



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**

**June 25, 2019 Government Records Council Meeting**

Larry Michael Welenc  
Complainant  
v.  
NJ State Police  
Custodian of Record

Complaint No. 2017-134

At the June 25, 2019 public meeting, the Government Records Council (“Council”) considered the June 18, 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 the Complainant has failed to establish in his request for reconsideration of the Council’s March 26, 2019 Final Decision 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 Complainant failed to establish that the complaint should be reconsidered based on a mistake. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the Complainant failed to prove that the Council made a mistake in determining that the Custodian met compliance and that there was no knowing and willful violation. Thus, the Complainant’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).

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 25<sup>th</sup> Day of June 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: June 28, 2019**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

*Reconsideration*  
**Supplemental Findings and Recommendations of the Council Staff  
June 25, 2019 Council Meeting**

**Larry Michael Welenc<sup>1</sup>  
Complainant**

**GRC Complaint No. 2017-134**

**v.**

**New Jersey State Police<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic information via e-mail of the title, position, salary, length of service, date of separation, reason for separation, and amount and type of pension for the following individuals:

- Sergeant (“Sgt.”) First Class William Porter
- Lieutenant (“Lt”) Joseph Mack
- Sgt. Charles H. Crilley
- Lt. Hans Schlichting
- Lt. Frank Schoenerin

**Custodian of Record:** DSFC David Robbins

**Request Received by Custodian:** December 3, 2016; March 6, 2017

**Response Made by Custodian:** February 13, 2017; April 28, 2017

**GRC Complaint Received:** June 12, 2017

**Background**

**March 26, 2019 Council Meeting:**

At its March 26, 2019 public meeting, the Council considered the March 19, 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:

1. The Custodian complied with the Council’s February 26, 2019 Interim Order because he responded within the prescribed time frame conforming to option No. 2 of said order. Further, the Custodian simultaneously provided certified confirmation of compliance to the Council Staff.

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

<sup>2</sup> Represented by Deputy Attorney General Tasha Bradt.

2. The Custodian unlawfully denied access to the title/position and salary information sought in the Complainant's December 3, 2016 OPRA request. However, the Custodian ultimately disclosed this information as part of his response to the March 6, 2017 OPRA request. Further, the Custodian did not unlawfully deny access to the remaining pension amounts because New Jersey State Police did not possess them. N.J.S.A. 47:1A-6. Also, the Custodian complied with the Council's February 26, 2019 Interim order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

### Procedural History:

On March 29, 2019, the Council distributed its Final Decision to all parties. On April 8, 2019, the Complainant filed a request for reconsideration of the Council's Final Decision based on a mistake. Therein, the Complainant contended that the Council should have found that the Custodian knowingly and willfully violated OPRA. The Complainant contended that the New Jersey State Police ("NJSP") were required to maintain the requested pension information. Further, the Complainant alleged that the Custodian should have went to [yourmoney.nj.gov](http://yourmoney.nj.gov) to see if the missing pension information was available before directing the Complainant there: it was not. The Complainant requested that the Custodian be required to submit a detailed explanation of how he was able to obtain and disclose Lt. Schlichting's pension information and no other pension information could be located.<sup>3</sup>

On April 24, 2019, Custodian's Counsel submitted objections to the request for reconsideration. Counsel argued that the Complainant failed to show that the Council made a mistake. Counsel argued that the Complainant also failed to establish that the Council erroneously concluded that the Custodian complied with the Council's Order and that his actions were not knowing and willful in nature.

On the same day, the Complainant submitted a letter disputing Counsel's objections. The Complainant contended that the Custodian failed to comply with the Order because he did not disclose any additional pension information and did not provide a detailed explanation regarding Lt. Schlichting's pension information. The Complainant reiterated that the Custodian was required to maintain the responsive personnel information and that [yourmoney.nj.gov](http://yourmoney.nj.gov) did not contain it.

### Analysis

#### Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any

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<sup>3</sup> The Complainant also argued that the Custodian knew "the facts concerning" the death his father and subsequent legal proceedings. Further, the Complainant argued that it was "inconceivable" that the Custodian did not know that Governor Chris Christie directed Attorney General Christopher Porrino to respond to his request to reopen an investigation concerning the death of his father.

decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, the Complainant filed the request for reconsideration of the Council's March 26, 2019 Final Decision on April 8, 2019, six (6) business days from the issuance of the Council's Order.

Applicable case law holds that:

“A party should not seek reconsideration merely based upon dissatisfaction with a decision.” D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a “palpably incorrect or irrational basis;” or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, . . . 242 N.J. Super. at 401. “Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.” Ibid.

[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).]

Upon review of the submissions, the GRC concludes that the Complainant's request for reconsideration should be denied. At the core of the Complainant's request is his allegation that the Custodian did not comply with the Council's February 26, 2019 Interim Order. This is contrary to the fact that the Custodian, who certified that he could not provide any additional pension information on the remaining officers, provided an explanation as to how he was able to disclose Lt. Schlichting's pension information. In fact, the Council detailed this explanation in its March 26, 2019 Final Decision. Id. at 3. The Council ultimately found that this explanation satisfied its Order requirements. Id.

Further, the Complainant appears to insinuate in his filings that NJSP had some administrative control over yourmoney.nj.gov or at least should have known that responsive pension was not posted therein. However, there is no evidence in the record to support that either NJSP or the Custodian maintains any control over datasets placed on the website. Further, the Council acknowledged that the Custodian likely erred by referring the Complainant to yourmoney.nj.gov: “[t]he GRC is satisfied with this explanation, although it would likely have been more appropriate to direct the Complainant to [the Division of Pensions and Benefits (“DPB”)] to obtain the information.” Id. Ultimately, the Custodian was under no obligation to

obtain responsive pension information from DPB, which is part of an entirely different State department. This is notwithstanding that the Custodian certified he originally did in response to the December 3, 2016 OPRA request. Id. at 2.

Finally, the Complainant's allegations against the Custodian, and ultimately the NJSP, relate to his attempts to reopen an investigation into his father's death. The Complainant has contended that the Custodian's actions were motivated to withhold the requested pension information because of this issue. However, the Complainant only offers circumspect arguments with no factual support. Additionally, as of this date, there is no evidence in the record indicating that the Complainant attempted to obtain the sought-after pension information from DPB, directly.

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above: 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. See Cummings, 295 N.J. Super. at 384. The Complainant failed to establish that the complaint should be reconsidered based on a mistake. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. See D'Atria, 242 N.J. Super. at 401. Specifically, the Complainant failed to prove that the Council made a mistake in determining that the Custodian met compliance and that there was no knowing and willful violation. Thus, the Complainant's request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the Complainant has failed to establish in his request for reconsideration of the Council's March 26, 2019 Final Decision 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 Complainant failed to establish that the complaint should be reconsidered based on a mistake. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the Complainant failed to prove that the Council made a mistake in determining that the Custodian met compliance and that there was no knowing and willful violation. Thus, the Complainant'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).

Prepared By: Frank F. Caruso  
Acting Executive Director

June 18, 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*

**FINAL DECISION**

**March 26, 2019 Government Records Council Meeting**

Larry Michael Welenc  
Complainant  
v.  
NJ State Police  
Custodian of Record

Complaint No. 2017-134

At the March 26, 2019 public meeting, the Government Records Council (“Council”) considered the March 19, 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 February 26, 2019 Interim Order because he responded within the prescribed time frame conforming to option No. 2 of said order. Further, the Custodian simultaneously provided certified confirmation of compliance to the Council Staff.
2. The Custodian unlawfully denied access to the title/position and salary information sought in the Complainant’s December 3, 2016 OPRA request. However, the Custodian ultimately disclosed this information as part of his response to the March 6, 2017 OPRA request. Further, the Custodian did not unlawfully deny access to the remaining pension amounts because New Jersey State Police did not possess them. N.J.S.A. 47:1A-6. Also, the Custodian complied with the Council’s February 26, 2019 Interim order. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do 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 26<sup>th</sup> Day of March, 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: March 29, 2019**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff  
March 26, 2019 Council Meeting**

**Larry Michael Welenc<sup>1</sup>  
Complainant**

**GRC Complaint No. 2017-134**

v.

**New Jersey State Police<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic information via e-mail of the title, position, salary, length of service, date of separation, reason for separation, and amount and type of pension for the following individuals:

- Sergeant (“Sgt.”) First Class William Porter
- Lieutenant (“Lt”) Joseph Mack
- Sgt. Charles H. Crilley
- Lt. Hans Schlichting
- Lt. Frank Schoenerin

**Custodian of Record:** DSFC David Robbins

**Request Received by Custodian:** December 3, 2016; March 6, 2017

**Response Made by Custodian:** February 13, 2017; April 28, 2017

**GRC Complaint Received:** June 12, 2017

**Background**

February 26, 2019 Council Meeting:

At its February 26, 2019 public meeting, the Council considered the February 19, 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 unlawfully denied access to the title/position and salary information sought in the Complainant’s December 3, 2016 OPRA request. N.J.S.A. 47:1A-6. Specifically, this information is plainly disclosable under OPRA and should have been provided. N.J.S.A. 47:1A-10. Notwithstanding, the GRC declines to order disclosure

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

<sup>2</sup> Represented by Deputy Attorney General Tasha Bradt.

of this information because the Custodian subsequently provided same on April 28, 2017.

2. The Custodian may have unlawfully denied access to the responsive personnel information comprising the amount and type of pension received for the identified individuals. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10. The Custodian must either: 1) locate and disclose the relevant personnel information to the Complainant; or 2) provide a detailed explanation of how he was able to obtain and disclose Lt. Schlichting's pension amount and no other pension information.
3. **The Custodian shall comply with conclusion No. 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, if applicable. Further, the Custodian shall simultaneously deliver<sup>3</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>4</sup> to the Council Staff.<sup>5</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.

#### Procedural History:

On February 28, 2019, the Council distributed its Interim Order to all parties. On March 7, 2019, the Custodian responded to the Council's Interim Order. The Custodian certified that New Jersey State Police ("NJSP") did not make, maintain, or keep on file the amount of pension for a former officer. The Custodian certified that upon receipt of the Complainant's December 3, 2016 OPRA request, he reached out to the Division of Pensions and Benefits ("DPB") as a courtesy. The Custodian affirmed that after receiving pension information for Lt. Schlichting, he responded to the Complainant providing same.

The Custodian certified that because NJSP did not maintain the responsive information, he determined that it was more appropriate to direct the requestor to [yourmoney.nj.gov](http://yourmoney.nj.gov). The Custodian affirmed that he did not again provide Lt. Schlichting's pension amount in response to the March 6, 2017 OPRA request because he had previously provided same. See Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609, 619 (App. Div. 2008); Caggiano v. Office of the Governor, GRC Complaint No. 2014-408 (September 2015).

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<sup>3</sup> The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

<sup>4</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>5</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.

## Analysis

### Compliance

At its February 26, 2019 meeting, the Council ordered the Custodian to either: 1) locate and disclose the relevant personnel information to the Complainant; or 2) provide a detailed explanation of how he was able to obtain and disclose Lt. Schlichting's pension amount and no other pension information. Further, the Council required the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule R. 1:4-4, to the Council Staff. On February 28, 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. Thus, the Custodian's response was due by close of business on March 7, 2019.

On March 7, 2019, the fifth (5<sup>th</sup>) business day after receipt of the Council's Order, the Custodian provided certified confirmation of compliance in which he detailed how he was able to disclose Lt. Schlichting's pension amount. Specifically, the Custodian affirmed that he reached out to DPB to obtain the pension amounts, but then determined it more appropriate to direct the Complainant to yourmoney.nj.gov. The GRC is satisfied with this explanation, although it would likely have been more appropriate to direct the Complainant to DPB to obtain the information.<sup>6</sup> Thus, because the Custodian provided an explanation of the reason why he was able to disclose Lt. Schlichting's information alone, he complied with the Council's Order.

Therefore, the Custodian complied with the Council's February 26, 2019 Interim Order because he responded within the prescribed time frame conforming to option No. 2 of said order. Further, the Custodian simultaneously provided certified confirmation of compliance to the Council Staff.

### 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

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<sup>6</sup> The GRC notes that Rodriguez v. Kean Univ., GRC Complaint No. 2013-69 (March 2014) gives custodians the authority to direct requestors to the exact place on the internet where responsive records reside. Notwithstanding, the GRC encountered errors in attempts to verify that the Complainant could, in fact, obtain this information from yourmoney.nj.gov.

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 (id.; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); 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)).

Here, the Custodian unlawfully denied access to the title/position and salary information sought in the Complainant's December 3, 2016 OPRA request. However, the Custodian ultimately disclosed this information as part of his response to the March 6, 2017 OPRA request. Further, the Custodian did not unlawfully deny access to the remaining pension amounts because NJSP did not possess them. N.J.S.A. 47:1A-6. Also, the Custodian complied with the Council's February 26, 2019 Interim order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do 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 Council Staff respectfully recommends the Council find that:

1. The Custodian complied with the Council's February 26, 2019 Interim Order because he responded within the prescribed time frame conforming to option No. 2 of said order. Further, the Custodian simultaneously provided certified confirmation of compliance to the Council Staff.
2. The Custodian unlawfully denied access to the title/position and salary information sought in the Complainant's December 3, 2016 OPRA request. However, the Custodian ultimately disclosed this information as part of his response to the March 6, 2017 OPRA request. Further, the Custodian did not unlawfully deny access to the remaining pension amounts because New Jersey State Police did not possess them. N.J.S.A. 47:1A-6. Also, the Custodian complied with the Council's February 26, 2019 Interim order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do 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: Frank F. Caruso  
Acting Executive Director

March 19, 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**

**February 26, 2019 Government Records Council Meeting**

Larry Michael Welenc  
Complainant  
v.  
NJ State Police  
Custodian of Record

Complaint No. 2017-134

At the February 26, 2019 public meeting, the Government Records Council (“Council”) considered the February 19, 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 unlawfully denied access to the title/position and salary information sought in the Complainant’s December 3, 2016 OPRA request. N.J.S.A. 47:1A-6. Specifically, this information is plainly disclosable under OPRA and should have been provided. N.J.S.A. 47:1A-10. Notwithstanding, the GRC declines to order disclosure of this information because the Custodian subsequently provided same on April 28, 2017.
2. The Custodian may have unlawfully denied access to the responsive personnel information comprising the amount and type of pension received for the identified individuals. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10. The Custodian must either: 1) locate and disclose the relevant personnel information to the Complainant; or 2) provide a detailed explanation of how he was able to obtain and disclose Lt. Schlichting’s pension amount and no other pension information.
3. **The Custodian shall comply with conclusion No. 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, if applicable. Further, the Custodian shall simultaneously deliver<sup>1</sup>**

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<sup>1</sup> The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.



**certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>2</sup> to the Council Staff.<sup>3</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.

Interim Order Rendered by the  
Government Records Council  
On The 26<sup>th</sup> Day of February, 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: February 28, 2019**

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<sup>2</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>3</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.

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff  
February 26, 2019 Council Meeting**

**Larry Michael Welenc<sup>1</sup>  
Complainant**

**GRC Complaint No. 2017-134**

v.

**New Jersey State Police<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic information via e-mail of the title, position, salary, length of service, date of separation, reason for separation, and amount and type of pension for the following individuals:

- Sergeant (“Sgt.”) First Class William Porter
- Lieutenant (“Lt”) Joseph Mack
- Sgt. Charles H. Crilley
- Lt. Hans Schlichting
- Lt. Frank Schoenerin

**Custodian of Record:** DSFC David Robbins

**Request Received by Custodian:** December 3, 2016; March 6, 2017

**Response Made by Custodian:** February 13, 2017; April 28, 2017

**GRC Complaint Received:** June 12, 2017

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

**Request and Response:**

On December 3, 2016 the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On February 13, 2017, the Custodian responded in writing disclosing the length of service, date of separation, and reason therefore for each individual. The Custodian also disclosed a pension amount for Lt. Schlichting. The Custodian finally noted that pension information could be found at [yourmoney.nj.gov](http://yourmoney.nj.gov).

On March 6, 2017, the Complainant resubmitted the above OPRA request to the Custodian seeking the same personnel information, noting that the Custodian’s February 13, 2017 response

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

<sup>2</sup> Represented by Deputy Attorney General Tasha Bradt.

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

was incomplete. On April 28, 2017, the Custodian responded in writing providing the title/position, salary, length of service, date of separation, and reason therefore. The Custodian also stated that the New Jersey State Police (“NJSP”) did not maintain an amount/type of pension for the individuals. The Custodian referred the Complainant to the “[New Jersey Department of Treasury,] Division of Pensions and Benefits (“DPB”).

#### Denial of Access Complaint:

On June 12, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that this complaint centered on two (2) OPRA requests. The Complainant noted that he submitted the March 6, 2017 OPRA request after the Custodian provided an incomplete response to his December 3, 2016 OPRA request.

The Complainant asserted that the Custodian failed to provide a pension amount and type for each individual identified in his request. The Complainant asserted that this information was “public information” and was disclosable. The Complainant noted that the Custodian previously disclosed pension information about his late father, as well as a pension amount for Lt. Schlichting in response to his December 3, 2016 request.

#### Statement of Information:

On July 27, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the first (1<sup>st</sup>) OPRA request on December 3, 2016. The Custodian certified that he responded on February 13, 2017 disclosing length of service, date of separation, and reason for separation. The Custodian certified that he noted the Complainant could obtain pension information from [yourmoney.nj.gov](http://yourmoney.nj.gov).

The Custodian certified that he received the Complainant’s second (2<sup>nd</sup>) OPRA request on March 6, 2017. The Custodian certified that he responded on April 28, 2017 disclosing the title/position, salary, length of service, date of separation, and reason therefore. The Custodian affirmed that he again noted that NJSP did not make, maintain, or keep on file the amount and type of pension for former officers. The Custodian certified that he directed the Complainant to DPB for the outstanding information.

The Custodian contended that he lawfully denied access to the outstanding pension information because NJSP did not maintain it. Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). The Custodian further argued that he properly directed the Complainant to the appropriate agency to obtain it. N.J.S.A. 47:1A-5(h).

#### Additional Submissions:

On July 30, 2017, the Complainant submitted a reply to the SOI. The Complainant argued that the Custodian erroneously certified that NJSP did not maintain responsive information. The Complainant reiterated that, in response to a prior OPRA request, the Custodian provided the amount and type of pension for his late father. The Complainant further noted that in response to

the December 3, 2016 OPRA request, the Custodian disclosed Lt. Schlichting's pension amount. The Complainant further argued that in response to the March 6, 2017 request, the Custodian omitted Lt. Schlichting's pension amount.

Finally, the Complainant averred that the Custodian explained NJSP's inability to provide pension information in a May 5, 2017 e-mail. The Complainant averred that therein, the Custodian stated that his father's pension information was on file with NJSP because he was killed in the line of duty. The Complainant averred that the Custodian further stated that retiree pension information was not kept by NJSP. The Complainant questioned this explanation, given that Lt. Schlichting's pension amount was provided although his reason for separation was retirement. The Complainant also questioned how information not maintained by NJSP would be posted on the internet.

### 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.<sup>4</sup>

Regarding personnel records, OPRA begins with a presumption against disclosure and "proceeds with a few narrow exceptions that . . . need to be considered." Kovalcik v. Somerset Cnty. Prosecutor's Office, 206 N.J. 581, 594 (2011). Those narrow exceptions include "an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of any pension received . . ." N.J.S.A. 47:1A-10 (emphasis added).<sup>5</sup>

Further, the Council has previously found that, in light of a custodian's certification that no records responsive to the request exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). However, should a complainant provide competent, credible evidence to refute a legal certification, the Council held that a custodian violated OPRA. See Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-76 (Interim Order dated June 26, 2012).

In the instant complaint, the Complainant's December 3, 2016 OPRA request sought the title, position, salary, length of service, date of separation, reason for separation, and amount and type of pension regarding five (5) individuals. In his February 13, 2017 response, the Custodian provided only the length of service, date of separation, and reason therefore. The Custodian did

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<sup>4</sup> The GRC notes that it appears the Custodian failed to respond in a timely manner to both OPRA requests. However, the GRC is not

<sup>5</sup> In Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2011-64 (Interim Order dated August 28, 2012), the Council held that a custodian must provide the most comprehensive record containing responsive personnel information. Here, however, the Complainant specifically sought the requested information in list form and did not challenge the format of the response. For this reason, the GRC will not address whether the disclosed lists were contrary to applicable case law.

not include the remaining information, except for Lt. Schlichting's pension amount. The Complainant's March 6, 2017 OPRA request sought the same information as the December 3, 2016 OPRA request. In his April 28, 2017 response, the Custodian provided all information, inclusive of that lacking from the February 13, 2017 response. However, the Custodian did not provide the amount and type of each individual's pension. Of note, missing from this response was Lt. Schlichting's pension amount previously included in the February 13, 2017 response.

As to the December 3, 2016 OPRA request, the GRC is satisfied that the Custodian unlawfully denied access to the title/position and salary for each individual. A plain reading of OPRA provides that the request sought disclosable information that should have been provided. N.J.S.A. 47:1A-10. Thus, the Custodian should have disclosed it to the Complainant, but failed to do so until responding to the Complainant's March 6, 2017 OPRA request.

Accordingly, the Custodian unlawfully denied access to the title/position and salary information sought in the Complainant's December 3, 2016 OPRA request. N.J.S.A. 47:1A-6. Specifically, this information is plainly disclosable under OPRA and should have been provided. N.J.S.A. 47:1A-10. Notwithstanding, the GRC declines to order disclosure of this information because the Custodian subsequently provided same on April 28, 2017.

As to the remaining issue of pension information for the five (5) individuals, the Custodian certified in the SOI that NJSP did not maintain any responsive information. While such a response typically results in a finding similar to Pusterhofer, GRC 2005-49, conflicting facts here require a different outcome. Specifically, the Custodian was able to provide Lt. Schlichting's pension amount in his February 13, 2017 response, which he then omitted from his April 28, 2017 response. This disclosure alone, followed by withholding it, calls into question the Custodian's certification. The Custodian provided no explanation in the SOI as to why he was able to provide this one piece of information, but not others.

The GRC also finds the Complainant's discussion of the Custodian's May 5, 2017 e-mail as compelling evidence to potentially refute the Custodian's certification. The e-mail itself casts a deeper shadow on how the Custodian was able to provide Lt. Schlichting's pension amount. Specifically, the Custodian stated that NJSP did not maintain pension information on retirees, which his April 28, 2017 response indicates was Lt. Schlichting's reason for separation. Further, while the GRC recognizes that the Custodian provided the Complainant alternative options for obtaining the pension information, he was no less obligated to provide it if NJSP was maintaining same.

Therefore, the Custodian may have unlawfully denied access to the responsive personnel information comprising the amount and type of pension received for the identified individuals. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10. The Custodian must either: 1) locate and disclose the relevant personnel information to the Complainant; or 2) provide a detailed explanation of how he was able to obtain and disclose Lt. Schlichting's pension amount and no other pension information.

### **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 unlawfully denied access to the title/position and salary information sought in the Complainant's December 3, 2016 OPRA request. N.J.S.A. 47:1A-6. Specifically, this information is plainly disclosable under OPRA and should have been provided. N.J.S.A. 47:1A-10. Notwithstanding, the GRC declines to order disclosure of this information because the Custodian subsequently provided same on April 28, 2017.
2. The Custodian may have unlawfully denied access to the responsive personnel information comprising the amount and type of pension received for the identified individuals. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10. The Custodian must either: 1) locate and disclose the relevant personnel information to the Complainant; or 2) provide a detailed explanation of how he was able to obtain and disclose Lt. Schlichting's pension amount and no other pension information.
3. **The Custodian shall comply with conclusion No. 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, if applicable. Further, the Custodian shall simultaneously deliver<sup>6</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>7</sup> to the Council Staff.<sup>8</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.

Prepared By: Frank F. Caruso  
Acting Executive Director

February 19, 2019

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<sup>6</sup> The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

<sup>7</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>8</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.