



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

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

**January 26, 2021 Government Records Council Meeting**

Kevin M. O'Brien  
Complainant

Complaint No. 2019-149

v.

NJ Division of Consumer Affairs  
Custodian of Record

At the January 26, 2021 public meeting, the Government Records Council (“Council”) considered the January 19, 2021 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 unlawfully denied access to the Complainant’s July 12, 2019 OPRA request. N.J.S.A. 47:1A-6. The Custodian failed to show that release of the requested e-mails would be “inimical to the public interest” under N.J.S.A. 47:1A-3(a). See North Jersey Media Grp. v. Twp. of Lyndhurst, 229 N.J. 541, 573-74 (2017). However, the Council declines to order disclosure as the Custodian certified that she provided the responsive records on September 16, 2019, and again as part of the Statement of Information.
2. The Custodian unlawfully denied access to the requested e-mails. N.J.S.A. 47:1A-6. However, the Custodian ultimately provided the responsive records to the Complainant on September 16, 2019. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or were 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 January 2021

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: January 28, 2021**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
January 26, 2021 Council Meeting**

**Kevin M. O'Brien<sup>1</sup>  
Complainant**

**GRC Complaint No. 2019-149**

v.

**N.J. Division of Consumer Affairs<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of:

1. All e-mails to and from Jared O’Cone and B. David Jarashow attorney of law for Paz Delgado from June 1<sup>st</sup> to July 12<sup>th</sup>, 2019.
2. All e-mails to and from Joseph Iasso and B. David Jarashow attorney of law for Paz Delgado from June 1<sup>st</sup> to July 12<sup>th</sup>, 2019.
3. All e-mails to and from Joseph Iasso and Jared O’Cone between June 1<sup>st</sup> to July 12<sup>th</sup>, 2019 relating to Kevin O’Brien and OCP case #4172300.OCP (Kevin O’Brien v. Paz Painters).

**Custodian of Record:** Lucie Moreira

**Request Received by Custodian:** July 12, 2019

**Response Made by Custodian:** July 23, 2019; September 16, 2019

**GRC Complaint Received:** July 25, 2019

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

**Request and Response:**

On July 12, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 23, 2019, the Custodian responded in writing denying access to the records stating they were part of an ongoing investigation and therefore exempt under OPRA. N.J.S.A. 47:1A-3. That same day, the Complainant responded to the Custodian stating that there was no active investigation, and that the requested records were related to settlement discussions regarding a contractor.

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

<sup>2</sup> Represented by Deputy Attorney General Roman Guzik.

<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 25, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the records pertained to a complaint he filed with the Division of Consumer Affairs (“DCA”) in November 2018. The Complainant asserted that at the time of the request there was no active investigation and same had concluded in March 2019.

The Complainant asserted that OPRA’s ongoing investigation exemption was valid only if the records’ release would be inimical to the public interest. The Complainant argued that there was no risk to public interest since it pertained to the Complainant’s DCA complaint and investigation thereto. The Complainant maintained that the e-mails would pertain to discussions regarding settlement with a contractor, and not any investigation.<sup>4</sup>

### Supplemental Response:

On August 19, 2019, the Custodian was notified by Joseph Iasso that the investigation into the Complainant’s complaint had concluded, and the records requested were available. On or about September 16, 2019, the Custodian responded to the Complainant providing the requested records. The Custodian stated that DCA agreed to release the records since a settlement had been signed.

### Statement of Information:

On October 10, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on July 12, 2019. The Custodian certified that her search included contacting the OCP investigator named in the request to search their files and e-mails for responsive documents. The Custodian also certified that MIS performed a search of the applicable mailboxes. The Custodian certified that she responded in writing on July 23, 2019, denying access on the basis that the records pertained to an ongoing investigation under N.J.S.A. 47:1A-3.

The Custodian certified that on August 19, 2019 she was notified by Mr. Iasso that the investigation had concluded, and a settlement had been signed. The Custodian certified that she provided the responsive records to the Complainant on September 16, 2019, after reviewing same.

The Custodian initially argued that because the records were provided to the Complainant, the matter should be dismissed as moot. De Vesa v. Dorsey, 134 N.J. 420, 428 (1993). The Custodian asserted that the Appellate Division has previously held that there is no denial of access under OPRA when the requestor has the records at issue. See Bart v. Paterson Hous. Auth., 403 N.J. Super. 609, 618 (App. Div. 2018). The Custodian also asserted that when the plaintiff already has the record sought, a decision granting access has no practical effect. See Mason v. City of Hoboken, 2008 N.J. Super. Unpub. LEXIS 1660, \*7 (App. Div. Jan. 29, 2008); L.R. v. Camden Bd. of Educ. Custodian, 2012 N.J. Super. Unpub. LEXIS 1140, \*6-7 (App. Div. May 23, 2012).

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<sup>4</sup> The Complainant also made common law arguments regarding his need for access. However, pursuant to N.J.S.A. 47:1A-7, the GRC only has the authority to adjudicate requests made pursuant to OPRA. See also Rowan, Jr. v. Warren Hills Reg’l Sch. Dist. (Warren), GRC Complaint No. 2011-347 (January 2013).

The Custodian asserted that since DCA provided the responsive records, the claim is thus moot. Thus, the Custodian argued there is no issue to be decided and the matter should be dismissed.<sup>5</sup>

### 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.

Furthermore, OPRA provides that in order to withhold access to records under N.J.S.A. 47:1A-3(a), the agency must show that the records “pertain to an investigation in progress by any public agency,” that disclosure will “be inimical to the public interest,” and also show that the records were not available to the public prior to the beginning of the investigation. See North Jersey Media Grp. v. Twp. of Lyndhurst, 229 N.J. 541, 573 (2017).

In North Jersey Media Grp., the Court noted that section 3(a) has seen little analysis in published decisions, stating:

In Serrano v. South Brunswick Township, 358 N.J. Super. 352, 367, 817 A.2d 1004 (App. Div. 2003), the Appellate Division rejected a claim that the release of a 9-1-1 tape could make it difficult to impanel a jury in a murder case and might call for a change of venue. Even if that were to happen, the panel observed, the “inconveniences to the prosecutor” did not make disclosure “inimical to the public interest.” Ibid. The panel also initially noted that the tape “was created hours before the police investigation began” and was “open for public inspection” at that time. Id. at 366, 817 A.2d 1004 (quoting N.J.S.A. 47:1A-3(a)). Section 3(a) expressly carves that type of record out of the ongoing investigations exception.

...

[I]n [Paff v. Ocean Cnty. Prosecutor’s Office, 446 N.J. Super. 163, 189-90 (App. Div. 2016)], the Appellate Division briefly addressed section 3(a). In light of the facts of the case, which are discussed above, a majority of the panel found that the MVR recordings preceded any investigation and that their release would not be inimical to the public interest.

[229 N.J. at 573-74.]

In summary, the Court found that the custodian must demonstrate that disclosure of the record will “be inimical to the public interest” under N.J.S.A. 47:1A-3(a).

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<sup>5</sup> The Custodian also argued that any common law assertions were moot due to the disclosure. See F.N. 4.

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In the instant matter, the Complainant sought access to e-mails between individuals during a set period pertaining to a complaint he filed with DCA. In response, the Custodian denied access under N.J.S.A. 47:1A-3 stating that the e-mails pertained to an ongoing investigation. The Complainant asserted that at the time of the request there was no active investigation and the content within the requested e-mails would only discuss a settlement stemming from an already concluded investigation.

In the SOI, the Custodian certified that on August 19, 2019, she was informed that the investigation had concluded, and thereafter provided the responsive records to the Complainant on September 16, 2019. The Custodian also provided copies of the responsive records as part of the SOI.

A review of the e-mails finds that most of the discussions between the parties pertained to settlement negotiations. There was little to no reference to an investigation, active or otherwise. Moreover, in the SOI the Custodian did not discuss the basis for raising the ongoing investigation exemption, but instead argued that the matter be dismissed as moot since the Complainant received the responsive records. Thus, even if the e-mails did pertain to an ongoing investigation, the Custodian failed to show that the release of same would be “inimical to the public interest” and hinder the course of the investigation. North Jersey Media Grp., 229 N.J. at 573-74.

Accordingly, the Custodian unlawfully denied access to the Complainant’s July 12, 2019 OPRA request. N.J.S.A. 47:1A-6. The Custodian failed to show that release of the requested e-mails would be “inimical to the public interest” under N.J.S.A. 47:1A-3(a). See North Jersey Media Grp., 229 N.J. at 573-74. However, the Council declines to order disclosure as the Custodian certified that she provided the responsive records on September 16, 2019, and again as part of the SOI.

### **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)).

In the matter before the Council, the Custodian unlawfully denied access to the requested e-mails. N.J.S.A. 47:1A-6. However, the Custodian ultimately provided the responsive records to the Complainant on September 16, 2019. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or were 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 unlawfully denied access to the Complainant’s July 12, 2019 OPRA request. N.J.S.A. 47:1A-6. The Custodian failed to show that release of the requested e-mails would be “inimical to the public interest” under N.J.S.A. 47:1A-3(a). See North Jersey Media Grp. v. Twp. of Lyndhurst, 229 N.J. 541, 573-74 (2017). However, the Council declines to order disclosure as the Custodian certified that she provided the responsive records on September 16, 2019, and again as part of the Statement of Information.
2. The Custodian unlawfully denied access to the requested e-mails. N.J.S.A. 47:1A-6. However, the Custodian ultimately provided the responsive records to the Complainant on September 16, 2019. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or were 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

January 19, 2021