



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 29, 2014 Government Records Council Meeting

John F. Nelson
Complainant

Complaint No. 2013-124

v.

NJ Department of Law & Public Safety
Custodian of Record

At the July 29, 2014 public meeting, the Government Records Council (“Council”) considered the July 22, 2014 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 complied with the Council’s June 24, 2014 Interim Order because he responded in the prescribed time frame providing the record and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied the Complainant access to a portion of the requested record, the Custodian has since provided the Complainant with a lawfully redacted copy of the MVR. 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 29th Day of July, 2014

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 31, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
July 29, 2014 Council Meeting**

**John F. Nelson¹
Complainant**

GRC Complaint No. 2013-124

v.

**New Jersey Department of Law & Public Safety²
Custodial Agency**

Records Relevant to Complaint: The dashboard camera tape (“mobile video recording” or “MVR”) of the April 6, 2013, 10:06 AM, traffic stop involving the Complainant.

Custodian of Record: A/Lt. Gregory Shawaryn

Request Received by Custodian: April 11, 2013

Response Made by Custodian: April 22, 2013; May 3, 2013

GRC Complaint Received: April 30, 2013

Background

April 29, 2014 Council Meeting:

At its April 29, 2014 public meeting, the Council considered the April 22, 2014 *In Camera* 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 complied with the Council’s January 28, 2014 Interim Order because she responded in the prescribed extended time frame providing the requested records and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian must disclose a copy of the MVR to the Complainant that does not redact section two (2), spanning from 10:06:22 to 10:06:28, as the Custodian unlawfully denied access to this portion of the recording based on N.J.S.A. 47:1A-1. However, the Custodian lawfully denied access to redacted sections one (1), three (3), four (4), and (5) because these portions contain material exempt from disclosure pursuant to N.J.A.C. 13:1E-3.2(a)7 and N.J.S.A. 47:1A-1.

¹ No legal representation listed on record.

² The Custodian is represented by Deputy Attorney General Megan E. Shafranski.

1. **The Custodian must comply with finding No. 2 within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**
2. 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.

June 24, 2014 Meeting

At its June 24, 2014 public meeting, the Council considered the June 17, 2014 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, found that:

1. The Custodian has failed to establish in his request for reconsideration of the Council's April 29, 2014 Interim Order that either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Custodian failed to establish that the complaint should be reconsidered based on mistake. The Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Thus, the Custodian's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. **The Custodian must comply with the Council's April 29, 2014 Interim Order within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**

Procedural History:

On May 1, 2014, the Council distributed its April 29, 2014 Interim Order to all parties. On May 14, 2014, the Custodian filed a request for reconsideration of the Council's April 29, 2014 Interim Order based on a mistake.

On June 25, 2014, the Council distributed its Interim Order to all parties. On July 1, 2014, the Custodian provided a certification to the Government Records Council ("GRC") stating that "on this date, I caused a DVD containing the MVR in question . . .to be produced and sent to [the Complainant]."

Analysis

Compliance

At its June 24, 2014 meeting, the Council ordered the Custodian to comply with the Council's April 29, 2014 Interim Order by disclosing a copy of the MVR to the Complainant that did not redact the section spanning from 10:06:22 to 10:06:28 within five (5) business days from receipt of same and to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On June 25, 2014, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on July 2, 2014.

On July 1, 2014, the fourth (4th) business day after receipt of the Council's Order, the Custodian provided the required certifications to the GRC stating that the appropriately redacted MVR had been sent to the Complainant on July 1, 2014.

Therefore, the Custodian complied with the Council's June 24, 2014 Interim Order because he responded in the prescribed time frame providing the record and simultaneously provided certified confirmation of compliance to the Executive Director.

Knowing & Willful

OPRA states that "[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty" N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states "[i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]" N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (id.; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Although the Custodian unlawfully denied the Complainant access to a portion of the requested record, the Custodian has since provided the Complainant with a lawfully redacted copy of the MVR. 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 complied with the Council's June 24, 2014 Interim Order because he responded in the prescribed time frame providing the record and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied the Complainant access to a portion of the requested record, the Custodian has since provided the Complainant with a lawfully redacted copy of the MVR. 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: Robert T. Sharkey, Esq.
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

July 22, 2014



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
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RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

April 29, 2014 Government Records Council Meeting

John F. Nelson
Complainant

Complaint No. 2013-124

v.

New Jersey Department of Law & Public Safety
Custodian of Record

At the April 29, 2014 public meeting, the Government Records Council (“Council”) considered the April 22, 2014 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 complied with the Council’s January 28, 2014 Interim Order because he responded in the prescribed extended time frame providing the requested records and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian must disclose a copy of the MVR to the Complainant that does not redact section two (2), spanning from 10:06:22 to 10:06:28, as the Custodian unlawfully denied access to this portion of the recording based on N.J.S.A. 47:1A-1. However, the Custodian lawfully denied access to redacted sections one (1), three (3), four (4), and (5) because these portions contain material exempt from disclosure pursuant to N.J.A.C. 13:1E-3.2(a)7 and N.J.S.A. 47:1A-1.
3. **The Custodian must comply with finding No. 2 within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.¹**
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.

¹ 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.

Interim Order Rendered by the
Government Records Council
On The 29th Day of April, 2014

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: May 1, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
April 29, 2014 Council Meeting**

**John F. Nelson¹
Complainant**

GRC Complaint No. 2013-124

v.

**New Jersey Department of Law & Public Safety²
Custodial Agency**

Records Relevant to Complaint: The dashboard camera tape (“mobile video recording” or “MVR”) of the April 6, 2013, 10:06 AM, traffic stop involving the Complainant.

Custodian of Record: A/Lt. Gregory Shawaryn
Request Received by Custodian: April 11, 2013
Response Made by Custodian: April 22, 2013; May 3, 2013
GRC Complaint Received: April 30, 2013

Records Submitted for *In Camera* Examination: Redacted and unredacted copies of a Mobile Video Recording of the April 6, 2013 traffic stop involving the Complainant.

Background

January 28, 2014 Council Meeting:

At its January 28, 2014 public meeting, the Council considered the January 21, 2014 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 must disclose the requested, unredacted MVR to the GRC so that an *in camera* examination may be conducted to determine the validity of the Custodian’s assertion that the record was properly redacted based on N.J.S.A. 47:1A-1 and N.J.A.C. 13:1E-3.2(a)(7.). Paff, 379 N.J. Super. 354-55.
2. **The Custodian must deliver³ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see #1 above), nine (9) copies of the redacted**

¹ No legal representation listed on record.

² The Custodian is represented by Deputy Attorney General Megan E. Shafranski.

³ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

records, a redaction index⁴, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁵ that the record provided is the record requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.

3. 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 January 29, 2014, the Council distributed its Interim Order to all parties. On February 6, 2014, Counsel for the Custodian ("Counsel") requested an extension of time to respond until February 7, 2014. On February 7, 2014, Counsel responded to the Council's Interim Order by submitting redacted and unredacted copies of the requested MVR, an accompanying document index, and the Custodian's supplemental certification.

Analysis

Compliance

At its January 28, 2014 meeting, the Council ordered the Custodian to disclose nine (9) copies each of the redacted and unredacted MVR, a redaction index, and a legal certification from the Custodian within five (5) business days from receipt of the Order to the GRC. On January 29, 2014, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on February 5, 2014.

On February 6, 2014, Counsel requested, and was granted, a one (1) day extension of time to respond due to the State of Emergency declared by the Governor on February 5, 2014. On February 7, 2014, Counsel disclosed the redacted and unredacted copies of the requested record, the document index, and a copy of the Custodian's certification to the GRC.

Therefore, the Custodian complied with the Council's January 28, 2014 Interim Order because he responded in the prescribed extended time frame providing the requested records and simultaneously provided certified confirmation of compliance to the Executive Director.

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

⁴ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁵ "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."

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. N.J.S.A. 47:1A-6.

The Custodian contends that access to the redacted portions of the MVR was properly denied based on N.J.A.C. 13:1E-3.2(a)7, which exempts the duty assignment of an individual law enforcement officer or any personally identifiable information that may reveal or lead to information that may reveal such duty assignment, and N.J.S.A. 47:1A-1, which states that a public agency has a responsibility and an obligation to safeguard from public access a citizen’s personal information with which it has been entrusted when disclosure thereof would violate the citizen’s reasonable expectation of privacy.

The GRC conducted an *in camera* examination on the submitted record. The results of this examination are set forth in the following table:

Redaction Number	Record Name/Date	Description of Redaction	Custodian’s Explanation/ Citation Redactions	Findings of the <i>In Camera</i> Examination⁶
1.	MVR from April 6, 2013 traffic stop involving Complainant - 10:06:08 to 10:06:18	Badge numbers of State Trooper who stopped Complainant and those broadcast over the radio involving non-party State Troopers.	<u>N.J.A.C.</u> 13:1E-3.2(a)7: Records designated confidential: The duty assignment of an individual law enforcement officer or any personally identifiable information that may reveal or lead to information that may reveal such duty assignment.	The Custodian lawfully denied access to this portion of the MVR because it contains personally identifiable information that may reveal, or lead to information that may reveal, the duty assignment of an individual law enforcement officer. <u>N.J.A.C.</u> 13:1E-3.2(a)7.
2.	MVR from April 6, 2013 traffic stop involving Complainant - 10:06:22 to 10:06:28	N.J. registration number of Complainant’s vehicle.	<u>N.J.S.A.</u> 47:1A-1 et. seq.: Privacy Interest: A public agency has a responsibility and an obligation to safeguard from public access a citizen’s personal	This redacted portion of the MVR contains the registration number of the Complainant’s vehicle. Disclosure of such would not violate the

⁶ Unless expressly identified for redaction, everything in the record shall be disclosed.

			information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy.	Complainant's reasonable expectation of privacy. The Custodian has thus unlawfully denied access to this portion of the MVR.
3.	MVR from April 6, 2013 traffic stop involving Complainant - 10:08:55 to 10:09:02	Third Party radio transmission involving other citizens and State Troopers doing police work unrelated to the Complainant's traffic stop.	<u>N.J.S.A. 47:1A-1 et. seq.:</u> Privacy Interest: A public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy.	The Custodian lawfully denied access to this portion of the MVR because it contains information that implicates OPRA's personal privacy interest exemption.. <u>N.J.S.A. 47:1A-1 et. seq.</u>
4.	MVR from April 6, 2013 traffic stop involving Complainant - 10:10:40 to 10:11:05	Third Party radio transmission involving other citizens and State Troopers doing police work unrelated to the Complainant's traffic stop.	<u>N.J.S.A. 47:1A-1 et. seq.:</u> Privacy Interest: A public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy.	The Custodian lawfully denied access to this portion of the MVR because it contains information that implicates OPRA's personal privacy interest exemption. <u>N.J.S.A. 47:1A-1 et. seq.</u>
5.	MVR from April 6, 2013 traffic stop involving Complainant -	Badge numbers of State Trooper who stopped Complainant and those	<u>N.J.A.C. 13:1E-3.2(a)7:</u> Records designated confidential: The duty assignment of an individual law	The Custodian lawfully denied access to this portion of the MVR because it contains personally identifiable

	10:12:05 to END	broadcast over the radio involving non-party State Troopers & Third Party radio transmission involving other citizens and State Troopers doing police work unrelated to the Complainant's traffic stop.	enforcement officer or any personally identifiable information that may reveal or lead to information that may reveal such duty assignment; and <u>N.J.S.A. 47:1A-1 et. seq.:</u> Privacy Interest: A public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy.	information that may reveal, or lead to information that may reveal, the duty assignment of an individual law enforcement officer, and it contains information that implicates OPRA's personal privacy interest exemption. <u>N.J.A.C. 13:1E-3.2(a)7;</u> <u>N.J.S.A. 47:1A-1 et. seq.</u>
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Thus, the Custodian lawfully denied access to the requested record, in part, because redacted sections one (1) and five (5) contain material State Troopers' badge numbers exempt from disclosure under N.J.A.C. 13:1E-3.2(a)7, and redacted sections three (3) and four (4) contain material related to non-party individuals, such as the make, model, color, and license plate numbers of cars being pulled over, that, if disclosed, would violate citizens' reasonable expectations of privacy pursuant to N.J.S.A. 47:1A-1. The Custodian, however, unlawfully denied access to redacted section two (2) containing the Complainant's New Jersey vehicle registration number. As the Complainant requested the MVR, the disclosure of the audio portion of the record describing his registration number cannot be said to violate his reasonable expectation of privacy under N.J.S.A. 47:1A-1.

Consistent with N.J.S.A. 47:1A-5(g), if the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to OPRA, the custodian must delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and must promptly permit access to the remainder of the record.

Thus, the Custodian must disclose a copy of the MVR to the Complainant that does not redact section two (2), spanning from 10:06:22 to 10:06:28, as the Custodian unlawfully denied access to this portion of the recording based on N.J.S.A. 47:1A-1. However, the Custodian lawfully denied access to redacted sections one (1), three (3), four (4), and (5) because these

portions contain material exempt from disclosure pursuant to N.J.A.C. 13:1E-3.2(a)⁷ and N.J.S.A. 47:1A-1.

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 complied with the Council's January 28, 2014 Interim Order because he responded in the prescribed extended time frame providing the requested records and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian must disclose a copy of the MVR to the Complainant that does not redact section two (2), spanning from 10:06:22 to 10:06:28, as the Custodian unlawfully denied access to this portion of the recording based on N.J.S.A. 47:1A-1. However, the Custodian lawfully denied access to redacted sections one (1), three (3), four (4), and (5) because these portions contain material exempt from disclosure pursuant to N.J.A.C. 13:1E-3.2(a)⁷ and N.J.S.A. 47:1A-1.
3. **The Custodian must comply with finding No. 2 within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**⁷
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: Robert T. Sharkey, Esq.
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.
Senior Counsel

April 22, 2014

⁷ 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.



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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INTERIM ORDER

January 28, 2014 Government Records Council Meeting

John F. Nelson
Complainant

Complaint No. 2013-124

v.

New Jersey Department of Law & Public Safety
Custodian of Record

At the January 28, 2014 public meeting, the Government Records Council (“Council”) considered the January 21, 2014 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 must disclose the requested, unredacted MVR to the GRC so that an *in camera* examination may be conducted to determine the validity of the Custodian’s assertion that the record was properly redacted based on N.J.S.A. 47:1A-1 and N.J.A.C. 13:1E-3.2(a)(7.). Paff, 379 N.J. Super. 354-55.
2. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see #1 above), nine (9) copies of the redacted records, a redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,³ that the record provided is the record requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council’s Interim Order.**
3. 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.

¹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

² The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

³ “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.”



Interim Order Rendered by the
Government Records Council
On The 28th Day of January, 2014

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: January 29, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 28, 2014 Council Meeting**

**John F. Nelson¹
Complainant**

GRC Complaint No. 2013-124

v.

**New Jersey Department of Law & Public Safety²
Custodial Agency**

Records Relevant to Complaint: The dashboard camera tape (“mobile video recording” or “MVR”) of the April 6, 2013, 10:06 AM, traffic stop involving the Complainant.

Custodian of Record: A/Lt. Gregory Shawaryn

Request Received by Custodian: April 11, 2013

Response Made by Custodian: April 22, 2013; May 3, 2013

GRC Complaint Received: April 30, 2013

Background³

Request and Response:

On April 11, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 22, 2013, seven (7) business days later, the Custodian responded in writing requesting an extension of time to respond until May 1, 2013. On May 3, 2013, the Custodian sent a copy of the requested record to the Complainant and stated that portions of the requested record had been redacted in accordance with N.J.S.A. 47:1A-1 et. seq. and N.J.A.C. 13:1E-3.2(a)(7).

Denial of Access Complaint:

On April 30, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that, in light of his need to use the MVR as evidence in his related court case, the redaction of the record violates his rights under OPRA.

¹ No legal representation listed on record.

² The Custodian is represented by Deputy Attorney General Megan E. Shafranski.

³ 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.

Statement of Information:

On July 31, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that he received the Complainant’s OPRA request on April 11, 2013. The Custodian further certifies that on April 22, 2013, he explained via email to the Custodian that the MVR needed to be redacted and requested an extension of time. The Custodian additionally certifies that on May 3, 2013, the Complainant was sent a redacted copy of the requested MVR.

The Custodian asserts that the MVR was redacted to protect the privacy interests of third parties not involved in the incident pursuant to N.J.S.A. 47:1A-1 et. seq., and that additional redactions were performed in accordance with N.J.A.C. 13:1E-3.2(a)(7). The Custodian, through Counsel, contends that the OPRA request has been fulfilled and, therefore, that there is no merit to the complaint.

Additional Submissions

Custodian’s First (1st) Certification

On November 22, 2013, the GRC requested clarification from the Custodian in the form of a certification regarding: (1) the length of the unredacted MVR in question; (2) the length of the redacted portion of the MVR; (3) the general nature of the content that was redacted; and (4) the statutory basis (or bases) for those redactions.

On November 27, 2013, the GRC granted an extension of time to respond until December 3, 2013. On December 3, 2013, the GRC received the Custodian’s certification that:

1. The unredacted MVR in question is 6:47 (six minutes, forty-seven seconds) in length. The start time is 10:06:03 and the end time is 10:12:47.
2. The redacted portions of the MVR in question are at the following times and contain the following information:

10:06:08 to 10:06:18 (Badge number of Trooper)
10:06:22 to 10:06:28 (NJ Registration number of vehicle)
10:08:55 to 10:09:02 (Third party radio transmission)
10:10:40 to 10:11:05 (Third party radio transmission)
10:12:05 to END (Badge number of Trooper & Third Party)

The total amount of time redacted is 90 (ninety) seconds.

3. The general nature of the content that was redacted includes personal and/or identifying information. Specifically, third-party radio transmissions, the New Jersey Registration of the vehicle in question, and the badge number(s) of the Trooper(s) (radio call portions of the MVR audio) were redacted.

4. The statutory bases for these redactions are N.J.S.A. 47:1A-1 et. seq. (“Privacy Interest: A public agency has a responsibility and an obligation to safeguard from public access a citizen’s personal information with which it has been entrusted when disclosure thereof would violate the citizen’s reasonable expectation of privacy[.]”) and N.J.A.C. 13:1E-3.2(a)7 (“Records designated confidential: The duty assignment of an individual law enforcement officer or any personally identifiable information that may reveal or lead to information that may reveal such duty assignment . . .”)[.]

Certification of A/Lt. Gregory Shawaryn dated December 3, 2013.

Custodian’s Second (2nd) Certification

On December 9, 2013, the GRC requested further clarification of the certification submitted by the Custodian. On December 13, 2013, the GRC received the Custodian’s additional certification that:

1. The trooper badge number of both the trooper who stopped [the Complainant] and the badge numbers broadcast over the radio involving non-party transmissions have been redacted pursuant to N.J.A.C. 13:1E-3.2(a)7 . . .
2. The NJ Registration number of the vehicle in question is redacted pursuant to N.J.S.A. 47:1A-1 et. seq. . . .
3. Third party radio transmissions are radio calls that can be audibly heard on the MVR in question. They do not involve the subject stop or [the Complainant] and are redacted pursuant to N.J.S.A. 47:1A-1 et. seq. [privacy interest] . . . The third party radio transmissions that can be heard on the unredacted MVR audio involve other troopers doing other police work not related in any way to [the Complainant]; as such, those troopers and citizens have reasonable expectations of privacy as to disclosure of any police activity not related to [the Complainant] and the traffic stop in question.

Certification of A/Lt. Gregory Shawaryn dated December 13, 2013.

Analysis

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request

“with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the GRC in which the GRC dismissed the complaint by accepting the custodian’s legal conclusion for the denial of access without further review. The court stated that:

[OPRA] contemplates the GRC’s *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the Open Public Meetings Act, N.J.S.A. 10:4-6 to -21, it also provides that the GRC “may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.” N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

Id. at 355.

The court additionally stated that:

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC’s obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

Id.

The Appellate Division of the New Jersey Superior Court has also held that the GRC must enforce OPRA’s declaration, in N.J.S.A. 47:1A-1, that “a public agency has a responsibility and an obligation to safeguard from public access a citizen’s personal information with which it has been entrusted when disclosure thereof would violate the citizen’s reasonable expectation of privacy.” Serrano v. S. Brunswick Twp., 358 N.J. Super. 352, 368 (App. Div. 2003). More recently, the New Jersey Supreme Court made the following observations with respect to N.J.S.A. 47:1A-1:

[N.J.S.A. 47:1A-1] is neither a preface nor a preamble. It has no telltale “whereas” clauses that often appear in a preamble. It appears after OPRA’s enactment clause, making the provision part of the body of the law. PRB Enters., Inc. v. S. Brunswick Planning Bd., 105 N.J. 1, 5, 518 A.2d 1099 (1987). . . . Specifically, it imposes an obligation on public agencies to protect against disclosure of personal information which would run contrary to reasonable privacy interests.

Burnett v. Cnty. of Bergen, 198 N.J. 408, 422-23 (2009).

The Council examined issues concerning the disclosure of MVR media in Gorman v. Gloucester City Police Dep't, GRC Complaint No. 2004-108 (October 2008). There, the Council conducted an *in camera* examination of the MVR tape that was withheld from disclosure and, because the *in camera* examination raised substantial issues relevant to a citizen's privacy interest, the Council turned to its decision in Merino v. Ho-Ho-Kus, GRC Complaint No. 2003-110 (February 2004). In that decision, the Council utilized a common law test to determine whether, on balance, certain records should be disclosed in light of N.J.S.A. 47:1A-1.

Here, the Custodian certified that portions of the requested MVR were redacted because the privacy interests of citizens are at issue and because the duty assignment of individual law enforcement officers may be revealed. Citing N.J.S.A. 47:1A-1; N.J.A.C. 13:1E-3.2(a)(7.). Thus, it is necessary for the GRC to conduct an *in camera* examination of the requested MVR and then employ the common law balancing test established by the New Jersey Supreme Court in Doe v. Poritz, 142 N.J. 1 (1995) and subsequently applied by the GRC. This balancing test is applicable to cases in which privacy interests are implicated, and it allows the GRC to exercise its discretion in determining whether an individual's privacy interest is outweighed by any factors militating in favor of disclosure of a government record.

Thus, the Custodian must disclose the requested, unredacted MVR to the GRC so that an *in camera* examination may be conducted to determine the validity of the Custodian's assertion that the record was properly redacted based on N.J.S.A. 47:1A-1 and N.J.A.C. 13:1E-3.2(a)(7.). Paff, 379 N.J. Super. 354-55.

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 must disclose the requested, unredacted MVR to the GRC so that an *in camera* examination may be conducted to determine the validity of the Custodian's assertion that the record was properly redacted based on N.J.S.A. 47:1A-1 and N.J.A.C. 13:1E-3.2(a)(7.). Paff, 379 N.J. Super. 354-55.
2. **The Custodian must deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see #1 above), nine (9) copies of the redacted**

⁴ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

records, a redaction index⁵, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁶ that the record provided is the record requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.

3. 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: Robert T. Sharkey, Esq.
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.
Senior Counsel

January 21, 2013

⁵ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁶ "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."