



**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**

**June 25, 2013 Government Records Council Meeting**

Brandon Melvin  
Complainant

Complaint No. 2012-212

v.

New Jersey Department of Law & Public Safety,  
Division of State Police  
Custodian of Record

At the June 25, 2013 public meeting, the Government Records Council ("Council") considered the June 18, 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 disclosed to the Complainant the record responsive to request item number 1 and provided certified confirmation of same to the Executive Director within the required five (5) business days.
2. Although Custodian Vargas failed to meet his burden of proving that the Complainant withdrew his OPRA request before the Custodian responded to the request granting or denying access, the Custodian fully complied with the Council's May 28, 2013 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's actions contained a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions did 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 25<sup>th</sup> Day of June, 2013



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

Steven Ritardi, Esq., Acting Chair  
Government Records Council

**Decision Distribution Date: June 27, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
June 25, 2013 Council Meeting**

**Brandon Melvin**<sup>1</sup>  
**Complainant**

**GRC Complaint No. 2012-212**

v.

**New Jersey Department of Law and Public Safety, New Jersey State Police**<sup>2</sup>  
**Custodian of Records**

**Records Relevant to Complaint:** Copies of all video and photographic documentation, which includes mobile video recorder (“MVR”) recordings, of the scene of a May 31, 2009 motor vehicle accident on Route 78 in Newark, N.J. The vehicle involved in the accident was being driven by Karl A. Reilly at the time of the accident. The State Police case number is B130200901363A.

**Request Made:** June 29, 2012

**Response Made:** July 11, 2012

**GRC Complaint Filed:** July 18, 2012<sup>3</sup>

**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 failed to meet his burden of proving that the Complainant withdrew his OPRA request before the Custodian responded to the request granting or denying access. Therefore, this matter remains active and in accordance with the Custodian’s certification, the Custodian shall disclose to the Complainant the record responsive to request item number 1.
  
2. **The Custodian shall comply with paragraph 1 above within five (5) business days from receipt of the Council’s Interim Order, with appropriate redactions if**

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

<sup>2</sup> Detective SFC Gregory Shawaryn is the Custodian of Records and replaced Detective Ismael E. Vargas who was the Custodian of Records at the time of the request. Represented by Deputy Attorney General Justin Conforti.

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

Brandon Melvin v. New Jersey Department of Law and Public Safety, New Jersey State Police, 2012-212 – Supplemental Findings and Recommendations of the Executive Director

**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,<sup>4</sup> to the Executive Director.<sup>5</sup>**

3. The Custodian did not unlawfully deny access to the records responsive to request item number 2 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).
4. 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 7, 2013, the Custodian responded to the Council's Interim Order. The Custodian certifies that on June 6, 2013, the MVR recording of the scene of the May 31, 2009 motor vehicle accident on Route 78 in Newark, N.J., which is New Jersey State Police case number B130200901363A, was disclosed with appropriate and necessary redactions to the Complainant. The Custodian further certifies that he provided a document index explaining the lawful basis for each redaction to the Complainant.

### Analysis

#### Compliance

On May 28, 2013, the Council ordered the Custodian to disclose to the Complainant the record responsive to request item number 1. The Council also ordered the Custodian to provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On June 3, 2013, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. On June 7, 2013, within the required five (5) business days, the Custodian provided to the Executive Director certified confirmation that he disclosed to the Complainant the record responsive to request item number 1.

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<sup>4</sup> "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."

<sup>5</sup> 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.

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Therefore, the Custodian has complied with the terms of the Council's May 28, 2013 Interim Order because the Custodian disclosed to the Complainant the record responsive to request item number 1 and provided certified confirmation of same 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:

“... 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, 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)).

Therefore, although Custodian Vargas failed to meet his burden of proving that the Complainant withdrew his OPRA request before the Custodian responded to the request granting or denying access, the Custodian fully complied with the Council's May 28, 2013 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's actions contained a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions did 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 disclosed to the Complainant the record responsive to request item number 1 and provided certified confirmation of same to the Executive Director within the required five (5) business days.
2. Although Custodian Vargas failed to meet his burden of proving that the Complainant withdrew his OPRA request before the Custodian responded to the request granting or denying access, the Custodian fully complied with the Council's May 28, 2013 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's actions contained a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions did 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

June 18, 2013



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

INTERIM ORDER

May 28, 2013 Government Records Council Meeting

Brandon Melvin  
Complainant

Complaint No. 2012-212

v.

New Jersey Department of Law and Public Safety,  
New Jersey State Police  
Custodian of Record

At the 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, finds that:

1. The Custodian failed to meet his burden of proving that the Complainant withdrew his OPRA request before the Custodian responded to the request granting or denying access. Therefore, this matter remains active and in accordance with the Custodian's certification, the Custodian shall disclose to the Complainant the record responsive to request item number 1.
2. **The Custodian shall comply with paragraph 1 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,<sup>1</sup> to the Executive Director.<sup>2</sup>**
3. The Custodian did not unlawfully deny access to the records responsive to request item number 2 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).

<sup>1</sup> "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."

<sup>2</sup> 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.

4. 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 28<sup>th</sup> Day of May, 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: June 3, 2013**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
May 28, 2013 Council Meeting**

**Brandon Melvin**<sup>1</sup>  
**Complainant**

**GRC Complaint No. 2012-212**

v.

**New Jersey Department of Law and Public Safety, New Jersey State Police**<sup>2</sup>  
**Custodian of Records**

**Records Relevant to Complaint:** Copies of all video and photographic documentation, which includes mobile video recorder (“MVR”) recordings, of the scene of a May 31, 2009 motor vehicle accident on Route 78 in Newark, N.J. The vehicle involved in the accident was being driven by Karl A. Reilly at the time of the accident. The State Police case number is B130200901363A.

**Request Made:** June 29, 2012

**Response Made:** July 11, 2012

**GRC Complaint Filed:** July 18, 2012<sup>3</sup>

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

**Request and Response:**

On June 29, 2012, the Complainant submitted an Open Public Records Act (“OPRA”) request seeking the above-listed records. On July 11, 2012, the seventh (7<sup>th</sup>) business day following receipt of such request, the Custodian responded in writing confirming a July 11, 2012, telephone conversation with the Complainant, wherein the Complainant instructed the Custodian to await further instructions from the Complainant concerning processing of the OPRA request.

**Denial of Access Complaint:**

On July 18, 2012, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he is a private investigator for Investigative Consultants International seeking the requested records for his

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

<sup>2</sup> Detective Ismael E. Vargas, Custodian of Records. Represented by Deputy Attorney General Justin Conforti.

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

<sup>4</sup> The parties may have submitted additional correspondence, or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

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client who is an attorney representing the driver involved in the accident for which the records are being sought. The Complainant stated that he filed his OPRA request on June 29, 2012, and received a telephonic response from the Custodian on July 11, 2012.

The Complainant stated that the Custodian informed him that no photographs were taken of the accident scene but there was a video captured of the scene via MVR recording. The Complainant further stated that the Custodian informed him that it is State Police policy to redact from the video any recording identifying troopers, civilians, vehicles or mile markers prior to disclosure. The Complainant also stated the Custodian told him that such redaction is an expensive and time consuming process and if it is necessary to extensively redact portions of the video it will not be disclosed.

The Complainant stated that he informed the Custodian that he has been retained by an attorney who represents a driver who was involved in a single vehicle accident; therefore, the driver should be entitled to an unredacted copy of the record. The Complainant stated that he and the Custodian then agreed to put the request on hold pending the outcome of a discussion between the Complainant and his client.

Statement of Information:

On August 21, 2012, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on June 29, 2012, and responded to the request on July 11, 2012. The Custodian also certified that the records responsive to the Complainant’s request were photographs or diagrams and MVR recordings of the scene of a motor vehicle accident identified as State Police case number B130200901363A.

The Custodian certified that he responded to the Complainant’s request by contacting the Complainant and explaining that the requested photographs were denied because they do not exist and that if an MVR recording exists it must be reviewed for potential redaction of confidential information pursuant to N.J.S.A. 47:1A-5(a).<sup>5</sup> The Custodian further certified that he sent an e-mail to the Complainant dated July 11, 2012, in which he confirmed he would await further instructions from the Complainant concerning processing of the Complainant’s OPRA request.

The Custodian certified that a voicemail dated July 17, 2012, from Mike Boyle, one of the Complainant’s associates at Investigative Consultants International, and a subsequent e-mail that same date from the Complainant, constituted withdrawal of the Complainant’s request.<sup>6</sup> The Custodian confirmed the Complainant’s withdrawal of the OPRA request via e-mail dated July 20, 2012.

The Custodian certified that the complaint should be dismissed because the Complainant withdrew his request before the Custodian provided an official response to the request. The Custodian certifies that he was prepared to provide the Complainant with a copy of the requested MVR tape in redacted form; therefore the agency did not deny the Complainant’s request.

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<sup>5</sup> The Custodian subsequently confirmed in the SOI that the MVR responsive to the request does exist.

<sup>6</sup> The Custodian stated that the e-mail was received at 4:31 p.m.

### Additional Information:

On August 28, 2012, the Complainant sent a certification to the GRC, wherein the Complainant certified that, although the Custodian averred that the Complainant withdrew his request on July 17, 2012, he did not in fact withdraw his request. The Complainant certified that the only contact he had with the Custodian on July 17, 2012, was the transmission of an e-mail which served as a transmittal for the Custodian's copy of the Denial of Access Complaint. The Complainant further certified that the Custodian referenced that same e-mail as a justification for closing his OPRA request and again later referred to it in his SOI as the Complainant's method of withdrawing the request. The Complainant certified that he does not know what Mr. Boyle may have told that Custodian; however, the Complainant asserted that Mr. Boyle was not the requestor and therefore the content of any message from Boyle should not be relevant to the Complainant's request.

The Complainant certified that he did receive an e-mail from the Custodian informing him that the request would be administratively closed; however, the Complainant certified that said e-mail was sent to him three (3) days after the Denial of Access Complaint was served upon the Custodian. The Complainant further certified that he had telephone conversations with the Custodian during which the Custodian informed him that the requested MVR record would be outsourced to a third party agency for a lengthy and expensive redaction process which might render it useless. The Complainant certified that he believed such a process would be tantamount to an unlawful denial of access under OPRA and, therefore, he told the Custodian that rather than accepting a redacted copy of the MVR record he would file a complaint to have the issue adjudicated by the GRC. The Complainant certified that the Custodian's SOI is attempting to confuse the issue by asserting that the Complainant withdrew his request.

### Analysis<sup>7</sup>

#### Sufficiency of Response

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 specifically states that a custodian "shall indicate the specific basis [for denial of access]..." N.J.S.A. 47:1A-5(g). Further, in Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), the GRC held that: "[a]lthough the Custodian responded in writing to the Complainant's...OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5(i), *the Custodian's response was legally insufficient because he failed to respond to each request item individually*. Therefore, the Custodian has violated N.J.S.A. 47:1A-5(g)." (Emphasis added.)

Here, the Custodian responded to the request by telling the Complainant during a telephone conversation that the requested photographs are denied because they do not exist and that if an MVR recording did exist it would have to be reviewed for potential redaction of confidential information.<sup>8</sup> Subsequently, on that same date the Custodian did respond to the

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<sup>7</sup> There may be other OPRA issues in this matter; however, the Council's analysis is based solely on the claims made in the Complainant's Denial of Access Complaint.

<sup>8</sup> As averred by the Custodian in the SOI.

Complainant in writing via e-mail but the e-mail failed to address each item contained in the Complainant's OPRA request and also failed to specify a date certain on which the Complainant could expect access to be granted or denied. Instead, the e-mail confirmed a purported agreement reached during the earlier telephone conversation to the effect that the Custodian would await further instruction from the Complainant before processing the request. As such, the written response was insufficient because it did not grant access, deny access, seek clarification or properly request an extension of time.

Therefore, 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 or to specify a date certain on which the Complainant could expect access to be granted or denied. N.J.S.A. 47:1A-5(g); Paff, supra.

### **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.

Request item number 1: MVR recordings of the scene of a May 31, 2009 motor vehicle accident on Route 78 in Newark, N.J., New Jersey State Police case number B130200901363A.

The threshold issue is whether the Complainant withdrew his OPRA request prior to the Custodian's response to the request granting or denying access.

The Custodian certified in the SOI that "...an MVR tape of the accident does exist and would be provided with appropriate redactions, if any..." The Custodian certified that the social security number, credit card number, unlisted telephone number or driver license number could be redacted pursuant to N.J.S.A. 47:1A-5(a). However, the Custodian further certified that the record was not disclosed because the Complainant withdrew his OPRA request on July 17, 2012. Therefore, the Custodian believes the complaint should be dismissed because the Complainant withdrew his request before the Custodian had the opportunity to produce the MVR tape.

The Complainant filed a responsive certification indicating that he did not withdraw his request. The Complainant certified that the only contact he had with the Custodian on July 17, 2012, was the transmission of an e-mail which served as a transmittal for the Custodian's copy of the Denial of Access Complaint.

Here, there is nothing in the evidence of record to indicate that Mike Boyle was a co-requestor of the records, or otherwise represented the Complainant in this matter. As such, Mr. Boyle's alleged July 17, 2012 voicemail message to the Custodian should not have been afforded any weight by the Custodian in reaching his conclusion that the Complainant withdrew his OPRA request. Furthermore, although the Custodian also certified that he relied upon the

Complainant's e-mail dated July 17, 2012, in determining that the Complainant withdrew his records request, the Custodian did not include a copy of this e-mail with his submission.

The Complainant certified that the only contact he had with the Custodian on July 17, 2012, was the transmission of one e-mail. The Custodian attached a copy of an e-mail dated July 17, 2012, 4:26 p.m. In this e-mail the Complainant informed the Custodian that he understood "Mike" left a message for the Custodian indicating he spoke with a GRC representative who told him he should proceed with a complaint. Then, after acknowledging the Custodian's cooperation, the Complainant informed the Custodian that he had attached a copy of the complaint to the e-mail. There is nothing in the e-mail that could be construed as withdrawing the request. To the contrary, the request formed the basis of the complaint, and the Complainant was transmitting a copy of the complaint to the Custodian via the e-mail.

Accordingly, the Council finds that the Custodian failed to meet his burden of proving that the Complainant withdrew his OPRA request before the Custodian responded to the request granting or denying access. Therefore, this matter remains active and in accordance with the Custodian's certification, the Custodian shall disclose to the Complainant the record responsive to request item number 1.

Request item number 2: photographic documentation of the scene of a May 31, 2009 motor vehicle accident on Route 78 in Newark, N.J., New Jersey State Police case number B130200901363A.

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 certified in the SOI that no records responsive to the complainant's request existed. The complainant submitted no evidence to refute the custodian's certification in this regard. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian's certification, there was no unlawful denial of access to the requested records.

Here, the Custodian certified in the SOI that the photographs, which are the records responsive to request item number 2, were denied because they do not exist. The Custodian further certified that where a party's request for public records are not in the possession of the public agency that they were requested from, OPRA does not require that public agency to produce the records. N.J.S.A. 47:1A-1, et seq.

Therefore, the Custodian did not unlawfully deny access to the records responsive to request item number 2 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, *supra*.

## **Knowing & Willful**

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 failed to meet his burden of proving that the Complainant withdrew his OPRA request before the Custodian responded to the request granting or denying access. Therefore, this matter remains active and in accordance with the Custodian's certification, the Custodian shall disclose to the Complainant the record responsive to request item number 1.
2. **The Custodian shall comply with paragraph 1 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,<sup>9</sup> to the Executive Director.<sup>10</sup>**
3. The Custodian did not unlawfully deny access to the records responsive to request item number 2 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).
4. 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, Esq.

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

May 21, 2013

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<sup>9</sup> "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."

<sup>10</sup> 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.

Brandon Melvin v. New Jersey Department of Law and Public Safety, New Jersey State Police, 2012-212 – Findings and Recommendations of the Executive Director