



State of New Jersey

GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
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TRENTON, NJ 08625-0819

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VINCENT P. MALTESE, Chairman
ACTING COMMISSIONER JOSEPH V. DORIA, JR.
COMMISSIONER LUCILLE DAVY
ROBIN BERG TABAKIN
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

December 19, 2007 Government Records Council Meeting

Diomedes Valenzuela
Complainant

Complaint No. 2006-182

v.

Township of Irvington
Custodian of Record

At the December 19, 2007 public meeting, the Government Records Council ("Council") considered the December 12, 2007 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 accepts the settlement as reached by the parties at the Office of Administrative Law.

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 19th Day of December, 2007

Robin Berg Tabakin, Vice Chairman
Government Records Council

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



David Fleisher, Secretary
Government Records Council

Decision Distribution Date: December 20, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
December 19, 2007 Council Meeting**

**Diomedes Valenzuela¹
Complainant**

GRC Complaint No. 2006-182

v.

**Township of Irvington²
Custodian of Records**

Records Relevant to Complaint:

1. Original 118 Log Sheet for Unit 105 (Officer Diomedes A. Valenzuela, Badge # 218) for November 27, 2001
2. 118 Log Sheet for November 27, 2001 submitted by Unit 105
3. Print out of Unit Status History Display from November 26, 2001 23:59:05 hours to November 28, 2001 00:01:01 hours
4. Copy of Daily Work Sheet for November 27, 2001
5. Copy of all reports completed by Unit 105 (Diomedes Valenzuela, Badge # 218) on November 27, 2001 excluding any personal or confidential information
6. Inspection of the original recording of the telephone conversation between Officer Rahmon Love and Officer Diomedes Valenzuela on November 27, 2001

Request Made: August 30, 2006

Response Made: November 2, 2006

Custodian: Harold Wiener

GRC Complaint Filed: October 5, 2006

Background

July 25, 2007

Government Records Council's ("Council") Interim Order. At its July 25, 2007 public meeting, the Council considered the July 18, 2007 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 it is unclear as to which Township employee obstructed access to the requested recording during the eleven (11) months following the request of such recording because the following employees have all been involved with this complaint: Municipal Clerk (Harold Weiner), Township Attorney (Marvin T. Braker), Police Chief (Michael Chase) and Detective Lieutenant (John Molisso). Therefore, it is possible that actions of Municipal Clerk (Harold Weiner), the Township Attorney (Marvin T. Braker), Police Chief (Michael Chase) and Detective Lieutenant

¹ No legal representation listed on record.

² Represented by Marvin T. Braker, Esq. (Irvington, NJ).

(John Molisso) were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether any or all of the above listed Township officials and employees knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. This conclusion further supports the GRC's May 30, 2007 Interim Order referring this matter to the Office of Administrative Law.

July 30, 2007

Council's Interim Order distributed to the parties.

December 12, 2007

Office of Administrative Law ("OAL") Initial Decision Settlement. At a hearing on December 11, 2007 at the OAL, settlement discussions were held and a settlement was reached.

Analysis

Because a settlement was reached at OAL, no legal analysis is required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council accept the settlement as reached by the parties at the Office of Administrative Law.

Prepared By:

Dara Lownie
Senior Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

December 12, 2007



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
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VINCENT P. MALTESE, Chairman
ACTING COMMISSIONER CHARLES RICHMAN
COMMISSIONER LUCILLE DAVY
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INTERIM ORDER

July 25, 2007 Government Records Council Meeting

Diomedes Valenzuela

Complainant

v.

Township of Irvington

Custodian of Record

Complaint No. 2006-182

At the July 25, 2007 public meeting, the Government Records Council (“Council”) considered the July 18, 2007 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 it is unclear as to which Township employee obstructed access to the requested recording during the eleven (11) months following the request of such recording because the following employees have all been involved with this complaint: Municipal Clerk (Harold Weiner), Township Attorney (Marvin T. Braker), Police Chief (Michael Chase) and Detective Lieutenant (John Molisso). Therefore, it is possible that actions of Municipal Clerk (Harold Weiner), the Township Attorney (Marvin T. Braker), Police Chief (Michael Chase) and Detective Lieutenant (John Molisso) were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether any or all of the above listed Township officials and employees knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. This conclusion further supports the GRC’s May 30, 2007 Interim Order referring this matter to the Office of Administrative Law.

Interim Order Rendered by the
Government Records Council
On The 25th Day of July, 2007

Robin Berg Tabakin, Vice Chairman
Government Records Council



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

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: July 30, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
July 25, 2007 Council Meeting**

**Diomedes Valenzuela¹
Complainant**

GRC Complaint No. 2006-182

v.

**Township of Irvington²
Custodian of Records**

Records Relevant to Complaint:

1. Original 118 Log Sheet for Unit 105 (Officer Diomedes A. Valenzuela, Badge # 218) for November 27, 2001
2. 118 Log Sheet for November 27, 2001 submitted by Unit 105
3. Print out of Unit Status History Display from November 26, 2001 23:59:05 hours to November 28, 2001 00:01:01 hours
4. Copy of Daily Work Sheet for November 27, 2001
5. Copy of all reports completed by Unit 105 (Diomedes Valenzuela, Badge # 218) on November 27, 2001 excluding any personal or confidential information
6. Inspection of the original recording of the telephone conversation between Officer Rahmon Love and Officer Diomedes Valenzuela on November 27, 2001

Request Made: August 30, 2006

Response Made: November 2, 2006

Custodian: Harold Wiener

GRC Complaint Filed: October 5, 2006

Background

May 30, 2007

Government Records Council's ("Council") Interim Order. At its May 30, 2007 public meeting, the Council considered the May 23, 2007 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. Based on the Custodian's certification dated March 13, 2007, the Custodian has complied with the Council's February 28, 2007 Interim Order by providing the Complainant with the requested reports which were created by the Complainant on November 27, 2001.

¹ No legal representation listed on record.

² Marvin T. Braker, Esq. (Irvington, NJ).

2. Pursuant to the Council's February 28, 2007 Interim Order, the Custodian's assertion that staff has not yet located the requested reports in the archives, approximately five (5) months following the date the Custodian received the Complainant's request, is not justifiable. Therefore, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless, or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access to the requested reports under the totality of the circumstances.

May 31, 2007

Council's Interim Order distributed to the parties.

June 14, 2007

Letter from Complainant to Custodian. The Complainant states that he is in receipt of the Custodian's letter dated April 26, 2007 in which the Custodian advised the Complainant to contact Detective Lieutenant Molisso to schedule an appointment to inspect the original November 27, 2001 recording at the internal affairs office, as was requested on August 30, 2006. The Complainant states that he has called Detective Lieutenant Molisso several times and left several messages and has not yet received a response concerning this matter. The Complainant states that he has not been contacted by anyone from the Township or the Police Department. The Complainant states that to date, he has not been provided access to either of the two (2) November 27, 2001 recordings, as requested. [Disclosure of this record was not included in the GRC's May 30, 2007 Interim Order because the Custodian had previously certified that this record had been made available to the Complainant.]

June 14, 2007

Letter from Custodian to Complainant. The Custodian states that this letter is in response to the Complainant's letter dated June 14, 2007. The Custodian states that it is his understanding that this complaint has been forwarded to the Office of Administrative Law for adjudication. However, the Custodian also states that he is forwarding the Complainant's letter dated June 14, 2007, to the Police Chief, Police Director, Internal Affairs Detective Lieutenant Molisso and the Township Attorney in the event that they choose to respond on behalf of the Township.

June 19, 2007

Letter from Custodian to GRC. The Custodian states that he has enclosed a letter dated July 5, 2002 which designates the Police Chief as Custodian of public safety records.

June 22, 2007

Letter from GRC to Custodian's Counsel. The GRC states that it is in receipt of a letter from the Complainant dated June 14, 2007, in which the Complainant states that he has been unable to contact Detective Lieutenant Molisso to schedule an appointment to inspect the requested November 27, 2001 recording. The GRC requests a certification from the Custodian indicating why the Complainant has not been provided with the

original recording as requested. Additionally, the GRC requests that the Custodian specifically indicate who is obstructing access to said record.

June 22, 2007

Letter from Custodian to GRC. The Custodian states that he is obligated to wait for legal direction from the Township Attorney in order to sign the requested legal certification on behalf of the true Custodian in this matter, Police Chief Michael L. Chase.

July 6, 2007

Letter from GRC to Police Chief. The GRC states that it is in receipt of information from the Complainant indicating that he had not yet been provided access to inspect the requested original November 27, 2001 recording. The GRC states that if said recording has not been made available to the Complainant by the close of business on July 9, 2007, the GRC will have to adjudicate this matter further in regards to a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. The GRC requests that the Chief submit a legal certification by the close of business on July 9, 2007 confirming whether the original recording has been made available to the Complainant.

July 9, 2007

Letter from Police Chief to Complainant. The Police Chief states that at 9:45 on this date he called the Complainant to set up an appointment to inspect the original recordings of November 27, 2001 as per the Complainant's OPRA request. The Police Chief states that this letter shall confirm said telephone call and serve as written documentation of the Township's attempt to provide access to the requested recording. The Police Chief requests that the Complainant contact his office to schedule an appointment to review the requested recording.

July 10, 2007

Police Chief's certification. The Police Chief certifies that on July 9, 2007 at 9:45 am, he contacted the Complainant by telephone on the Police Department's taped line and left a message requesting that the Complainant contact the Chief's office to schedule an appointment to inspect the requested recording. The Police Chief also certifies that he sent a letter to the Complainant dated July 9, 2007 indicating same. The Police Chief certifies that he has not yet received a reply from the Complainant.

July 12, 2007

Letter from Police Chief to GRC. The Police Chief states that on this date he left a voicemail message for the Complainant on the Police Department's taped line indicating that the requested recording is currently available in the Legal Office. The Police Chief also states that shortly after his call to the Complainant, the Complainant contacted the Internal Affairs Department by telephone to indicate that he would not be able to inspect the recording at this time due to medical reasons. The Police Chief states that staff in the Internal Affairs Department advised the Complainant to call back to arrange an appointment when he is available.

Analysis

Whether the Custodian's delay in access to the requested recording rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that:

“[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ...” N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

“... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170 at 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 (App. Div. 1996) at 107).

On August 30, 2006, the Complainant requested to inspect the original recording of the telephone conversation between Officer Rahmon Love and Officer Diomedes Valenzuela which took place on November 27, 2001. Via letter dated April 26, 2007, the Custodian advised the Complainant to contact Detective Lieutenant Molisso to schedule an appointment to inspect the requested recording. In a letter to the Custodian dated June 14, 2007, the Complainant indicated that he had left several messages for Detective Lieutenant Molisso and has received no response from anyone in the Township. On June 22, 2007, the GRC sent a letter to the Township Attorney requesting a certification from the Custodian indicating why the Complainant has not been provided with the original recording. Additionally, the GRC requested that the Custodian specifically indicate who is obstructing access to said record. The GRC did not receive the requested certification.

The Police Chief certifies that he left a telephone message and sent a letter to the Complainant on July 9, 2007 (approximately eleven (11) months following the date of the Complainant's OPRA request) requesting that the Complainant schedule an appointment to inspect the November 27, 2001 recording.

It is unclear as to which Township employee obstructed access to the requested recording during the eleven (11) months following the request of such recording because the following employees have all been involved with this complaint: the Municipal Clerk (Harold Weiner), Township Attorney (Marvin T. Braker), Police Chief (Michael Chase) and Detective Lieutenant (John Molisso). Therefore, it is possible that the actions of the Municipal Clerk (Harold Weiner), Township Attorney (Marvin T. Braker), Police Chief (Michael Chase) and Detective Lieutenant (John Molisso) were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether any or all of the above listed Township officials and employees knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. This conclusion further supports the GRC's May 30, 2007 Interim Order referring this matter to the Office of Administrative Law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that it is unclear as to which Township employee obstructed access to the requested recording during the eleven (11) months following the request of such recording because the following employees have all been involved with this complaint: Municipal Clerk (Harold Weiner), Township Attorney (Marvin T. Braker), Police Chief (Michael Chase) and Detective Lieutenant (John Molisso). Therefore, it is possible that actions of Municipal Clerk (Harold Weiner), the Township Attorney (Marvin T. Braker), Police Chief (Michael Chase) and Detective Lieutenant (John Molisso) were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether any or all of the above listed Township officials and employees knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. This conclusion further supports the GRC's May 30, 2007 Interim Order referring this matter to the Office of Administrative Law.

Prepared By:

Dara Lownie
Senior Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

July 18, 2007



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VINCENT P. MALTESE, Chairman
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INTERIM ORDER

May 30, 2007 Government Records Council Meeting

Diomedes Valenzuela
Complainant

Complaint No. 2006-182

v.

Township of Irvington
Custodian of Record

At the May 30, 2007 public meeting, the Government Records Council (“Council”) considered the May 23, 2007 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. Based on the Custodian’s certification dated March 13, 2007, the Custodian has complied with the Council’s February 28, 2007 Interim Order by providing the Complainant with the requested reports which were created by the Complainant on November 27, 2001.
2. Pursuant to the Council’s February 28, 2007 Interim Order, the Custodian’s assertion that staff has not yet located the requested reports in the archives, approximately five (5) months following the date the Custodian received the Complainant’s request, is not justifiable. Therefore, it is possible that the Custodian’s actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless, or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access to the requested reports under the totality of the circumstances.

Interim Order Rendered by the
Government Records Council
On The 30th Day of May, 2007



Vincent P. Maltese, Chairman
Government Records Council

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

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: May 31, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
May 30, 2007 Council Meeting**

**Diomedes Valenzuela¹
Complainant**

GRC Complaint No. 2006-182

v.

**Township of Irvington²
Custodian of Records**

Records Relevant to Complaint:

1. Original 118 Log Sheet for Unit 105 (Officer Diomedes A. Valenzuela, Badge # 218) for November 27, 2001
2. 118 Log Sheet for November 27, 2001 submitted by Unit 105
3. Print out of Unit Status History Display from November 26, 2001 23:59:05 hours to November 28, 2001 00:01:01 hours
4. Copy of Daily Work Sheet for November 27, 2001
5. Copy of all reports completed by Unit 105 (Diomedes Valenzuela, Badge # 218) on November 27, 2001 excluding any personal or confidential information
6. Inspection of the original recording of the telephone conversation between Officer Rahmon Love and Officer Diomedes Valenzuela on November 27, 2001

Request Made: August 30, 2006

Response Made: November 2, 2006

Custodian: Harold Wiener

GRC Complaint Filed: October 5, 2006

Background

February 28, 2007

Government Records Council's ("Council") Interim Order. At its February 28, 2007 public meeting, the Council considered the February 21, 2007 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. As the Custodian certifies that all records responsive have been provided to the Complainant with the exception of the 118 log sheet for Unit 105 which does not exist, the Custodian would not have unlawfully denied access to the requested records. However, because the Custodian did not provide the Complainant with a written response to his OPRA requests until the twenty second (22nd) business day

¹ No legal representation listed on record.

² Represented by Marvin T. Braker, Esq. (Irvington, NJ).

- following the date such requests were received, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., resulting in a “deemed denial.”
2. As the Custodian has not yet provided the requested reports created by the Complainant on November 27, 2001 on the basis that Sergeant Sandberg is still searching the archives for such records, the Custodian has unlawfully denied access to the requested reports. The Custodian shall release the requested reports to the Complainant with appropriate redactions, if any, and a legal justification for any redacted part thereof. Such a delay for retrieving records from archives (now over five (5) months) is not justifiable.
 3. **The Custodian shall comply with # 2 above within five (5) business days from receipt of the Council’s Interim Order and simultaneously provide certified confirmation of compliance, pursuant to *N.J. Court Rules, 1969 R. 1:4-4 (2005)*, to the Executive Director.**
 4. The Custodian’s assertion that staff has not yet located the requested reports in the archives, approximately five (5) months following the date the Custodian received the Complainant’s request, is not justifiable. Therefore, it is possible that the Custodian’s actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless, or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access to the requested reports under the totality of the circumstances.

March 2, 2007

Council’s Interim Order distributed to the parties.

March 13, 2007

Custodian’s response to the Council’s Interim Order. The Custodian certifies that the Irvington Police Department provided the remaining requested records, two (2) police reports created by the Complainant on November 21, 2001, to the Office of the Township Attorney on March 13, 2007. The Custodian certifies that the Office of the Township Attorney contacted the Complainant by telephone to advise that the requested records were available for pickup. Additionally, the Custodian certifies that via letter dated March 13, 2007, he notified the Complainant of same.

April 11, 2007³

Letter from GRC to Custodian. The GRC states that it is in receipt of three (3) letters from the Complainant addressed to the Custodian regarding a diskette the Complainant received pursuant to the Complainant’s August 30, 2006 OPRA request. The GRC requests a legal certification indicating whether or not the original recording of the November 27, 2001 telephone conversation between the Complainant and Officer Love has been made available to the Complainant. If said record has not been made available to the Complainant, the GRC requests that the Custodian provide a legal justification for same.

April 18, 2007

³ All April correspondence relates to a CD-ROM released to the Complainant prior to the GRC’s February 28, 2007 Interim Order.
Diomedes Valenzuela v. Township of Irvington, 2006-182 – Supplemental Findings and Recommendations of the Executive Director 2

Letter from Custodian to GRC. The Custodian certifies that the Detective Lieutenant John Molisso of the Irvington Police Department's Internal Affairs Division advised him that the original recording of the November 27, 2001 telephone conversation between the Complainant and Officer Love was recorded directly onto the Police Department's Communication System's computer hard drive. The Custodian certifies that Detective Lieutenant John Molisso advised him that the Complainant was provided with said recording because it was burned onto a CD ROM from the Police Department's Communication System's original computer hard drive. Additionally, the Custodian certifies that Detective Lieutenant John Molisso advised him that pursuant to NJ Court Rule 1001, the Complainant was provided with an original of the requested recording.

April 23, 2007

Letter from GRC to Custodian. The GRC states that upon speaking with the Complainant, the Complainant indicated that he wished to inspect the original recording of the November 27, 2001 telephone conversation between himself and Officer Love from the Police Department's recording system, as requested in the Complainant's August 30, 2006 OPRA request. The GRC requests that the Custodian provide a certification indicating whether or not the Complainant has been provided access to inspect the original recording, as requested. The GRC states that if the Custodian is unable to provide the Complainant access to said recording, the Custodian should provide a legal justification for same.

April 26, 2007

The Custodian certifies that the Township Attorney has advised Detective Lieutenant John Molisso that the Complainant may inspect the requested original recording of the November 27, 2001 telephone conversation between himself and Officer Love from the Police Department's recording system at the Internal Affairs Office. The Custodian certifies that via letter dated April 26, 2007, he advised the Complainant that in order to inspect the original recording as requested, the Complainant should contact Detective Lieutenant John Molisso to arrive at a mutually agreeable time for this to occur.

Analysis

Whether the Custodian complied with the Council's February 28, 2007 Interim Order?

In a letter to the GRC dated March 13, 2007, the Custodian certifies that the Irvington Police Department provided the remaining requested records, two (2) police reports created by the Complainant on November 21, 2001, to the Office of the Township Attorney on March 13, 2007. The Custodian also certifies that on March 13, 2007, he notified the Complainant in writing that the requested records were available for pickup.

Based on the Custodian's certification dated March 13, 2007, the Custodian has complied with the Council's February 28, 2007 Interim Order by providing the Complainant with the requested reports which were created by the Complainant on November 27, 2001.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Based on the Custodian's certification dated March 13, 2007, the Custodian has complied with the Council's February 28, 2007 Interim Order by providing the Complainant with the requested reports which were created by the Complainant on November 27, 2001.
2. Pursuant to the Council's February 28, 2007 Interim Order, the Custodian's assertion that staff has not yet located the requested reports in the archives, approximately five (5) months following the date the Custodian received the Complainant's request, is not justifiable. Therefore, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless, or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access to the requested reports under the totality of the circumstances.

Prepared By:

Dara Lownie
Senior Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

May 23, 2007



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GOVERNMENT RECORDS COUNCIL

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CATHERINE STARGHILL Esq., Executive Director

INTERIM ORDER

February 28, 2007 Government Records Council Meeting

Diomedes Valenzuela
Complainant

Complaint No. 2006-182

v.

Township of Irvington
Custodian of Record

At the February 28, 2007 public meeting, the Government Records Council (“Council”) considered the February 21, 2007 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:

1. As the Custodian certifies that all records responsive have been provided to the Complainant with the exception of the 118 log sheet for Unit 105 which does not exist, the Custodian would not have unlawfully denied access to the requested records. However, because the Custodian did not provide the Complainant with a written response to his OPRA requests until the twenty second (22nd) business day following the date such requests were received, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., resulting in a “deemed denial.”
2. As the Custodian has not yet provided the requested reports created by the Complainant on November 27, 2001 on the basis that Sergeant Sandberg is still searching the archives for such records, the Custodian has unlawfully denied access to the requested reports. The Custodian shall release the requested reports to the Complainant with appropriate redactions, if any, and a legal justification for any redacted part thereof. Such a delay for retrieving records from archives (now over five (5) months) is not justifiable.
3. **The Custodian shall comply with # 2 above within five (5) business days from receipt of the Council’s Interim Order and simultaneously provide certified confirmation of compliance, pursuant to *N.J. Court Rules, 1969 R. 1:4-4 (2005)*, to the Executive Director.**
4. The Custodian’s assertion that staff has not yet located the requested reports in the archives, approximately five (5) months following the date the Custodian received the Complainant’s request, is not justifiable. Therefore, it is possible that the Custodian’s actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless, or unintentional. As such, this



complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access to the requested reports under the totality of the circumstances.

Interim Order Rendered by the
Government Records Council
On The 28th Day of February 2007

Robin Berg Tabakin, Vice Chairman & Secretary
Government Records Council

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

Kathryn Forsyth
Government Records Council

Decision Distribution Date: March 2, 2007

**Findings and Recommendations of the Executive Director
February 28, 2007 Council Meeting**

Diomedes Valenzuela¹

GRC Complaint No. 2006-182

Complainant

v.

Township of Irvington²
Custodian of Records

Records Relevant to Complaint³:

1. Original 118 Log Sheet for Unit 105 (Officer Diomedes A. Valenzuela, Badge # 218) for November 27, 2001
2. 118 Log Sheet for November 27, 2001 submitted by Unit 105
3. Print out of Unit Status History Display from November 26, 2001 23:59:05 hours to November 28, 2001 00:01:01 hours
4. Copy of Daily Work Sheet for November 27, 2001
5. Copy of all reports completed by Unit 105 (Diomedes Valenzuela, Badge # 218) on November 27, 2001 excluding any personal or confidential information
6. Inspection of the original recording of the telephone conversation between Officer Rahmon Love and Officer Diomedes Valenzuela on November 27, 2001

Request Made: August 30, 2006

Response Made: November 2, 2006

Custodian: Harold Wiener

GRC Complaint Filed: October 5, 2006

Background

August 30, 2006

Complainant's Open Public Records Act ("OPRA") requests. The Complainant requests the records relevant to this complaint listed above.

August 30, 2006

Memorandum from Custodian to Police Director and Police Chief. The Custodian states that he has enclosed the Complainant's five (5) separate OPRA requests

¹ No legal representation listed on record.

² Represented by Marvin Braker, Esq. (Irvington, NJ).

³ The Complainant submitted five (5) separate OPRA requests on August 30, 2006 for the records relevant to this complaint.

and asks that the Police Director or Police Chief respond to the Complainant's requests as required by OPRA and provide the Custodian with a copy of said response.

September 5, 2006

Memorandum from Police Director to Police Chief. The Police Director asks that the Police Chief complete the Complainant's OPRA requests and submit all available documents. The Director states that some information may be located in Internal Affairs. The Director also requests that the Police Chief provide the Director a copy of the Chief's response to the Complainant. Additionally, the Police Director notes that OPRA requests are time sensitive and require immediate attention.

September 21, 2006

Memorandum from Police Director to Police Chief. The Police Director states that the Complainant's requests seem to have gone unanswered and requires the Chief's immediate attention. The Director requests that the Chief assign staff to complete these requests and notify the Director and Custodian accordingly.

October 5, 2006

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- Complainant's OPRA requests dated August 30, 2006
- Letter from Custodian to Police Director and Police Chief dated August 30, 2006
- Letter from Police Director to Police Chief dated September 5, 2006
- Undated letter from Custodian to Police Director and Police Chief
- Letter from Police Director to Police Chief dated September 21, 2006

The Complainant asserts that on August 30, 2006, he submitted five (5) separate OPRA requests to the Township of Irvington and has not received any response regarding these requests. The Complainant claims that he is not requesting any personal or confidential information.

October 19, 2006

Offer of Mediation sent to both parties. Neither party agreed to mediate this complaint.

October 30, 2006

Request for Statement of Information sent to the Custodian.

November 2, 2006

Custodian's response to the OPRA requests. The Custodian responded to the Complainant's OPRA requests on the twenty second (22nd) business day following

receipt of such requests. The Custodian states that he is in receipt of the requested records as furnished by the Police Department on November 1, 2006. The Custodian claims that the Township Attorney left a voicemail message for the Complainant on November 1, 2006 advising that the records were available. The Custodian also states that the requested records may be picked up during regular business hours.

November 20, 2006

Custodian's Statement of Information ("SOI") with the following attachments:

- Complainant's OPRA requests dated August 30, 2006
- Letter from Custodian to Township Attorney dated October 19, 2006
- Memorandum from Custodian to Police Director and Police Chief dated October 20, 2006
- Letter from Custodian to Township Attorney dated October 25, 2006
- Letter from Custodian to Township Attorney dated October 30, 2006
- Letter from Custodian to Complainant dated November 2, 2006
- Receipt of Records Pursuant to Government Records Request Forms signed by Complainant dated November 9, 2006

The Custodian certifies that the requested records were provided to the Complainant on November 9, 2006.⁴

November 27, 2006

Custodian's subsequent response to the Complainant's OPRA requests. The Custodian states that he has received the Complainant's letter dated November 23, 2006 regarding his August 30, 2006 OPRA requests. The Custodian asserts that on October 26, 2006, the Police Department notified the Township Attorney that no record of a 118 for Unit 105 on November 27, 2001 exists. Additionally, the Custodian claims that on October 26, 2006, the Police Department notified the Township Attorney that two (2) reports created by the Complainant on November 27, 2001 exist and that Sergeant Sandberg is searching the archives for said reports and will forward them to the Legal Department once they are located.

January 3, 2007

Letter from GRC to Custodian. GRC requests a document index from the Custodian in the form of a legal certification identifying the records requested and the records provided.

January 3, 2007

Letter from Custodian to GRC. The Custodian states that all the requested records were released to the Complainant via the Township Attorney with the following two (2) exceptions:

1. 118 log sheet for Unit 105 (Officer Diomedes Valenzuela #218) for November 27, 2001
2. Copies of all reports that were completed by Unit 105 (Officer Diomedes Valenzuela #218) on November 27, 2001.

⁴ This statement is not true pursuant to the Custodian's letter to the Complainant dated November 27, 2006.

The Custodian states that the Complainant indicated same in his November 23, 2006 letter to the Township. The Custodian also states that he notified the Complainant, via letter dated November 27, 2006, that the Police Department had indicated that there was no record of a 118 for Unit 105 on November 27, 2001 and that two (2) reports created by the Complainant on November 27, 2001 exist, which Sergeant Sandberg has been searching for in the archives. The Custodian states that he spoke with Sergeant Sandberg who asserted that he would renew his search for said records as they had not yet been located.

January 29, 2007

Letter from GRC to Custodian. GRC requests that the Custodian legally certify to the statements made in his January 3, 2007 submission to the GRC.

January 29, 2007

Letter from Custodian to GRC. The Custodian resubmits his letter to the GRC dated January 3, 2007 and certifies that his statements are true to the best of his knowledge.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA provides that:

“...[i]f the custodian is *unable to comply with a request* for access, the custodian shall *indicate the specific basis therefore* on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” (Emphasis added.) N.J.S.A. 47:1A-5.g

Additionally, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

The Complainant states that on August 30, 2006, he submitted five (5) separate OPRA requests to the Township of Irvington. The Complainant claims that as of October 5, 2006, he had not received any response from the Custodian.

The Custodian responded to the Complainant’s OPRA request on November 2, 2006, the twenty second (22nd) business day following receipt of such request. In the Custodian’s letter to the Complainant dated November 2, 2006, the Custodian states that he is in receipt of the requested records as furnished by the Police Department on November 1, 2006. The Custodian claims that the Township Attorney left a voicemail message for the Complainant on November 1, 2006 advising that the records were available. The Custodian certifies that on November 9, 2006, the Township Attorney released all of the requested records to the

Complainant. However, in a subsequent response to the Complainant's requests, the Custodian states that the following two (2) records have not been provided:

1. 118 log sheet for Unit 105 (Officer Diomedes Valenzuela #218) for November 27, 2001
2. Copies of all reports that were completed by Unit 105 (Officer Diomedes Valenzuela #218) on November 27, 2001

The Custodian states that the Complainant indicated same in his November 23, 2006 letter to the Township. The Custodian certifies that he notified the Complainant, via letter dated November 27, 2006, that the Police Department had indicated that there was no record of a 118 for Unit 105 on November 27, 2001 and that two (2) reports created by the Complainant on November 27, 2001 exist, which Sergeant Sandberg has been searching for in the archives. The Custodian also certifies that he spoke with Sergeant Sandberg who asserted that he would renew his search for said records as they had not yet been located.

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. 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.

OPRA also provides that if a Custodian is unable to comply with a records request, he must notify the Complainant in writing indicating a lawful reason for same pursuant to N.J.S.A. 47:1A-5.g. Additionally, OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days of receipt of said request. As also prescribed under N.J.S.A. 47:1A-5.i, a custodian's failure to respond within the required seven (7) business days results in a "deemed" denial.

In this complaint, the Complainant states that he submitted his OPRA requests on August 30, 2006. The Custodian did not provide a written response to said requests until November 2, 2006, twenty two (22) business days following the date the Custodian received the requests. Additionally, in a letter dated November 27, 2006, the Custodian notified the Complainant that the Police Department advised the Township Attorney, via letter dated October 26, 2006, that no record of

a 118 for Unit 105 on November 27, 2001 exists. The Custodian also indicated that Sergeant Sandberg was searching the archives for the requested reports created by the Complainant on November 27, 2001.

As the Custodian certifies that all records responsive have been provided to the Complainant with the exception of the 118 log sheet for Unit 105 which does not exist, the Custodian would not have unlawfully denied access to the requested records. However, because the Custodian did not provide the Complainant with a written response to his OPRA requests until the twenty second (22nd) business day following the date such requests were received, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., resulting in a “deemed denial.” Additionally, as the Custodian has not yet provided the requested reports created by the Complainant on November 27, 2001 on the basis that Sergeant Sandberg is still searching the archives for such, the Custodian should release said records to the Complainant. Such a delay for retrieving records from archives (now over five (5) months) is not justifiable.

Whether the Custodian’s delay in access to the requested reports rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that “[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ...” N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

“... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

The Complainant states that on August 30, 2006, he submitted an OPRA request for a copy of all reports completed by Unit 105 on November 21, 2001. Via letter dated November 27, 2007, approximately three (3) months following the date of the Complainant's request, the Custodian informed the Complainant that two (2) reports created by the Complainant on November 21, 2001 exist and that Sergeant Sandberg had not yet located these records in the archives. To date, the Custodian has not released these records to the Complainant.

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 at 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 (App. Div. 1996) at 107).

The language of OPRA is clear that a Custodian must either grant or deny access to a records request within the statutorily mandated seven (7) business days. In this complaint, the Custodian violated OPRA by not doing so results in a “deemed” denial of the requested records. Additionally, the Custodian's assertion that staff has not yet located the requested reports in the archives, approximately five (5) months following the date the Custodian received the Complainant's request, is not justifiable. Therefore, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless, or unintentional. As such, this complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonable denied access to the requested reports under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

5. As the Custodian certifies that all records responsive have been provided to the Complainant with the exception of the 118 log sheet for Unit 105 which does not exist, the Custodian would not have unlawfully denied access to the requested records. However, because the Custodian did not provide the Complainant with a written response to his OPRA requests until the twenty second (22nd) business day following the date such requests were received, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., resulting in a “deemed denial.”
6. As the Custodian has not yet provided the requested reports created by the Complainant on November 27, 2001 on the basis that Sergeant Sandberg is still searching the archives for such records, the Custodian has unlawfully denied access to the requested reports. The Custodian shall release the requested reports to the Complainant with appropriate redactions, if any, and a legal justification for any redacted part thereof. Such a delay for retrieving records from archives (now over five (5) months) is not justifiable.
7. **The Custodian shall comply with # 2 above within five (5) business days from receipt of the Council’s Interim Order and simultaneously provide certified confirmation of compliance, pursuant to *N.J. Court Rules, 1969 R. 1:4-4 (2005)*, to the Executive Director.**
8. The Custodian’s assertion that staff has not yet located the requested reports in the archives, approximately five (5) months following the date the Custodian received the Complainant’s request, is not justifiable. Therefore, it is possible that the Custodian’s actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless, or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access to the requested reports under the totality of the circumstances.

Prepared By:

Dara Lownie
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

February 21, 2007