



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**

Mark L. Tompkins  
Complainant

Complaint No. 2018-142

v.

Newark Police Department (Essex)  
Custodian of Record

At the April 28, 2020 public meeting, the Government Records Council (“Council”) considered the April 3, 2020 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 Complainant’s June 6, 2018 OPRA request because the Custodian certified, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6. See also Kasko v. Twp. of Westfield, GRC Complaint No. 2011-06 (March 2012); and Pusterhofer v. New Jersey 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 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**

**Mark L. Tompkins<sup>1</sup>  
Complainant**

**GRC Complaint No. 2018-142**

**v.**

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

**Records Relevant to Complaint:** Hard copies via U.S. mail of:

A “Complete Index List” of the days worked and days off work, on and between the dates of 9/12/2004 through 9/18/2004 pertaining to City of Newark (“City”) police officers Bonnie Leverett, badge number 7460 (South District), and David Fortenberry, badge number 7840 (South District).

**Custodian of Record:** Kenneth Louis  
**Request Received by Custodian:** June 6, 2018  
**Response Made by Custodian:** July 2, 2018  
**GRC Complaint Received:** July 23, 2018

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

**Request and Response:**

On May 18, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 7, 2018, the Custodian responded in writing, stating that the City Clerk’s Office received the OPRA request and anticipated a response date on or before June 26, 2018.

On July 2, 2018, the Custodian responded in writing, stating that he was informed by Najah Hatim-Johnson of the Newark Police Division’s (“NPD”) Legal Affairs Unit (“LAU”), that the requested list was not retained by the Newark Public Safety Department. The Custodian also attached the memorandum between the LAU and the City Clerk’s Office dated June 28, 2018.

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

<sup>2</sup> Represented by Kenyatta Stewart, Esq., Acting Corporation Counsel (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.

### Denial of Access Complaint:

On July 23, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that if his requested records were not at the searched location, the Custodian should have forwarded the OPRA request to the appropriate agency. The Complainant argued that the Custodian should not have just denied access based upon the memo from the Legal Affairs Unit.

### Statement of Information:

On March 10, 2020,<sup>4</sup> the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on June 7, 2018. The Custodian certified that upon receipt, the staff of the City Clerk’s Office’s OPRA Division forwarded the request to the NPD to search for responsive records. The Custodian included a memorandum from Jose Da Silva, a manager at the Archives & Records Management Center (“ARMC”) of the City Clerk’s Office. Therein, Mr. Da Silva stated that in June 2018, Ms. Hatim-Johnson asked him to conduct a search for blotters for the City’s South Precinct from 2004. Mr. Da Silva stated that no such blotters were located. The Custodian certified that he responded in writing on July 2, 2018, stating that the NPD did not retain the requested records.

Upon receiving the complaint at issue, the Custodian certified that another search was conducted for responsive records. In his memorandum, Mr. Da Silva stated that on August 12, 2018, Ms. Hatim-Johnson asked him to search for the personnel files of Ofcs. Leverett and Fortenberry, but none were located. Ms. Hatim-Johnson then forwarded the results to the City Clerk’s Office via memorandum on August 13, 2018.

Mr. Da Silva then stated that on March 10, 2020, Ana Golinski at the City Clerk’s Office asked him to search for any destruction authorizations for the City’s police records related to the OPRA request. Mr. Da Silva stated that he discovered that “Time Records File,” “Blotter Sheets/Daily Assignment Sheets,” and “Daily Activity/Tally Sheets/Vehicles Logs” for 2004 were destroyed in 2017 according to the New Jersey’s Records Management Services (“RMS”) regulations. The Custodian included excerpts from the RMS retention schedules as part of the SOI.

The Custodian argued that he did not violate OPRA, as the requested records were destroyed in 2004 pursuant to RMS regulations. The Custodian asserted that the City Clerk’s Office conducted several searches for responsive records, but none were located. The Custodian contended that the requested records were destroyed in 2017, the year before the Complainant submitted his OPRA request. The Custodian asserted that logic and GRC precedent provide that a custodian cannot violate OPRA by failing to provide records that no longer exist. Kasko v. Twp. of Westfield, GRC Complaint No. 2011-06 (March 2012).

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<sup>4</sup> The Custodian originally submitted an SOI on August 15, 2018. However, the SOI was deficient as it did not address the OPRA request at issue and was not signed by the Custodian of Record. Thus, the GRC requested a new submission on February 28, 2020.

## 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, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. New Jersey Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). In Kasko, GRC 2011-06, the complainant sought quarterly earnings reports dated in 2001. The custodian certified that three (3) separate searches were conducted to locate responsive records, but none were found. The custodian also certified that the records had a six (6) year retention schedule. The Council held that the custodian did not unlawfully deny access.

In the current matter, the Custodian initially responded to the Complainant’s request that the NPD did not retain the responsive records. The Complainant asserted that the Custodian should have forwarded request to the proper agency, rather than just deny access. The Custodian then certified in the SOI that the City Clerk’s Office conducted several separate searches for responsive records and clarified that no responsive records were located. The Custodian also provided excerpts of the RMS retention schedules which demonstrate that any responsive records would have been scheduled for destruction in 2017. Furthermore, the Complainant failed to provide evidence to refute the Custodian’s certification. Thus, the GRC is satisfied that the Custodian did not unlawfully deny access to the requested records. See Kasko, GRC 2011-06; and Pusterhofer, GRC 2005-49.

Accordingly, the Custodian has borne his burden of proof that he lawfully denied access to the Complainant’s June 6, 2018 OPRA request because the Custodian certified, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6. See also Kasko, GRC 2011-06; and 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 Complainant’s June 6, 2018 OPRA request because the Custodian certified, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6. See also Kasko v. Twp. of Westfield, GRC Complaint No. 2011-06 (March 2012); and Pusterhofer v. New Jersey Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

Prepared By: Samuel A. Rosado  
Staff Attorney

April 3, 2020