



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

PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

## FINAL DECISION

### February 27, 2018 Government Records Council Meeting

Eric Warner, Esq. (o/b/o David Trotman)  
Complainant

Complaint No. 2016-163

v.

City of Trenton (Mercer)  
Custodian of Record

At the February 27, 2018 public meeting, the Government Records Council (“Council”) considered the February 20, 2018 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 no further adjudication is necessary because the Complainant voluntarily withdrew the complaint in writing to the GRC on February 20, 2018. No further adjudication is required.

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 27<sup>th</sup> Day of February, 2018

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 2, 2018**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff  
February 27, 2018 Council Meeting**

**Eric Warner, Esq. (o/b/o David Trotman)<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-163**

v.

**City of Trenton (Mercer)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies of “[a]ny and all police reports in any way related to any and all police activity over the last ten years for the following addresses: Supremo Foods, 359 Pennington Ave., Trenton, NJ 08618 [and] Supremo Foods, 410 Lalor Street, Trenton, NJ 08611.”

**Custodian of Record:** Richard Kachmar  
**Request Received by Custodian:** May 24, 2016  
**Response Made by Custodian:** June 30, 2016  
**GRC Complaint Received:** June 8, 2016

**Background**

**July 26, 2016 Council Meeting:**

At its July 26, 2016 public meeting, the Government Records Council (“Council”) considered the July 19, 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’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 v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Because a Police Department employee stated that 144 police reports are responsive to the request for which the Complainant is willing to pay a \$205.56 special service charge, and because the Custodian has failed to meet his burden of proving that the

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<sup>1</sup> Represented by Scott L. Carlson, Esq. (Morristown, NJ).

<sup>2</sup> Represented by Lori E. Caughman, Esq. (Trenton, NJ).

Eric Warner (o/b/o David Trotman) v. City of Trenton (Mercer), 2016-163 – Supplemental Findings and Recommendations of the Council Staff

denial of access to the records was lawful, the Custodian must disclose said records to the Complainant. N.J.S.A. 47:1A-6.

3. **The Custodian shall comply with paragraph #2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
4. 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.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On July 27, 2016, the Council distributed its July 26, 2016 Interim Order to all parties. On February 20, 2018, the Complainant voluntarily withdrew the complaint via e-mail to the GRC.

**Analysis**

No analysis necessary.

**Conclusions and Recommendations**

The Council Staff respectfully recommends the Council find that no further adjudication is necessary because the Complainant voluntarily withdrew the complaint in writing to the GRC on February 20, 2018. No further adjudication is required.

Prepared By: John E. Stewart

February 20, 2018<sup>3</sup>

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<sup>3</sup> This complaint was prepared for adjudication at the Council's August 30, 2016 meeting; however, the complaint could not be adjudicated due to lack of a quorum. This complaint was tabled at the Council's September 29, 2016 meeting because legal counsel needed more time to review the matter and requested that the complaint be held.  
Eric Warner (o/b/o David Trotman) v. City of Trenton (Mercer), 2016-163 – Supplemental Findings and Recommendations of the Council Staff



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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Commissioner

INTERIM ORDER

July 26, 2016 Government Records Council Meeting

Eric Werner, Esq. (o/b/o David Trotman)  
Complainant

Complaint No. 2016-163

v.

City of Trenton (Mercer)  
Custodian of Record

At the July 26, 2016 public meeting, the Government Records Council (“Council”) considered the July 19, 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’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 v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Because a Police Department employee stated that 144 police reports are responsive to the request for which the Complainant is willing to pay a \$205.56 special service charge, and because the Custodian has failed to meet his burden of proving that the denial of access to the records was lawful, the Custodian must disclose said records to the Complainant. N.J.S.A. 47:1A-6.
3. **The Custodian shall comply with paragraph #2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>1</sup> to the Executive Director.<sup>2</sup>**

<sup>1</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>2</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.



4. 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.
5. The Council defers analysis of whether the Complainant is a prevailing party 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 July, 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: July 27, 2016**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Eric Werner, Esq. (o/b/o David Trotman)<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-163**

**v.**

**City of Trenton (Mercer)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies of “[a]ny and all police reports in any way related to any and all police activity over the last ten years for the following addresses: Supremo Foods, 359 Pennington Ave., Trenton, NJ 08618 [and] Supremo Foods, 410 Lalor Street, Trenton, NJ 08611.”

**Custodian of Record:** Richard Kachmar  
**Request Received by Custodian:** May 24, 2016  
**Response Made by Custodian:** June 30, 2016  
**GRC Complaint Received:** June 8, 2016

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

**Request and Response:**

On May 24, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 30, 2016, the twenty-sixth (26<sup>th</sup>) business day following receipt of said request, the Custodian certified that he responded to the Complainant. The Custodian neither certified as to the content of the response nor attached a copy of the response to the Statement of Information. Moreover, the Custodian failed to certify whether the response was in writing.

**Denial of Access Complaint:**

On June 8, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that on May 19, 2016, on behalf of his client David Trotman, he submitted an OPRA request to the Custodian. The

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<sup>1</sup> Represented by Scott L. Carlson, Esq. (Morristown, NJ).

<sup>2</sup> Represented by Lori E. Caughman, Esq. (Trenton, 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.

Complainant contends that he never received a response from the Custodian, and because it has been over seven business days since he submitted the request, the Custodian has unlawfully denied him access to the requested records. The Complainant asks the GRC to order disclosure of the requested records and award prevailing party attorney's fees.

#### Statement of Information:

On July 7, 2016, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on May 24, 2016, and responded on June 30, 2016. The Custodian certifies that the complaint "came into the office during a holiday week and many employees have scheduled time off. The matter fell through the cracks and if the requestor had made a follow up would [sic] have been filled without the need to file a complaint." The Custodian further certified that "[t]he request was sent to the police department and the department responded on May 25, 2016 . . . indicat[ing] that a fee is necessary to fulfill the request."<sup>4</sup>

#### Additional Submissions:

The GRC telephoned the Complainant on July 14, 2016, to follow-up with him post-SOI receipt to determine if he received the June 30, 2016 response to his request and whether he is willing to pay the special service charge of \$205.56. The Complainant informed the GRC that he did receive the response and is willing to pay the special service charge.

### Analysis

#### Timeliness

Unless a shorter time period is otherwise provided, a custodian must 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 accordingly 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>5</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 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).

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<sup>4</sup> The Custodian attached to the SOI a copy of a memorandum. The memorandum, dated May 25, 2016, was from Trenton Police Detective Alexis Durlacher to the Custodian regarding the instant complaint. The memorandum states that there are 144 police reports responsive to the request, and that a special service charge of \$205.56, representing six hours at \$34.26 per hour, is necessary "to pull, print, and redact all of the police reports." The Custodian also attached to the SOI as Item #9 a document index; however, except for the pre-printed headings, the document index was blank.

<sup>5</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.

Here, the Custodian certified that he received the Complainant's OPRA request on May 24, 2016, knew there were 144 police reports responsive to the request, but did not respond until June 30, 2016. Although the Custodian failed to indicate whether the response was in writing, the form of response is a moot issue because the Custodian certified that he responded twenty-six (26) business days from the date he received the request, which is well beyond the statutorily-mandated time period.

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 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 Complainant filed the instant complaint on June 8, 2016, which was ten (10) business days after the Custodian certified that he had received the request. As of that date, the Custodian had not responded to the Complainant's OPRA request, despite the fact that a Police Department employee had informed the Custodian on May 25, 2016 that there were 144 police reports responsive to the request. As such, the Custodian failed to meet his burden of proving that the denial of access to the records was lawful. N.J.S.A. 47:1A-6.

Although the Complainant stated that he is willing to pay a \$205.56 special service charge for the requested records, the Custodian failed to inform him that the charge was being assessed. Accordingly, the Complainant did not know the Custodian intended to withhold disclosure of the requested records pending payment of the charge until sometime after June 30, 2016, when the Complainant finally received the Custodian's response.

Therefore, because a Police Department employee stated that 144 police reports are responsive to the request for which the Complainant is willing to pay a \$205.56 special service charge, and because the Custodian has failed to meet his burden of proving that the denial of access to the records was lawful, the Custodian must disclose said records to the Complainant. N.J.S.A. 47:1A-6.

### **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.



## Prevailing Party Attorney's Fees

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian'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 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).
2. Because a Police Department employee stated that 144 police reports are responsive to the request for which the Complainant is willing to pay a \$205.56 special service charge, and because the Custodian has failed to meet his burden of proving that the denial of access to the records was lawful, the Custodian must disclose said records to the Complainant. N.J.S.A. 47:1A-6.
3. **The Custodian shall comply with paragraph #2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>6</sup> to the Executive Director.<sup>7</sup>**
4. 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.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: John E. Stewart

July 19, 2016

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<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."

<sup>7</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.