



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

CHRIS CHRISTIE  
*Governor*

KIM GUADAGNO  
*Lt. Governor*

CHARLES A. RICHMAN  
*Commissioner*

**FINAL DECISION**

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

Andre Herd  
Complainant

v.

City of Newark (Essex)  
Custodian of Record

Complaint No. 2016-50

At the January 31, 2017 public meeting, the Government Records Council (“Council”) considered the December 6, 2016 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 records in the Complainant’s July 23, 2015 OPRA request 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).

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**

**Andre Herd<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-50**

v.

**City of Newark (Essex)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** “Public records from criminal case files [sic] State v. Herd, Indictment No. 582-2-86,” including all police incident reports, all arrest warrants, complaints, 911 emergency calls (audio transcripts), “promis gavals [sic],” and any other public records in the file.

**Custodian of Record:** Kenneth Louis

**Request Received by Custodian:** August 6, 2015; October 13, 2015; November 4, 2015

**Response Made by Custodian:** August 6, 2015; October 21, 2015, November 30, 2015

**GRC Complaint Received:** February 5, 2016

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

**Request and Response:**

On July 23, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 6, 2015, the Custodian responded to the Complainant’s request in a letter seeking further information in order to process the request. The Custodian stated that the City’s Police Department required a central complaint number and advised the Complainant that indictment records, warrants, complaints, and *Promis Gavels* are court documents and that he should contact the Newark Municipal Court, as the City did not maintain those records. The Custodian additionally requested specific dates and locations to search for audio recordings. The Custodian further advised that the portion of the request seeking “all police reports” was an overly broad request and required research, pursuant to N.J.S.A. 47:1A-1. See Red v. Twp. of West Milford, GRC Complaint No. 2002-58 (January 17, 2003); Bent v. Twp. of Stafford, 381 N.J. Super. 30 (App. Div. 2005); MAG Ent’mt LLC v. Div. of Alcohol Beverages Control, 375 N.J. Super. 534, 546 (App. Div. 2005).

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

<sup>2</sup> Represented by Willie L. Parker, Esq. (Newark, 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.

On September 15, 2015, the Custodian wrote to the Complainant, revising his previous response to correct a typo on the indictment number listed in the original OPRA request. On September 25, 2015, the Complainant responded to the Custodian's request for more information, listing the incident location as 431 South 7th Street and the date of the incident as November 27, 1985.

On October 16, 2015, the Custodian responded to the Complainant's clarification letter, advising that the Newark Police Department had begun a search for responsive records and anticipated a response date of November 2, 2015. On October 21, 2015, the Custodian responded to the Complainant and informed him that no records were found. The Custodian advised the Complainant to contact the Newark Municipal Courts, the Municipal Prosecutor, Essex County Superior Court, and Essex County Prosecutor's Office and provided contact information.

On October 24, 2015, the Complainant wrote to the Custodian, providing additional information. The Custodian responded on November 6, 2015, anticipating a response date of December 1, 2015. On November 30, 2015, the Custodian wrote to the Complainant, advising that a search using the additional information was conducted and that no responsive records were located.

#### Denial of Access Complaint:

On February 5, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted an unlawful denial of access but made no additional legal arguments.

#### Statement of Information:

On April 28, 2016, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on August 6, 2015, and responded that same day, requesting additional information to process the request. He certified that a corrected letter response was mailed to the Complainant on September 15, 2016. He further certified that the Complainant responded on October 13, 2015, providing additional information. The Custodian averred that he wrote to the Complainant on October 16, 2015, acknowledging receipt of his letter and indicating a response date of November 2, 2015.

The Custodian certified that on October 21, 2015, the Police Department responded to the Custodian's office and indicated that after a search of police records using the RMS system and microfilm archive, no records were located. The Custodian averred that he wrote to the Complainant that same day, advising him that a search revealed no responsive records and inviting him again to contact the Municipal Court, Municipal Prosecutor, Newark Superior Court, and Essex County Prosecutor.

The Custodian certified that his office received the Complainant's October 24, 2015 letter on November 4, 2015, and that his office subsequently e-mailed the Newark Police Department on November 6, 2015, to conduct a new search. On November 12, 2015, the Archive Unit of the City Clerk reported to the Police Department on their attempt to locate responsive records. On November 17, 2015, the Police Department responded to the Custodian, advising that no records were found, despite the additional information provided by the Complainant.

The Custodian further averred that on November 30, 2015, he sent a letter to the Complainant, advising that no records were located and referring him to the Superior Court for assistance. The Custodian certified that on March 15, 2016, the Archives Unit advised the Custodian that no destruction approvals were located related to the requested records. The Custodian certified that on April 27, 2016, he received an e-mail from the Archives Manager, advising that no destruction approvals relating to the requested records were located.

### **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 Complaint No. 2005-49) (July 2005). Here, the Custodian’s response to the Complainant’s OPRA request and subsequent letters providing additional search information stated that no responsive records were located. Furthermore, the Complainant provided no competent, credible evidence to indicate otherwise.

Therefore, the Custodian has borne his burden of proof that he lawfully denied access to the requested records in the Complainant’s July 23, 2015 OPRA request 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.

### **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 records in the Complainant’s July 23, 2015 OPRA request 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).

Prepared By: Husna Kazmir  
Staff Attorney

December 6, 2016<sup>4</sup>

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<sup>4</sup> This complaint was prepared for adjudication at the Council’s December 13, 2016 meeting but could not be adjudicated due to lack of quorum.