



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

June 29, 2010 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2007-222

v.

Borough of Keansburg Police Department (Monmouth)
Custodian of Record

At the June 29, 2010 public meeting, the Government Records Council ("Council") considered the June 22, 2010 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, accepts the Administrative Law Judge's Initial Decision dated June 11, 2010 in which the Judge granted a summary decision in favor of the Custodian and Ordered that the complaint be dismissed.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 29th Day of June, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: July 14, 2010



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
June 29, 2010 Council Meeting**

**Richard Rivera¹
Complainant**

GRC Complaint No. 2007-222

v.

**Borough of Keansburg Police Department (Monmouth)²
Custodian of Records**

Records Relevant to Complaint: Police Department Internal Affairs Case Index Reports for each and every year 2000-2006.³

Request Made: August 28, 2007

Response Made: September 13, 2007

Custodian: Thomas P. Cusick, Municipal Clerk

GRC Complaint Filed: September 26, 2007⁴

Background

June 23, 2009

At the June 23, 2009 public meeting, the Government Records Council (“Council”) considered the June 16, 2009 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 evidence of record, it is concluded that Borough Manager Wall did not unlawfully fail to forward the Complainant’s OPRA request dated August 28, 2007 to the Custodian because there is no proof that he actually received the request.

2. This complaint should be referred to the Office of Administrative Law for a full hearing to determine whether the Custodian unlawfully denied access to the requested records, including whether the Attorney General’s Internal Affairs Policy & Procedure contained within the Police Management Manual promulgated by the Police Bureau of the Division of Criminal Justice in the New Jersey Department of Law and Public Safety, as discussed in Rivera v.

¹ No legal representation listed on record.

² Represented by John O. Bennett III, Esq., of Dilworth Paxson, LLP (Neptune, NJ).

³ The records requested in the Denial of Access Complaint are different than those set forth in the original request because all but the records relevant to the complaint were disclosed to the Complainant prior to the date of complaint.

⁴ The GRC received the Denial of Access Complaint on said date.

Borough of Roselle Park (Union), GRC Complaint No. 2007-224 (November 2008), applies to the subject records, and if so, for a further determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

June 25, 2009

Council's Interim Order distributed to the parties.

August 13, 2009

Complaint transmitted to the Office of Administrative Law.

June 11, 2010

Administrative Law Judge's ("ALJ") Initial Decision. The ALJ **CONCLUDES** that:

“[t]he custodian of the requested records did not unlawfully deny access to the Internal Affairs Case Index Reports because they are confidential documents. I further **CONCLUDE** that the failure of respondent to formally adopt the IAPP as its policy did not diminish the confidential nature of the Internal Affairs Case Index Reports that were sought. I further **CONCLUDE** the custodian of the sought records did not knowingly or willfully violate complainant's OPRA request nor did he unreasonably deny access to the Internal Affairs Case Index Reports.

For the reasons set forth above, I **GRANT** a summary decision in favor of the respondent and **ORDER** that the complaint be **DISMISSED.**”

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council accept the Administrative Law Judge's Initial Decision dated June 11, 2010 in which the Judge granted a summary decision in favor of the Custodian and Ordered that the complaint be dismissed.

Prepared By: John E. Stewart
Case Manager/*In Camera* Attorney

Approved By: Catherine Starghill, Esq.
Executive Director

June 22, 2010



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

JON S. CORZINE
Governor

JOSEPH V. DORIA, JR.
Commissioner

INTERIM ORDER

June 23, 2009 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2007-222

v.

Borough of Keansburg Police Department (Monmouth)
Custodian of Record

At the June 23, 2009 public meeting, the Government Records Council (“Council”) considered the June 16, 2009 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 evidence of record, it is concluded that Borough Manager Wall did not unlawfully fail to forward the Complainant’s OPRA request dated August 28, 2007 to the Custodian because there is no proof that he actually received the request.
2. This complaint should be referred to the Office of Administrative Law for a full hearing to determine whether the Custodian unlawfully denied access to the requested records, including whether the Attorney General’s Internal Affairs Policy & Procedure contained within the Police Management Manual promulgated by the Police Bureau of the Division of Criminal Justice in the New Jersey Department of Law and Public Safety, as discussed in Rivera v. Borough of Roselle Park (Union), GRC Complaint No. 2007-224 (November 2008), applies to the subject records, and if so, for a further determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.



Interim Order Rendered by the
Government Records Council
On The 23rd Day of June, 2009

Robin Berg Tabakin, Chair
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: June 25, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 23, 2009 Council Meeting**

**Richard Rivera¹
Complainant**

GRC Complaint No. 2007-222

v.

**Borough of Keansburg Police Department (Monmouth)²
Custodian of Records**

Records Relevant to Complaint: Police Department Internal Affairs Case Index Reports for each and every year 2000-2006.³

Request Made: August 28, 2007

Response Made: September 13, 2007

Custodian: Thomas P. Cusick, Municipal Clerk

GRC Complaint Filed: September 26, 2007⁴

Background

August 28, 2007

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

September 13, 2007

Custodian's response to the OPRA request. Captain Michael Pigott of the Keansburg Police Department responds in writing to the Complainant's OPRA request sometime between the first (1st) and the fifth (5th) business day following receipt of such request.⁵ Captain Pigott discloses some of the records requested by the Complainant but denies access to the records relevant to this complaint because he contends said records are confidential.

September 26, 2007

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

¹ No legal representation listed on record.

² Represented by John O. Bennett III, Esq., of Dilworth Paxson, LLP (Neptune, NJ).

³ The records requested in the Denial of Access Complaint are different than those set forth in the original request because all but the records relevant to the complaint were disclosed to the Complainant prior to the date of complaint.

⁴ The GRC received the Denial of Access Complaint on said date.

⁵ The Custodian certifies receiving the Complainant's OPRA request sometime between September 6, 2007 and September 12, 2007.

- Complainant's OPRA request dated August 28, 2007
- Custodian's response to the Complainant's OPRA request dated September 13, 2007

The Complainant states that the records to which he was denied access are lists of police officers who had citizen complaints filed against them. The Complainant states that the names can be redacted.

October 2, 2007

Offer of Mediation sent to both parties.

October 3, 2007

The Complainant agrees to mediation.

October 12, 2007

Telephone call from Deputy Clerk JoAnne O'Brien. Deputy Clerk O'Brien states that she is the acting Custodian. Ms. O'Brien contends that the Offer of Mediation was not received by the Borough of Keansburg until October 10, 2007 and requests an extension of time to decide if mediation is a viable alternative for the Borough.

October 12, 2007

Letter from the GRC to the Deputy Clerk. The GRC grants the Borough an extension of time until October 16, 2007 to return the executed Agreement to Mediate.

October 15, 2007

The Custodian agrees to mediation.

October 16, 2007

The complaint is referred for mediation.

March 18, 2008

The complaint is referred back from mediation to the GRC for adjudication.

March 25, 2008

Request for the Statement of Information sent to the Custodian.

April 4, 2008

Custodian's Statement of Information ("SOI") attaching Complainant's OPRA request dated August 28, 2007.

The SOI was signed by three (3) municipal employees, all purporting to be the Custodian: Police Captain Michael Pigott, Municipal Clerk Thomas Cusick and Deputy Municipal Clerk Jo-Ann O'Brien.⁶

⁶ Hereinafter, when "Custodian" is used, it will refer to Clerk Thomas Cusick (see October 29, 2008 background entry). For all other agency activities, the employee actually performing the activity will be named.

The Custodian certifies that his search for the requested records involved locating the requested file since he maintains actually physical custody of the requested records, retrieving the records, reviewing the records in consultation with Monmouth County Assistant Prosecutor Patricia Quelch to determine what, if any, records are disclosable and having copies made of the disclosable records.

The Custodian also certifies that the records responsive to the request must be retained for three (3) years before they may be destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management. The Custodian certifies that the records responsive to the request have not been destroyed.

The Custodian certifies that on July 26, 2007, the Complainant called and left a voicemail message for Municipal Clerk Thomas Cusick requesting an official OPRA request form. The Custodian further certifies that on July 26, 2007, and again on August 3, 2007, Deputy Clerk O'Brien contacted the Complainant and left messages on his answering machine advising him that the Custodian could supply the OPRA request form that the Complainant had requested. The Custodian certifies that Captain Pigott subsequently provided the Complainant with an OPRA request form sometime during the week of August 6 though August 10, 2007. The Custodian certifies that on September 6, 2007, the Complainant informed the Clerk's Office that he received an official OPRA request form from the Police Department. The Custodian further certifies that on that same date, Ms. O'Brien returned the Complainant's call and informed the Complainant that it was important he submit his OPRA request to the Clerk's Office. The Custodian certifies that Ms. O'Brien advised the Complainant to fax the completed OPRA request form to the Clerk's Office fax number at 732-787-0787.

The Custodian certifies that on a date between September 6, 2007 and September 13, 2007, the Custodian received from the Complainant the records request upon which this complaint is based. The Custodian further certifies that Captain Pigott responded to the OPRA request on September 13, 2007 by disclosing to the Complainant the requested Annual Internal Affairs Summary Reports, but denying the Complainant access to the Internal Affairs Case Index Reports.

The Custodian certifies that the denied records responsive to the Complainant's request, and the legal reason for denying the Complainant access to such records, are as follows:

ITEM NUMBER	RECORD DEEMED RESPONSIVE TO THE COMPLAINANT'S REQUEST	YEAR	LEGAL EXPLANATION AND STATUTORY CITATION FOR DENIAL OF ACCESS
1	Internal Affairs Case Index Report.	2000	Because complaints against police officers can be the basis for discipline and other personnel decisions, the complaints are considered confidential

			<p>personnel information and exempt from disclosure because they contain information generated by or on behalf of public employers or public employees in connection with any grievance filed by or against an individual pursuant to <u>N.J.S.A. 47:1A-1.1</u>.</p> <p>The requested record is a device used by the Police Department to track potentially problematic situations and is used to make personnel decisions and determine whether department-wide problems exist, therefore it constitutes inter-agency or intra-agency advisory, consultative or deliberative (“ACD”) material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u>.</p> <p>The requested record contains information regarding complaints filed against police officers and/or reprimands of officers, which is not subject to public access because it constitutes a personnel or pension record containing information related to any grievance filed by or against an individual and is exempt from disclosure pursuant to <u>Merino v. Borough of Ho-Ho-Kus</u>, GRC Complaint No. 2003-110 (July 2004) and <u>N.J.S.A. 47:1A-10</u>.</p>
2	Same as Item #1	2001	Same as explanation for Item #1
3	Same as Item #1	2002	Same as explanation for Item #1
4	Same as Item #1	2003	Same as explanation for Item #1
5	Same as Item #1	2004	Same as explanation for Item #1
6	Same as Item #1	2005	Same as explanation for Item #1
7	Same as Item #1	2006	Same as explanation for Item #1

April 9, 2008

The Complainant’s response to the Custodian’s SOI. The Complainant contends that the Attorney General’s Internal Affairs Policy & Procedure (“IAPP”) requires that each police department in the State maintain an Internal Affairs Index file.⁷ The

⁷ The IAPP is contained within the Police Management Manual promulgated by the Police Bureau of the Division of Criminal Justice in the New Jersey Department of Law and Public Safety. N.J.S.A. 40A:14-1 Richard Rivera v. Borough of Keansburg Police Department (Monmouth), 2007-222 – Findings and Recommendations of the Executive Director

Complainant states that the index is not a part of an internal affairs complaint, but rather is a listing of all internal affairs cases received by a police agency and serves as a means of tracking the cases and ensuring the case files and investigations are complete. The Complainant states that the Custodian has not yet acknowledged whether the Keansburg Police Department maintains such records.

The Complainant asserts that the Custodian has improperly referenced Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004) in support of his denial of access. The Complainant contends that Merino relates to complaints filed against a police officer, but that the Internal Affairs Indexes which he requested are not complaints. The Complainant also asserts that the records do not constitute ACD material, but rather are listings of case numbers, allegations, and names of the complainants, accused officers and assigned investigators. Further, the Complainant states that the names of the complainants and the officers may be redacted, and he attaches several examples of redacted case indexes in support of his position.

October 7, 2008

E-mail from the GRC to Captain Pigott. The GRC informs Captain Pigott that he signed the SOI as Custodian and therefore the GRC requests of him a copy of the Keansburg Police Department Internal Affairs Policy.

October 7, 2008

E-mail from the GRC to the Complainant. The GRC requests that the Complainant inform the GRC where he obtained fax number 732-787-5997, which is the number he used to transmit his OPRA request dated August 28, 2007 to the Borough. The GRC informs the Complainant that the fax number does not match any number listed in the Borough's directory.

October 7, 2008

E-mail from the Complainant to the GRC. The Complainant states he does not recall where he obtained the fax number he used to transmit to the Custodian his OPRA request. The Complainant contends there was some confusion because he was asked to fax his OPRA request to different numbers in the Clerk's Office and the Police Department.

October 8, 2008

Telephone call from Keansburg Police Chief Raymond O'Hare to the GRC. The Chief states that he was provided with a copy of the GRC's e-mail correspondence to Captain Pigott dated October 7, 2008, and that he would promptly send a copy of the Department's Internal Affairs Policy to the GRC.

October 8, 2008

E-mail from the GRC to Captain Pigott. The GRC requests Captain Pigott provide the GRC with a certification clarifying the SOI. Specifically, the GRC requests Captain Pigott provide the GRC with a single date on which the Borough received the

request upon which the complaint is based. Also, the GRC requests Captain Pigott forward a copy of Attachment 9(B) to the SOI, which was referenced in the SOI as an attachment but was not attached at the time of GRC receipt. Finally, the GRC requests Captain Pigott advise the GRC which office or employee has fax number 732-787-5997, which is the number to which the Complainant faxed his August 28, 2007 OPRA request.

October 8, 2008

Telephone call from Captain Pigott to the GRC. Captain Pigott calls the GRC to reply to the questions posed in the GRC's e-mail sent to him earlier this date. Captain Pigott confirms that he is the Custodian in this matter and that phone number 732-787-5997 is a valid number to a fax machine located in the Borough Manager's Office. The GRC informs Captain Pigott that the Borough Manager was obligated under OPRA to deliver to the Custodian the OPRA request the Borough Manager received via facsimile. The GRC further informs Captain Pigott that the Complainant's fax to the Borough Manager's Office generated a transmission report dated August 28, 2007, and that this date will be the date of request unless the Custodian offers proof to the contrary. The GRC advises Captain Pigott that if he is the Custodian, the Clerk and Deputy Clerk must be removed as signatories on the SOI. Captain Pigott acknowledges that the SOI will be modified accordingly, and that he will promptly forward missing SOI Attachment 9(B) to the GRC.

October 8, 2008

E-mail from the GRC to Captain Pigott. The GRC confirms the telephone call between the GRC and Captain Pigott earlier this date.

October 9, 2008

Telephone call from Deputy Municipal Clerk Jo-Ann O'Brien to the GRC. Ms. O'Brien informs the GRC that Municipal Clerk Cusick and Captain Pigott are also on the speakerphone. Captain Pigott again confirms that he is the Custodian in this matter and that he will sign another certification page for the SOI deleting Ms. O'Brien and Mr. Cusick as signatories. Captain Pigott states that the Keansburg Police Department does not have a written policy consistent with the IAPP; however, the Police Department generally follows the IAPP when handling internal investigations.

Mr. Cusick informs the GRC that the Borough Manager, Terence Wall, maintained the fax machine with the telephone number 732-787-5997 in Mr. Wall's office which was solely occupied and maintained by Mr. Wall until he left employment with the Borough on September 7, 2007. Mr. Cusick further states that if the Complainant's August 28, 2007 OPRA request was faxed to Mr. Wall's office, it was never forwarded by Mr. Wall to Mr. Cusick while Mr. Wall was employed as the Borough Manager. The GRC advises Mr. Cusick that his statements regarding the circumstances surrounding the fax machine must be prepared in the form of a certification and submitted to the GRC. Captain Pigott agrees to promptly send to the GRC Mr. Cusick's certification along with the attachment and modifications to the SOI.

October 17, 2008

E-mail from the GRC to Captain Pigott. The GRC confirms the conference call on October 9, 2008. The GRC informs Captain Pigott that, to date, the material he

promised to submit has not been received by the GRC. Captain Pigott is further informed that if the material is not received within three (3) business days the adjudication will proceed based only upon the submissions presently on file.

October 20, 2008⁸

Facsimile transmission from Municipal Clerk Thomas P. Cusick to the GRC. Mr. Cusick forwards to the GRC an amended certification page for the SOI on which he certifies that he is the sole Custodian in this matter.

Custodian Cusick also forwards to the GRC a separate certification dated October 20, 2008, in which he certifies that Borough Manager Terence Wall maintained a fax machine with the number 732-787-5997 in an office solely occupied and maintained by Mr. Wall. The Custodian further certifies that Mr. Wall's office was locked from August 27, 2007 until August 30, 2007, while Mr. Wall was on vacation. The Custodian also certifies that Mr. Wall left employment with the Borough on September 7, 2007 and that at no time prior to this date was the Complainant's OPRA request forwarded to the Custodian or a member of his staff.

The Custodian forwards to the GRC a copy of SOI Attachment 9(B), which is page 10 of the Records Retention and Disposition Schedule ("Schedule") established and approved by New Jersey Department of State, Division of Archives and Records Management. This page from the Schedule shows disposition information for record series number 0048-0000.

Analysis

Whether the former Borough Manager violated OPRA by not forwarding the Complainant's OPRA request to the Custodian?

OPRA provides that:

"[a]ny officer or employee of a public agency who receives a request for access to a government record shall forward the request to the custodian of the record or direct the requestor to the custodian of the record." N.J.S.A. 47:1A-5.h.

The Complainant contends that his OPRA request was dated and provided to the Custodian on August 28, 2007. The Complainant's method of delivery was via fax transmission to 732-787-5997. The Custodian certifies he neither received a faxed records request from the Complainant, nor did he receive any request from the Complainant until after the Complainant obtained an OPRA request form from the Police Department on or about September 6, 2007 and returned it to the Police Department sometime between September 6, 2007 and September 12, 2007.

⁸ Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.
Richard Rivera v. Borough of Keansburg Police Department (Monmouth), 2007-222 – Findings and Recommendations of the Executive Director

Although the Complainant could not recall how he learned that fax number 732-787-5997 transmitted to a Borough fax machine, the evidence of record reveals the Complainant successfully transmitted his OPRA request via that fax number on August 28, 2007 at 10:04 a.m.

Upon inquiry from the GRC, the Custodian certified that Borough Manager Terence Wall maintained a fax machine with the number 732-787-5997 in an office solely occupied and maintained by Mr. Wall. The Custodian also certified that Mr. Wall's office was locked from August 27, 2007 until August 30, 2007, while Mr. Wall was on vacation. Based upon the Custodian's certification, Mr. Wall returned from vacation on August 30, 2007 and continued as a Borough employee until September 7, 2007, at which time he terminated his employment with the Borough.

N.J.S.A. 47:1A-5.h. provides, and the Council has consistently held, that an employee of a public agency who receives an OPRA request must either direct the requestor to the custodian or forward the requestor's OPRA request to the custodian. In Mourning v. New Jersey Department of Corrections, GRC Complaint No. 2006-75 (August 2006), the Council determined that because the employee who received an OPRA request did not forward the request to the custodian or direct the requestor to the custodian the employee violated N.J.S.A. 47:1A-5.h. Similarly, in Vessio v. New Jersey Department of Community Affairs, Division of Fire Safety, GRC Complaint No. 2007-63 (May 2007), the Council found that because an employee improperly forwarded the complainant's OPRA request to the custodian the employee violated N.J.S.A. 47:1A-5.h.

The evidence of record reveals the Complainant's OPRA request was successfully faxed to the machine in the Borough Manager's office on August 28, 2007, during a period when Mr. Wall was absent and the office was vacant. The issue, then, is whether the Borough Manager *received the request* when he returned to his office.

In Bellan-Boyer v. NJ Department of Community Affairs, GRC Complaint No. 2007-114 (October 2007), the complainant stated that he submitted an OPRA request to the custodian and received confirmation of a successful fax transmittal. In this matter, although there was no allegation of a third-party employee coming into possession of the request, there was a change of custodians. The complainant stated in his complaint that the original custodian informed him that the agency never received the complainant's OPRA request. The replacement custodian certified that, upon a diligent search of agency files, he found no record of the complainant's OPRA request. The Council found that the original custodian did not unlawfully deny access to the complainant's OPRA request because there was no proof that the custodian actually received the request.

In the instant complaint, as in Bellan-Boyer, *supra*, there is no evidence that the Borough Manager actually received the request. The Complainant's fax receipt only serves as proof that the request was successfully transmitted to the receiving machine, not that the Borough Manager received it. There are a number of reasons why a request may not have been printed, or if printed, may not have been received by the intended recipient.

The Superior Court articulated several disadvantages in using a fax transmission as the sole means for document delivery in Coldwell Banker Commercial/Feist & Feist

Realty Corp. v. Blancke P.W. L.L.C., 368 N.J. Super. 382 (App. Div. 2004). In that matter, the court said:

“[d]espite the prevalent use of fax machines for business purposes...[f]axes...do not provide a means to determine the actual recipient of the fax...the recipient of a fax is always a machine, not an individual. Without further personal verification, the sender has no way of knowing that the fax was ever removed from the machine and no knowledge of which individual actually received it.” *Id* at 393.

Based on the evidence of record, it is concluded that Borough Manager Wall did not unlawfully fail to forward the Complainant’s OPRA request dated August 28, 2007 to the Custodian because there is no proof he actually received the request.

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 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.

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.

The Complainant states that the records to which he was denied access, the Police Department Internal Affairs Index Reports for the years 2000 through 2006 (“index files”) are lists of police officers who had citizen complaints filed against them. The Complainant states that the names can be redacted, therefore the Complainant contends

that the requested records are subject to public access and claims that there is no legal basis for the Custodian to withhold disclosure of said redacted records.

The Custodian denied the Complainant access to the index files on the basis that they are confidential; however, the Custodian failed to cite legal authority in support of his contention at the time the records were denied. The Custodian, however, later certified in the SOI that, in addition to being confidential, there are three (3) other reasons for denying the Complainant access to the requested records.

First, the Custodian asserted that the records relevant to the complaint are exempt from disclosure because they contain information generated by or on behalf of public employers or public employees in connection with any grievance filed by or against an individual pursuant to N.J.S.A. 47:1A-1.1. Second, the Custodian avers that the requested record is a device used by the Police Department to track potentially problematic situations and is used to make personnel decisions and determine whether department-wide problems exist, therefore it constitutes inter-agency or intra-agency advisory, consultative or deliberative (“ACD”) material exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. Third, the Custodian certifies the records relevant to the complaint are not subject to public access because they constitute personnel or pension records containing information related to any grievance filed by or against an individual pursuant to N.J.S.A. 47:1A-10. and Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004).

The evidence of record indicates that this complaint is contested regarding whether the records withheld from disclosure constitute records that are exempt pursuant to N.J.S.A. 47:1A-1.1. and/or N.J.S.A. 47:1A-10. The Custodian argues that they are confidential and exempt from disclosure. The Complainant alleges that the records are not part of the internal affairs complaint or investigation. The Complainant contends the records are maintained separate from the internal affairs investigation, and as such, are not confidential. The Complainant also contends the index files do not constitute ACD material.

OPRA states that if the GRC is unable to make a determination as to a record's accessibility based upon the complaint and the custodian's response thereto, the [GRC] shall conduct a hearing on the matter in conformity with the rules and regulations provided for hearings by a state agency in contested cases under the Administrative Procedures Act [APA]. N.J.S.A. 47:1A-7.e.

The APA further provides that the Office of Administrative Law “shall acquire jurisdiction over a matter only after it has been determined to be a contested case by an agency head and has been filed with the Office of Administrative Law...” *N.J.A.C. 1:1-3.2(a)*.

As such, this complaint should be referred to the Office of Administrative Law for a full hearing to determine whether the Custodian unlawfully denied access to the requested records, including whether the Attorney General's Internal Affairs Policy & Procedure contained within the Police Management Manual promulgated by the Police Bureau of the Division of Criminal Justice in the New Jersey Department of Law and

Public Safety, as discussed in Rivera v. Borough of Roselle Park (Union), GRC Complaint No. 2007-224 (November 2008), applies to the subject records, and if so, for a further determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Based on the evidence of record, it is concluded that Borough Manager Wall did not unlawfully fail to forward the Complainant's OPRA request dated August 28, 2007 to the Custodian because there is no proof that he actually received the request.
2. This complaint should be referred to the Office of Administrative Law for a full hearing to determine whether the Custodian unlawfully denied access to the requested records, including whether the Attorney General's Internal Affairs Policy & Procedure contained within the Police Management Manual promulgated by the Police Bureau of the Division of Criminal Justice in the New Jersey Department of Law and Public Safety, as discussed in Rivera v. Borough of Roselle Park (Union), GRC Complaint No. 2007-224 (November 2008), applies to the subject records, and if so, for a further determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Prepared By: John E. Stewart
Case Manager/*In Camera* Attorney

Approved By: Catherine Starghill, Esq.
Executive Director

June 16, 2009