



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

**April 28, 2020 Government Records Council Meeting**

Marquis McCray  
Complainant

Complaint No. 2018-121

v.

NJ Department of Corrections  
Custodian of Record

At the April 28, 2020 public meeting, the Government Records Council (“Council”) considered the April 21, 2020 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 did not bear his burden of proof that he 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 dated October 31, 2007).
2. The Custodian’s response was insufficient because he failed to respond in writing to each individual item contained in the OPRA request. Accordingly, the Custodian violated OPRA pursuant to N.J.S.A. 47:1A-5(g), Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008) and Graumann v. Newfield Police Dep’t (Gloucester), GRC Complaint No. 2014-314 (May 2015).
3. the Custodian’s failure to locate responsive records until after he conducted an additional search following the GRC’s request for additional information, resulted in an insufficient search. Thus, the Custodian unlawfully denied access to the additional records responsive to the Complainant’s OPRA request located in connection with the second search. N.J.S.A. 47:1A-6; Schneble v. N.J. Dep’t of Env’tl. Protection, GRC Complaint No. 2007-220 (April 2008). However, the GRC declines to order disclosure of those records because the Custodian disclosed same to the Complainant on March 17, 2020.
4. The Custodian violated N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i), provided an insufficient response pursuant to Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008) and Graumann v. Newfield Police Dep’t (Gloucester), GRC Complaint No. 2014-314 (May 2015), and conducted an

insufficient search pursuant to Schneble v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008). However, following receipt of the GRC's request for additional information, the Custodian disclosed to the Complainant all responsive records to the request located via the additional search. 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 28<sup>th</sup> Day of April 2020

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: April 30, 2020**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
April 28, 2020 Council Meeting**

**Marquis McCray<sup>1</sup>  
Complainant**

**GRC Complaint No. 2018-121**

**v.**

**N.J. Department of Corrections<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**<sup>3</sup> “I request a copy of the original Inmate Inventory Sheet [ (“IIS”) ] from [East Jersey State Prison (“EJSP”) ] on 3-30-18, listing all of my property and any and all reports of confiscated items.”

**Custodian of Record:** John Falvey  
**Request Received by Custodian:** May 21, 2018  
**Response Made by Custodian:** N/A  
**GRC Complaint Received:** June 29, 2018

**Background**<sup>4</sup>

**Request:**

On May 10, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.

**Denial of Access Complaint:**

On June 29, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant<sup>5</sup> asserted that prior to filing his OPRA request, he filed a lost or stolen property claim with the EJSP after being transferred to another facility. The Complainant asserted that he subsequently filed the instant OPRA request related to his claim. The Complainant contended that he has not received a response from the Custodian.

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

<sup>2</sup> Represented by Deputy Attorney General Francis A. Raso.

<sup>3</sup> The Complainant did not specify the method of delivery.

<sup>4</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.

<sup>5</sup> At the time of the OPRA request, the Complainant was an incarcerated individual residing at Northern State Prison.

Response:

On July 6, 2018, the thirty-second (32<sup>nd</sup>) business day after receipt of the OPRA request, Northern State Prison (“NSP”) Executive Assistant Mario Viera responded in writing on behalf of the Custodian providing three (3) pages of records.

Statement of Information:

On August 8, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on May 21, 2018. The Custodian certified that upon review, he assigned the request to Mr. Viera. The Custodian also certified that the New Jersey Department of Corrections (“DOC”) conducted searches for responsive records at the mailrooms of NSP and EJSP. The Custodian certified that Mr. Viera responded on his behalf on July 6, 2018, providing three (3) pages of records as indicated on the attached copy of DOC’s “OPRA Records Request Payment Notification and Authorization” form (“PNA form”). The Custodian certified that the three (3) pages comprised a copy of the requested IIS.

The Custodian argued that the matter should be dismissed as moot, as the requested record have been provided to the Complainant, citing Stop & Shop Supermarket Co., LLC v. Cnty. of Bergen, 450 N.J. Super. 286, 294-92 (App. Div. 2017); and Mason v. City of Hoboken, 2008 N.J. Super. Unpub. LEXIS 1660, \*7 (App. Div. Jan. 29, 2008). The Custodian asserted that the Complainant was provided the responsive record and that any delay in production was inadvertent. The Custodian therefore asserted that because the Complainant possessed all responsive records, the complaint should be dismissed as moot.

Additional Submissions:

On August 27, 2018, the Complainant submitted correspondence in response to the Custodian’s SOI. The Complainant asserted that the Custodian did not provide a complete response to his OPRA request. The Complainant contended that the request sought “any and all reports of confiscated items” in addition to the IIS he received.

The Complainant asserted that upon receiving only a copy of the IIS, he filed a subsequent OPRA request on July 18, 2018 seeking “property confiscation reports.” He asserted that on August 7, 2018, the Custodian responded to the OPRA request stating that one (1) property disposition form was located at NSP and was awaiting payment for the copying fee. The Complainant argued that this form was not the same as a confiscation report. The Complainant contended that any responsive records would come from EJSP and not NSP, as his property was confiscated while residing there. The Complainant therefore argued that the Custodian’s contention that all responsive records were provided was false and contended that the matter should not be dismissed.

On September 7, 2018, the Complainant submitted additional correspondence to the GRC. The Complainant asserted that he received the property disposition form from the Custodian on August 27, 2018. The Complainant argued that this record was not responsive to the request at issue or his July 18, 2018 OPRA request. The Complainant maintained that the current matter

should not be dismissed.

On March 5, 2020, the GRC requested additional information from the Custodian. Specifically, the GRC asked the Custodian:

Did yourself or Mr. Viera conduct a search for “any and all confiscation reports” in addition to the inventory sheet in response to the Complainant’s OPRA request? If so, please indicated [sic] whether records were located and the search undertaken.

On March 9, 2020, the Custodian’s Counsel requested an extension of time to respond, which the GRC granted that same day to March 17, 2020.

On March 17, 2020, the Custodian responded to the GRC’s request for additional information. The Custodian certified that upon receiving the OPRA request at issue, he assigned same to Mr. Viera at ESP. The Custodian certified that Mr. Viera provided the Complainant with the responsive IIS on July 6, 2018. The Custodian then certified that as of July 6, 2018, he was under the impression that the OPRA request had been fulfilled.

The Custodian certified that DOC received the Complainant’s additional OPRA request on July 18, 2018. The Custodian certified that within this request, the Complainant contended that he did not receive reports of confiscated items that he sought within his original OPRA request. The Custodian certified that he consulted with Mr. Viera as well as EJSP Executive Assistant Karyn Parker-Foreman. The Custodian certified that Ms. Parker-Foreman informed him that no responsive records were found at EJSP, while Mr. Viera informed him that he located a property disposition form that may have been responsive. The Custodian certified that DOC Technical Program Assistant Wendy Myers-Williams disclosed the property disposition form to the Complainant on August 27, 2018. The Custodian then certified that as of August 27, 2018, he was under the impression that the July 18, 2018 OPRA request had been fulfilled.

The Custodian then certified that he was unaware of the Complainant’s August 27, 2018 and September 7, 2018 correspondence until he received a copy of same from the GRC on March 5, 2020. The Custodian certified that he conducted a search for any “confiscation reports” that may have been responsive to the Complainant’s request. The Custodian certified that upon reviewing his e-mail archives, he located an e-mail from Ms. Parker-Foreman dated July 27, 2018, wherein she advised the Custodian that the Complainant was disciplined during his time at EJSP. The Custodian certified that upon searching the Complainant’s disciplinary file, he located eight (8) pages of “seizure of contraband” reports dated March 10, 2018. The Custodian certified that although the Complainant was no longer in the DOC’s custody, DOC had his last known address on file, and he sent the eight (8) pages of records to said address via regular mail on March 17, 2020.

The Custodian certified that the Complainant’s OPRA requests were now satisfied, and that any delay in production was inadvertent.

## Analysis

### Timeliness

OPRA mandates that a custodian must either 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 within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).<sup>6</sup> Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).

In the instant complaint, the Complainant argued that the Custodian failed to respond to his OPRA request. In the SOI, the Custodian certified that he received the Complainant's OPRA request on May 21, 2018. The Custodian further affirmed that he forwarded the OPRA request to Mr. Viera for processing. The Custodian then certified that Mr. Viera did not respond to the subject OPRA request until July 6, 2018, the thirty-second (32<sup>nd</sup>) business day after receipt of the subject OPRA request, or the fourth (4<sup>th</sup>) business day after the complaint filing. Thus, the evidence of record supports that a "deemed" denial of access occurred here.

Therefore, the Custodian did not bear his burden of proof that he 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.

### Insufficient Response

OPRA provides that a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g). Further, in Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008), the GRC held that "[t]he Custodian's response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5(g)." In Graumann v. Newfield Police Dep't (Gloucester), GRC Complaint No. 2014-314 (May 2015), the subject OPRA request sought multiple items in a single paragraph, as opposed to an enumerated list. In her response, the custodian only addressed a portion of the OPRA request. The Council determined that the custodian's response was insufficient because it failed to address each request item individually. In reaching this conclusion, the Council reasoned that the custodian "completely failed to acknowledge or address the balance of the request."

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<sup>6</sup> A custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

In the instant matter, the Complainant's OPRA request sought a copy of an IIS as well as reports of confiscated items. The evidence of record indicates that Mr. Viera responded on July 6, 2018 providing three (3) pages of records. However, the Custodian certified in the SOI that the pages comprised a copy of the IIS, and the Custodian made no reference to the Complainant's request for reports of confiscated items. In accordance with Graumann, GRC 2014-314, the evidence of record demonstrates that the Custodian's response was insufficient.

Therefore, the Custodian's response was insufficient because he failed to respond in writing to each individual item contained in the OPRA request. Accordingly, the Custodian violated OPRA pursuant to N.J.S.A. 47:1A-5(g), Paff, GRC 2007-272, and Graumann, GRC 2014-314.

### **Insufficient Search**

It is the custodian's responsibility to perform a complete search for the requested records before responding to an OPRA request, as doing so will help ensure that the custodian's response is accurate and has an appropriate basis in law. In Schneble v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008), the custodian initially stated that no records responsive to the complainant's OPRA request existed. The custodian certified that after receipt of the complainant's denial of access complaint, which contained e-mails responsive to the complainant's request, the custodian conducted a second search and found records responsive to the complainant's request. The GRC held that the custodian had performed an inadequate search and thus unlawfully denied access to the responsive records. See also Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (January 2011).

Here, Mr. Viera responded on July 6, 2018, providing a copy of the IIS. Thereafter on July 18, 2018, the Complainant submitted a subsequent OPRA request seeking reports of confiscated items that were not addressed in the July 6, 2018 response. The Custodian certified that upon consulting with Ms. Parker-Foreman and Mr. Viera, one (1) record was located that may have been responsive. The Custodian certified that Ms. Myers-Williams provided the Complainant with a copy of said record on August 27, 2018.

Thereafter, in response to the GRC's March 5, 2020 request for additional information, the Custodian certified that he conducted an additional search for reports of confiscated items. The Custodian certified that upon searching through the Complainant's disciplinary file, he located eight (8) pages of "seizure of contraband" reports. The Custodian certified that he provided the reports to the Complainant via regular mail on March 17, 2020 and considered both OPRA requests to be fulfilled. Thus, in accordance with Schneble, GRC 2007-220, the evidence in the record supports that the Custodian's initial search was insufficient.

Therefore, the Custodian's failure to locate responsive records until after he conducted an additional search following the GRC's request for additional information, resulted in an insufficient search. Thus, the Custodian unlawfully denied access to the additional records responsive to the Complainant's OPRA request located in connection with the second search. N.J.S.A. 47:1A-6; Schneble, GRC 2007-220. However, the GRC declines to order disclosure of those records because the Custodian disclosed same to the Complainant on March 17, 2020.

## **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 (*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 violated N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i), provided an insufficient response pursuant to Paff, GRC 2007-272 and Graumann, GRC 2014-314, and conducted an insufficient search pursuant to Schneble, GRC 2007-220. However, following receipt of the GRC’s request for additional information, the Custodian disclosed to the Complainant all responsive records to the request located via the additional search. 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 Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he 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 dated October 31, 2007).



2. The Custodian's response was insufficient because he failed to respond in writing to each individual item contained in the OPRA request. Accordingly, the Custodian violated OPRA pursuant to N.J.S.A. 47:1A-5(g), Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008) and Graumann v. Newfield Police Dep't (Gloucester), GRC Complaint No. 2014-314 (May 2015).
3. the Custodian's failure to locate responsive records until after he conducted an additional search following the GRC's request for additional information, resulted in an insufficient search. Thus, the Custodian unlawfully denied access to the additional records responsive to the Complainant's OPRA request located in connection with the second search. N.J.S.A. 47:1A-6; Schneble v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008). However, the GRC declines to order disclosure of those records because the Custodian disclosed same to the Complainant on March 17, 2020.
4. The Custodian violated N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i), provided an insufficient response pursuant to Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008) and Graumann v. Newfield Police Dep't (Gloucester), GRC Complaint No. 2014-314 (May 2015), and conducted an insufficient search pursuant to Schneble v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008). However, following receipt of the GRC's request for additional information, the Custodian disclosed to the Complainant all responsive records to the request located via the additional search. 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: Samuel A. Rosado  
Staff Attorney

April 21, 2020