



**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*

**RICHARD E. CONSTABLE, III**  
*Commissioner*

**FINAL DECISION**

**July 23, 2013 Government Records Council Meeting**

Paul Marinaccio  
Complainant

Complaint No. 2012-174

v.

Borough of Fanwood (Union)  
Custodian of Record

At the July 23, 2013 public meeting, the Government Records Council (“Council”) considered the July 16, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian has complied with the terms of the Council’s May 28, 2013 Interim Order because the Custodian has disclosed to the Complainant the records responsive to request items numbered 1 and 2, and delivered certified confirmation of compliance to the Executive Director within the required five (5) business days.
2. Although the Custodian failed to respond immediately to the Complainant’s OPRA request for salary information, and failed to respond in writing to each item contained in the Complainant’s OPRA request, and failed to disclose to the Complainant the records responsive to request items numbered 1 and 2, the Custodian did comply with the terms of the Council’s May 28, 2013 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.



Final Decision Rendered by the  
Government Records Council  
On The 23 Day of July 2013

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: July 26, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
July 23, 2013 Council Meeting**

**Paul Marinaccio<sup>1</sup>  
Complainant**

**GRC Complaint No. 2012-174**

**v.**

**Borough of Fanwood (Union)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. The name, position, salary, payroll record and length of service for every Fanwood Borough Police Department employee employed full or part time from January 16, 2009 until May 31, 2009.
2. The name, position, salary, payroll record and length of service for every Fanwood Borough Municipal Court employee employed full or part time from January 16, 2009 until May 31, 2009.
3. All video associated with Fanwood Municipal Court complaint number 2005 C 058315, State v. Richard Harrington, including but not limited to video recorded by patrol car mounted cameras.

**Custodian of Record:** Eleanor McGovern

**Request Received by Custodian:** March 13, 2012

**Response Made by Custodian:** March 16, 2012

**GRC Complaint Received:** June 19, 2012

**Background**

**May 28, 2013 Council Meeting:**

At its May 28, 2013 public meeting, the Government Records Council (“Council”) considered the May 21, 2013 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 responded in writing to the Complainant’s OPRA request within the statutorily mandated time frame. N.J.S.A. 47:1A-5(i). However, the Custodian violated the law by failing to respond immediately to the Complainant’s OPRA request for salary information. *See* N.J.S.A. 47:1A-5(e); Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007).

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

<sup>2</sup> Represented by Dennis Estis, Esq., of Greenbaum, Rowe, Smith & Davis, LLP (Woodbridge, NJ).

2. The Custodian's response was legally insufficient because the Custodian failed to respond in writing to each item contained in the Complainant's OPRA request. N.J.S.A. 47:1A-5(g); Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).
3. The Custodian shall disclose to the Complainant records responsive to the Complainant's request item number 1 and request item number 2; to wit, any personnel or pensions records which contain the name, position, salary, payroll record and length of service for every full or part time Police Department or Municipal Court employee employed from January 16, 2009 until May 31, 2009. N.J.S.A. 47:1A-10; Valdes v. Union City Board of Education (Hudson), GRC Complaint No. 2011-64 (Interim Order dated August 28, 2012).
4. The Custodian did not unlawfully deny access to the records responsive to request item number 3 because the Custodian certified that no responsive records exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. *See* Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
5. **The Custodian shall comply with paragraph 3 above within five (5) business days from receipt of the Council's Interim Order, with appropriate redactions if necessary, 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.

Procedural History:

On June 3, 2013, the Council distributed its Interim Order to all parties.

Compliance:

On June 5, 2013, the Custodian responded to the Council's Interim Order. The Custodian certifies that she disclosed to the Complainant a list in table format by name and position all police officers, dispatchers, crossing guards, the police secretary, municipal judge, court clerk, violations clerk, court administrator, deputy court administrator, prosecutor and public defender. The Custodian further provided for each person the salary earned from January 2009 until May 2009, as well as the length of service for each named employee. The Custodian certifies that the Borough does not maintain pension records.

The Complainant faxed the GRC on June 12, 2013, to state that the Custodian did not provide the actual records, but only a list made from the records for him. The Complainant states that, in particular, Patrolman Sanchez was left off the list of police officers. The

Complainant demands the actual payroll records, not a list. The Complainant, cited Valdes v. Union City Board of Education (Hudson), GRC Complaint No. 2011-64 (August 28, 2012), and alleged that the Custodian did not comply with the Order because she did not “retrieve the most comprehensive record that contained the requested personnel information” and provide it to him. The Complainant states the payroll records are the most comprehensive records, and therefore should be disclosed to him instead of a prepared list.

The Custodian was informed of the Complainant’s demands, and she submitted a second certification to the GRC dated June 11, 2013, in which she admitted that she inadvertently left off the requested information for Patrolman Sanchez. The Custodian also certifies that she disclosed a corrected listing of the requested information for the police department to the Complainant.

On June 17, 2013, the Custodian submitted a third certification to the GRC in which she certifies that she forwarded the actual payroll records to the Complainant, redacted to reveal only the requested information. On June 19, 2013, the Complainant faxed the GRC to allege that the Custodian failed to provide a redaction index for the redactions made to the payroll records.<sup>3</sup>

### Analysis

#### Compliance

On May 28, 2013, the Council ordered the Custodian to disclose to the Complainant any personnel or pensions records which contain the name, position, salary, payroll record and length of service for every full or part time Police Department or Municipal Court employee employed from January 16, 2009 until May 31, 2009, with appropriate redactions if necessary. The Council further ordered the Custodian to provide certified confirmation of compliance to the Executive Director, including a detailed document index explaining the lawful basis for each redaction, within five (5) business days from receipt of the Council’s Interim Order.

On June 5, 2013, within the required five (5) business days, the Custodian delivered to the Executive Director certification that she disclosed to the Complainant a list in table format by name and position all police officers, dispatchers, crossing guards, the police secretary, municipal judge, court clerk, violations clerk, court administrator, deputy court administrator, prosecutor and public defender. The Custodian further certified that she provided for each person the salary earned from January 2009 until May 2009, as well as the length of service for each named employee. The Custodian certified that the Borough does not maintain pension records. Moreover, the Custodian submitted to the GRC a second certification dated June 11, 2013, wherein she admitted that she inadvertently left off the requested information for Patrolman Sanchez. The Custodian certified that she disclosed a corrected listing of the requested information for the police department to the Complainant. Finally, on June 17, 2013, the Custodian submitted a third certification to the GRC in which she certified that she forwarded the actual payroll records to the Complainant, redacted to reveal only the requested information.

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<sup>3</sup> The parties submitted additional correspondence. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.

Although the Custodian complied with the Council's decision in a timely manner by creating and disclosing to the Complainant a document containing information responsive to the request, the Complainant, citing Valdes v. Union City Board of Education (Hudson), GRC Complaint No. 2011-64 (August 28, 2012), alleged the Custodian did not comply with the Order because she did not "retrieve the most comprehensive record that contained the requested personnel information" and provide it to him. To appease the Complainant, the Custodian subsequently disclosed payroll records to the Complainant, redacted to reveal only the requested information.

The purpose of OPRA is not to needlessly burden a records custodian, but rather "... to make identifiable government records 'readily accessible'..." MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). Therefore, where OPRA makes provision for disclosure of specific information, such as is required under N.J.S.A. 47:1A-10, and the Custodian compiles such information from existing government records in order to disclose information responsive to the request, then such disclosure is a reasonable and adequate response to the request.<sup>4</sup>

Here, however, the Custodian went beyond that which is required after the Complainant expressed dissatisfaction with the list of information prepared by the Custodian and demanded actual payroll records. The Custodian provided him with the actual records. However, the Custodian's efforts still did not satisfy the Complainant, because he then wanted a redaction index for each redaction the Custodian made to the payroll records.

A redaction index is necessary to provide a lawful basis for denying access to the *requested record*, or part(s) thereof. A redaction index is unnecessary, however, when as here, the redactions have been made to material that has not been requested and is being withheld from disclosure via redaction. In this instance, the Custodian redacted a more comprehensive record so that only the information required to be disclosed was revealed. As suggested in Valdes, supra, she "...tailor[ed] it by redaction to fulfill the complainant's request." The Complainant did not request the content of the records that were redacted, and therefore it is unreasonable for the Complainant to demand a redaction index.

The Custodian has complied with the terms of the Council's May 28, 2013 Interim Order because the Custodian has disclosed to the Complainant the records responsive to request items numbered 1 and 2, and delivered certified confirmation of compliance to the Executive Director within the required five (5) business days.

### **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

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<sup>4</sup> It must be emphasized that this procedure is only applicable to those cases in which OPRA requires disclosure of information.

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 (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, although the Custodian failed to respond immediately to the Complainant’s OPRA request for salary information, and failed to respond in writing to each item contained in the Complainant’s OPRA request, and failed to disclose to the Complainant the records responsive to request items numbered 1 and 2, the Custodian did comply with the terms of the Council’s May 28, 2013 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian has complied with the terms of the Council’s May 28, 2013 Interim Order because the Custodian has disclosed to the Complainant the records responsive to request items numbered 1 and 2, and delivered certified confirmation of compliance to the Executive Director within the required five (5) business days.
2. Although the Custodian failed to respond immediately to the Complainant’s OPRA request for salary information, and failed to respond in writing to each item contained in the Complainant’s OPRA request, and failed to disclose to the Complainant the records responsive to request items numbered 1 and 2, the Custodian did comply with the terms of the Council’s May 28, 2013 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: John E. Stewart, Esq.

Approved By: Brandon D. Minde, Esq.  
Executive Director

July 16, 2013