



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**

**September 26, 2017 Government Records Council Meeting**

Scott M. Halliwell and  
Anthony G. Pennant  
Complainant

Complaint No. 2016-130

v.

Borough of Brooklawn (Camden)  
Custodian of Record

At the September 26, 2017 public meeting, the Government Records Council (“Council”) considered the September 19, 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 the Custodian has borne his burden of proof that he lawfully denied access to the Complainants’ OPRA request because he certified in the SOI, and the record reflects, that no responsive documents exist. N.J.S.A. 47:1A-6; *see Pusterhofer v. NJ Dep’t of Educ.*, GRC Complaint No. 2005-49 (July 2005).

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 26<sup>th</sup> Day of September, 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: September 29, 2017**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
September 26, 2017 Council Meeting**

**Scott M. Halliwell and  
Anthony G. Pennant<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-130**

v.

**Borough of Brooklawn (Camden)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** An electronic copy via e-mail of the letter explaining the outcome of the Internal Affairs investigation launched by the Complainants on February 3, 2015. Specifically, the Complainants seek letters regarding the conduct of Sergeants Hirst and Ellis, stemming from their actions in two (2) hit and run incidents.

**Custodian of Record:** Ryan Giles

**Request Received by Custodian:** April 14, 2016

**Response Made by Custodian:** April 22, 2016

**GRC Complaint Received:** April 22, 2016

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

**Request and Response:**

On April 14, 2016, the Complainants submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.<sup>4</sup> On April 22, 2016, the Custodian responded in writing, stating that no responsive records exist.

**Denial of Access Complaint:**

On April 22, 2017, the Complainants filed a Denial of Access Complaint with the

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

<sup>2</sup> Represented by Timothy J. Higgins, Esq., of Law Offices of Timothy J. Higgins (Cherry Hill, 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.

<sup>4</sup> The Complainants and Custodian exchanged additional e-mails on April 14, 2016. The GRC has reviewed said e-mails and determined that they are unrelated to the OPRA request at issue in this complaint. Specifically, Complainants sent an e-mail to the Custodian referencing an April 4, 2016 communication. Thereafter, the Custodian responded to that communication. Although he does appear to refer to the subject OPRA request, the reference is a rhetorical statement of his assumption on the outcome of future OPRA requests and not a promise to provide records in response to this request.

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Government Records Council (“GRC”).<sup>5</sup> The Complainants disputed the Custodian’s response that no records exist. The Complainants noted that the Custodian previously provided four (4) different versions of “these letters” (in response to a prior OPRA request).

Statement of Information:

On July 6, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainants’ OPRA request on April 14, 2016. The Custodian affirmed that he searched through “My Documents” folders to determine whether any letters for Sergeants Hirst and Ellis existed. The Custodian affirmed that he also searched through the file folder labeled “Administrative Investigation Police 2015,” where the other records previously provided to Complainants were located. The Custodian certified that he was unable to locate any responsive letters for Sergeants Hirst and Ellis. The Custodian certified that he responded to Complainants in writing on April 22, 2016, stating that no records existed. The Custodian further certified that no records responsive to the Complainants’ OPRA request existed.

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 pursuant to N.J.S.A. 47:1A-6.

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. *See Pusterhofer v. NJ Dep’t of Educ.*, GRC Complaint No. 2005-49 (July 2005). Here, the Custodian responded to Complainants’ OPRA request, advising that no records exist. In the SOI, the Custodian certified that no letters for Sergeants Hirst or Ellis were responsive to the Complainant’s OPRA request.

The Complainants disputed that no records existed, noting in the Denial of Access Complaint that they received four (4) letters to date. The Complainants attached those letters to the SOI. However, the Custodian obviously interpreted the OPRA request to seek letters in reference to only Sergeants Hirst and Ellis. Even if the OPRA request sought those four (4) letters (in addition to any Hirst or Ellis letters), disclosure of them would not advance the purposes of OPRA. *See Bart v. City of Paterson Hous. Auth.*, 403 N.J. Super. 609 (App. Div. 2008) (holding that a custodian could not have unlawfully denied access to a record already in

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<sup>5</sup> The Complainants submitted correspondence that occurred during the mediation relevant to Halliwell & Pennant v. Borough of Brooklawn (Camden), GRC Complaint No. 2015-289 (May 2016). Further, Complainants made assertions about the outcome of the mediation. However, pursuant to the Uniform Mediation Act, N.J.S.A. 2A:23C-1 *et seq.*, communications that take place during the mediation process are not deemed to be public records subject to disclosure under OPRA. N.J.S.A. 2A:23C-2. Further, all communications which occur during the mediation process are privileged from disclosure and may not be used in any judicial, administrative, or legislative proceeding, or in any arbitration, unless all parties and the mediator waive the privilege. N.J.S.A. 2A:23C-4.

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the requestor's possession). Based on the foregoing, the GRC does not consider the existence of the four (4) letters previously provided as evidence to refute the Custodian's certification that no Hirst or Ellis letters exist.

Accordingly, the Custodian has borne his burden of proof that he lawfully denied access to the Complainants' OPRA request because he certified in the SOI, and the record reflects, that no responsive documents exist. N.J.S.A. 47:1A-6; *see Pusterhofer*, GRC 2005-49.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the Custodian has borne his burden of proof that he lawfully denied access to the Complainants' OPRA request because he certified in the SOI, and the record reflects, that no responsive documents exist. N.J.S.A. 47:1A-6; *see Pusterhofer v. NJ Dep't of Educ.*, GRC Complaint No. 2005-49 (July 2005).

Prepared By: Frank F. Caruso  
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September 19, 2017