



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

November 12, 2019 Government Records Council Meeting

Scott DiRoma
Complainant

Complaint No. 2016-278

v.

NJ State Parole Board
Custodian of Record

At the November 12, 2019 public meeting, the Government Records Council (“Council”) considered the October 30, 2019 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:

1. The Custodian complied with the Council’s September 24, 2019 Interim Order because the Custodian in a timely manner forwarded certified confirmation of compliance to the Executive Director, wherein she certified that she redacted the responsive record in compliance with the Council’s Order and mailed a copy of the record to the Complainant.
2. Although the Custodian did not fully comply with the Council’s December 18, 2018 Interim Order because the Custodian failed to deliver to the Council in a timely manner the required number of copies of the unredacted and redacted record for an *in camera* examination, and denied the Complainant access to portions of a record that the Council determined via an *in camera* examination should have been disclosed, the Custodian subsequently did disclose all portions of the record to the Complainant in compliance with the Council’s September 24, 2019 Interim Order. Moreover, 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 12th Day of November 2019

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: November 15, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
November 12, 2019 Council Meeting**

Scott DiRoma¹
Complainant

GRC Complaint No. 2016-278

v.

New Jersey State Parole Board²
Custodial Agency

Records Relevant to Complaint: Unredacted copies of:

1. E-mail dated August 26, 2016 from Sharon Longinetti to Tania Larkin and Albert Kozak
2. Non-Evidentiary Property Policy (P.N. 09.006).³

Custodian of Record: Dina I. Rogers

Request Received by Custodian: August 31, 2016

Response Made by Custodian: September 19, 2016

GRC Complaint Received: October 25, 2016

Background

September 24, 2019 Council Meeting:

At its September 24, 2019 public meeting, the Government Records Council (“Council”) considered the September 17, 2019 Findings and Recommendations of the Council Staff 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 fully comply with the Council’s December 18, 2018 Interim Order because the Custodian failed to deliver to the GRC in a timely manner nine (9) copies of the unredacted and redacted record for an *in camera* examination.
2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Suzanne Davies.

³ There were other records requested that are not relevant to this complaint.

3. 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 September 26, 2019, the Council distributed its September 24, 2019 Interim Order to all parties. On October 3, 2019, the Custodian's Counsel requested, and was granted, a five (5) business day extension of time for the Custodian to respond to the Council's Interim Order. On October 10, 2019 the Custodian responded to the Council's Interim Order providing certified confirmation of compliance to the Executive Director.

Analysis

Compliance

On September 24, 2019, the Council ordered the above-referenced compliance. On September 26, 2019, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Therefore, compliance was due on or before October 3, 2019. On October 3, 2019, the Custodian's Counsel requested, and was granted, a five (5) business day extension of time for the Custodian to respond to the Council's Interim Order, making compliance due on or before October 10, 2019.

On October 10, 2019, the Custodian's Counsel submitted the Custodian's certification of compliance to the Executive Director, wherein the Custodian certified that she redacted the responsive record in compliance with the Council's September 24, 2019 Interim Order. The Custodian further certified that she sent a copy of said record to the Complainant via regular mail.

Therefore, the Custodian complied with the Council's September 24, 2019 Interim Order because the Custodian in a timely manner forwarded certified confirmation of compliance to the Executive Director, wherein she certified that she redacted the responsive record in compliance with the Council's Order and mailed a copy of the record to the Complainant.

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)).

Although the Custodian did not fully comply with the Council’s December 18, 2018 Interim Order because the Custodian failed to deliver to the Council in a timely manner the required number of copies of the unredacted and redacted record for an *in camera* examination, and denied the Complainant access to portions of a record that the Council determined via an *in camera* examination should have been disclosed, the Custodian subsequently did disclose all portions of the record to the Complainant in compliance with the Council’s September 24, 2019 Interim Order. Moreover, 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 complied with the Council’s September 24, 2019 Interim Order because the Custodian in a timely manner forwarded certified confirmation of compliance to the Executive Director, wherein she certified that she redacted the responsive record in compliance with the Council’s Order and mailed a copy of the record to the Complainant.
2. Although the Custodian did not fully comply with the Council’s December 18, 2018 Interim Order because the Custodian failed to deliver to the Council in a timely manner the required number of copies of the unredacted and redacted record for an *in camera* examination, and denied the Complainant access to portions of a record that the Council determined via an *in camera* examination should have been disclosed, the Custodian subsequently did disclose all portions of the record to the Complainant in compliance with the Council’s September 24, 2019 Interim Order. Moreover, 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: John E. Stewart

October 30, 2019



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

INTERIM ORDER

September 24, 2019 Government Records Council Meeting

Scott DiRoma
Complainant

Complaint No. 2016-278

v.

NJ State Parole Board
Custodian of Record

At the September 24, 2019 public meeting, the Government Records Council (“Council”) considered the September 17, 2019 Findings and Recommendations of the Council Staff 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 fully comply with the Council’s December 18, 2018 Interim Order because the Custodian failed to deliver to the GRC in a timely manner nine (9) copies of the unredacted and redacted record for an *in camera* examination.
2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.¹**
3. 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.

¹ 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.

Interim Order Rendered by the
Government Records Council
On The 24th Day of September 2019

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 26, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
September 24, 2019 Council Meeting**

**Scott DiRoma¹
Complainant**

GRC Complaint No. 2016-278

v.

**New Jersey State Parole Board²
Custodial Agency**

Records Relevant to Complaint: Unredacted copies of :

1. E-mail dated August 26, 2016 from Sharon Longinetti to Tania Larkin and Albert Kozak
2. Non-Evidentiary Property Policy (P.N. 09.006).³

Custodian of Record: Dina I. Rogers

Request Received by Custodian: August 31, 2016

Response Made by Custodian: September 19, 2016

GRC Complaint Received: October 25, 2016

Record Submitted for *In Camera* Examination: Non-Evidentiary Property Policy (Policy Number 09.006).

Background

December 18, 2018 Council Meeting:

At its December 18, 2018 public meeting, the Government Records Council (“Council”) considered the December 11, 2018 Findings and Recommendations of the Council Staff 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 she 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),

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Suzanne Davies.

³ There were other records requested that are not relevant to this complaint.

and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

2. Although the Custodian unlawfully denied the Complainant access to request item number 1, after reviewing the complaint the Custodian disclosed said e-mail in unredacted form to the Complainant on December 2, 2016. N.J.S.A. 47:1A-6. As such, the GRC declines to take further action with respect to request item number 1.
3. The Custodian shall provide the record responsive to request item number 2, the Non-Evidentiary Property Policy (P.N. 09.006), for an *in camera* review by the Council to determine whether the redacted segments, if disclosed, would reveal the Board's surveillance, security, tactical, investigative, or operational techniques, measures, or procedures, creating a risk to the safety of persons, property, electronic data, or software, or compromise the Board's ability to effectively conduct investigations. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
4. **The Custodian must deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see #3 above), nine (9) copies of the redacted record, a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the record provided is the record 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 December 19, 2018, the Council distributed its December 18, 2018 Interim Order to all parties. On December 26, 2018, the Custodian's Counsel requested, and was granted, an extension of time until January 7, 2019 for the Custodian to comply with the Council's Interim Order. On December 27, 2018, the Custodian's Counsel filed a request for reconsideration of the Council's December 18, 2018 Interim Order based on mistake and new evidence.

On January 7, 2019, the Custodian's Counsel delivered to the GRC a legal certification from the Custodian that the record provided is the record requested by the Council for the *in camera* inspection, nine (9) copies of the redaction index, one (1) copy of the unredacted Non-Evidentiary Property Policy (P.N. 09.006) and one (1) copy of the redacted Non-Evidentiary Property Policy (P.N. 09.006). On May 7, 2019, the GRC e-mailed the Custodian's Counsel seeking to have the Custodian deliver to the GRC the balance of the copies of the redacted and unredacted record pursuant to the Council's December 18, 2018 Interim Order. On May 20, 2019, the GRC received from the Custodian the balance of the redacted and unredacted records.

May 21, 2019 Council Meeting:

At its May 21, 2019 public meeting, the Government Records Council (“Council”) considered the May 14, 2019 Supplemental Findings and Recommendations of the Council Staff 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 the Custodian has failed to establish in her request for reconsideration of the Council’s December 18, 2018 Interim Order that either 1) the Council's decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Custodian failed to establish that the complaint should be reconsidered based on mistake and new evidence. The Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. The evidence of record the Council relied upon in rendering its December 18, 2018 Interim Order is clear: the Custodian received the Complainant’s OPRA request on August 31, 2016 and responded to the request on September 19, 2016. Therefore, the Council did not err in finding that the Custodian did not respond to the request in a timely manner, and the Custodian’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). Thus, the Council’s December 18, 2018 Interim Order remains in effect and the GRC shall determine whether the Custodian complied with the terms of said Interim Order.

Analysis

Compliance

On December 18, 2018, the Council ordered the above-referenced compliance. On December 19, 2018, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Therefore, compliance was due on or before December 27, 2018. On December 26, 2018, the Custodian’s Counsel requested, and was granted, an extension of time until January 7, 2019 for the Custodian to comply with the Council’s Interim Order. On January 7, 2019, the Custodian’s Counsel delivered to the GRC a legal certification from the Custodian, nine (9) copies of a redaction index and one (1) copy each of the unredacted and redacted Non-Evidentiary Property Policy (P.N. 09.006). The Custodian subsequently delivered the balance of the documents for the *in camera* examination on May 20, 2019, after being asked to do so by the GRC on May 7, 2019.

Therefore, the Custodian did not fully comply with the Council’s December 18, 2018 Interim Order because the Custodian failed to deliver to the GRC in a timely manner nine (9) copies of the unredacted and redacted record for an *in camera* examination.

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.

The GRC conducted an *in camera* examination on the submitted record. The results of this examination are set forth in the following table:

Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian’s Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination ⁴
1	Non-Evidentiary Property Policy (Policy Number 09.006) page 2 of 7	Index: Topics II, III, V, and VII	<u>N.J.A.C.</u> 10A:71-2.2(a)(6), redacted language reveals the Board’s surveillance, security, and operation techniques which if disclosed would create a risk of safety to persons,	Disclose all but the topic for V The topic for V may reveal operational techniques which if disclosed would compromise the Board’s ability to effectively conduct investigations

⁴ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

			property or compromise the Board's ability to effectively conduct investigations	
2	Non-Evidentiary Property Policy (Policy Number 09.006)	All of Section II and Section III	Same as explanation for redaction number 1	Disclose The redacted material does not reveal the Board's surveillance, security, and operation techniques which if disclosed would create a risk of safety to persons, property or compromise the Board's ability to effectively conduct investigations
3	Non-Evidentiary Property Policy (Policy Number 09.006)	All of Section IV (B)	Same as explanation for redaction number 1	Disclose all but the last 10 words The last 10 words may reveal operational techniques which if disclosed would compromise the Board's ability to effectively conduct investigations
4	Non-Evidentiary Property Policy (Policy Number 09.006)	All of Sections IV (E), (F), (G), (H), and (I)	Same as explanation for redaction number 1	Disclose The redacted material is procedural in nature, and does not reveal the Board's surveillance,

				security, and operation techniques which if disclosed would create a risk of safety to persons, property or compromise the Board's ability to effectively conduct investigations
5	Non-Evidentiary Property Policy (Policy Number 09.006)	All of Section V	Same as explanation for redaction number 1	Disclose Section V (E) All but Section V (E) may reveal operational techniques which if disclosed would compromise the Board's ability to effectively conduct investigations
6	Non-Evidentiary Property Policy (Policy Number 09.006)	Section VI (A) and (C)	Same as explanation for redaction number 1	Disclose Section VI (A) Section VI (A) does not reveal the Board's surveillance, security, and operation techniques which if disclosed would create a risk of safety to persons, property or compromise the Board's ability to effectively conduct investigations
7	Non-Evidentiary	All of Section VII	Same as explanation for	Disclose

	Property Policy (Policy Number 09.006)		redaction number 1	The redacted material does not reveal the Board's surveillance, security, and operation techniques which if disclosed would create a risk of safety to persons, property or compromise the Board's ability to effectively conduct investigations
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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 that:

1. The Custodian did not fully comply with the Council's December 18, 2018 Interim Order because the Custodian failed to deliver to the GRC in a timely manner nine (9) copies of the unredacted and redacted record for an *in camera* examination.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.⁵**
3. 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 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.

Prepared By: John E. Stewart
Staff Attorney

September 17, 2019



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

PHILIP D. MURPHY
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LT. GOVERNOR SHEILA Y. OLIVER
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INTERIM ORDER

December 18, 2018 Government Records Council Meeting

Scott DiRoma
Complainant

Complaint No. 2016-278

v.

NJ State Parole Board
Custodian of Record

At the December 18, 2018 public meeting, the Government Records Council (“Council”) considered the December 11, 2018 Findings and Recommendations of the Council Staff 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 she 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 v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Although the Custodian unlawfully denied the Complainant access to request item number 1, after reviewing the complaint the Custodian disclosed said e-mail in unredacted form to the Complainant on December 2, 2016. N.J.S.A. 47:1A-6. As such, the GRC declines to take further action with respect to request item number 1.
3. The Custodian shall provide the record responsive to request item number 2, the Non-Evidentiary Property Policy (P.N. 09.006), for an *in camera* review by the Council to determine whether the redacted segments, if disclosed, would reveal the Board's surveillance, security, tactical, investigative, or operational techniques, measures, or procedures, creating a risk to the safety of persons, property, electronic data, or software, or compromise the Board's ability to effectively conduct investigations. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
4. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see #3 above), nine (9) copies of the redacted**

¹ 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.



record, a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,³ that the record provided is the record 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 18th Day of December, 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: December 19, 2018

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

³ "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 Council Staff
December 18, 2018 Council Meeting**

Scott DiRoma¹
Complainant

GRC Complaint No. 2016-278

v.

New Jersey State Parole Board²
Custodial Agency

Records Relevant to Complaint: Unredacted copies of :

1. E-mail dated August 26, 2016 from Sharon Longinetti to Tania Larkin and Albert Kozak
2. Non-Evidentiary Property Policy (P.N. 09.006).³

Custodian of Record: Dina I. Rogers

Request Received by Custodian: August 31, 2016

Response Made by Custodian: September 19, 2016

GRC Complaint Received: October 25, 2016

Background⁴

Request and Response:

On August 31, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 19, 2016, the twelfth (12th) business day following receipt of said request, the Custodian responded in writing informing the Complainant that the records responsive to his request were attached. The Custodian further stated that the e-mail dated August 26, 2016 from Sharon Longinetti to Tania Larkin and Albert Kozak was redacted to remove advisory, consultative or deliberative (“ACD”) material. The Custodian also stated that the Non-Evidentiary Property Policy was redacted to remove information that may reveal “surveillance, security, tactical, investigative, or operational techniques, measures or procedures, which, if disclosed, would create a risk to the safety of persons, property, electronic data, or software, or compromise the Board’s ability to effectively conduct investigations[.]”

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Suzanne Davies.

³ There were other records requested that are not relevant to this complaint.

⁴ 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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

Denial of Access Complaint:

On October 25, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he provided the OPRA request to the Custodian on August 31, 2016, and she responded to the request on September 19, 2016.

The Complainant asserted that request items number 1 and 2 were disclosed to him in redacted form. The Complainant stated that request item number 1 had the letters FYI immediately preceding the redaction, which revealed that the redacted material was information, and not ACD material. The Complainant stated that request item number 2 should not have been redacted because he did not believe the Custodian’s reason for the redactions was valid.

The Complainant attached to the complaint a copy of the August 26, 2016 e-mail from Sharon Longinetti and a copy of the Non-Evidentiary Property Policy, which were both disclosed to him in redacted form.

Statement of Information:

On December 2, 2016, the Custodian filed a Statement of Information (“SOI”).⁵ The Custodian certified that she received the Complainant’s OPRA request on or about August 21, 2016, and responded in writing on September 19, 2016. The Custodian certifies that all requested records were provided to the Complainant on September 19, 2016; however, an e-mail dated August 26, 2016 was redacted to remove ACD material, and the Non-Evidentiary Property Policy was redacted in part to delete operational and investigative techniques pursuant to N.J.A.C. 10A:71-2.2(a)(6).⁶

The Custodian’s Counsel stated that, after further review of the complaint, the Custodian disclosed request item number 1 to the Complainant in unredacted form on December 2, 2016. As such, Counsel stated that the complaint is now moot with respect to request item number 1.

With respect to request item number 2, Counsel stated that the Custodian properly redacted the record pursuant to N.J.A.C. 10A:71-2.2(a)(8), which provides that in addition to records designated as confidential under OPRA, the following records are also confidential and not subject to disclosure: “Such other information, files, documents, reports, records or other written material as the Board may deem confidential to insure the integrity of the parole and parole supervision processes.”⁷ The Custodian’s Counsel also stated that N.J.A.C. 10A:71-2.2(a)(6) specified precisely which documents are confidential, those being:

Standard Operating Procedures, manuals, and training materials, that may reveal the Board’s surveillance, security, tactical, investigative, or operational techniques, measures, or procedures, which, if disclosed, would create a risk to the safety of

⁵ An incomplete SOI was previously submitted to the GRC on November 21, 2016.

⁶ The evidence of record reveals that the date of the e-mail (request item number 1) is August 26, 2016, not August 31, 2016.

⁷ This provision is N.J.A.C. 10A:71-2.2(a)(9), not N.J.A.C. 10A:71-2.2(a)(8).

persons, property, electronic data, or software, or compromise the Board's ability to effectively conduct investigations.

Counsel further stated that the information redacted within the Non-Evidentiary Property Policy related to the property officer, the property room and location, assigned safes for items of exceptional value, searching techniques, and inventory/seized items. Counsel argued that, given what was redacted, the Custodian lawfully denied access pursuant to the regulation.

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).⁸ 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).

Here, there is no dispute between the parties that the Complainant's OPRA request was provided to the Custodian on August 31, 2016, and that the Custodian responded to the request on September 19, 2016. Thus, the Custodian did not respond to the OPRA request until the twelfth (12th) business day following receipt of the request.

Therefore, the Custodian did not bear her burden of proof that she 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.

Request item number 1 - redacted e-mail dated August 26, 2016 from Sharon Longinetti

⁸ 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.

On September 19, 2016, the above-mentioned e-mail was disclosed to the Complainant in redacted form to withhold ACD material. The Complainant challenged the redaction, stating that due to the format of the e-mail's content, the redacted portion could not have been ACD material. In the SOI the Custodian's Counsel stated that, after reviewing the complaint, the Custodian decided to disclose the record to the Complainant in unredacted form, which she did on December 2, 2016.

Therefore, although the Custodian unlawfully denied the Complainant access to request item number 1, after reviewing the complaint the Custodian disclosed said e-mail in unredacted form to the Complainant on December 2, 2016. N.J.S.A. 47:1A-6. As such, the GRC declines to take further action with respect to request item number 1.

Request item number 2 - Non-Evidentiary Property Policy (P.N. 09.006)

On September 19, 2016, the Custodian disclosed request item number 2 to the Complainant in redacted form to remove information that could reveal surveillance, security, tactical, investigative, or operational techniques, measures or procedures, which, if disclosed, would create a safety risk. The Complainant challenged the redactions because he stated he believed the Custodian did not have a valid reason to deny him access to portions of the record.

N.J.A.C. 10A:71-2.2(a) provides:

In addition to records designated as confidential pursuant to the provisions of [OPRA] . . . the following records shall be deemed confidential and shall not be subject to public access . . . 6. Standard operating procedures, manuals, and training materials, that may reveal the Board's surveillance, security, tactical, investigative, or operational techniques, measures, or procedures, which, if disclosed, would create a risk to the safety of persons, property, electronic data, or software, or compromise the Board's ability to effectively conduct investigations[.]

The Custodian relied on the provisions of N.J.A.C. 10A:71-2.2 to deny the Complainant access to segments of the Non-Evidentiary Property Policy. The Custodian's Counsel specifically cited N.J.A.C. 10A:71-2.2(a)(9) as the provision which held the record to be confidential. However, the GRC is not convinced that N.J.A.C. 10A:71-2.2(a)(9) would be applicable to deny access to segments of the Non-Evidentiary Property Policy because there is no evidence in the record to establish that the Board deemed the Non-Evidentiary Property Policy to be included within "[s]uch other information, files, documents, reports, records or other written material" that should be confidential to insure the integrity of the parole and parole supervision processes.

It is clear, though, from a review of the redacted Non-Evidentiary Property Policy which was attached to the complaint, that it is encompassed within the provisions of N.J.A.C. 10A:71-2.2(a)(6) because that subsection includes standard operating procedures and the Non-Evidentiary Property Policy is classified as a "NJ State Parole Board Policy and Procedure." However, to be confidential, the record must " . . . reveal the Board's surveillance, security, tactical, investigative, or operational techniques, measures, or procedures, which, if disclosed, would create a risk to the

safety of persons, property, electronic data, or software, or compromise the Board's ability to effectively conduct investigations[.]”

As such, it is necessary for the GRC to examine the record responsive to request item number 2, the Non-Evidentiary Property Policy (P.N. 09.006), to determine whether the redacted segments, if disclosed, would reveal the Board's surveillance, security, tactical, investigative, or operational techniques, measures, or procedures, creating a risk to the safety of persons, property, electronic data, or software, or compromise the Board's ability to effectively conduct investigations.

In Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the court held that:

[T]he 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. at 355.]

Therefore, the Custodian shall provide the record responsive to request item number 2, the Non-Evidentiary Property Policy (P.N. 09.006), for an *in camera* review by the Council to determine whether the redacted segments, if disclosed, would reveal the Board's surveillance, security, tactical, investigative, or operational techniques, measures, or procedures, creating a risk to the safety of persons, property, electronic data, or software, or compromise the Board's ability to effectively conduct investigations. See Paff, 379 N.J. Super. 346.

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 Council Staff respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she 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 v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

2. Although the Custodian unlawfully denied the Complainant access to request item number 1, after reviewing the complaint the Custodian disclosed said e-mail in unredacted form to the Complainant on December 2, 2016. N.J.S.A. 47:1A-6. As such, the GRC declines to take further action with respect to request item number 1.
3. The Custodian shall provide the record responsive to request item number 2, the Non-Evidentiary Property Policy (P.N. 09.006), for an *in camera* review by the Council to determine whether the redacted segments, if disclosed, would reveal the Board's surveillance, security, tactical, investigative, or operational techniques, measures, or procedures, creating a risk to the safety of persons, property, electronic data, or software, or compromise the Board's ability to effectively conduct investigations. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
4. **The Custodian must deliver⁹ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see #3 above), nine (9) copies of the redacted record, a document or redaction index¹⁰, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,¹¹ that the record provided is the record 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: John E. Stewart
Staff Attorney

December 11, 2018

⁹ 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.

¹⁰ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

¹¹ "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."