



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**

**February 21, 2017 Government Records Council Meeting**

Rashon Barkley  
Complainant

Complaint No. 2016-23

v.

Newark Police Department (Essex)  
Custodian of Record

At the February 21, 2017 public meeting, the Government Records Council (“Council”) considered the February 14, 2017 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted 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 requested 9-1-1 dispatch recording, as described in the Complainant’s OPRA request. He certified that no responsive records exist, 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 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 21<sup>st</sup> Day of February, 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 23, 2017**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
February 21, 2017 Council Meeting**

**Rashon Barkley<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-23**

v.

**Newark Police Department (Essex)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** A copy of the 9-1-1 dispatch recording under central complaint #4418-93, from a January 16, 1993 incident on Broad Street in Newark, New Jersey.

**Custodian of Record:** Kenneth Louis

**Request Received by Custodian:** December 2, 2015

**Response Made by Custodian:** December 8, 2015; December 14, 2015; December 25, 2015; and December 28, 2015

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

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

**Request and Response:**

On November 21, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 28, 2015, the Custodian responded in writing to deny the request. The Custodian noted that the Newark Police Department (“NPD”) Commanding Communications/Technology Division had conducted a diligent search and found that the requested 9-1-1 call was inaccessible in the storage center retrieval operation, due to a thirty (30) day purging of the system.

**Denial of Access Complaint:**

On January 22, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian had unlawfully denied access to the request but made no additional legal arguments.

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

<sup>2</sup> Represented by Corporation Counsel Willie L. Parker, Esq.

<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 February 11, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on December 2, 2015. The Custodian averred that on that same day, his office forwarded the request to the NPD, requesting that they review their files and provide the Custodian with any responsive records. The Custodian certified that he wrote to the Complainant on December 8, 2015, acknowledging receipt of the request and requesting an extension of time to respond until December 15, 2015. He certified that he wrote to the Complainant again on December 14, 2015, seeking an extension of time to respond until December 23, 2015.

The Custodian averred that on December 15, 2015, his office e-mailed the NPD to follow up on pending OPRA requests, including the OPRA request that is the subject of the instant complaint. He certified that he received a response on December 24, 2015, indicating that OPRA requests were not being completed at the time due to police personnel “being deployed” for public safety duties. The Custodian certified that he then wrote to the Complainant that same day, requesting an additional extension of time to respond until January 26, 2016. The Custodian certified that Ms. Cheryl Coxon, the Supervisor of the OPRA Division, received a memorandum from Sergeant Beatrice Golden from NPD, advising that a search revealed that the requested footage was unobtainable. The Custodian certified that Sgt. Golden informed him that the footage was inaccessible due to a thirty (30) day purging of the system. The Custodian certified that he responded in writing to the Complainant’s request on December 28, 2015, advising him that the tape was inaccessible.

The Custodian certified that upon receipt of the Complainant’s Denial of Access Complaint, his staff contacted the NPD, who reiterated that the requested audio recording was not available. The Custodian also attached a copy of the Request and Authorization for Records Disposal, indicating that 9-1-1 recordings from January 1993 were no longer accessible due to the 30 day purging system.

### 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, 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 v. NJ Dep’t. of Educ.*, GRC 2005-49 (July 2005). Here, the Custodian certified that a search by the NPD revealed that the requested 9-1-1 dispatch recording did not exist due to the system’s thirty (30)

day purging. Additionally, the Complainant provided no evidence to refute the Custodian's certification.

Therefore, the Custodian has borne his burden of proof that he lawfully denied access to the requested 9-1-1 dispatch recording, as described in the Complainant's OPRA request. He certified that no responsive records exist, 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.

### **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 requested 9-1-1 dispatch recording, as described in the Complainant's OPRA request. He certified that no responsive records exist, 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 2005-49 (July 2005).

Prepared By: Husna Kazmir  
Staff Attorney

February 14, 2017