



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Commissioner

**FINAL DECISION**

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

Darryl Davis  
Complainant

Complaint No. 2015-366

v.

NJ Department of Corrections  
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 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 pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.
2. The Custodian has borne his burden of proof that he lawfully denied access to the requested records, because he certified that no responsive records were located, and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. N.J.S.A. 47:1A- 6; Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. Although the Custodian failed to respond to the Complainant’s request for records within the statutorily mandated seven (7) business days, which resulted in in a “deemed” denial of said request, he argued that no records responsive to the request existed and that an unlawful denial of access did not occur. Additionally, the Custodian advised that OPRA Liaison Ms. Maloney had been under the mistaken impression that the request had been closed. He averred that, upon realization of the deficiency of the response, his office and Ms. Maloney took immediate steps to rectify the situation and ensured that a response was sent to the Complainant on the same day the Department received his follow-up inquiry. Additionally, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian’s 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**

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

**Darryl Davis<sup>1</sup>  
Complainant**

**GRC Complaint No. 2015-366**

v.

**NJ Department of Corrections<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Any and all records regarding an incident occurring July 17, 2015, relating to Resident Darryl Davis being “in possession of other residents[sic] information,” including but not limited to seizure of contraband reports, SID administration investigation reports, use of force reports, and resident contraband seizure reports.

**Custodian of Record:** John Falvey

**Request Received by Custodian:** August 25, 2015; October 29, 2015

**Response Made by Custodian:** October 29, 2015

**GRC Complaint Received:** November 18, 2015

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

**Request and Response:**

On August 14, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On October 20, 2015, he wrote to the Custodian seeking a status update as to his request. On October 29, 2015, OPRA Liaison Deborah Maloney responded in writing, stating that no responsive reports were located.

**Denial of Access Complaint:**

On November 18, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he believes the requested records do exist because he was “made aware” that reports were generated by a Special Investigation Division (“SID”) investigation. He further alleged that two other Special Treatment Unit (“STU”) residents received “the same or similar” records from the Custodian in response to another OPRA request. The Complainant made no additional legal arguments.

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

<sup>2</sup> No legal representation listed on record.

<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.

## Statement of Information:

On December 16, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that his office received the Complainant’s OPRA request on August 25, 2015. He noted that the request related to a July 17, 2015 incident at the Special Treatment Unit (“STU”) in Woodbridge, which is jointly run by the Department of Corrections and the Department of Human Services. He further noted that Corrections Staff at the Adult Diagnostic and Treatment Center (“ADTC”) provide security related services for STU and therefore his office referred the request to OPRA Liaison Deborah Maloney at ADTC. He certified that any responsive records would be located with ADTC staff. He certified that he then received a letter from the Complainant on October 29, 2015, seeking a status update. The Custodian averred that his office immediately contacted Ms. Maloney, who advised that she checked with Custody Staff and the SID and was informed that no records matching the request were found. She “thought the request had been closed” and noted that she would immediately send a response.

The Custodian certified that Ms. Maloney responded in writing on October 29, 2015, advising the Complainant that no responsive records were located. The Custodian conceded a deemed denial in this case, admitting that the Complainant was not properly notified of the status of his request within seven business days. He argued that while there was a deemed denial in this case, the GRC had previously held that it is a proper denial of access where there are no records responsive to a request. *See Pusterhofer v. NJ Dep’t of Educ.*, GRC Complaint No. 2005-49 (July 2005). He additionally argued that the elements of a knowing and willful OPRA violation were not present because: (i) there were no records the Department sought to withhold; (ii) Ms. Maloney expressed that she thought the request had been closed; (iii) the Custodian’s office took immediate action to rectify the situation upon learning of the deficiency of the response; and (iv) a response was sent the same day the Department received the Complainant’s follow-up inquiry.

With respect to the Complainant’s allegation that fellow STU residents received responses and records, the Custodian certified that he reviewed the responsive records for those requests and found that none of them referred to the Complainant. Nor were they responsive to his specific OPRA request.

## 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

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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.

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).

In the instant matter, the Custodian certified that, after receipt of the Complainant’s request on August 25, 2015, his office forwarded the request to staff at the ADTC. He acknowledged that no response was made until he received the Complainant’s status update letter on October 29, 2015. The Custodian certified that upon receipt of the Complainant’s follow-up letter, he contacted OPRA Liaison Ms. Maloney at ADTC, who responded that same day, advising that no responsive records were located.

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 pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and 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.

The Council has previously found that, in light of a custodian’s certification that no records responsive to the request exist, and where no evidence exists in the record to refute the custodian’s certification, no unlawful denial of access occurred. See Pusterhofer, GRC 2005-49 (July 2005). Here, the Custodian certified that upon contacting Ms. Maloney on October 29, 2015, she advised that, after checking with Custody Staff and the Special Investigations Division, no records matching the request were found. In response to the Complainant’s allegations in his Denial of Complaint, that two other STU residents received “the same or similar records” from the Custodian, the Custodian certified that he had reviewed the responsive records for those requests and found that they did not refer to the Complainant. Nor were they responsive to his specific OPRA request.

Therefore, the Custodian has borne his burden of proof that he lawfully denied access to the requested records, because he certified that no responsive records were located, and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. N.J.S.A. 47:1A- 6; Pusterhofer, GRC 2005-49.

### **Knowing & Willful**

OPRA states that “[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of

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

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (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, 107 (App. Div. 1996)).

Here, although the Custodian failed to respond to the Complainant’s request for records within the statutorily mandated seven (7) business days, which resulted in a “deemed” denial of said request, he argued that no records responsive to the request existed and that an unlawful denial of access did not occur. Additionally, the Custodian advised that OPRA Liaison Ms. Maloney had been under the mistaken impression that the request had been closed. He averred that, upon realization of the deficiency of the response, his office and Ms. Maloney took immediate steps to rectify the situation and ensured that a response was sent to the Complainant on the same day the Department received his follow-up inquiry. Additionally, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian’s 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 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 pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

2. The Custodian has borne his burden of proof that he lawfully denied access to the requested records, because he certified that no responsive records were located, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. N.J.S.A. 47:1A- 6; Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
3. Although the Custodian failed to respond to the Complainant's request for records within the statutorily mandated seven (7) business days, which resulted in in a "deemed" denial of said request, he argued that no records responsive to the request existed and that an unlawful denial of access did not occur. Additionally, the Custodian advised that OPRA Liaison Ms. Maloney had been under the mistaken impression that the request had been closed. He averred that, upon realization of the deficiency of the response, his office and Ms. Maloney took immediate steps to rectify the situation and ensured that a response was sent to the Complainant on the same day the Department received his follow-up inquiry. Additionally, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's 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: Husna Kazmir  
Staff Attorney

January 24, 2017