



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
PO Box 819  
TRENTON, NJ 08625-0819

PHILIP D. MURPHY  
*Governor*

LT. GOVERNOR SHEILA Y. OLIVER  
*Commissioner*

**FINAL DECISION**

**January 31, 2023 Government Records Council Meeting**

Scott Madlinger  
Complainant

Complaint No. 2020-90

v.

Berkeley Township Police Department (Ocean)  
Custodian of Record

At the January 31, 2023 public meeting, the Government Records Council (“Council”) considered the January 24, 2023 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 the Council dismiss the complaint because the Complainant withdrew the matter via e-mail to the Custodian’s Counsel, copying the Honorable Sarah Surgent, Administrative Law Judge, on January 6, 2023. Therefore, no further adjudication is required.

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 31<sup>st</sup> Day of January 2023

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: February 6, 2023**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
January 31, 2023 Council Meeting**

**Scott Madlinger<sup>1</sup>  
Complainant**

**GRC Complaint No. 2020-90**

v.

**Berkeley Township Police Department (Ocean)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies via e-mail of “first five (5) audio calls received regarding 1 Stroud Ct during the time period 04/16/2020 – 04/20/2020.”

**Custodian of Record:** Marcy Novellino<sup>3</sup>

**Request Received by Custodian:** April 20, 2020

**Response Made by Custodian:** April 27, 2020

**GRC Complaint Received:** April 28, 2020

**Background**

**March 29, 2022 Council Meeting:**

At the March 29, 2022 public meeting, the Government Records Council (“Council”) considered the March 22, 2022 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 complied with the Council’s February 22, 2022 Interim Order because the Custodian in a timely manner forwarded certified confirmation of compliance to the Executive Director, wherein she certified that there are no records responsive to the request because any responsive records have been erased.
2. Communications Supervisor Vanessa Rosetti’s actions may have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such this complaint should be referred to Office of Administrative Law for a hearing to determine whether Communications Supervisor Rosetti knowingly and willfully violated OPRA and unreasonably denied access to the requested records under the totality of the circumstances and is therefore subject to a civil penalty pursuant to N.J.S.A. 47:1A-11.

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

<sup>2</sup> No legal representation listed on record.

<sup>3</sup> Sandra Breslford was the records custodian for the Police Department at the time of the request and response. Scott Madlinger v. Berkeley Township Police Department (Ocean), 2020-90 – Supplemental Findings and Recommendations of the Executive Director

Procedural History:

On March 30, 2022, the Council distributed its March 29, 2022 Interim Order to all parties. On September 6, 2022, the complaint was transmitted to the Office of Administrative Law (“OAL”). On January 6, 2023, the Complainant, Scott Madlinger, e-mailed the Custodian’s Counsel, Robin La Bue, Esq., copying the Honorable Sarah Surgent, Administrative Law Judge, withdrawing the complaint. On January 17, 2023, the OAL transmitted the complaint back to the GRC marked “WITHDRAWAL.”

**Analysis**

No analysis required.

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council dismiss the complaint because the Complainant withdrew the matter via e-mail to the Custodian’s Counsel, copying the Honorable Sarah Surgent, Administrative Law Judge, on January 6, 2023. Therefore, no further adjudication is required.

Prepared By: John E. Stewart

January 24, 2023



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
PO Box 819  
TRENTON, NJ 08625-0819

PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**INTERIM ORDER**

**March 29, 2022 Government Records Council Meeting**

Scott Madlinger  
Complainant

Complaint No. 2020-90

v.

Berkeley Township Police Department (Ocean)  
Custodian of Record

At the March 29, 2022 public meeting, the Government Records Council (“Council”) considered the March 22, 2022 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 February 22, 2022 Interim Order because the Custodian in a timely manner forwarded certified confirmation of compliance to the Executive Director, wherein she certified that there are no records responsive to the request because any responsive records have been erased.
2. Communications Supervisor Vanessa Rosetti’s actions may have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such this complaint should be referred to Office of Administrative Law for a hearing to determine whether Communications Supervisor Rosetti knowingly and willfully violated OPRA and unreasonably denied access to the requested records under the totality of the circumstances and is therefore subject to a civil penalty pursuant to N.J.S.A. 47:1A-11.

Interim Order Rendered by the  
Government Records Council  
On The 29<sup>th</sup> Day of March 2022

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: March 30, 2022**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
March 29, 2022 Council Meeting**

**Scott Madlinger**<sup>1</sup>  
**Complainant**

**GRC Complaint No. 2020-90**

v.

**Berkeley Township Police Department (Ocean)**<sup>2</sup>  
**Custodial Agency**

**Records Relevant to Complaint:** Copies via e-mail of “first five (5) audio calls received regarding 1 Stroud Ct during the time period 04/16/2020 – 04/20/2020.”

**Custodian of Record:** Marcy Novellino<sup>3</sup>

**Request Received by Custodian:** April 20, 2020

**Response Made by Custodian:** April 27, 2020

**GRC Complaint Received:** April 28, 2020

**Background**

February 22, 2022 Council Meeting:

At its February 22, 2022 public meeting, the Government Records Council (“Council”) considered the February 15, 2022 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 violated N.J.S.A. 47:1A-5(c) by failing to provide the Complainant a proposed fee for acceptance or rejection. Additionally, the Custodian may have unlawfully denied access to any responsive calls that existed. N.J.S.A. 47:1A-6. Thus, the Custodian shall locate and disclose those responsive records located or certify if none existed. If the Custodian believes a special service charge still applies to the search, she shall calculate the cost and provide it to the Complainant for acceptance or rejection, inclusive of a completed 14-point analysis.
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council’s Interim Order by disclosing the responsive records with any appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously providing**

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

<sup>2</sup> No legal representation listed on record.

<sup>3</sup> Sandra Breslford was the records custodian for the Police Department at the time of the request and response. Scott Madlinger v. Berkeley Township Police Department (Ocean), 2020-90 – Supplemental Findings and Recommendations of the Executive Director

certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director.

3. **In the event the Custodian determines that a special service charge is applicable, the Custodian shall calculate the appropriate special service charge and shall then make the amount of the charge, together with the completed 14-point analysis, available to the Complainant within five (5) business days from receipt of the Council's Interim Order. The Complainant shall, within five (5) business days from receipt of the special service charge, deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase the records. The Complainant's failure to take any action within said time frame shall be construed the same as (b) above and the Custodian shall no longer be required to search for and disclose any requested records pursuant to N.J.S.A. 47:1A-5 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within twenty (20) business days following the Complainant's payment of the special service charge, the Custodian shall search for and disclose any records responsive to the Complainant's request with appropriate redactions and a detailed document index explaining the lawful basis for any such redaction and simultaneously deliver to the Executive Director certified confirmation of compliance in accordance with R. 1:4-4. Should a search result in no responsive records, the Custodian and/or those employees participating in the search shall certify to that fact. If the Complainant declined to purchase the records, the Custodian shall deliver to the Executive Director within the twenty (20) business day period a statement confirming the Complainant's refusal to purchase the requested records and such statement shall be in the form of a certification in accordance with R. 1:4-4. The completed 14-point analysis shall be attached to the certification and incorporated therein by reference.**
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 February 23, 2022, the Council distributed its February 22, 2022 Interim Order to all parties. On March 1, 2022, the Custodian e-mailed the Complainant and the GRC "the Custodian's response to [Complainant's] request for 'copies of first five (5) audio calls received regarding 1 Stroud Ct. during the time period 04/16/2020-04/20/2020.'" The e-mail contained a certification from Communications Supervisor Vanessa Rosetti averring that no responsive records exist because any responsive records would have been erased.<sup>4</sup> On March 1, 2022, the GRC e-mailed the Custodian, informing her that notwithstanding the GRC's receipt of Ms. Rosetti's certification, the GRC still required a certification of compliance from her. The GRC further informed the Custodian that the deadline for complying with the Council's Interim Order was March 2, 2022.

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<sup>4</sup> Ms. Rosetti's signature block on her e-mails states that she is the "Berkeley Township Police Department Communications Supervisor."

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On March 2, 2022, the Custodian submitted to the GRC via e-mail the Custodian's certification of compliance.

## Analysis

### Compliance

On February 22, 2022, the Council ordered the above-referenced compliance. On February 23, 2022, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Therefore, compliance was due on or before March 2, 2022.

On March 2, 2022, the fifth (5<sup>th</sup>) business day after receipt of the Council's Order, the Custodian forwarded certified confirmation of compliance to the GRC, wherein she certified that on April 20, 2020, she received the Complainant's OPRA request and forwarded the request to Communications Supervisor Rosetti, the employee responsible for maintaining the radio, telephone and 9-1-1 recordings for the Township Police Department. The Custodian certified that on April 27, 2020, a response was sent to the Complainant informing him that records responsive to the request could not be located using only an address for "such an extensive time period." The Custodian certified that the Complainant filed a complaint alleging a denial of access, and thereafter on February 23, 2022, she received the GRC's decision requiring production of the requested records or an estimated special service charge. The Custodian further certified that the Council's Interim Order was forwarded to Ms. Rosetti for a determination of the special service charge applicable to the production of the requested records. The Custodian certified that Ms. Rosetti completed a certification, averring that pursuant to Police Department policy, the pertinent recordings are maintained for a period of at least 31 days before erasure and reuse. The Custodian certified that Ms. Rosetti's certification is attached to the Custodian's certification of compliance and incorporated therein.

Communications Supervisor Rosetti prepared a certification dated February 28, 2022, for submission to the GRC as part of the Custodian's compliance. Ms. Rosetti certified that she is responsible for maintaining the radio, telephone and 9-1-1 recordings on the Eventide Recorder for the Township Police Department. Ms. Rosetti certified that she responded to the Complainant's April 20, 2020 OPRA request by informing the Complainant that responsive documents could not be located using only an address for such an extensive time period. Ms. Rosetti certified that she requested further information to refine the request.<sup>5</sup> Ms. Rosetti certified that, rather than supply additional information, the Complainant filed a complaint with the GRC. Ms. Rosetti further certified that on February 23, 2022, the Township received the GRC's decision requiring production of the requested records or an estimated special service charge to provide the requested records. Ms. Rosetti certified that pursuant to the Berkeley Township Police Department Communications Policy, recordings of telephone and radio conversations, including the 9-1-1 system, are maintained for a period of at least 31 days before erasure and reuse.<sup>6</sup> Ms. Rosetti

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<sup>5</sup> This was not Ms. Rosetti's original response to the OPRA request. Ms. Rosetti's initial response was that there were "no responsive documents."

<sup>6</sup> Ms. Rosetti attached the policy to the certification as Exhibit A.

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concluded by averring that, “[a]t this time, there are no documents responsive to this request. Any radio communications for the period of 4/16/2020 – 4/20/2020 have been erased.”

Therefore, the Custodian complied with the Council’s February 22, 2022 Interim Order because the Custodian in a timely manner forwarded certified confirmation of compliance to the Executive Director, wherein she certified that there are no records responsive to the request because any responsive records have been erased.

### **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 (Berg); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Here, the Complainant’s April 20, 2020 request sought incoming phone call records between April 16 and April 20, 2020. The Custodian certified in the Statement of Information (“SOI”), and the evidence of record reflects, that the complaint was served by the Complainant upon the Township on May 4, 2020. Therefore, as of the date the complaint was received, any responsive records would have been created fifteen (15) to nineteen (19) days earlier. The Police Department’s policy requires that recordings be held for at least thirty-one (31) days; therefore, the records in controversy, if any, were still in existence at the time the complaint was served on the Township.

To avoid destruction of records during the pendency of a complaint, the Superior Court decided in Paff v. N.J. Dep’t of Labor, 392 N.J. Super. 334, 341 (App. Div. 2007) that “. . . the agency to which the request is made shall be required to produce sworn statements by agency personnel setting forth in detail . . . a statement of the agency’s document retention/destruction policy *and* the last date on which documents that may have been responsive to the request were destroyed.” (Emphasis in original.) Accordingly, in SOI item number 10 the GRC requires



custodians to certify as to the last date on which records that may have been responsive to the request were destroyed. The Custodian did not enter the last date on which documents that may have been responsive to the request were destroyed, it was therefore the understanding of the GRC that any responsive records were still in existence.

However, the evidence of record reveals that Communications Supervisor Rosetti knew that records responsive to the request may have existed at the time of her response to the request. Instead of providing the Complainant with an opportunity to review and accept or reject a special service charge for conducting a more intensive search for the records, she merely informed the Complainant that there were no responsive records. Moreover, during the pendency of the complaint, while Communications Supervisor Rosetti had a duty to safeguard the records from destruction, the recordings that potentially contained responsive records were erased. Communications Supervisor Rosetti may have allowed for this erasure knowing that the recordings containing any responsive records could be secured.<sup>7</sup>

Accordingly, Communications Supervisor Rosetti's actions may have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such this complaint should be referred to Office of Administrative Law for a hearing to determine whether Communications Supervisor Rosetti knowingly and willfully violated OPRA and unreasonably denied access to the requested records under the totality of the circumstances and is therefore subject to a civil penalty pursuant to N.J.S.A. 47:1A-11.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's February 22, 2022 Interim Order because the Custodian in a timely manner forwarded certified confirmation of compliance to the Executive Director, wherein she certified that there are no records responsive to the request because any responsive records have been erased.
2. Communications Supervisor Vanessa Rosetti's actions may have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such this complaint should be referred to Office of Administrative Law for a hearing to determine whether Communications Supervisor Rosetti knowingly and willfully violated OPRA and unreasonably denied access to the requested records under the totality of the circumstances and is therefore subject to a civil penalty pursuant to N.J.S.A. 47:1A-11.

Prepared By: John E. Stewart  
Staff Attorney

March 22, 2022

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<sup>7</sup> Berkeley Township Police Department Communications Policy § XII(E).  
Scott Madlinger v. Berkeley Township Police Department (Ocean), 2020-90 – Supplemental Findings and Recommendations of the Executive Director



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DEPARTMENT OF COMMUNITY AFFAIRS  
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PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**INTERIM ORDER**

**February 22, 2022 Government Records Council Meeting**

Scott Madlinger  
Complainant

Complaint No. 2020-90

v.

Berkeley Township Police Department (Ocean)  
Custodian of Record

At the February 22, 2022 public meeting, the Government Records Council (“Council”) considered the February 15, 2022 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 violated N.J.S.A. 47:1A-5(c) by failing to provide the Complainant a proposed fee for acceptance or rejection. Additionally, the Custodian may have unlawfully denied access to any responsive calls that existed. N.J.S.A. 47:1A-6. Thus, the Custodian shall locate and disclose those responsive records located or certify if none existed. If the Custodian believes a special service charge still applies to the search, she shall calculate the cost and provide it to the Complainant for acceptance or rejection, inclusive of a completed 14-point analysis.
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council’s Interim Order by disclosing the responsive records with any appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously providing certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>1</sup> to the Executive Director.<sup>2</sup>**
3. **In the event the Custodian determines that a special service charge is applicable, the Custodian shall calculate the appropriate special service charge and shall then make the amount of the charge, together with the completed 14-point analysis,<sup>3</sup> available to the Complainant within five (5) business days from receipt of the Council’s Interim Order. The Complainant shall, within five (5) business days from receipt of the special service charge, deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase the records.**

<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.

<sup>3</sup> See <https://nj.gov/grc/pdf/OPRASpecialServiceCharge.pdf>.

**The Complainant's failure to take any action within said time frame shall be construed the same as (b) above and the Custodian shall no longer be required to search for and disclose any requested records pursuant to N.J.S.A. 47:1A-5 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within twenty (20) business days following the Complainant's payment of the special service charge, the Custodian shall search for and disclose any records responsive to the Complainant's request with appropriate redactions and a detailed document index explaining the lawful basis for any such redaction and simultaneously deliver<sup>4</sup> to the Executive Director certified confirmation of compliance in accordance with R. 1:4-4.<sup>5</sup> Should a search result in no responsive records, the Custodian and/or those employees participating in the search shall certify to that fact. If the Complainant declined to purchase the records, the Custodian shall deliver to the Executive Director within the twenty (20) business day period a statement confirming the Complainant's refusal to purchase the requested records and such statement shall be in the form of a certification in accordance with R. 1:4-4.<sup>6</sup> The completed 14-point analysis shall be attached to the certification and incorporated therein by reference.**

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 22<sup>nd</sup> Day of February 2022

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: February 23, 2022**

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<sup>4</sup> The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

<sup>5</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>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."

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
February 22, 2022 Council Meeting**

**Scott Madlinger**<sup>1</sup>  
**Complainant**

**GRC Complaint No. 2020-90**

v.

**Berkeley Township Police Department (Ocean)**<sup>2</sup>  
**Custodial Agency**

**Records Relevant to Complaint:** Copies via e-mail of “first five (5) audio calls received regarding 1 Stroud Ct during the time period 04/16/2020 – 04/20/2020.”

**Custodian of Record:** Marcy Novellino<sup>3</sup>

**Request Received by Custodian:** April 20, 2020

**Response Made by Custodian:** April 27, 2020

**GRC Complaint Received:** April 28, 2020

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

Request and Response:

On April 20, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 27, 2020 at 11:31 a.m., the fifth (5<sup>th</sup>) business day following receipt of said request, Vanessa Rosetti, on behalf of the Custodian, responded in writing informing the Complainant that there are no records responsive to his request.

On April 27, 2020 at 11:52 a.m., the Complainant e-mailed Ms. Rosetti stating that the police department did receive calls and he renewed his request for responsive records. On April 27, 2020 at 11:55 a.m., Ms. Rosetti e-mailed the Complainant, informing him that she could not search by address for such an extensive time period. Ms. Rosetti asked the Complainant for the telephone number of the caller or a shorter period of time during which the calls were allegedly received by the police department. On April 27, 2020 at 12:04 p.m., the Complainant e-mailed Ms. Rosetti stating that he would file a complaint.

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

<sup>2</sup> No legal representation listed on record.

<sup>3</sup> Sandra Breslford was the records custodian for the Police Department at the time of the request and response.

<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.

On April 27, 2020 at 1:04 p.m., the Custodian e-mailed the Complainant, informing him that he must provide a telephone number of the caller or a shorter period of time; otherwise, someone would have to listen to five days of telephone calls to determine if any of the calls were responsive to the Complainant's request.<sup>5</sup> The Custodian stated that the Complainant would incur a fee for the employee's time to listen to all of the calls.

On April 27, 2020 at 2:14 p.m., the Custodian e-mailed the Complainant attaching an animal control incident sheet and related e-mail. The Custodian stated that animal control had the only responsive records she could locate.<sup>6</sup>

#### Denial of Access Complaint:

On April 28, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that there was a post on social media regarding a hazardous substance being placed on the lawn at 1 Stroud Court and people had commented in the post that they had called the Berkeley Township Police Department. The Complainant stated that he filed an OPRA request for the first five calls for 1 Stroud Court and received a response that the Custodian could not locate any records responsive to the request; however, the Complainant asserts that records of responsive telephone calls do exist.

#### Statement of Information:

On May 26, 2020, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on April 20, 2020. The Custodian certified that Vanessa Rosetti responded in writing on April 27, 2020 "indicating a need for more specific info." The Custodian certified that after she received an e-mail from the Complainant on April 27, 2020, stating that he intended to file a complaint, she e-mailed the Complainant and informed him that more information was needed to conduct the search, otherwise personnel would have to listen to five days of telephone calls to determine if any such calls pertained to the records the Complainant was seeking. The Custodian also certified that she informed the Complainant that there would be a fee for such a time-intensive search. The Custodian further certified that via e-mail dated April 27, 2020, she forwarded to the Complainant documents related to Stroud Court that had been in possession of animal control.

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<sup>5</sup> There is nothing in the evidence of record to indicate that the Complainant subsequently provided the Custodian with a telephone number of the caller or shortened the time frame of his request.

<sup>6</sup> On April 27, 2020 at 2:58 p.m., the Complainant e-mailed the Custodian contesting her disclosure of the animal control records being all of the records responsive to his request. The Complainant suggested that he did not receive all responsive records by stating that "I myself emailed animal control." The Complainant continued in his e-mail to list several categories of records he allegedly requested, including complaints, CAD reports and narratives concerning the Stroud Court address. Although those records may have been requested, they are not records relevant to the instant complaint.

## 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.

Whenever a records custodian asserts that fulfilling an OPRA records request requires an “extraordinary” expenditure of time and effort, a special service charge may be warranted pursuant to N.J.S.A. 47:1A-5(c). In this regard, OPRA provides that:

Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an extraordinary expenditure of time and effort to accommodate the request, the public agency may charge, in addition to the actual cost of duplicating the record, a special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies . . . requestor shall have the opportunity to review and object to the charge prior to it being incurred.

[Id.]

In the instant complaint Vanessa Rosetti, on behalf of the Custodian, responded to the Complainant’s April 20, 2020 OPRA request on April 27, 2020, by informing the Complainant that there are no records responsive to his request. However, later that same date, Ms. Rosetti e-mailed the Complainant, informing him that she could not search by address for such an extensive time period, and asked the Complainant to provide a telephone number of the caller or shorten the time frame of his request.

Later, on April 27, 2020, the Custodian certified that she e-mailed the Complainant and informed him that more information was needed to conduct a search for the requested records, otherwise an employee would have to listen to five days of telephone calls to determine if any of the calls pertained to the records the Complainant was seeking. The Custodian certified that she informed the Complainant there would be a fee for such a time-intensive search. The Complainant filed his complaint the next day; the Custodian again asserted in the SOI that a special service charge would apply to the search necessary to locate potentially responsive records. However, at no point has the Custodian provided a proposed fee amount to the Complainant to accept or reject.

The evidence of record here supports that a violation of OPRA and potential unlawful denial of access may have occurred. Specifically, after asserting that no records existed without attempting a search, Ms. Rosetti and the Custodian both asserted that a special service charge may apply. However, and inconsistent with N.J.S.A. 47:1A-5(c), neither provided a proposed fee

for the Complainant's acceptance or rejection. While the GRC recognizes that the Complainant filed this complaint the day after the Custodian's response, she nonetheless had a legal obligation to apprise the Complainant of the proposed special service charge amount. N.J.S.A. 47:1A-5(c). Further, it is unclear whether responsive records exist because no search was performed.

Therefore, the Custodian violated N.J.S.A. 47:1A-5(c) by failing to provide the Complainant a proposed fee for acceptance or rejection. Additionally, the Custodian may have unlawfully denied access to any responsive calls that existed. N.J.S.A. 47:1A-6. Thus, the Custodian shall locate and disclose those responsive records located or certify if none existed. If the Custodian believes a special service charge still applies to the search, she shall calculate the cost and provide it to the Complainant for acceptance or rejection, inclusive of a completed 14-point analysis.

### **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 violated N.J.S.A. 47:1A-5(c) by failing to provide the Complainant a proposed fee for acceptance or rejection. Additionally, the Custodian may have unlawfully denied access to any responsive calls that existed. N.J.S.A. 47:1A-6. Thus, the Custodian shall locate and disclose those responsive records located or certify if none existed. If the Custodian believes a special service charge still applies to the search, she shall calculate the cost and provide it to the Complainant for acceptance or rejection, inclusive of a completed 14-point analysis.
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order by disclosing the responsive records with any appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously providing certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>7</sup> to the Executive Director.<sup>8</sup>**
3. **In the event the Custodian determines that a special service charge is applicable, the Custodian shall calculate the appropriate special service charge and shall then make the amount of the charge, together with the completed 14-point**

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<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."

<sup>8</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium.

analysis,<sup>9</sup> available to the Complainant within five (5) business days from receipt of the Council's Interim Order. The Complainant shall, within five (5) business days from receipt of the special service charge, deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase the records. The Complainant's failure to take any action within said time frame shall be construed the same as (b) above and the Custodian shall no longer be required to search for and disclose any requested records pursuant to N.J.S.A. 47:1A-5 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within twenty (20) business days following the Complainant's payment of the special service charge, the Custodian shall search for and disclose any records responsive to the Complainant's request with appropriate redactions and a detailed document index explaining the lawful basis for any such redaction and simultaneously deliver<sup>10</sup> to the Executive Director certified confirmation of compliance in accordance with R. 1:4-4.<sup>11</sup> Should a search result in no responsive records, the Custodian and/or those employees participating in the search shall certify to that fact. If the Complainant declined to purchase the records, the Custodian shall deliver to the Executive Director within the twenty (20) business day period a statement confirming the Complainant's refusal to purchase the requested records and such statement shall be in the form of a certification in accordance with R. 1:4-4.<sup>12</sup> The completed 14-point analysis shall be attached to the certification and incorporated therein by reference.

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.

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<sup>9</sup> See <https://nj.gov/grc/pdf/OPRASpecialServiceCharge.pdf>.

<sup>10</sup> The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

<sup>11</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>12</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."