certified that the search yielded no responsive records which she could disclose. 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 that no evidence existed in the record to refute the custodian's certification, there was no unlawful denial of access to the requested records.

With the exception of one questionable record, the Custodian here did not unlawfully deny access to the Complainant's OPRA request for arrest records, incident records, statements, and other records concerning three individuals named by the Complainant because she responded that there were no legally disclosable records and subsequently certified to same in the SOI. Additionally, there is no competent, credible evidence in the record to refute the Custodian's certification. *Pusterhofer*, GRC 2005-49

However, the Custodian did identify a record found during her search, which she did not disclose to the Complainant, one which she certified "mention[s]" the name of a juvenile with a similar name to one of the three listed individuals. The Custodian asserted that disclosure of the juvenile's name is prohibited by New Jersey Court Rule 5:19-2, as made applicable to OPRA under *N.J.S.A. 47:1A-9*. However, the Custodian provided the GRC with no other information, such as the type of record or a description of the nature and extent of the document's "mention" of the juvenile's name. Absent that information, the GRC is unable to determine whether or not the Custodian lawfully denied access to the requested record.

In *Paff v. NJ Dep't of Labor, Bd. of Review*, 379 *N.J. Super.* 346 (App. Div. 2005), the complainant appealed a final decision of the Council<sup>7</sup> that dismissed the complaint after accepting the custodian's legal conclusion for the denial of access without further review. The Court stated that "OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records . . . . When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers." *Id.* The Court stated that:

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<sup>6</sup> Incident reports are exempt from disclosure as criminal investigatory records. *Nance v. Scotch Plains Twp. Police Dep't*, GRC Complaint No. 2003-125 (January 2005). However, arrest records are subject to disclosure. *Morgano v. Essex Cnty. Prosecutor's Office*, GRC Complaint No. 2007-156 (February 2008).

<sup>7</sup> *Paff v. N.J. Dep't of Labor, Bd. of Review*, GRC Complaint No. 2003-128 (October 2005).

The statute also contemplates the GRC's *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the "Open Public Meetings Act," N.J.S.A. 10:4-6 to -21, it also provides that the GRC "may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed." N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

Id. at 355.

Further, the Court stated that:

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal... There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC's obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

Id.

In the present case, the Custodian did not provide the GRC with adequate information as to the type or nature of one "legally disclosable" record. Therefore, the GRC must conduct an *in camera* review to determine whether or not the Custodian unlawfully denied access by withholding the record that she identified as part of the Police Department's search. Paff, 379 N.J. Super. 346 N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9.

### **Knowing & Willful**

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 Custodian's compliance with the Council's Interim Order.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find:

1. The Custodian did not bear her burden of proof that either she or the police records custodian timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's or the Police Department's 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 pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

2. With the exception of one questionable record, the Custodian here did not unlawfully deny access to the Complainant's OPRA request for arrest records, incident records, statements, and other records concerning three individuals named by the Complainant because she responded that there were no legally disclosable records and subsequently certified to same in the SOI. Additionally, there is no competent, credible evidence in the record to refute the Custodian's certification. Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The Custodian did not provide the GRC with adequate information as to the type or nature of one "legally disclosable" record. Therefore, the GRC must conduct an *in camera* review to determine whether or not the Custodian unlawfully denied access by withholding the record that she identified as part of the Police Department's search. Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9.
4. **The Custodian must deliver<sup>8</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 3 above), a document or redaction index identifying the document or the portion of the document upon which the denial was based<sup>9</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>10</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
5. 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 Custodian's compliance with the Council's Interim Order.

Prepared By: Ernest Bongiovanni  
Staff Attorney

March 22, 2016<sup>11</sup>

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<sup>8</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

<sup>9</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>10</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>11</sup> This complaint was prepared for adjudication at the Council's February 23, 2016 meeting, but was tabled based on legal advice. This complaint was also prepared for adjudication at the Council's March 29, 2016 meeting; however, the complaint could not be adjudicated due to lack of a quorum.