



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Acting Commissioner

FINAL DECISION

May 27, 2010 Government Records Council Meeting

Marc Liebeskind
Complainant

Complaint No. 2009-62

v.

Piscataway Township Police Department (Middlesex)
Custodian of Record

At the May 27, 2010 public meeting, the Government Records Council (“Council”) considered the May 20, 2010 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. Because the Custodian, on April 14, 2010, forwarded a certification to the GRC which averred that the Custodian disclosed to the Complainant a copy of the Police Department’s procedure for using video cameras in police cars titled “Mobile Video/Audio Recording (MVR) Equipment of the Piscataway Township Police Department,” the Custodian complied with the terms of the Council’s April 8, 2010 Interim Order.
2. Although the Custodian’s failure to respond to the Complainant’s OPRA request within the statutorily mandated time period resulted in a “deemed” denial of access and the Custodian’s failure to provide the Police Department procedure for using video cameras in police cars to the Complainant in the medium requested resulted in an unlawful denial of access, the Custodian did disclose said procedure to the Complainant in a timely manner upon receipt of the Council’s April 8, 2010 Interim Order. Further, there is nothing in the record to suggest the Custodian’s actions were intentional and deliberate with knowledge of their wrongfulness. Therefore, it is concluded that 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 27th Day of May, 2010

Robin Berg Tabakin, Chairman
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: June 3, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
May 27, 2010 Council Meeting**

**Marc Liebeskind¹
Complainant**

GRC Complaint No. 2009-62

v.

**Piscataway Township Police Department (Middlesex)²
Custodian of Records**

Record Relevant to Complaint: Copies of:

1. Complete audio recording of all radio transmissions for Computer Aided Dispatching (“CAD”) incident report number 8022292 covering the time period 6:35 a.m. through 7:21 a.m. inclusive.
2. Complete audio recording of all radio transmissions for CAD incident report number 8022298 covering the time period 7:21 a.m. through 7:34 a.m. inclusive.
3. Documents related to CAD incident report number 8022292.
4. Police Department procedure for using video cameras in police cars.
5. Police Department procedure for mailing complaints.

Request Made: February 3, 2009

Response Made: February 19, 2009

Custodian: Sandra Wiley, Manager of Central Records

GRC Complaint Filed: February 20, 2009³

Background

April 8, 2010

At the April 8, 2010 public meeting, the Government Records Council (“Council”) considered the April 1, 2010 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, found that:

1. The Custodian’s failure to respond in writing to the Complainant’s February 3, 2009 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

¹ No legal representation listed on record.

² Represented by James Clarkin, Esq. (Piscataway, NJ).

³ The GRC received the Denial of Access Complaint on said date.

Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

2. Because the Custodian certified that records responsive to Item No.1 and Item No. 2 of the records request, which are the audio recordings of radio transmissions for Computer Aided Dispatching incident report numbers 8022292 and 8022298, as well as Item No. 5 of the records request, which is the Police Department procedure for mailing complaints, do not exist, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Apart from the Custodian's "deemed" denial, because the Custodian certified that the documents that comprise Item No. 3 of the records request which are the documents related to Computer Aided Dispatching incident report number 8022292 were disclosed to the Complainant on February 19, 2009, and because there is no credible evidence in the record to refute said certification, there was no unlawful denial of access pursuant to N.J.S.A. 47:1A-5.g. and Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).
4. Because the Custodian responded to Item No. 4 of the Complainant's request, the Police Department procedure for using video cameras in police cars, by denying the Complainant access to the record in the medium the Complainant specifically requested; to wit, a tangible copy, and because N.J.S.A. 47:1A-5.d. provides that a custodian shall permit access to a government record in the medium requested, the Custodian has unlawfully denied the Complainant access to the record pursuant to N.J.S.A. 47:1A-5.d. and Manahan v. Salem County, GRC Complaint No. 2006-184 (December 2008). Accordingly, the Custodian shall disclose to the Complainant a copy of the Police Department procedure for using video cameras in police cars.
5. **The Custodian shall comply with item #4 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, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
6. 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.

April 13, 2010

Council's Interim Order distributed to the parties.

April 14, 2010

Custodian's Certification. The Custodian certifies that on this date, in compliance with the terms of the Council's Interim Order dated April 8, 2010, she disclosed to the Complainant a true copy of the "Mobile Video/Audio Recording (MVR) Equipment of the Piscataway Township Police Department."⁴

Analysis

Whether the Custodian complied with the Council's April 8, 2010 Interim Order?

The Council's Interim Order dated April 8, 2010 directed the Custodian, within five (5) business days from receipt of the Council's Interim Order, to disclose the Police Department's procedure for using video cameras in police cars in the medium the Complainant specifically requested; to wit, a tangible copy pursuant to N.J.S.A. 47:1A-5.d. The Interim Order also required the Custodian to provide a detailed document index explaining the lawful basis for any redaction. Further, under the terms of the Order, the Custodian was required to simultaneously provide certified confirmation of compliance to the Executive Director.

Because the Custodian on April 14, 2010 forwarded a certification to the GRC which averred that the Custodian disclosed to the Complainant a copy of the Police Department's procedure for using video cameras in police cars titled "Mobile Video/Audio Recording (MVR) Equipment of the Piscataway Township Police Department," the Custodian complied with the terms of the Council's April 8, 2010 Interim Order.

Whether the Custodian's delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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:

"... If 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,

⁴ The Custodian further described this record as "Police Department Rules and Regulations/Policies and Procedures Volume IX, Chapter 24."
Marc Liebeskind v. Piscataway Township Police Department (Middlesex), 2009-62 – Supplemental Findings and Recommendations of the Executive Director

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 (Berg); 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 failed to respond in writing to the Complainant’s OPRA request within the statutorily mandated time frame which resulted in a “deemed” denial of access to the requested records. The Custodian did, however, respond in writing to the Complainant on the tenth (10th) business day following receipt of the Complainant’s request stating that, *inter alia*, the Complainant already conducted an on-site review of Item No. 4 of the Complainant’s request, the Police Department procedure for using video cameras in police cars. The Custodian further clarified her reason for not disclosing to the Complainant a copy of the requested procedure in her Statement of Information, wherein she averred that the Complainant’s request for a copy of the Police Department procedure for using video cameras in police cars was previously fulfilled because the procedure was reviewed by the Complainant on January 8, 2009 when the Complainant visited police headquarters.

On April 8, 2010, the Council by Interim Order required the Custodian to disclose to the Complainant a tangible copy of the Police Department procedure for using video cameras in police cars within five (5) business days from receipt of said Order. The Custodian subsequently complied with the Council’s Order in a timely manner.

Although the Custodian’s failure to respond to the Complainant’s OPRA request within the statutorily mandated time period resulted in a “deemed” denial of access and the Custodian’s failure to provide the Police Department procedure for using video cameras in police cars to the Complainant in the medium requested resulted in an unlawful denial of access, the Custodian did disclose said procedure to the Complainant in a timely manner upon receipt of the Council’s April 8, 2010 Interim Order. Further, there is nothing in the record to suggest the Custodian’s actions were intentional and deliberate with knowledge of their wrongfulness. Therefore, it is concluded that 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. Because the Custodian, on April 14, 2010, forwarded a certification to the GRC which averred that the Custodian disclosed to the Complainant a copy of the Police Department's procedure for using video cameras in police cars titled "Mobile Video/Audio Recording (MVR) Equipment of the Piscataway Township Police Department," the Custodian complied with the terms of the Council's April 8, 2010 Interim Order.

2. Although the Custodian's failure to respond to the Complainant's OPRA request within the statutorily mandated time period resulted in a "deemed" denial of access and the Custodian's failure to provide the Police Department procedure for using video cameras in police cars to the Complainant in the medium requested resulted in an unlawful denial of access, the Custodian did disclose said procedure to the Complainant in a timely manner upon receipt of the Council's April 8, 2010 Interim Order. Further, there is nothing in the record to suggest the Custodian's actions were intentional and deliberate with knowledge of their wrongfulness. Therefore, it is concluded that 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: John E. Stewart
Case Manager/*In Camera* Attorney

Approved By: Catherine Starghill, Esq.
Executive Director

May 20, 2010



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Acting Commissioner

INTERIM ORDER

April 8, 2010 Government Records Council Meeting

Marc Liebeskind
Complainant

Complaint No. 2009-62

v.

Piscataway Township Police Department (Middlesex)
Custodian of Record

At the April 8, 2010 public meeting, the Government Records Council (“Council”) considered the April 1, 2010 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’s failure to respond in writing to the Complainant’s February 3, 2009 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. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Custodian certified that records responsive to Item No.1 and Item No. 2 of the records request, which are the audio recordings of radio transmissions for Computer Aided Dispatching incident report numbers 8022292 and 8022298, as well as Item No. 5 of the records request, which is the Police Department procedure for mailing complaints, do not exist, and because there is no credible evidence in the record to refute the Custodian’s certification, the Custodian did not unlawfully deny access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Apart from the Custodian’s “deemed” denial, because the Custodian certified that the documents that comprise Item No. 3 of the records request which are the documents related to Computer Aided Dispatching incident report number 8022292 were disclosed to the Complainant on February 19, 2009, and because there is no credible evidence in the record to refute said certification,



there was no unlawful denial of access pursuant to N.J.S.A. 47:1A-5.g. and Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).

4. Because the Custodian responded to Item No. 4 of the Complainant's request, the Police Department procedure for using video cameras in police cars, by denying the Complainant access to the record in the medium the Complainant specifically requested; to wit, a tangible copy, and because N.J.S.A. 47:1A-5.d. provides that a custodian shall permit access to a government record in the medium requested, the Custodian has unlawfully denied the Complainant access to the record pursuant to N.J.S.A. 47:1A-5.d. and Manahan v. Salem County, GRC Complaint No. 2006-184 (December 2008). Accordingly, the Custodian shall disclose to the Complainant a copy of the Police Department procedure for using video cameras in police cars.
5. **The Custodian shall comply with item #4 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, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹, to the Executive Director.²**
6. 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 8th Day of April, 2010

Robin Berg Tabakin, Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

¹ "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."

² 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.

Harlynn A. Lack, Secretary
Government Records Council

Decision Distribution Date: April 13, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 8, 2010 Council Meeting**

**Marc Liebeskind¹
Complainant**

GRC Complaint No. 2009-62

v.

**Piscataway Township Police Department (Middlesex) ²
Custodian of Records**

Record Relevant to Complaint: Copies of:

1. Complete audio recording of all radio transmissions for Computer Aided Dispatching (“CAD”) incident report number 8022292 covering the time period 6:35 a.m. through 7:21 a.m. inclusive.
2. Complete audio recording of all radio transmissions for CAD incident report number 8022298 covering the time period 7:21 a.m. through 7:34 a.m. inclusive.
3. Documents related to CAD incident report number 8022292.
4. Police Department procedure for using video cameras in police cars.
5. Police Department procedure for mailing complaints.

Request Made: February 3, 2009

Response Made: February 19, 2009

Custodian: Sandra Wiley, Manager of Central Records

GRC Complaint Filed: February 20, 2009³

Background

February 3, 2009

Complainant’s Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

February 5, 2009

Facsimile from the Complainant to the Custodian. The Complainant forwards a duplicate copy of his OPRA request to the Custodian and informs the Custodian that he wants to make certain that the Custodian received the Complainant’s request.

¹ No legal representation listed on record.

² Represented by James Clarkin, Esq. (Piscataway, NJ).

³ The GRC received the Denial of Access Complaint on said date.

February 19, 2009

Facsimile from the Complainant to the Custodian. The Complainant informs the Custodian that it has been more than seven (7) business days but he has not yet received a response to his OPRA request.

February 19, 2009

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the tenth (10th) business day following receipt of such request. The Custodian informs the Complainant that Item No. 1 and No. 2 of the records relevant to the complaint are only required to be held for thirty (30) days.⁴ The Custodian also informs the Complainant that she has enclosed with her response records responsive to Item No. 3 of the records relevant to the complaint. The Custodian further informs the Complainant that the Complainant already conducted an on-site review of Items No. 4 and No. 5 of the records relevant to the complaint when the Complainant met with Captain Ivone on January 8, 2009.

February 26, 2009

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- Complainant's OPRA request dated February 3, 2009
- Facsimile from the Complainant to the Custodian dated February 5, 2009
- Copy of certified mail return receipt addressed to the Custodian's agency and received by J. White on February 5, 2009
- Facsimile from the Complainant to the Custodian dated February 19, 2009

The Complainant states that the Custodian acknowledged receipt of the Complainant's OPRA request on February 5, 2009 but that the Custodian never responded to said request.

The Complainant does not agree to mediate this complaint.

March 10, 2009

Request for the Statement of Information ("SOI") sent to the Custodian.

March 16, 2009

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated February 3, 2009
- Facsimile from the Complainant to the Custodian dated February 19, 2009
- Custodian's response to the OPRA request dated February 19, 2009

The Custodian certifies that she does not know the date that she received the Complainant's February 3, 2009 OPRA request; however, the Custodian certifies that she responded to the request on February 19, 2009.

⁴The retention period is subsequently corrected by the Custodian in her SOI.

The Custodian certifies that records responsive to Items No. 1 and No. 2 of the records relevant to the complaint were held electronically for a period of thirty-one (31) days in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management (“DARM”). The Custodian also certifies that the records responsive to the Complainant’s request for Item No. 3 must be retained for five (5) years and the records responsive to the Complainant’s request for Item No. 4 must be retained permanently pursuant to the Records Destruction Schedule established and approved by DARM.

The Custodian certifies that the documents that comprise Item No. 3 of the records relevant to the complaint were disclosed to the Complainant on November 19, 2008, and disclosed again to the Complainant as an attachment to the Custodian’s February 19, 2009 response to the Complainant’s OPRA request. The Custodian did not certify what her search for the requested records involved.

The Custodian certifies that records responsive to Item No. 4 of the records relevant to the complaint were already reviewed by the Complainant on January 8, 2009, when he met with Captain Ivone at police headquarters. The Custodian further certifies that no records responsive to Item No. 5 of the records relevant to the complaint exist and that this was explained to the Complainant by Captain Ivone on January 8, 2009.⁵

March 19, 2009

E-mail from the Complainant to the GRC. The Complainant states that the Custodian’s SOI should have been provided to the GRC on March 17, 2009 and asks if the GRC received the SOI.

March 19, 2009

E-mail from the GRC to the Complainant. The GRC informs the Complainant that the GRC received the Custodian’s SOI and informs the Complainant that the GRC will send the Complainant a copy of the SOI if the Complainant does not receive a copy from the Custodian within three (3) days.

March 22, 2009

The Complainant’s response to the Custodian’s SOI. The Complainant states that he received a copy of the SOI. The Complainant asserts that the Custodian failed to provide responsive answers to Items 10 through 12 of the SOI. The Complainant also states that he never received a copy of records responsive to Item No. 4 of the records relevant to this complaint; the Complainant asserts he was only allowed to review the record in response to an earlier OPRA request. The Complainant states that he requested a copy of the record in the request that gave rise to the instant complaint.

April 28, 2009

Letter from the GRC to the Custodian. The GRC informs the Custodian that the SOI is deficient because it responds to several OPRA requests rather than the request that formed the basis for this complaint. The GRC advises the Custodian that the February 3,

⁵ The Custodian also discussed several earlier discovery demands and OPRA requests filed by the Complainant that are not relevant to the instant complaint.

2009 OPRA request is the only request that the Custodian must address in the SOI. The GRC also asks the Custodian to respond to Items 7 and 8 of the SOI and to clarify the disposition of certain records.

April 28, 2009

Telephone call from Captain Ivone, Piscataway Central Records, to the GRC. Captain Ivone states that he received a copy of the letter from the GRC to the Custodian dated April 28, 2009. The Captain is concerned that the GRC found the SOI to be defective and asks the GRC to elaborate on what the GRC needs in the SOI. The GRC informs Captain Ivone that only one (1) OPRA request formed the basis for the instant complaint and no other earlier requests need be addressed, that specific dates must be inserted for Items 7 and 8 and that Item 9 needs to be clarified. The Captain acknowledged that the SOI would be supplemented with the clarifying information and submitted to the GRC with a copy to the Complainant within five (5) business days.

April 29, 2009

E-mail from the GRC to the Custodian. The GRC confirms the telephone conversation between the GRC and Captain Ivone.

May 1, 2009

Facsimile transmission from the Custodian to the GRC. The Custodian states that per request of the GRC she is supplementing her SOI. The Custodian certifies that she received the Complainant's OPRA request on February 3, 2009 and that she responded to the request on February 19, 2009. The Custodian further certifies that the records that would have been responsive to Item No. 1 and Item No. 2 of the Complainant's request no longer exist because the recordings were destroyed after being retained for a thirty-one (31) day period pursuant to the New Jersey Local Police Departments Records Retention Schedule established and approved by DARM.⁶ The Custodian avers that because said records no longer exist, she is unable to disclose them to the Complainant.

May 1, 2009

E-mail from the Complainant to the GRC. The Complainant refutes the Custodian's certification that recordings of police radio transmissions are destroyed every thirty-one (31) days. The Complainant states that he knows that the agency has retained recordings longer than that period of time. The Complainant further states that the Custodian, by having retained recordings longer than the thirty-one (31) days, has contradicted her reason for denying the Complainant access to the requested records.

⁶ Neither the Complainant nor the Custodian referenced any of the records by date. CAD Incident Numbers are used to identify Items No. 1 through No. 3 of the records relevant to the complaint. Requested records No. 1 and No. 2 were audio recordings of radio transmissions that were coupled to Incident No. 8022292 and Incident No. 8022298, respectively. In the Custodian's SOI she certified that the Complainant had submitted an earlier OPRA request dated December 2, 2008 seeking records from Incident No. 8022298, which is the later of the two (2) incidents. Accordingly, because Incident Numbers 8022292 and 8022298 were in existence on or before December 2, 2008, the records coupled to these incidents would have been retained for more than thirty-one (31) days as of the date of the Complainant's February 3, 2009 request which gave rise to the instant complaint.

May 1, 2009

E-mail from the GRC to the Complainant. The GRC informs the Complainant that the length of time an agency may have previously retained a record is immaterial with respect to the instant complaint.

May 7, 2009

The Complainant's response to the Custodian's SOI supplement. The Complainant states that the Custodian failed to fully complete the document index table. The Complainant further states that the Custodian did not complete Item No. 10 and Item No. 11 of the SOI. Specifically, the Complainant states that the Custodian does not certify as to the records search undertaken and only certifies that Item No. 1 and Item No. 2 were destroyed but does not specify the date or dates of such record destruction.

The Complainant also states that he discussed record destruction with Joseph Falca of DARM. The Complainant states that Mr. Falca informed the Complainant that at the conclusion of the retention period municipal police departments must obtain written permission from DARM prior to destroying any records. The Complainant alleges that the Custodian may have illegally destroyed the requested records and cites N.J.S.A. 47:3-17 in support of his allegation. Moreover, the Complainant contends that regardless of the designated retention period, a record cannot be destroyed if it is in litigation. The Complainant states that the Custodian illegally destroyed the requested records contrary to the provisions of Records Destruction Schedule M900000-904 because the records are involved in litigation. The Complainant states that he wants the GRC to require the Custodian to produce the written authorization from DARM which authorized the destruction of Item No. 1 and Item No. 2 of the records relevant to the complaint.

May 7, 2009

E-mail from the GRC to the Complainant. The GRC informs the Complainant that if he intends to rely upon a third party statement, he must obtain a certification from the third party. The GRC also informs the Complainant that with his response to the Custodian's SOI supplement all submissions have now been received by the GRC in this matter.⁷

May 11, 2009

E-mail from the GRC to the Custodian. The GRC forwards to the Custodian the Complainant's response to the SOI supplement. The GRC allows the Custodian a five (5) business day period of time to respond to the Complainant's submission.

May 20, 2009

E-mail from the Custodian to the GRC. The Custodian clarifies the thirty-one (31) day retention period for CAD recordings by certifying that such recordings are retained as long as needed for their continuing administrative, legal or historical value but can be electronically recycled at some point following the thirty-one (31) day period. The Custodian also certifies that there is no current litigation involving the Complainant and the Piscataway Township Police Department.

⁷ *N.J.A.C. 5:105-2.3* and 2.4 limits the number of party submissions for each complaint.

June 1, 2009

E-mail from the Complainant to the GRC. The Complainant seeks to amend his complaint pursuant to *N.J.A.C. 5:105-2.3* by adding several copies of *Request and Authorization for Records Disposal* documents obtained from DARM via an OPRA request dated May 20, 2009.

June 3, 2009⁸

E-mail from the GRC to the Complainant. The GRC informs the Complainant that pursuant to *N.J.A.C. 5:105-2.3* he is beyond the thirty (30) business day period for amending his complaint as a matter of right. The GRC further informs the Complainant that he must obtain authorization from the Executive Director in order to amend his complaint at this time.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA further provides that:

“*A custodian shall permit access to a government record and provide a copy thereof in the medium requested* if the public agency maintains the record in that medium. If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium.” (Emphasis added.) N.J.S.A. 47:1A-5.d.

OPRA also provides that:

“...[a] custodian shall promptly comply with a request to inspect, examine, copy, or provide a copy of a government record. If the custodian

⁸ Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.
Marc Liebeskind v. Piscataway Township Police Department (Middlesex), 2009-62 – Findings and Recommendations of the Executive Director

is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g.

OPRA states that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA also states that:

“[t]he Government Records Council shall ... receive, hear, review and adjudicate a complaint filed by any person concerning *a denial of access to a government record* by a records custodian...” (Emphasis added.) N.J.S.A. 47:1A-7.b.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

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.

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. As also prescribed under 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. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g. 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. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Here, the Custodian certified in the SOI that she received the Complainant's OPRA request on February 3, 2009 and responded in writing to the request on February 19, 2009, which is the tenth (10th) business day following receipt of such request.

Accordingly, the Custodian's failure to respond in writing to the Complainant's February 3, 2009 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. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Item No.1 of Records Request – A copy of the complete audio recording of all radio transmissions for CAD incident report number 8022292 covering the time period 6:35 a.m. through 7:21 a.m. inclusive.

Item No.2 of Records Request – A copy of the complete audio recording of all radio transmissions for CAD incident report number 8022298 covering the time period 7:21 a.m. through 7:34 a.m. inclusive.

The Custodian certified that the records that would have been responsive to Item No. 1 and Item No. 2 of the Complainant's request no longer exist because the recordings were destroyed after being retained for a thirty-one (31) day period pursuant to the New Jersey Local Police Departments Records Retention Schedule established and approved by DARM.

The Complainant stated that pursuant to N.J.S.A. 47:3-17, the Custodian should not have destroyed the records because at the conclusion of the retention period police departments must obtain written permission from DARM prior to destroying any records. Moreover, the Complainant alleged that regardless of the designated retention period, a record cannot be destroyed if it is in litigation and the Complainant stated that the Custodian illegally destroyed the requested records because those records were involved in litigation.

N.J.S.A. 47:3-17 is a statute that is not within the GRC's jurisdiction to interpret. Pursuant to N.J.S.A. 47:1A-7.b., which delineates the GRC's powers and duties, the Council does not have the authority to regulate the manner in which an agency maintains its files or which records an agency must maintain. Therefore, whether or not the records were destroyed properly pursuant to N.J.S.A. 47:3-17 is beyond the scope of the GRC's findings. *See* Toscano v. NJ Department of Labor, Division of Vocational Rehabilitation Services, GRC Complaint No. 2007-296 (March 2008), where the Council determined that the GRC does not have the authority to determine whether an agency correctly followed their records retention policy.

The fact remains, however, that the Custodian certified that the records that would have been responsive to Item No. 1 and Item No. 2 of the Complainant's request no longer exist because the recordings were destroyed after being retained for a thirty-one (31) day period pursuant to the New Jersey Local Police Departments Records Retention Schedule established and approved by DARM. For this reason, the Custodian certified

that she is unable to disclose said records to the Complainant, and the Complainant has failed to produce credible evidence that the specific requested records do, in fact, exist.

Item No. 5 of Records Request – Police Department procedure for mailing complaints.

The Custodian certified that records responsive to Item No. 5 of the records relevant to the complaint do not exist and the Complainant failed to produce credible evidence to disprove the Custodian's certification.

The Council has held that if a custodian has sufficiently borne his/her burden of proving that there is no record responsive to the Complainant's request, the Custodian could not have unlawfully denied access. In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The Custodian responded stating that there was no record of any telephone calls made to the Complainant. The Custodian subsequently certified that no records responsive to the Complainant's request existed. The GRC determined that although the Custodian failed to respond to the OPRA request in a timely manner, the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed.

In the instant complaint, because the Custodian certified that records responsive to Item No.1 and Item No. 2 of the records request, which are the audio recordings of radio transmissions involved in CAD incident report numbers 8022292 and 8022298, as well as Item No. 5 of the records request, which is the Police Department procedure for mailing complaints, do not exist, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to the requested records pursuant to Pusterhofer, supra.

Item No. 3 of Records Request – Documents related to CAD incident report number 8022292.

The Custodian certified that the documents that comprise Item No. 3 of the records request were disclosed to the Complainant on February 19, 2009 as an attachment to the Custodian's response to the Complainant's OPRA request.

In Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), the Custodian certified that a record responsive to the Complainant's request was provided to the Complainant and no other records responsive to the Complainant's request existed. The GRC subsequently held that:

“[t]he Custodian certified that the Complainant was in receipt of all [records] responsive to the request. The Custodian has met the burden of proving that all records in existence responsive to the request were provided to the Complainant. Therefore there was no unlawful denial of access.”

In the instant complaint, apart from the Custodian's "deemed" denial, the Custodian certified that the documents that comprise Item No. 3 of the records request which are the documents related to CAD incident report number 8022292, were disclosed to the Complainant on February 19, 2009, and because there is no credible evidence in the record to refute said certification, there was no unlawful denial of access pursuant to N.J.S.A. 47:1A-5.g. and Burns, *supra*.

Item No. 4 of Records Request – Police Department procedure for using video cameras in police cars.

The Custodian certified that records responsive to Item No. 4 of the records request were already reviewed by the Complainant on January 8, 2009 when the Complainant met with Captain Ivone at police headquarters. The Complainant states that although he was allowed to review the record in response to an earlier OPRA request, he never received a copy of it, and therefore he requested a copy in his February 3, 2009 OPRA request.

It is clear that the Complainant sought copies of the requested records. In his complaint, the Complainant wrote the word "copy" in front of Item No. 4, as well as every other enumerated record that was denied. Moreover, on the OPRA request form the Complainant skipped "on site inspection" in favor of "pickup" as the preferred record delivery method. This underscored his intent to obtain tangible records.

N.J.S.A. 47:1A-5.d. provides that a custodian shall permit access to a government record in the medium requested or in another meaningful medium and the Council has steadfastly upheld this provision of OPRA. In Manahan v. Salem County, GRC Complaint No. 2006-184 (December 2008), the Complainant requested that several records be sent to her electronically. The Custodian responded by granting access to the records in printed form; a different medium than requested. The Custodian subsequently asserted that the requested records were not maintained in the medium requested so they were supplied in paper format which was the medium in which they were maintained. The Council, in rejecting the Custodian's assertion, held that:

"...the Custodian failed to provide the Complainant with the records responsive in the medium requested and failed to provide copies of the requested records in a meaningful medium, [therefore] the Custodian has violated N.J.S.A. 47:1A-5.d. and unlawfully denied access."⁹

Therefore, because the Custodian responded to Item No. 4 of the Complainant's request, the Police Department procedure for using video cameras in police cars, by denying the Complainant access to the record in the medium the Complainant specifically requested; to wit, a tangible copy, and because N.J.S.A. 47:1A-5.d. provides that a custodian shall permit access to a government record in the medium requested, the

⁹ The Council's Final Order was rendered on December 18, 2008 because the complaint was forwarded to the Office of Administrative Law solely for the purpose of determining whether the Custodian knowingly and willfully violated OPRA. The Council's interim decision concerning disclosure of records in the medium requested was rendered over a year earlier on September 26, 2007.

Custodian has unlawfully denied the Complainant access to the record pursuant to N.J.S.A. 47:1A-5.d. and Manahan, supra. Accordingly, the Custodian shall disclose to the Complainant a copy of the Police Department procedure for using video cameras in police cars.

Whether the Custodian’s delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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 Executive Director respectfully recommends the Council find that:

1. The Custodian’s failure to respond in writing to the Complainant’s February 3, 2009 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. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Custodian certified that records responsive to Item No.1 and Item No. 2 of the records request, which are the audio recordings of radio transmissions for Computer Aided Dispatching incident report numbers 8022292 and 8022298, as well as Item No. 5 of the records request, which is the Police Department procedure for mailing complaints, do not exist, and because there is no credible evidence in the record to refute the Custodian’s certification, the Custodian did not unlawfully deny access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Apart from the Custodian’s “deemed” denial, because the Custodian certified that the documents that comprise Item No. 3 of the records request which are the documents related to Computer Aided Dispatching incident report number 8022292 were disclosed to the Complainant on February 19, 2009, and because there is no credible evidence in the record to refute said certification, there was no unlawful denial of access pursuant to N.J.S.A. 47:1A-5.g. and Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).
4. Because the Custodian responded to Item No. 4 of the Complainant’s request, the Police Department procedure for using video cameras in police cars, by denying the Complainant access to the record in the medium the Complainant specifically requested; to wit, a tangible copy, and because N.J.S.A. 47:1A-

5.d. provides that a custodian shall permit access to a government record in the medium requested, the Custodian has unlawfully denied the Complainant access to the record pursuant to N.J.S.A. 47:1A-5.d. and Manahan v. Salem County, GRC Complaint No. 2006-184 (December 2008). Accordingly, the Custodian shall disclose to the Complainant a copy of the Police Department procedure for using video cameras in police cars.

5. **The Custodian shall comply with item #4 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, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹⁰, to the Executive Director.¹¹**
6. 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: John E. Stewart
Case Manager/*In Camera* Attorney

Approved By: Catherine Starghill, Esq.
Executive Director

April 1, 2010

¹⁰ "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."

¹¹ 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.