



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

FINAL DECISION

April 29, 2014 Government Records Council Meeting

Charles L. Marciante  
Complainant

Complaint No.: 2013-171

v.

NJ Department of Environmental Protection  
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 time frame providing nine (9) copies of the requested record for an *in camera* review and simultaneously provided certified confirmation of compliance to the Executive Director.
2. **The *In Camera* Examination set forth in the above table reveals the Custodian has lawfully denied access to, or redacted portions of, the records listed in the document index pursuant to N.J.S.A. 47:1A-6.**
3. The Custodian lawfully denied access to the responsive records because the emails, witness statement, and memorandum constitute criminal investigatory records that are exempt from disclosure under OPRA. See N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; Janeczko v. New Jersey Department of Law & Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 & 2002-80 (June 2004).
4. The Custodian also lawfully denied access to the email responsive to Item #1 because it contains ACD material that is exempt from access under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6.
5. The Custodian also lawfully denied access to this portion of Item #2 because it contains security information that is specifically exempt from disclosure pursuant to OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6.



6. The Custodian complied with the Council's January 28, 2014 Order and lawfully denied access to the responsive records; therefore, the Council should decline to analyze whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances or whether the Complainant is entitled to prevailing party attorney's fees.

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 29<sup>th</sup> 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 2, 2014**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Charles L. Marciante<sup>1</sup>  
Complainant**

**GRC Complaint No. 2013-171**

v.

**N.J. Department of Environmental Protection<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:<sup>3</sup>**

Item Number One (“#1”): For the time period of April 1, 2013 to April 5, 2013, any and all documents transcribing, detailing, or otherwise referring to the April 1, 2013 telephone conversation by and between Charles Marciante and Paul Tarlowe.

Item Number Two (“#2”): For the time period of April 1, 2013 to April 5, 2013, a copy of any and all emails sent by Paul Tarlowe to his supervisor(s) referring or relating to Charles Marciante.

Item Number Three (“#3”): For the time period of April 1, 2013 to April 5, 2013, a copy of the document, memo, or other written notice sent to the New Jersey State Park offices or buildings, New Jersey Department of Environmental Protection (“DEP”) facilities or buildings, and/or other state buildings, which included Charles Marciante’s photograph, address, and/or vehicle description.

**Custodian of Record:** Matthew J. Coefer

**Request Received by Custodian:** April 5, 2013

**Response Made by Custodian:** April 10, 2013; April 23, 2013

**GRC Complaint Received:** June 5, 2013

**Records Submitted for *In Camera* Examination:** Unredacted copies of the responsive emails, witness statement, and memorandum.

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<sup>1</sup> The Complainant is represented by Maeve E. Cannon, Esq. (Princeton, NJ).

<sup>2</sup> The Custodian is represented by Deputy Attorney General Melissa P. Abatemarco.

<sup>3</sup> The Complainant requested additional records that are not at issue in this complaint.

## 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 GRC must conduct an *in camera* review of the undisclosed records in order to determine the validity of the Custodian's assertion that the records responsive to Items #1, #2, and #3 above are exempt from disclosure based on OPRA's exemptions for criminal and ongoing investigative records, advisory, consultative, or deliberative material, and building security. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-3; Paff v. N.J. Department of Labor, Board of Review, 379 N.J. Super. 354-55 (App. Div. 2005).
2. **The Custodian must deliver<sup>4</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see item number one (1) above), a document or redaction index<sup>5</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>6</sup> that the records provided are the records 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.
4. The Council defers analysis of whether the Complainant is a prevailing party 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 4, 2014, Counsel responded to the Council's Interim Order by submitting unredacted copies of the requested records, an accompanying document index, and the Custodian's supplemental certification.

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<sup>4</sup> 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.

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

<sup>6</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."

## Analysis

### Compliance

At its January 28, 2014 meeting, the Council ordered the Custodian to disclose nine (9) copies each of the unredacted records, 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 4, 2014, Counsel disclosed the unredacted copies of the requested records, the document index, and a copy of the Custodian's certification to the GRC.

The Custodian complied with the Council's January 28, 2014 Interim Order because he responded in the prescribed time frame providing nine (9) copies of the requested record for an *in camera* review 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 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 argues that the responsive documents are exempt from disclosure pursuant to Executive Order No. 48 (Hughes 1968) ("EO 48") and N.J.S.A. 47:1A-9 as State Police investigatory files, and under N.J.S.A. 47:1A-1.1 as general criminal investigatory records. The Custodian additionally contends that the records are exempt as advisory, consultative, or deliberative ("ACD") materials based on N.J.S.A. 47:1A-1.1 because: (1) they contain communications made by Paul Tarlowe to DEP Police before they decided how to respond to the alleged threat; and (2) they reflect deliberations over how DEP personnel should handle the safety issues raised by the alleged threat. Lastly, the Custodian asserts that Item #3 is also not subject to disclosure under either N.J.S.A. 47:1A-1.1, because it contains information that could jeopardize the security procedures for State buildings, facilities, or persons, or N.J.S.A. 47:1A-1, because it describes personal identifying information that is subject to redaction.

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

<b>Record Number</b>	<b>Record Name/Date</b>	<b>Description of Record</b>	<b>Custodian's Explanation/ Citation for Non-disclosure or Redactions</b>	<b>Findings of the <i>In Camera</i> Examination</b>
Item #1	4/2/13 9:33:21 a.m. Email from Paul Tarlowe to Captain Frank Panico & Deputy Chief Matt Brown	Email describing Paul Tarlowe's 4/1/13 telephone conversation with Complainant and Mr. Tarlowe's impressions of that conversation (one (1) page).	<u>N.J.S.A. 47:1A-9 &amp; EO 48</u> State Police Investigatory Records;  <u>N.J.S.A. 47:1A-1.1</u> Criminal Investigatory Records;  <u>N.J.S.A. 47:1A-1.1</u> ACD Materials	The Custodian lawfully denied access to the email message based on OPRA's exemption from disclosure of criminal investigatory records and ACD material. <u>N.J.S.A. 47:1A-1.1.</u>
Item #1	4/2/13 N.J. Division of Fish & Wildlife Voluntary Witness Statement Form from Paul Tarlowe	Paul Tarlowe's witness statement describing 4/1/13 telephone conversation with Complainant (one (1) page).	<u>N.J.S.A. 47:1A-9 &amp; EO 48</u> State Police Investigatory Records;  <u>N.J.S.A. 47:1A-1.1</u> Criminal Investigatory Records;  <u>N.J.S.A. 47:1A-1.1</u> ACD Materials	The Custodian lawfully denied access to the witness statement based on OPRA's exemption from disclosure of criminal investigatory records. <u>N.J.S.A. 47:1A-1.1.</u>
Item #2	4/2/13 3:39:35 p.m. Email from Paul Tarlowe to 16 DEP staff	Email describing 4/1/13 telephone conversation with Complainant and clarifying content of 4/2/13 memorandum (described below) Email regarding Division of Fish & Wildlife's facilities' security parameters (one (1) page).	<u>N.J.S.A. 47:1A-9 &amp; EO 48</u> State Police Investigatory Records;  <u>N.J.S.A. 47:1A-1.1</u> Criminal Investigatory Records;  <u>N.J.S.A. 47:1A-1.1</u> ACD Materials	The Custodian lawfully denied access to the email message based on OPRA's exemption from disclosure of criminal investigatory records. <u>N.J.S.A. 47:1A-1.1.</u> Additionally, one (1) email that is part of the message chain is exempt from disclosure based on its implications for building security.

				<u>N.J.S.A. 47:1A-1.1.</u>
Item #3	4/2/13 DEP Memorandum from Bureau of Law Enforcement's Chief Mark A. Chicketano to Division of Wildlife Personnel, N.J. State Police, and Trenton Campus Security Personnel	Memorandum from Chief Mark A. Chicketano summarizing Paul Tarlowe's 4/1/13 telephone conversation with Complainant and listing Complainant's name, address, date of birth, driver's license number, approximate height and weight, and registered vehicles. A photograph of the Complainant is attached (two (2) pages).	<u>N.J.S.A. 47:1A-9</u> & EO 48 State Police Investigatory Records;  <u>N.J.S.A. 47:1A-1.1</u> Criminal Investigatory Records;  <u>N.J.S.A. 47:1A-1.1</u> ACD Materials;  <u>N.J.S.A. 47:1A-1.1</u> Building Security;  <u>N.J.S.A. 47:1A-1.1</u> Personal Identifying Information	The Custodian lawfully denied access to the witness statement based on OPRA's exemption from disclosure of criminal investigatory records. <u>N.J.S.A. 47:1A-1.1.</u>

OPRA provides in pertinent part that a criminal investigatory record, “a record which is not required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding[,]” is not subject to disclosure. N.J.S.A. 47:1A-1.1. A “law enforcement agency,” in turn, is defined as “a public agency, or part thereof, determined by the Attorney General to have law enforcement responsibilities.” *Id.* Further, criminal investigatory records “include records involving all manner of crimes, resolved or unresolved, and include[] information that is part and parcel of an investigation, confirmed and unconfirmed.” Janeczko v. N.J. Dep’t of Law & Public Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 & 2002-80 (June 2004).

Here, the GRC’s *in camera* review of the responsive emails, witness statement, and memorandum revealed that these documents fall within OPRA’s definition of “criminal investigatory records.” *See N.J.S.A. 47:1A-1.1.* The DEP Division of Fish and Wildlife Bureau of Law Enforcement’s (“Bureau’s”) personnel are recognized as “law enforcement officers” in several New Jersey statutes, while various state laws define “state law enforcement agency” as an entity that “includes, but is not limited to, the police department of a State agency . . . .” *See, e.g., N.J.S.A. 39:3C-27; N.J.S.A. 43:15A-97; N.J.S.A. 18A:6-4.12(d); N.J.S.A. 27:25-15.16(d); N.J.S.A. 40A:14-178(d); N.J.S.A. 52:17B-77.6(d); see also N.J.S.A. 34:13A-15 (defining public police department as any agency having employees engaged in performing police services, including units of officers in the Bureau); N.J.S.A. 13:1L-21 (noting that State park police*

officers and department personnel have arrest powers, and that law enforcement training program shall be established for such personnel). The record indicates that Bureau officers and local law enforcement were performing an active investigation of the alleged threat made by the Complainant at the time the responsive documents were created. These documents are not “required to be made, maintained, or kept on file,” but, upon review, they do pertain to the criminal investigation, regardless of whether the investigation has been resolved or the information contained therein has been confirmed. N.J.S.A. 47:1A-1.1; Janeczko, GRC 2002-79 & 2002-80.

Therefore, the Custodian lawfully denied access to the responsive records because the emails, witness statement, and memorandum constitute criminal investigatory records that are exempt from disclosure under OPRA. See N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; Janeczko, GRC 2002-79 & 2002-80.

In addition to being exempt from disclosure as criminal investigatory records, Item #1 constitutes ACD material, and Item #2 contains content that implicates building security. See N.J.S.A. 47:1A-1.1.

OPRA excludes from the definition of a government record “inter-agency or intra-agency advisory, consultative or deliberative material.” N.J.S.A. 47:1A-1.1. In O’Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006), the Council stated that

[N]either the statute nor the courts have defined the terms . . . “advisory, consultative, or deliberative” in the context of the public records law. The Council looks to an analogous concept, the deliberative process privilege, for guidance in the implementation of OPRA’s ACD exemption. Both the ACD exemption and the deliberative process privilege enable a governmental entity to shield from disclosure material that is pre-decisional and deliberative in nature. Deliberative material contains opinions, recommendations, or advice about agency policies. In Re the Liquidation of Integrity Insurance Company, 165 N.J. 75, 88 (2000); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J.149 (App. Div. 2004).

Id.

The deliberative process privilege doctrine permits government agencies to withhold documents that reflect advisory opinions, recommendations, and deliberations submitted as part of a process by which governmental decisions and policies are formulated. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, (1975). Specifically, the New Jersey Supreme Court has ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in decision-making process and its disclosure would reveal deliberations that occurred during that process. Educ. Law Ctr. v. N.J. Dep’t of Educ., 198 N.J. 274 (2009). In Integrity, the Court adopted a qualified deliberative process privilege, noting that:



A document must meet two requirements for the deliberative process privilege to apply. First, it must have been generated before the adoption of an agency's policy or decision. In other words, it must be pre-decisional. . . . Second, the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies. . . . Purely factual material that does not reflect deliberative processes is not protected. . . . Once the government demonstrates that the subject materials meet those threshold requirements, the privilege comes into play. In such circumstances, the government's interest in candor is the “preponderating policy” and, prior to considering specific questions of application, the balance is said to have been struck in favor of non-disclosure.

Id. at 84-85 (citations omitted).

The Court set out further procedural guidelines:

The initial burden falls on the state agency to show that the documents it seeks to shield are pre-decisional and deliberative in nature (containing opinions, recommendations, or advice about agency policies). Once the deliberative nature of the documents is established, there is a presumption against disclosure. The burden then falls on the party seeking discovery to show that his or her compelling or substantial need for the materials overrides the government's interest in non-disclosure. Among the considerations are the importance of the evidence to the movant, its availability from other sources, and the effect of disclosure on frank and independent discussion of contemplated government policies.”

Id., at 88 (*citing McClain v. Coll. Hosp.*, 99 N.J. 346, 361-62 (1985)).

Here, the email responsive to Item #1 was created prior to the adoption of the DEP’s, Bureau’s, or Division of Fish and Wildlife’s decision regarding the Complainant’s phone conversation with Paul Tarlowe, and it contains opinions, recommendations, or advice about agency policy regarding said conversation.

Therefore, the Custodian also lawfully denied access to the email responsive to Item #1 because it contains ACD material that is exempt from access under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6.

OPRA additionally states that “emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein” does not constitute a government record. N.J.S.A. 47:1A-1.1. One (1) of the emails that comprise Item #2 falls squarely within this exemption.

Therefore, the Custodian also lawfully denied access to this portion of Item #2 because it contains security information that is specifically exempt from disclosure pursuant to OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6.

Finally, the Custodian complied with the Council's January 28, 2014 Order and lawfully denied access to the responsive records; therefore, the Council should decline to analyze whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances, or whether the Complainant is entitled to prevailing party attorney's fees.

### **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 time frame providing nine (9) copies of the requested record for an *in camera* review and simultaneously provided certified confirmation of compliance to the Executive Director.
2. **The *In Camera* Examination set forth in the above table reveals the Custodian has lawfully denied access to, or redacted portions of, the records listed in the document index pursuant to N.J.S.A. 47:1A-6.**
3. The Custodian lawfully denied access to the responsive records because the emails, witness statement, and memorandum constitute criminal investigatory records that are exempt from disclosure under OPRA. *See* N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; Janeczko v. New Jersey Department of Law & Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 & 2002-80 (June 2004).
4. The Custodian also lawfully denied access to the email responsive to Item #1 because it contains ACD material that is exempt from access under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6.
5. The Custodian also lawfully denied access to this portion of Item #2 because it contains security information that is specifically exempt from disclosure pursuant to OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6.
6. The Custodian complied with the Council's January 28, 2014 Order and lawfully denied access to the responsive records; therefore, the Council should decline to analyze whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances or whether the Complainant is entitled to prevailing party attorney's fees.

Prepared By: Robert T. Sharkey, Esq.  
Staff Attorney

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

April 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  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

INTERIM ORDER

January 28, 2014 Government Records Council Meeting

Charles L. Marciante  
Complainant

Complaint No. 2013-171

v.

N.J. Department of Environmental Protection  
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 GRC must conduct an *in camera* review of the undisclosed records in order to determine the validity of the Custodian’s assertion that the records responsive to Items #1, #2, and #3 above are exempt from disclosure based on OPRA’s exemptions for criminal and ongoing investigative records, advisory, consultative, or deliberative material, and building security. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-3; Paff v. N.J. Department of Labor, Board of Review, 379 N.J. Super. 354-55 (App. Div. 2005).
2. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see item number one (1) above), a document or redaction index<sup>2</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>3</sup> that the records provided are the records 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.

<sup>1</sup> 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.

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

<sup>3</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.”



4. The Council defers analysis of whether the Complainant is a prevailing party 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 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, 2013 Council Meeting**

**Charles L. Marciante<sup>1</sup>  
Complainant**

**GRC Complaint No. 2013-171**

**v.**

**N.J. Department of Environmental Protection<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:<sup>3</sup>**

Item Number One (“#1”): For the time period of April 1, 2013 to April 5, 2013, any and all documents transcribing, detailing, or otherwise referring to the April 1, 2013 telephone conversation by and between Charles Marciante and Paul Tarlowe.

Item Number Two (“#2”): For the time period of April 1, 2013 to April 5, 2013, a copy of any and all emails sent by Paul Tarlowe to his supervisor(s) referring or relating to Charles Marciante.

Item Number Three (“#3”): For the time period of April 1, 2013 to April 5, 2013, a copy of the document, memo, or other written notice sent to the New Jersey State Park offices or buildings, New Jersey Department of Environmental Protection facilities or buildings, and/or other state buildings, which included Charles Marciante’s photograph, address, and/or vehicle description.

**Custodian of Record:** Matthew J. Coefer

**Request Received by Custodian:** April 5, 2013

**Response Made by Custodian:** April 10, 2013; April 23, 2013

**GRC Complaint Received:** June 5, 2013

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

**Request and Response:**

On April 5, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 10, 2013, three (3)

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<sup>1</sup> The Complainant is represented by Maeve E. Cannon, Esq. (Princeton, NJ).

<sup>2</sup> The Custodian is represented by Deputy Attorney General Melissa P. Abatamarco.

<sup>3</sup> The Complainant requested additional records that are not at issue in this complaint.

<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.

business days later, the Custodian responded in writing stating that records responsive to Items #1 and #2 above were available and would be faxed to the Complainant when the Custodian received them. The Custodian also stated that there were no records responsive to Item #3 above.

On April 23, 2013, the Custodian sent the Complainant a Revised Addendum Disposition advising that the New Jersey Department of Environmental Protection (“DEP”) had identified documents responsive to Item #3, but that all documents responsive to Items #1, #2, and #3 are considered confidential pursuant to N.J.S.A. 47:1A-9 and Executive Order No. 48 (Hughes 1968) (“EO 48”).

#### Denial of Access Complaint:

On June 5, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that EO 48 prevents the disclosure of State Police investigative files to anyone who is not a member of a duly recognized law enforcement agency. The Complainant contends that the documents requested in Items #1 and #2 were created before the start of a police investigation and thus cannot be considered police investigative files. *Citing Serrano v. S. Brunswick Twp.*, 358 N.J. Super. 352, 366 (App. Div. 2003). The Complainant further contends that the record responsive to Item #3 cannot qualify as an investigatory record because the document was publically displayed during, and subsequent to, the investigation of the Complainant.

#### 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 5, 2013, and responded on April 10, 2013. The Custodian further certifies that on April 23, 2013, the Complainant was sent a revised response after a record responsive to Item #3 was located.

The Custodian states that the request stems from the Complainant threatening Paul Tarlowe, a DEP employee, over the phone on April 1, 2013. The Custodian further states that on April 2, 2013, an investigation into the matter was opened by the DEP’s State Park Police (“DEP Police”), and that the group is designated as law enforcement personnel with the power to arrest. N.J.S.A. 13:1L-21. The Custodian additionally states that the documents responsive to Item #1 are an email from Mr. Tarlowe to two (2) individuals and a witness statement from Mr. Tarlowe; the document responsive to Item #2 is an email from Mr. Tarlowe to sixteen (16) DEP staff members; and the document responsive to Item #3 is a DEP memorandum from the DEP Police’s chief to the Division of Wildlife Personnel, the State Police, and Trenton Campus Security Personnel.

The Custodian asserts that the DEP Police are a duly recognized law enforcement agency and, as such, all of the responsive records concerning the investigation constitute investigative records under EO 48. N.J.S.A. 47:1A-9. The Custodian further asserts that the records were created when Mr. Tarlowe contacted the DEP Police, or during the investigation. The Custodian additionally asserts that the records responsive to Items #2 and #3 would provide information that could jeopardize the security procedures for State buildings, facilities, or persons therein.

N.J.S.A. 47:1A-1.1. The Custodian contends that no responsive records existed or were public prior to the involvement of the DEP Police, so the records responsive to Item #2 are confidential internal investigative and security records exempt as deliberative materials. N.J.S.A. 47:1A-1.1. The Custodian additionally contends that documents responsive to Items #2 and #3 contain personal identifying information. N.J.S.A. 47:1A-1. The Custodian also states that the DEP found no evidence that documents responsive to Item #3 were publically posted, and that such postings would not follow normal protocol.

#### Additional Submissions:

##### Counsel's Letter Reply to the Custodian's SOI

On August 22, 2013, Complainant's Counsel submitted a letter reply to the Custodian's SOI.

Regarding Items #1 and #2, Complainant's Counsel asserts that EO 48's exemption of State Police investigatory files from disclosure does not encompass the two (2) emails sent by Mr. Tarlowe on April 2, 2013. Complainant's Counsel also asserts that the DEP is not a "law enforcement agency" as used in OPRA because it has not been determined by the Attorney General to have law enforcement responsibilities. N.J.S.A. 47:1A-1.1. Complainant's Counsel further asserts that the power of the DEP Police to arrest individuals who commit crimes in an officer's presence does not establish this criterion. *Citing* N.J.S.A. 13:1D-9; N.J.S.A. 13:1L-21.

Regarding Item #3, Complainant's Counsel contends that OPRA's exemption for information that could compromise a building's security does not apply because the responsive document is an alert about the Complainant and does not detail security procedures or information about a building or facility. N.J.S.A. 47:1A-1.1.

Complainant's Counsel additionally argues that the personal identifying information contained in the requested documents is the Complainant's, that it has already been shared through email and public posting, and that it can be redacted. N.J.S.A. 47:1A-1.

##### The Custodian's Response to Counsel's Letter Reply

On September 20, 2013, Custodian's Counsel submitted a letter reply to the Complainant's Counsel's arguments.

Custodian's Counsel asserts that the responsive records are properly exempted from disclosure as advisory, consultative, or deliberative ("ACD") materials because: (1) they contain communications made by Mr. Tarlowe to DEP Police before they decided how to respond to the alleged threat; and (2) they reflect deliberations over how DEP personnel should handle the safety issues raised by the alleged threat.

Custodian's Counsel contends that the investigation began with the State Park Police, included town and county officers, and proceeded like a normal criminal investigation even though no charges were ultimately filed. Custodian's Counsel further contends that OPRA's

exemption for investigative records applies to civil matters as well, so the DEP need not be a law enforcement agency as defined in N.J.S.A. 47:1A-1.1. Custodian's Counsel argues that the records responsive to Item #1 are exempt as criminal investigatory records because Mr. Tarlowe's witness statement and email sent to two (2) DEP Police officers on the morning of April 2, 2013 triggered the investigation into the alleged threats. Custodian's Counsel asserts generally that none of the responsive records were ever public records, as none existed prior to the involvement of DEP Police officers.

Custodian's Counsel also argues that the Complainant's request is moot because the Complainant admitted to having a copy of the memorandum responsive to Item #3, and DEP does not believe there to be multiple versions of it.

### 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 meaningful review of the basis for an agency's decision to withhold government records . . . When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.

Paff, 379 N.J. Super. at 354.

The court also stated that:

The statute . . . 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.



Further, the court 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.

Here, the Custodian has made several arguments, grounded in OPRA and other relevant statutes, as to why the four (4) documents identified as responsive to the Complainant’s requests need not be disclosed. The Complainant, in turn, provided equally detailed counter-arguments. However, without inspecting the withheld records, and in light of the Custodian’s burden to prove a lawful denial of access, the GRC cannot conduct the “meaningful review of the basis for an agency’s decision to withhold government records” contemplated under OPRA. Id. at 354.

Therefore, the GRC must conduct an *in camera* review of the undisclosed records in order to determine the validity of the Custodian’s assertion that the records responsive to Items #1, #2, and #3 above are exempt from disclosure based on OPRA’s exemptions for criminal and ongoing investigative records, ACD material, and building security. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-3; 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.

### **Prevailing Party Attorney’s Fees**

The Council defers analysis of whether the Complainant is a prevailing party 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 GRC must conduct an *in camera* review of the undisclosed records in order to determine the validity of the Custodian’s assertion that the records responsive to Items #1, #2, and #3 above are exempt from disclosure based on OPRA’s exemptions for criminal and ongoing investigative records, advisory, consultative, or deliberative

material, and building security. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-3; Paff v. N.J. Department of Labor, Board of Review, 379 N.J. Super. 354-55 (App. Div. 2005).

2. **The Custodian must deliver<sup>5</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see item number one (1) above), a document or redaction index<sup>6</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>7</sup> that the records provided are the records 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.
4. The Council defers analysis of whether the Complainant is a prevailing party 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

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<sup>5</sup> 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.

<sup>6</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>7</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."