



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

**JON S. CORZINE**  
Governor

**CHARLES A. RICHMAN**  
Acting Commissioner

**FINAL DECISION**

**August 11, 2009 Government Records Council Meeting**

John Bentz  
Complainant

Complaint No. 2008-25

v.

Borough of Paramus Police Department (Bergen)  
Custodian of Record

At the August 11, 2009 public meeting, the Government Records Council (“Council”) considered the August 4, 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. While the Custodian properly requested an extension of time within the seven (7) business day deadline provided by OPRA, the Custodian failed to grant access, deny access, seek clarification or request an extension by January 3, 2008. Therefore, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time by January 3, 2008 results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Although the Custodian’s failure to either grant access, deny access, seek clarification or request an extension of time by January 3, 2008 resulted in a “deemed” denial of the Complainant’s OPRA request, because the Custodian provided the Complainant with the requested record as soon as the record became available, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian’s unlawful “deemed” denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the 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 11<sup>th</sup> Day of August, 2009

Robin Berg Tabakin, Chair  
Government Records Council

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

Janice L. Kovach  
Government Records Council

**Decision Distribution Date: August 13, 2009**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
August 11, 2009 Council Meeting**

**John Bentz<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2008-25**

v.

**Borough of Paramus, Police Department (Bergen)<sup>2</sup>**  
**Custodian of Records**

**Records Relevant to Complaint:** Audio tape of radio transmission on frequencies 1, 2, 3 – 1800-0000 10/30/07 and 1800-0000 10/31/07.

**Request Made:** November 27, 2007  
**Response Made:** December 6, 2007  
**Custodian:** Ian Shore, Borough Clerk<sup>3</sup>  
**GRC Complaint Filed:** February 6, 2008<sup>4</sup>

**Background**

**November 27, 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.

**December 6, 2007**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the seventh (7<sup>th</sup>) business day following receipt of such request. The Custodian states that due to the nature of the Complainant's request, the Custodian will not be able to provide the records requested until January 3, 2008.<sup>5</sup>

**February 6, 2008**

Denial of Access Complaint filed with the Government Records Council ("GRC"). The Complainant states that the Custodian unlawfully denied the Complainant access to the records requested. The Complainant states that on December 10, 2007, he telephoned the clerk, Toni Falato, who informed the Complainant that the Custodian had checked on the status of the records responsive, but that the records requested were not

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

<sup>2</sup> Represented by John Ten Hoeve, Esq. (Hackensack, NJ)

<sup>3</sup> Mr. Shore retired as the Borough Clerk on July 15, 2009. The Borough Clerk's position remains open. However, matters are currently being handled by the Deputy Borough Clerk, Toni Falato.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

<sup>5</sup> The Custodian characterizes this statement as a request for an extension of the deadline to respond to the Complainant's OPRA request.

yet available. The Complainant also states that on December 13, 2007, he again telephoned Ms. Falato who informed the Complainant that the Custodian was not in the office to discuss the status of the Complainant's OPRA request. The Complainant states that during a telephone call to the Borough on December 17, 2007, he was informed that the Custodian was still awaiting the receipt of the records responsive from Deputy Police Chief Carey.

**February 11, 2008**

Offer of Mediation sent to both parties.

**February 29, 2008**

The Custodian agrees to mediate this complaint.

**March 6, 2008**

The Complainant declines mediation.

**March 7, 2008**

Request for the Statement of Information sent to the Custodian.

**March 19, 2008**

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

- Complainant's OPRA request dated November 27, 2007;
- Letter from the Custodian to the Complainant dated December 6, 2008.

The Custodian states that the Complainant filed a Denial of Access Complaint with regard to a request for copies of audio tapes of phone calls to the Paramus Police Department on October 31, 2007. The Custodian states that the records requested consist of audio tapes for calls made between 6:00 p.m. and 11:59 p.m. The Custodian states that he received the Complainant's OPRA request on November 27, 2007. The Custodian states that the records sought were not in the custody and control of the Custodian but rather in the custody and control of the Borough of Paramus Police Department.

The Custodian states that he forwarded the Complainant's request to the Deputy Chief of the Borough of Paramus Police Department. The Custodian states that he was unable to grant the Complainant prompt access to the records requested because of the complex process required to screen the audio tapes of telephone calls prior to disclosure. The Custodian states that Deputy Chief Carey is the highest ranking police officer in the Borough of Paramus Police Department because the prior Chief of Police retired and no successor has been appointed. The Custodian states that Deputy Chief Carey is burdened with his existing responsibilities as a Captain in the Borough of Paramus Police Department, as well as the responsibilities of the Chief of Police. The Custodian states that Deputy Chief Carey is the only individual capable and authorized to review the audio tapes of phone calls to the Borough Paramus Police Department prior to disclosure.

The Custodian states that nearly 450 calls were made during the specified time period. The Custodian states that Deputy Chief Carey was required to review every call in order to determine whether the call contained information not subject to disclosure.

The Custodian states that Deputy Chief Carey could not disclose calls dealing with ongoing investigations, identifying victims of crimes, involving an attorney-client privilege, discussing security issues, disclosing confidential personal data, or discussing any other information that would be confidential and not subject to disclosure. The Custodian states that the process involved in reviewing the audio tapes was time consuming and required more than twelve (12) hours of Deputy Chief Carey's time. The Custodian states that the Paramus Police Department receives more than one thousand (1,000) calls each day. The Custodian states that Deputy Chief Carey must physically operate equipment to listen to each call, turn the machinery on and off between calls and then prepare a disk containing copies of the calls. The Custodian states that Deputy Chief Carey was not able to take more than one (1) full day of his time to conduct the review required to fulfill the Complainant's request.

The Custodian states that once Deputy Chief Carey completed his review, the audio tapes were provided to the Complainant on February 5, 2008. The Custodian states that Deputy Chief Carey's review did not reveal any calls that contained information that was exempt from disclosure. The Custodian states that copies of all audio taped calls for the time period specified have been provided to the Complainant. The Custodian states that the delay in providing the audio tapes requested was more than reasonable under the circumstances. The Custodian states that there can be no claim that Deputy Chief Carey willfully or knowingly violated any provision of OPRA.

#### **February 23, 2009**

E-mail from the GRC to the Custodian. The GRC states that the Custodian's SOI concerns a request for telephone calls to the Borough of Paramus Police Department on October 31, 2007 between 6 p.m. and 11:59 p.m. The GRC further states that the Complainant requested audio tapes of police radio transmissions, frequencies 1, 2, 3 for 1800-0000 on October 30, 2007 and 1800-000 on October 31, 2007. The GRC requests that the Custodian clarify his response to the Complainant's OPRA request. The GRC also requests that the Custodian confirm that he mailed the December 6, 2007 response letter to the Complainant. The GRC further requests that the Custodian set forth all contact (written and verbal) with the Complainant related to this records request and provide copies of any written contact. Lastly, the GRC requests that the Custodian certify to the date upon which the police radio transmissions audio tapes were provided to the Complainant.

#### **February 23, 2009**

E-mail from the GRC to the Complainant. The GRC asks if the Complainant received the December 6, 2007 letter as indicated by the Custodian in the SOI. The GRC asks the Complainant to provide the GRC with any written responses that the Complainant may have received from the Custodian. The GRC also asks that the Complainant verify the date upon which the Custodian provided the records requested to the Complainant.

#### **February 24, 2009**

E-mail from the Custodian's Counsel to the GRC. The Custodian's Counsel states that he has spoken to the Borough of Paramus Police Chief<sup>6</sup> and reviewed his file. The Custodian's Counsel states that the Chief confirmed that all recordings of all calls have been included in the records provided to the Complainant. The Custodian's Counsel states that there are no other audio records other than those provided to the Complainant. The Custodian's Counsel states that the Chief indicated that a review of the records responsive would disclose the frequencies from which the calls were made or received. The Custodian's Counsel states that the records provided were responsive to the Complainant's OPRA request.

### **March 2, 2009**

Certification from the Custodian to the GRC. The Custodian certifies that on December 6, 2007, he sent a letter to the Complainant requesting an extension of time within which to respond to the OPRA request. The Custodian certifies that he spoke to the Complainant on several occasions, advising the Complainant that he had not received the requested records from then-Deputy Chief Carey. The Custodian certifies that he spoke with then-Deputy Chief Carey on several occasions regarding the Complainant's request for records. The Custodian certifies that on February 5, 2008 he received a disk containing the records requested by the Complainant. The Custodian certifies that he informed the Complainant that the records requested were available for pick up and that the copying cost for the records requested was \$30.

### **March 5, 2009<sup>7</sup>**

E-mail from the Complainant to the GRC. The Complainant states that he received the Custodian's December 6, 2007 letter. The Complainant also states that he received the records requested on February 5, 2008 after paying copying cost of \$30.00.

## **Analysis**

### **Whether the Custodian unlawfully denied access to the requested record?**

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*

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<sup>6</sup> Deputy Chief Carey was promoted to the Police Chief position.

<sup>7</sup> 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.

*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 further provides that:

“Unless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access to a government record or deny a request for access to a government record as soon as possible, *but not later than seven business days after receiving the request*, provided that the record is currently available and not in storage or archived. *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*, unless the requestor has elected not to provide a name, address or telephone number, or other means of contacting the requestor.” (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.

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 Custodian responded in writing to the Complainant’s OPRA request on the seventh (7<sup>th</sup>) business day following receipt of such request. The Custodian stated that due to the nature of the Complainant’s request, the Custodian would not be able to provide the records requested until January 3, 2008. However, the Custodian failed to provide the record requested or to request an additional extension on January 3, 2008. The evidence of record indicates that the Complainant received the record requested on February 5, 2008.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. 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. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.<sup>8</sup> Thus, a custodian’s failure to respond in writing to a complainant’s OPRA

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<sup>8</sup> It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

While the Custodian properly requested an extension of time within the seven (7) business day deadline provided by OPRA, the Custodian failed to grant access, deny access, seek clarification or request an extension by January 3, 2008. Therefore, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time by January 3, 2008 results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

**Whether the Custodian’s delay in access to the requested records 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, 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).



Although the Custodian's failure to either grant access, deny access, seek clarification or request an extension of time by January 3, 2008 resulted in a "deemed" denial of the Complainant's OPRA request, because the Custodian provided the Complainant with the requested record as soon as the record became available, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. While the Custodian properly requested an extension of time within the seven (7) business day deadline provided by OPRA, the Custodian failed to grant access, deny access, seek clarification or request an extension by January 3, 2008. Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time by January 3, 2008 results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Although the Custodian's failure to either grant access, deny access, seek clarification or request an extension of time by January 3, 2008 resulted in a "deemed" denial of the Complainant's OPRA request, because the Custodian provided the Complainant with the requested record as soon as the record became available, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By: Sherin Keys, Esq.  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

August 4, 2009