



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

October 26, 2010 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2008-280

v.

Wall Police Department (Monmouth)
Custodian of Record

At the October 26, 2010 public meeting, the Government Records Council (“Council”) considered the October 19, 2010 *Reconsideration* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Council’s June 29, 2010 Interim Order should be reconsidered because the Council failed to consider probative, competent evidence as part of its April 8, 2010 Interim Order; to wit, that the Custodian certified that the mobile video recorder recordings do not exist, therefore the Custodian could not deliver to the Government Records Council the mobile video recorder media for an *in camera* examination within the time period provided by said Order, as extended, because the record was nonexistent.
2. Because the Custodian certified in the Statement of Information dated January 5, 2009 that the mobile video recordings were nonexistent, and because there is no credible evidence in the record to refute the Custodian’s certification, the Custodian did not unlawfully deny access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). It is therefore concluded upon reconsideration 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 and this complaint should not be referred to the Office of Administrative Law for a determination of this issue.
3. The filing of this complaint did not bring about a change (voluntary or otherwise) in the Custodian’s conduct. Therefore, pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and Mason v. City of Hoboken and City Clerk of the City of



Hoboken, 196 N.J. 51 (2008), the Complainant is not a “prevailing party” entitled to an award of reasonable attorney’s fees.

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

Final Decision Rendered by the
Government Records Council
On The 26th Day of October, 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: November 1, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL
*Reconsideration***

**Supplemental Findings and Recommendations of the Executive Director
October 26, 2010 Council Meeting**

**Richard Rivera¹
Complainant**

GRC Complaint No. 2008-280

v.

**Wall Police Department (Monmouth)²
Custodian of Records**

Records Relevant to Complaint:

GRC Complaint Number 2008-280

1. DVD or VHS format copies of mobile video and audio recordings made by Wall Police Officer Eric Olsen on April 14, 2008 from 9:00 am to 9:20 am.
2. Telephone and police radio transmission audio recordings for April 14, 2008 from 9:00 am to 9:30 am.
3. Telephone and police radio transmission audio recordings for May 8, 2008 from 9:00 pm to 9:20 pm.
4. Telephone and police radio transmission audio recordings for November 21, 2008 from 8:00 am to 8:15 am.

Request Made: November 21, 2008

Response Made: November 25, 2008

Custodian: Kevin Pressey, Records and ID Manager

GRC Complaints Filed: December 23, 2008³

Background

June 29, 2010

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, found that:

1. Because the Custodian certified on January 5, 2009 that no records relevant to the complaint were destroyed, and because the Custodian subsequently certified on April 26, 2010 that he is unable to locate the mobile video

¹ Represented by Walter M. Luers, Esq. (Oxford, NJ).

² Represented by Mark G. Kitrick, Esq., of King, Kitrick & Jackson, LLC (Brick, NJ).

³The GRC received the Denial of Access Complaint on said date.

recorder media ordered by the Council for *in camera* examination, said certifications being made at all times during the pendency of this complaint, the Custodian violated N.J.S.A. 47:1A-7.c. and failed to comply with the terms of the Council's April 8, 2010 Interim Order.

2. Because the Custodian failed to safeguard existing records from destruction, he could not deliver to the GRC the mobile video recorder media for an *in camera* examination within the time period provided by the Council's April 8, 2010 Interim Order, as extended, and thereby denied the Complainant any opportunity for access to the requested records. Thus, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional.
3. Because the Custodian failed to comply with the terms of the Council's Interim Order dated April 8, 2010, by not delivering the requested mobile video recorder media to the GRC for an *in camera* examination within the time provided for such compliance, as extended, the Council could not make a determination as to whether access was or was not improperly denied; therefore, pursuant to the analyses and decisions in Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Council cannot deliver a finding that the Complainant is a prevailing party entitled to an award of reasonable attorney's fees.
4. In view of the Custodian's actions, a fact finder could conclude that the Complainant was the victim of dilatory, obdurate or vexatious conduct by the Custodian during the pendency of the complaint directly resulting in the Council's inability to make a determination as to whether access was or was not improperly denied and prevailing party attorney fees should be awarded.
5. This complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian's actions amount to a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances and, if so, whether the Complainant is entitled to prevailing party attorney fees and the reasonable amount thereof.

July 12, 2010

Council's Interim Order distributed to the parties.

July 16, 2010

Custodian's request for reconsideration with the following attachments:

- Three (3) page Incident/Investigation Report with an appended one (1) page Incident Report Suspect List for a harassment incident dated April 14, 2008
- Certification of Wall Township Captain Timothy Clayton dated July 15, 2010
- Certification of Wall Township Officer Eric Olsen dated July 15, 2010

The Custodian's Counsel requests reconsideration of the Council's June 29, 2010 Interim Order. Counsel contends that the GRC must reconsider its decision because it made a mistake during the adjudication process. Further, Counsel asserts that new evidence and extraordinary circumstances require reconsideration of the Order.

Counsel asserts that the GRC determined that the Custodian violated OPRA because the Custodian was not able to provide to the GRC for an *in camera* examination an April 14, 2008 mobile video recorder ("MVR") recording made by Wall Police Officer Eric Olsen on April 14, 2008 from 9:00 am to 9:20 am. Counsel states that the GRC's conclusion was based on two (2) certifications from the Custodian: a certification dated January 5, 2009 which averred that no records relevant to the complaint were destroyed and a certification dated April 26, 2010 which averred the Custodian was unable to locate the unredacted recording. Counsel further states that the Wall Township Information Technology Representative also provided a certification dated April 26, 2010 which averred that said recording was unable to be located.

Counsel asserts that after the Council's June 29, 2010 Interim Order was distributed to the parties, Counsel spoke with Wall Township Captain Timothy Clayton and Officer Eric Olsen and learned that the MVR in the vehicle Officer Olsen was operating on April 14, 2008 was not activated, therefore no recording exists for the requested time frame on that date. Counsel attaches a police Incident/Investigation Report in support of the certifications.

August 2, 2010

Complainant's response to the Custodian's request for reconsideration. The Complainant's Counsel states that he never received a copy of the request for reconsideration. The Complainant's Counsel states that the Custodian's Counsel sent the submission directly to the Complainant, who received it on July 22, 2010 and thereafter delivered it to Counsel. The Complainant's Counsel requests that the GRC deem the time period for the Complainant's response pursuant to *N.J.A.C. 5:105-2.10* to have commenced on July 23, 2010.

The Complainant's Counsel argues that the request for reconsideration should be denied. The Complainant's Counsel recites the grounds for reconsideration followed by the GRC as (1) the decision was based upon a palpably incorrect or irrational basis or (2) that the Council did not consider, or failed to appreciate the significance of, probative, competent evidence.

Complainant's Counsel argues that although the Custodian claims mistake, extraordinary circumstances and new evidence as grounds for reconsideration, the Custodian actually seeks an opportunity to reargue the points of the Council's decision that were decided unfavorably for the Custodian. Counsel asserts that "reconsideration cannot be used to expand the record and reargue a motion." The Complainant's Counsel cites Capital Finance Co. v. Asterbadi, 398 N.J. Super. 299, 310 (App. Div. 2008) in support of his assertion. Counsel states that the Custodian provides no reasons why he failed to assert earlier that the MVR was not activated or why the search that was undertaken after June 29, 2010 could not have been conducted before that date. Counsel argues that three separate certifications containing different reasons regarding the status

of the records were offered by the Custodian: in January 2009 that the MVR record existed and was being preserved, in April 2010 that the record had been destroyed and in July 2010 that the record never existed. Counsel states that this highlights the need for an evidentiary hearing because the reasons for not producing the MVR record keep changing.

Counsel states that there was no mistake because the Council's decision relied upon the Custodian's certifications in reaching their decision. Counsel also states that the alleged new evidence presented by the Custodian is not new because the averments made by Captain Clayton and Officer Olsen in their certifications describe events which occurred on April 14, 2008.⁴ The Complainant's Counsel asserts that "[f]ar from being new evidence, it is evidence that should have been discovered during the Records Custodian's response to and investigation of this Complaint. And the failure of the Records Custodian or its counsel to glean this 'new' information from a Wall Township Captain and of one its (sic) Officers would hardly qualify as 'extraordinary circumstances.'"

Analysis

Whether the Custodian has met the required standard for reconsideration of the Council's June 29, 2010 Interim Order?

Pursuant to *N.J.A.C. 5:105-2.10*, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. *N.J.A.C. 5:105-2.10(a) – (e)*.

In the matter before the Council, the Council's June 29, 2010 Interim Order was distributed via overnight delivery to the parties on July 12, 2010. The Custodian's Counsel submitted a request for reconsideration of said Order on July 16, 2010. Accordingly, the Custodian's request for reconsideration of the Council's Interim Order was filed with the GRC three (3) business days from receipt of the Council's decision. It is undisputed that the request for reconsideration was provided to the Complainant on July 22, 2010 and the Complainant delivered it to his Counsel the following day. The Complainant's Counsel requests the GRC deem the time period for the Complainant's response pursuant to *N.J.A.C. 5:105-2.10* to have commenced on July 23, 2010 to ensure that he complied in a timely manner with the regulation. This is unnecessary because the Complainant received the request for reconsideration on July 22, 2010, and the Complainant's Counsel thereafter filed a response to the request for reconsideration on August 2, 2010. Counsel therefore responded seven (7) business days from receipt by the Complainant of the request for reconsideration, which is well within the time period provided by the regulation.

⁴ This is over one-half year prior to the date of the OPRA request which formed the basis of this complaint. Richard Rivera v. Wall Police Department (Monmouth), 2008-280 – Supplemental Findings and Recommendations of the Executive Director - Reconsideration 4

In support of the Custodian's motion for reconsideration, the Custodian's Counsel asserts that mistake, extraordinary circumstances and new evidence require reconsideration of the Council's June 29, 2010 Interim Order. However, the Custodian's Counsel does not address any of these purported reasons justifying reconsideration in his legal argument. Rather, the Custodian's case rests upon Counsel's assertion that, after receipt of the Council's June 29, 2010 Interim Order, he obtained two (2) certifications dated July 15, 2010: one (1) from Wall Township Captain Timothy Clayton and one (1) from Wall Township Officer Eric Olsen. The certifications averred that the MVR mounted in the vehicle Officer Olsen was operating on April 14, 2008 was not activated; therefore no recording exists for the requested time frame on that date. The Custodian's Counsel refers to these certifications as "...evidence, not known by the Custodian prior to the June 29, 2010 GRC Ruling..."

Such post-Order certifications do not constitute "new evidence" for purposes of reconsideration. With respect to "new evidence" the GRC makes it clear on the face of the Request for Reconsideration form that "[t]his is evidence that could not have been provided prior to the Council's Decision because the evidence did not exist at that time." (Emphasis in original.)

Applicable case law holds that:

"[a] party should not seek reconsideration merely based upon dissatisfaction with a decision." D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, supra, 242 N.J. Super. at 401. 'Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.' *Ibid.*" In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Here, in support of his request for reconsideration, the Custodian did not offer proof that the Council's decision was based upon a palpably incorrect or irrational basis or that the Council did not consider or failed to appreciate the significance of probative, competent evidence. Rather, the Custodian presented two (2) post-Order certifications which averred that the MVR recordings do not exist because the MVR mounted in the vehicle Officer Olsen was operating on April 14, 2008 was not activated. The Custodian's Counsel stated that this was "...evidence, not known by the Custodian prior to the June 29, 2010 GRC Ruling..."

As the moving party, the Custodian was required to establish either of the necessary criteria set forth above; namely 1) that the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence. See Cummings, *supra*. The Custodian failed to do so. The Custodian has also failed to show that the GRC acted arbitrarily, capriciously or unreasonably in reaching its decision. See D'Atria, *supra*.

Therefore, because the Custodian has failed to establish in his motion for reconsideration of the Council's June 29, 2010 Interim Order that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in disposing administratively of the complaint, the Custodian's motion for reconsideration is denied. See Cummings, *supra*, D'Atria, *supra*, and Comcast Cablevision, *supra*.

However, upon reviewing the file for this reconsideration, the GRC discovered probative, competent evidence presented by the Custodian that was not previously considered by the Council; therefore the GRC will reconsider this complaint on its own motion pursuant to *N.J.A.C. 5:105-2.10(a)*.

In the Custodian's Statement of Information ("SOI") dated January 5, 2009, the Custodian appended a two (2) page document index as Item 9. Column (A) of the document index states "List of Records Responsive to Complainant's OPRA Request." On page one (1) of the document index under Column (A), the Custodian listed each of the three (3) telephone and radio transmissions that were responsive to the complaint by time and date. In Column (F), which states "Legal Basis for Denial or Redaction," the Custodian recited the reason for denial of access that he stated in his response to the Complainant's OPRA request (he further elaborated on this legal basis for denial in his Factual and Legal Argument that was appended to the SOI as Item 12). On page two (2) of the document index, the Custodian continued explaining his basis for denial of access in Column (F) and in Column (A) of page two (2), the Custodian properly continued to list the records responsive to the Complainant's request by identifying the MVR recording by date. But then the Custodian also stated that the recordings "...do not exist because that patrol car is not equipped with video and audio recording equipment."

Although the Custodian did not place the basis for denying access to the MVR recording in the proper column and did not mention the nonexistence of the recording elsewhere in the SOI, because the document index is part of the SOI and therefore part of the Custodian's certification, it should have been previously considered by the GRC because it constitutes probative, competent evidence. If this evidence was considered, the GRC would have found that the MVR recordings were nonexistent and would not have required the Custodian to produce the recordings for an *in camera* examination in its April 8, 2010 Interim Order.

Accordingly, the Council's June 29, 2010 Interim Order should be reconsidered because the Council failed to consider probative, competent evidence as part of its April 8, 2010 Interim Order; to wit, that the Custodian certified that the MVR recordings do not exist, therefore the Custodian could not deliver to the GRC the mobile video recorder

media for an *in camera* examination within the time period provided by said Order, as extended, because the record was nonexistent.

Whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

The Council has held that if a custodian has sufficiently borne his/her burden of proving that there is no record responsive to the Complainant's request, the Custodian could not have unlawfully denied access. In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The Custodian responded stating that there was no record of any telephone calls made to the Complainant. The Custodian subsequently certified that no records responsive to the Complainant's request existed. The GRC determined that although the Custodian failed to respond to the OPRA request in a timely manner, the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed.

In the instant complaint, because the Custodian certified in the SOI dated January 5, 2009 that the MVR recordings were nonexistent, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to the requested records pursuant to Pusterhofer, supra. It is therefore concluded upon reconsideration 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 and this complaint should not be referred to the Office of Administrative Law for a determination of this issue.

Whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees?

OPRA provides that:

"[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:

institute a proceeding to challenge the custodian's decision by filing an action in Superior Court...or

in lieu of filing an action in Superior Court, file a complaint with the Government Records Council...

A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6.

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the court held that a complainant is a "prevailing party" if he/she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct. *Id.* at 432. Additionally, the court held that attorney's fees may be awarded when the

requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. *Id.*

In Teeters, the complainant appealed from a final decision of the Government Records Council which denied an award for attorney's fees incurred in seeking access to certain public records via two complaints she filed under OPRA against the Division of Youth and Family Services ("DYFS"). The records sought involved an adoption agency having falsely advertised that it was licensed in New Jersey. DYFS eventually determined that the adoption agency violated the licensing rules and reported the results of its investigation to the complainant. The complainant received the records she requested upon entering into a settlement with DYFS. The court found that the complainant engaged in reasonable efforts to pursue her access rights to the records in question and sought attorney assistance only after her self-filed complaints and personal efforts were unavailing. *Id.* at 432. With that assistance, she achieved a favorable result that reflected an alteration of position and behavior on DYFS's part. *Id.* As a result, the complainant was a prevailing party entitled to an award of a reasonable attorney's fee. Accordingly, the Court remanded the determination of reasonable attorney's fees to the GRC for adjudication.

Additionally, the New Jersey Supreme Court has ruled on the issue of "prevailing party" attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." Mason, *supra*, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). The court in Buckhannon stated that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." (quoting Black's Law Dictionary 1145 (7th ed. 1999)). The court in Mason, *supra*, at 76, held that "requestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) 'a factual causal nexus between plaintiff's litigation and the relief ultimately achieved'; and (2) 'that the relief ultimately secured by plaintiffs had a basis in law.'" Singer v. State, 95 N.J. 487, 495, *cert denied* (1984)."

Here, upon reconsideration it was determined that the Custodian certified in the SOI dated January 5, 2009 that the MVR recordings were nonexistent. Because the recordings were nonexistent they could not have been disclosed to the Complainant or delivered to the GRC for *in camera* examination.

As such, the filing of this complaint did not bring about a change (voluntary or otherwise) in the Custodian's conduct. Therefore, pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Complainant is not a "prevailing party" entitled to an award of reasonable attorney's fees.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Council's June 29, 2010 Interim Order should be reconsidered because the Council failed to consider probative, competent evidence as part of its April 8, 2010 Interim Order; to wit, that the Custodian certified that the mobile video recorder recordings do not exist, therefore the Custodian could not deliver to the Government Records Council the mobile video recorder media for an *in camera* examination within the time period provided by said Order, as extended, because the record was nonexistent.
2. Because the Custodian certified in the Statement of Information dated January 5, 2009 that the mobile video recordings were nonexistent, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). It is therefore concluded upon reconsideration 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 and this complaint should not be referred to the Office of Administrative Law for a determination of this issue.
3. The filing of this complaint did not bring about a change (voluntary or otherwise) in the Custodian's conduct. Therefore, pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Complainant is not a "prevailing party" entitled to an award of reasonable attorney's fees.

Prepared By: John E. Stewart, Esq.

Approved By: Catherine Starghill, Esq.
Executive Director

October 19, 2010



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

INTERIM ORDER

June 29, 2010 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2008-280

v.

Wall 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, finds that:

1. Because the Custodian certified on January 5, 2009 that no records relevant to the complaint were destroyed, and because the Custodian subsequently certified on April 26, 2010 that he is unable to locate the mobile video recorder media ordered by the Council for *in camera* examination, said certifications being made at all times during the pendency of this complaint, the Custodian violated N.J.S.A. 47:1A-7.c. and failed to comply with the terms of the Council’s April 8, 2010 Interim Order.
2. Because the Custodian failed to safeguard existing records from destruction, he could not deliver to the GRC the mobile video recorder media for an *in camera* examination within the time period provided by the Council’s April 8, 2010 Interim Order, as extended, and thereby denied the Complainant any opportunity for access to the requested records. Thus, it is possible that the Custodian’s actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional.
3. Because the Custodian failed to comply with the terms of the Council’s Interim Order dated April 8, 2010, by not delivering the requested mobile video recorder media to the GRC for an *in camera* examination within the time provided for such compliance, as extended, the Council could not make a determination as to whether access was or was not improperly denied; therefore, pursuant to the analyses and decisions in Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Council



cannot deliver a finding that the Complainant is a prevailing party entitled to an award of reasonable attorney's fees.

4. In view of the Custodian's actions, a fact finder could conclude that the Complainant was the victim of dilatory, obdurate or vexatious conduct by the Custodian during the pendency of the complaint directly resulting in the Council's inability to make a determination as to whether access was or was not improperly denied and prevailing party attorney fees should be awarded.
5. This complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian's actions amount to a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances and, if so, whether the Complainant is entitled to prevailing party attorney fees and the reasonable amount thereof.

Interim Order 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 12, 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. 2008-280

v.

**Wall Police Department (Monmouth)²
Custodian of Records**

Records Relevant to Complaint:

GRC Complaint Number 2008-280

1. DVD or VHS format copies of mobile video and audio recordings made by Wall Police Officer Eric Olsen on April 14, 2008 from 9:00 am to 9:20 am.
2. Telephone and police radio transmission audio recordings for April 14, 2008 from 9:00 am to 9:30 am.
3. Telephone and police radio transmission audio recordings for May 8, 2008 from 9:00 pm to 9:20 pm.
4. Telephone and police radio transmission audio recordings for November 21, 2008 from 8:00 am to 8:15 am.

Request Made: November 21, 2008

Response Made: November 25, 2008

Custodian: Kevin Pressey, Records and ID Manager

GRC Complaints Filed: December 23, 2008³

Background

April 8, 2010

Government Records Council's ("Council") Interim Order. At the April 8, 2010 public meeting, the Government Records Council ("Council") considered the April 1, 2010 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. Following the Council's decision in Gorman v. Gloucester City Police Department, GRC Complaint No. 2004-108 (October 2008) because privacy interests of citizens is at issue, it is necessary for the GRC to conduct an *in*

¹ Represented by Walter M. Luers, Esq. (Oxford, NJ).

² Represented by Michael Elward, Esq., of King, Kitrick & Jackson, LLC (Brick, NJ).

³The GRC received the Denial of Access Complaints on said date.

camera examination of the requested mobile video recording media and then employ the common law balancing test established by the New Jersey Supreme Court in Doe v. Poritz, 142 N.J. 1 (1995) and subsequently applied by the Council in Merino v. Ho-Ho-Kus, GRC Complaint No. 2003-110 (February 2004). Therefore, the Custodian must disclose the requested mobile video recording media to the GRC so that an *in camera* examination may be conducted.

2. **The Custodian must deliver to the Council in a sealed envelope a copy of the requested unredacted mobile video recording media document (see #1 above), a record index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the record provided is the record requested by the Council for the *in camera* examination. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. Because the Complainant's requests for Item No. 2 through Item No. 4 of the records relevant to GRC Complaint Number 2008-280 and the Complainant's requests for Item No. 1 through Item No. 6 of the records relevant to GRC Complaint Number 2008-281 are overbroad and fail to specifically identify the records sought, and because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to conduct research to locate records potentially responsive to the Complainant's request pursuant to the Superior Court's decisions in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and the Council's decision in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008).
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

April 12, 2010

Council's Interim Order distributed to the parties.

April 16, 2010

Letter from the Custodian to the GRC. The Custodian forwards to the GRC two (2) compact discs and several documents which the Custodian states are some of the records responsive to Items No. 2, No. 3 and No. 4 of the Complainant's request. The Custodian states that he is working with the Information Technology ("IT") Division to

correct a disk drive issue so that the police recordings can be copied. The Custodian states that he will keep the GRC apprised of his progress.

April 19, 2010

Letter from the GRC to the Custodian. The GRC returns the compact discs and documents to the Custodian and informs the Custodian that the Council's Interim Order provides only for delivery to the GRC of a copy of the requested mobile video recorder ("MVR") media in unredacted form, a document or redaction index and a legal certification that the record provided is the record requested by the Council for the *in camera* examination. The GRC grants the Custodian an additional five (5) business day extension of time to comply with the terms of the Council's April 8, 2010 Interim Order.

April 23, 2010

Telephone call from the Custodian to the GRC. The Custodian informs the GRC that he is also conferencing the Police Department's IT officer and the Custodian's Counsel onto the line. The IT officer commences an explanation of the difficulty he foresees in obtaining the police radio and telephone call records for the Complainant. The GRC informs the IT officer that the Police Department may feel free to retrieve and disclose those records to the Complainant, however, those records were not ordered for disclosure pursuant to the terms of the Council's April 8, 2010 Interim Order. The GRC informs the Custodian that the Interim Order provided only for delivery to the GRC of the unredacted MVR media, a document or redaction index and a legal certification that the record provided is the record requested by the Council for the *in camera* examination. The Custodian's Counsel states that providing a copy of the MVR media may be problematic because the agency no longer has the record. Counsel states that the Custodian will search a few more places and contact the GRC by the compliance deadline date, as extended.

April 26, 2010

Letter from the Custodian's Counsel to the GRC. Counsel forwards two (2) certifications to the GRC: one (1) each from the Custodian and the IT representative, Patrolman Steven Nash.

The Custodian certifies that he, along with Patrolman Nash, conducted an exhaustive search for the MVR recording made by Officer Eric Olsen on April 14, 2008 from 9:00 am to 9:20 am that was ordered by the Council to be delivered to the GRC for an *in camera* examination. The Custodian further certifies that he is unable to locate said record. The Custodian provides as an attachment to his certification a copy of the computer aided dispatch ("CAD") printout for the purported time period encompassed by the mobile video and audio recording.⁴

Patrolman Nash certifies that he has over thirteen (13) years of IT experience and was asked by the Custodian to attempt to retrieve the requested MVR recording.

⁴ Contrary to the Custodian's assertion, the CAD printout supplied to the GRC did not cover the time period encompassed by the requested MVR recording; rather it was for activity on November 21, 2008 from 7:45 am to 8:29 am. Moreover, a CAD printout was not permissible as a substitution for the MVR recording required to be delivered to the GRC pursuant to the Council's April 8, 2010 Interim Order.

Patrolman Nash certifies that the MVR digitally records images onto a stand alone computer in a police vehicle. The data is stored in the vehicle's computer system for approximately thirty (30) days, at which time it is written over by new data in continuous loop fashion; however, when a police vehicle returns to police headquarters the videos are uploaded to a base network and stored on a server that retains them for approximately three hundred forty (340) days. Nash further certifies that he checked the files and temporary user files on the server, as well as the files on a back-up server but was unable to retrieve the requested record. Nash concludes in his certification that the record cannot be recovered.

Analysis

Whether the Custodian complied with the Council's April 8, 2010 Interim Order?

OPRA provides:

"[a]t the request of the council, a public agency shall produce documents...with respect to the council's investigation of any complaint or the holding of any hearing." (Emphasis added.) N.J.S.A. 47:1A-7.c.

At its April 8, 2010 public meeting, the Council found that Item No. 1 of the records relevant to the complaint, an MVR recording made by Wall Police Officer Eric Olsen on April 14, 2008 from 9:00 am to 9:20 am, was not exempt from disclosure as overly broad material because the Complainant identified the records sought by media, date, time and creator. Thus, the Complainant's request sought a specifically identifiable record subject to disclosure.

Of paramount concern to the GRC with respect to disclosure of MVR media is the privacy interests of the citizenry. The New Jersey Superior Court, Appellate Division held that the GRC must enforce OPRA's declaration, in N.J.S.A. 47:1A-1, that "a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy." Serrano v. South Brunswick Twp., 358 N.J. Super. 352, 368 (App. Div. 2003). Because privacy interests of citizens was at issue in this matter, the Council deemed it necessary for the GRC to conduct an *in camera* examination of the requested MVR media and then employ the common law balancing test established by the New Jersey Supreme Court in Doe v. Poritz, 142 N.J. 1 (1995) and subsequently applied by the Council in Merino, *supra*. This balancing test is applicable to cases in which privacy interests are implicated and it allows the GRC to exercise its discretion in determining whether an individual's privacy interest is outweighed by any factors militating in favor of disclosure of a government record, including the Complainant's stated need for access to such information.

Accordingly, the Council's April 8, 2010 Interim Order directed the Custodian to disclose the requested MVR media to the GRC so that the GRC could conduct an *in camera* examination and thereby determine which segments, if any, of the MVR could be disclosed to the Complaint. However, the Custodian failed to deliver to the GRC the

MVR media within the time period provided by the Council's April 8, 2010 Interim Order as extended, because the Custodian certified that the record is no longer available.

To avoid destruction of records during the pendency of a complaint, the Superior Court decided in Paff v. NJ Department of Labor, 392 N.J. Super. 334, 341 (App. Div. 2007) that "...the agency to which the request is made shall be required to produce sworn statements by agency personnel setting forth in detail...a statement of the agency's document retention/destruction policy *and* the last date on which documents that may have been responsive to the request were destroyed." (Emphasis in original.) Accordingly, the GRC requires custodians to certify as to the status of the records responsive to the request, and in the instant complaint, the Custodian did provide such a certification. On January 5, 2009 the Custodian certified that:

"...no records relevant to the complaint have been destroyed and...they are maintained in accordance with New Jersey Department of State, Division of Archives and Records Management Local Police Departments Records Retention Schedule M900000-904."

The Custodian provided this certification forty-four (44) days following the Complainant's request for the records, which is, with respect to the requested MVR media, well within the agency's three hundred forty (340) day server retention period. Further, the Custodian knew that the Complainant alleged he had been unlawfully denied access to the records and, in as much as the records were in controversy; the Custodian had a duty to safeguard the records from destruction.

Therefore, because the Custodian certified on January 5, 2009 that no records relevant to the complaint were destroyed, and because the Custodian subsequently certified on April 26, 2010 that he is unable to locate the MVR media ordered by the Council for *in camera* examination, said certifications being made at all times during the pendency of this complaint, the Custodian violated N.J.S.A. 47:1A-7.c. and failed to comply with the terms of the Council's April 8, 2010 Interim Order.

Whether the Custodian's actions rise 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).

Here, because the Custodian failed to safeguard existing records from destruction, he could not deliver to the GRC the MVR media for an *in camera* examination within the time period provided by the Council’s April 8, 2010 Interim Order, as extended, and thereby denied the Complainant any potential opportunity for access to the requested records. Thus, it is possible that the Custodian’s actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional.

Whether the Complainant is a “prevailing party” pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney’s fees?

OPRA provides that:

“[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:

institute a proceeding to challenge the custodian's decision by filing an action in Superior Court...or

in lieu of filing an action in Superior Court, file a complaint with the Government Records Council...

A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6.

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the court held that a complainant is a “prevailing party” if he/she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. *Id.* at 432. Additionally, the court held that attorney’s fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial

determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. *Id.*

In Teeters, the complainant appealed from a final decision of the Government Records Council which denied an award for attorney's fees incurred in seeking access to certain public records via two complaints she filed under OPRA against the Division of Youth and Family Services (“DYFS”). The records sought involved an adoption agency having falsely advertised that it was licensed in New Jersey. DYFS eventually determined that the adoption agency violated the licensing rules and reported the results of its investigation to the complainant. The complainant received the records she requested upon entering into a settlement with DYFS. The court found that the complainant engaged in reasonable efforts to pursue her access rights to the records in question and sought attorney assistance only after her self-filed complaints and personal efforts were unavailing. *Id.* at 432. With that assistance, she achieved a favorable result that reflected an alteration of position and behavior on DYFS’s part. *Id.* As a result, the complainant was a prevailing party entitled to an award of a reasonable attorney's fee. Accordingly, the Court remanded the determination of reasonable attorney’s fees to the GRC for adjudication.

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, *supra*, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). The court in Buckhannon stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7th ed. 1999)). The court in Mason, *supra*, at 76, held that “requestors are entitled to attorney’s fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) ‘a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved’; and (2) ‘that the relief ultimately secured by plaintiffs had a basis in law.’ Singer v. State, 95 N.J. 487, 495, cert denied (1984).”

Here, the Complainant filed a complaint because he asserted that he was denied access to the requested records. The complaint sought relief by requesting a finding that the Custodian violated OPRA by not providing the records and an order that the Custodian provide the records. The Council ordered the Custodian to deliver a copy of the unredacted MVR media to the GRC so that the GRC could determine what, if any, segments of the MVR media were exempt from disclosure.

Because the Custodian failed to comply with the terms of the Council’s Interim Order dated April 8, 2010, by not delivering the requested MVR media to the GRC for an *in camera* examination within the time provided for such compliance, as extended, the Council could not make a determination as to whether access was or was not improperly denied; therefore, pursuant to the analyses and decisions in Teeters, *supra*, and Mason, *supra*, the Council cannot deliver a finding that the Complainant is a prevailing party entitled to an award of reasonable attorney’s fees.

In an analysis under Teeters, *supra*, and Mason, *supra*, the Custodian's failure to comply with the terms of the Council's April 8, 2010 Interim Order, therefore, has the effect of allowing the Custodian to potentially escape the assessment of prevailing party attorney fees. However, persuasive authority abounds to impose attorney fees on the basis of obdurate behavior by a party or counsel to a party.

The obdurate behavior exception generally requires a finding of dilatory, obdurate or vexatious conduct by the party against whom attorney fees are assessed. For example, in Graham v. Commonwealth Department of Environmental Resources, 79 Pa. Commw. 403 (1984), the agency refused to disclose hydrological information about the petitioners' lands under the State's Right-to-Know Law. The petitioners subsequently brought this action and, *inter alia*, asked for attorney fees under an obdurate behavior exception. In this matter, the court found that the petitioners were not entitled to attorney fees because they could not offer *sufficient proof* that they were "...victims of dilatory, obdurate or vexatious conduct during the pendency of [the] matter." *Id.* at 410. (Emphasis added.) Conversely, however, in Haas v. Haas, 2002 Ohio 6375 (2002), where the appellant misled the court at the parties' final divorce hearing which resulted in the appellee incurring significant expense, the appellate court upheld the trial court's award of attorney fees because it determined that the appellant acted "in bad faith, vexatiously, wantonly, obdurately, or for oppressive reasons." *Id.* See also Brenckle v. Arblaster, 320 Pa. Super. 87 (1983), where the appellants took numerous steps to frustrate a series of court orders dealing with the administration of a decedent's estate and the court determined that it "...may require a party to pay another participant's counsel fees if the party's conduct during the pendency of the matter was 'dilatory, obdurate, or vexatious'...[h]ere, the record supports the lower court's findings that appellants' conduct was arbitrary, vexatious, and in bad faith, and that the conduct of those who received the counsel fees and damage award was appropriate. *Id.* at 94.

In the instant case the Custodian:

- Knew the Complainant requested the MVR media on November 21, 2008.
- Certified on January 5, 2009 that no records relevant to the complaint had been destroyed and that the records were being safeguarded pursuant to New Jersey Department of State, Division of Archives and Records Management Local Police Departments Records Retention Schedule M900000-904.
- Failed to comply with the terms of the Council's April 8, 2010 Interim Order by disclosing the MVR media to the GRC so that the GRC could conduct an *in camera* examination and thereby determine which segments, if any, of the MVR could be disclosed to the Complainant.
- Certified on April 26, 2010 that he is not able to locate the requested the MVR media.

As custodian of records, the Custodian knew he had a duty to safeguard all records relevant to the complaint during the pendency of the complaint because the Council could find that he did not lawfully deny the Complainant access to the requested records and therefore order disclosure of such records. The Custodian, also by virtue of his position, knew or should have known the Superior Court's decision with respect to

the disposition of records during the pendency of a complaint as articulated in Paff, supra. By allowing the loss or destruction of the requested MVR media, the Custodian's actions served to prevent the GRC from conducting an *in camera* examination of said media, which could have resulted in disclosure of all or part of the record to the Complainant and consequently an award of prevailing party attorney fees.

This complaint should therefore be referred to the Office of Administrative Law for a determination of whether the Custodian's actions amount to a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances and, if so, whether the Complainant is entitled to prevailing party attorney fees and the reasonable amount thereof.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian certified on January 5, 2009 that no records relevant to the complaint were destroyed, and because the Custodian subsequently certified on April 26, 2010 that he is unable to locate the mobile video recorder media ordered by the Council for *in camera* examination, said certifications being made at all times during the pendency of this complaint, the Custodian violated N.J.S.A. 47:1A-7.c. and failed to comply with the terms of the Council's April 8, 2010 Interim Order.
2. Because the Custodian failed to safeguard existing records from destruction, he could not deliver to the GRC the mobile video recorder media for an *in camera* examination within the time period provided by the Council's April 8, 2010 Interim Order, as extended, and thereby denied the Complainant any opportunity for access to the requested records. Thus, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional.
3. Because the Custodian failed to comply with the terms of the Council's Interim Order dated April 8, 2010, by not delivering the requested mobile video recorder media to the GRC for an *in camera* examination within the time provided for such compliance, as extended, the Council could not make a determination as to whether access was or was not improperly denied; therefore, pursuant to the analyses and decisions in Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Council cannot deliver a finding that the Complainant is a prevailing party entitled to an award of reasonable attorney's fees.
4. In view of the Custodian's actions, a fact finder could conclude that the Complainant was the victim of dilatory, obdurate or vexatious conduct by the Custodian during the pendency of the complaint directly resulting in the Council's inability to make a determination as to whether access was or was not improperly denied and prevailing party attorney fees should be awarded.

5. This complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian's actions amount to a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances and, if so, whether the Complainant is entitled to prevailing party attorney fees and the reasonable amount thereof.

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Acting Commissioner

INTERIM ORDER

April 8, 2010 Government Records Council Meeting

Richard Rivera
Complainant

Complaint Nos. 2008-280 and 2008-281

v.

Wall Police Department (Monmouth)
Custodian of Record

At the April 8, 2010 public meeting, the Government Records Council (“Council”) considered the April 1, 2010 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. Following the Council’s decision in Gorman v. Gloucester City Police Department, GRC Complaint No. 2004-108 (October 2008) because privacy interests of citizens is at issue, it is necessary for the GRC to conduct an *in camera* examination of the requested mobile video recording media and then employ the common law balancing test established by the New Jersey Supreme Court in Doe v. Poritz, 142 N.J. 1 (1995) and subsequently applied by the Council in Merino v. Ho-Ho-Kus, GRC Complaint No. 2003-110 (February 2004). Therefore, the Custodian must disclose the requested mobile video recording media to the GRC so that an *in camera* examination may be conducted.
2. **The Custodian must deliver¹ to the Council in a sealed envelope a copy of the requested unredacted mobile video recording media document (see #1 above), a record index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4³, that the record provided is the record requested by the Council for the *in camera***

¹ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

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

³ “I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.”



examination. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.

3. Because the Complainant's requests for Item No. 2 through Item No. 4 of the records relevant to GRC Complaint Number 2008-280 and the Complainant's requests for Item No. 1 through Item No. 6 of the records relevant to GRC Complaint Number 2008-281 are overbroad and fail to specifically identify the records sought, and because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to conduct research to locate records potentially responsive to the Complainant's request pursuant to the Superior Court's decisions in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and the Council's decision in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008).
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 8th Day of April, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Harlynn A. Lack, Secretary
Government Records Council

Decision Distribution Date: April 12, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 8, 2010 Council Meeting**

**Richard Rivera¹
Complainant**

**GRC Complaint Number:
2008-280 and 2008-281²**

v.

**Wall Police Department (Monmouth)³
Custodian of Records**

Records Relevant to Complaint:

GRC Complaint Number 2008-280

1. DVD or VHS format copies of mobile video and audio recordings made by Wall Police Officer Eric Olsen on April 14, 2008 from 9:00 am to 9:20 am.
2. Telephone and police radio transmission audio recordings for April 14, 2008 from 9:00 am to 9:30 am.
3. Telephone and police radio transmission audio recordings for May 8, 2008 from 9:00 pm to 9:20 pm.
4. Telephone and police radio transmission audio recordings for November 21, 2008 from 8:00 am to 8:15 am.

GRC Complaint Number 2008-281

1. Mobile to mobile data terminal (“MDT”) transmission for August 4, 2007 from 4:00 pm to 4:30 pm.
2. All radio transmissions for August 4, 2007 from 4:00 pm to 4:30 pm.
3. All recorded telephone tapes for August 4, 2007 from 4:00 pm to 4:30 pm.
4. Police radio transmission and Fire Department band tapes for September 12, 2007 from 3:15 pm to 3:35 pm.
5. Police telephone tapes from all recorded phone lines for September 12, 2007 from 3:15 pm to 3:35 pm.
6. Police MDT messages for September 12, 2007 from 3:15 pm to 4:15 pm.

Requests Made: October 9, 2008 and November 21, 2008

Responses Made: October 15, 2008 and November 25, 2008

Custodian: Kevin Pressey, Records and ID Manager

GRC Complaints Filed: December 23, 2008⁴

¹ Represented by Walter M. Luers, Esq. (Oxford, NJ).

² Unless separately dated, each of the entries in the Background applies equally to both of these complaints. These matters have been consolidated for adjudication by the GRC based on the commonality of parties and issues inherent in each complaint.

³ Represented by Michael Elward, Esq., of King, Kitrick & Jackson, LLC (Brick, NJ).

Richard Rivera v. Wall Police Department (Monmouth), 2008-280 & 2008-281 – Findings and Recommendations of the Executive Director

Background

October 9, 2008

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

October 15, 2008

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's request which formed the basis for GRC Complaint No. 2008-281 on the second (2nd) business day following receipt of such request. The Custodian denies the Complainant's request and informs the Complainant that the request is too broad because it seeks recordings of blocks of time rather than a specific and identifiable record. The Custodian also asserts that the Complainant's request may encompass sensitive information pertaining to an investigation which could jeopardize the investigation, may encompass personal information such as social security numbers, driver's license numbers and similar information of a personal nature and may result in the release of medical, juvenile or domestic incident information. The Custodian asserts that he cannot redact information from all recorded phone lines and radio transmissions. The Custodian further asserts that retrieving the records that the Complainant requests would be labor intensive and substantially disrupt agency operations pursuant to N.J.S.A. 47:1A-5.g.

November 21, 2008

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

November 25, 2008

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's request which formed the basis for GRC Complaint No. 2008-280 on the second (2nd) business day following receipt of such request. The Custodian denies the Complainant's request and informs the Complainant that the request is too broad because it seeks a window of police radio and telephone recordings. The Custodian informs the Complainant that the Complainant must identify the specific record sought by referencing an event, person, case number, or other like criteria.

December 23, 2008

Denial of Access Complaint filed with the Government Records Council ("GRC") under complaint number 2008-280 with the following attachments:

- Complainant's OPRA request dated November 21, 2008
- Custodian's response to the OPRA request dated November 25, 2008

The Complainant's Counsel states that the Complainant filed his OPRA request for the records relevant to this complaint on November 21, 2008 and the Custodian responded to the Complainant's request on November 25, 2008. Counsel states that there

⁴The GRC received the Denial of Access Complaints on said date.
Richard Rivera v. Wall Police Department (Monmouth), 2008-280 & 2008-281 – Findings and Recommendations of the
Executive Director

is no dispute between the parties that the recordings requested by the Complainant are “public records” within the definition of OPRA.⁵

Counsel asserts that the Custodian stated he denied the Complainant’s request because it was not sufficiently specific and because the Custodian did not want to sift through a window of public records. Counsel states that the Custodian bears the burden of proving his denial is lawful pursuant to N.J.S.A. 47:1A-6. Counsel states that unlike the requestors in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005), the Complainant has not requested the Custodian undertake an open-ended research project. Counsel contends that, conversely, the Complainant was very specific and identified dates and times circumscribing the records sought. Counsel argues that the instant complaint is analogous to Paff v. Borough of Roselle, GRC Complaint No. 2007-255 (June 2008) because Counsel contends that the Council held in that matter that the complainant identified a type of government record within a specific date and therefore concluded the request was “not open-ended, nor does it require research[.]” Counsel states that if redactions are deemed necessary, the Custodian bears the burden of reviewing the recordings to determine what redactions, if any, would apply.

The Complainant’s Counsel requests the following relief:

1. That the GRC order the Custodian to produce copies of all of the records requested by the Complainant.
2. That the GRC make a determination that the Complainant is the prevailing party and award reasonable attorney’s fees.
3. That after investigating this matter the GRC makes a determination that the Custodian knowingly and willfully violated OPRA and unreasonably denied access to the records under the totality of the circumstances.

The Complainant does not agree to mediate this complaint.

December 23, 2008

Denial of Access Complaint filed with the Government Records Council (“GRC”) under complaint number 2008-281 with the following attachments:

- Complainant’s OPRA request dated October 9, 2008
- Custodian’s response to the OPRA request dated October 15, 2008

The Complainant’s Counsel states that the Complainant filed his OPRA request for the records relevant to this complaint on October 9, 2008 and the Custodian responded to the Complainant’s request on October 15, 2008. Counsel contends the Custodian denied the Complainant’s request for five (5) reasons:

⁵ The Complainant’s Counsel means “government records” pursuant to the definition in N.J.S.A. 47:1A-1.1.

1. The request is too broad.

Counsel states that unlike the requestors in MAG, supra, and Bent, supra, the Complainant has not requested the Custodian undertake an open-ended research project. Counsel contends that, conversely, the Complainant was very specific and identified dates and times circumscribing the records sought. Counsel argues that the instant complaint is analogous to Paff, supra, because Counsel contends that the Council held in that matter that the complainant identified a type of government record within a specific date and therefore concluded the request was “not open-ended, nor does it require research[.]” The Complainant’s Counsel asserts that the GRC should apply its decision in Paff, supra, and reject the Custodian’s argument. Counsel also asserts that there is no evidence the requested records are filed by names and identifiers; therefore the format of Complainant’s request is logical.

2 - 4. The information requested may be confidential.

Counsel argues that there is no evidence that the Custodian has reviewed any of the requested information, and, as such, the Custodian cannot espouse a good-faith belief that confidential information is contained within the requested records. Accordingly, Counsel asserts that this claim by the Custodian should also be rejected.

5. Retrieving the information would substantially disrupt agency operations.

Counsel argues that the Custodian’s contention that retrieving the information would substantially disrupt agency operations is only available to the Custodian after the Custodian has attempted to reach a reasonable solution with the Complainant that accommodates the interests of the Complainant and the agency, as per N.J.S.A. 47:1A-5.g. Counsel argues that because the Custodian did not attempt to reach a reasonable accommodation with the Complainant, this provision of OPRA is unavailable to the Custodian.

Counsel states that there is no dispute between the parties that the recordings requested by the Complainant are “public records” within the definition of OPRA.⁶ Further, Counsel asserts that if redactions are deemed necessary, the Custodian bears the burden to review the recordings and determine what redactions, if any, would apply.

The Complainant’s Counsel requests the following relief:

1. That the GRC order the Custodian to produce copies of all of the records requested by the Complainant.
2. That the GRC make a determination that the Complainant is the prevailing party and award reasonable attorney’s fees.
3. That after investigating this matter the GRC makes a determination that the Custodian knowingly and willfully violated OPRA and unreasonably denied access to the records under the totality of the circumstances.

The Complainant does not agree to mediate this complaint.

⁶ See footnote 5.

December 30, 2008

Request for the Statements of Information (“SOI”) sent to the Custodian.

January 5, 2009

Custodian’s SOI in response to GRC Complaint No. 2008-280 with the following attachments:

- Complainant’s OPRA request dated November 21, 2008
- Custodian’s response to the OPRA request dated November 25, 2008

The Custodian certifies that he did not conduct a search for the requested records because he knows the location of the records. The Custodian also certifies that no records relevant to the complaint have been destroyed and that they are maintained in accordance with New Jersey Department of State, Division of Archives and Records Management Local Police Departments Records Retention Schedule M900000-904.

The Custodian certifies that he received the Complainant’s OPRA request on November 22, 2008 and responded to the request on November 25, 2008.⁷ The Custodian certifies that the Complainant’s request is to review police radio and telephone transmissions as well as mobile video recordings (“MVR”) made during a period unilaterally defined by the Complainant. The Custodian avers that the Complainant does not identify a specific identifiable government record within the meaning of OPRA, but instead defines a period of time and asks that he be allowed to sift through all records in that time period. The Custodian denies the Complainant’s request because the Custodian contends the request does not constitute a valid request for a specific identifiable government record within the meaning of OPRA. In support of his position denying the Complainant access to the records, the Custodian cites New Jersey Builders Association v. New Jersey Council on Affordable Housing, 360 N.J. Super. 166 (App. Div. 2006), MAG Entertainment LLC v. Div. of ABC, 375 N.J. 534 (App. Div. 2005) and Bent v. Twp. of Stafford Police Dept., 381 N.J. Super. 30 (App. Div. 2005).⁸

The Custodian avers that the complaint relied upon by the Complainant in his Denial of Access Complaint, Paff, *supra*, is distinguishable from the instant matter because in Paff the complainant requested resolutions and minutes relating to certain public meetings whereas in the instant complaint the Complainant refers only to a time frame and not an externally fixed event such as a public meeting.

January 5, 2009

Custodian’s SOI in response to GRC Complaint No. 2008-281 with the following attachments:

- Complainant’s letter request dated October 9, 2008

⁷ The evidence of record reveals the Custodian received the records request on November 21, 2008. Further, November 22, 2008 was a Saturday and not a regular business day.

⁸ The Custodian means New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005).

- Custodian's response to the OPRA request dated October 15, 2008

The Custodian does not certify as to what his search for the requested records entailed. The Custodian certifies that the records are maintained in accordance with New Jersey Department of State, Division of Archives and Records Management Local Police Departments Records Retention Schedule M900000-904.

The Custodian certifies that he received the Complainant's OPRA request on October 10, 2008 and responded to the request on October 15, 2008. The Custodian certifies that the Complainant's request is to review police radio, telephone and data transmissions made during a period unilaterally defined by the Complainant. The Custodian avers that the Complainant does not identify a specific identifiable government record within the meaning of OPRA, but instead defines a period of time and asks that he be allowed to sift through all records in that time period. The Custodian denies the Complainant's request because the Custodian contends the request does not constitute a valid request for a specific identifiable government record within the meaning of OPRA. In support of his position denying the Complainant access to the records the Custodian cites New Jersey Builders, *supra*, MAG, *supra*, and Bent, *supra*.

The Custodian avers that the complaint relied upon by the Complainant in his Denial of Access Complaint, Paff, *supra*, is distinguishable from the instant matter because in Paff the complainant requested resolutions and minutes relating to certain public meetings whereas in the instant complaint the Complainant refers only to a time frame and not an externally fixed event such as a public meeting.

January 8, 2009

The Complainant's response to the Custodian's SOIs. The Complainant's Counsel recites the facts of MAG, *supra*, and Bent, *supra*. Counsel states that both of these cases contained requests that were framed as requests for discovery. Counsel asserts that the Complainant's requests were targeted according to date and time. Counsel cites three (3) cases that the GRC should rely upon in adjudicating the instant complaint: Paff, *supra*, Rivera v. Town of Guttenberg, GRC Complaint No. 2006-154 (June 2008) and O'Shea v. Stillwater, GRC Complaint No. 2007-253 (August 2009). The Complainant's Counsel states that all of the cases are analogous to the instant Complaint, but that Rivera is particularly noteworthy because in Rivera the Complainant requested telephone recordings for time periods ranging from less than one (1) hour to eleven (11) hours and the GRC did not find the requests overly broad or unclear.

January 8, 2009

E-mail from the Custodian's Counsel to the GRC. Counsel states that in the Complainant's response to the Custodian's SOIs the Complainant's Counsel cites an additional case, O'Shea, *supra*. Counsel requests an opportunity to reply, but during the interim, states that Paff, *supra*, is distinguishable from the instant matter because in Paff the records related to a public meeting, which is a fixed external event, and not a unilaterally defined window of time fixed by the requestor.

January 8, 2009

E-mail from the Custodian’s Counsel to the GRC. Counsel states that neither O’Shea, supra, nor Rivera, supra, addresses the Custodian’s argument. Counsel contends that the Custodian’s argument goes not to the breadth of the request but to the proper form of request, which under OPRA must be a request for a specifically identifiable government record.

October 2, 2009

E-mail from the GRC to the Complainant. The GRC asks the Complainant if he wants the GRC to use the same responses he provided to the GRC in an earlier complaint against the Wall Police Department⁹ as his answers to the following questions so that the GRC may employ the common law balancing test established by the New Jersey Supreme Court in Doe v. Poritz, 142 N.J. 1 (1995) to sufficiently analyze the Complainant’s requests for MVR materials:

1. Why do you need the requested record(s) or information?
2. How important is the requested record(s) or information to you?
3. Do you plan to redistribute the requested record(s) or information?
4. Will you use the requested record(s) or information for unsolicited contact of the individuals named in the government record(s)?

October 2, 2009

E-mail from the Complainant to the GRC. The Complainant states that the GRC should use his responses and documentation from Complaint Nos. 2008-142 and 2008-143 to answer the following questions:

Need for Access Questions	Complainant’s Response¹⁰
1. Why do you need the requested record(s) or information?	“I am seeking the information to determine what, if any, misconduct or criminal activity exists on the part of Wall Police officers and other Wall Township municipal employees as part of my independent review of activities.”
2. How important is the requested record(s) or information to you?	“Without these records and similar records requested on numerous occasions previously that were denied, I cannot demonstrate that Wall Police officers act ethically and in an unbiased manner when encountering members of the public with opposing views or seek more accountability.”

⁹ Rivera v. Wall Police Department (Monmouth), GRC Consolidated Complaint Nos. 2008-142 and 2008-143.

¹⁰ The Complainant went into much more detail in his responses which he put in the form of a certification. The Complainant indicated that he has reason to believe the Wall Police may have engaged in misconduct; however, the Complainant alleges that he needs the requested records to substantiate his position. The Complainant stated an intention to provide the records to investigators but he did not identify the investigative agency.

3. Do you plan to redistribute the requested record(s) or information?	“I have no intention to distribute the records.”
4. Will you use the requested record(s) or information for unsolicited contact of the individuals named in the government record(s)?	“I have no intention to contact named individuals other than [one individual] who was aware of my OPRA requests and provided [a] RELEASE AUTHORIZATION.”

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 further provides:

“...If the custodian of a government record asserts that part of a particular record is exempt from public access...the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record...[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.” N.J.S.A. 47:1A-5.g.

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.

Item No. 1 of GRC Complaint No. 2008-280 records request – DVD or VHS format copies of mobile video and audio recordings made by Wall Police Officer Eric Olsen on April 14, 2008 from 9:00 am to 9:20 am.

The Custodian stated he denied the Complainant’s request for this item because the request was too broad and sought a window of time. The Custodian informed the Complainant that the Complainant must identify the specific record sought by referencing an event, person, case number, or other like criteria. The Custodian in the SOI cites New Jersey Builders, supra, MAG, supra, and Bent, supra in support of his position.

The Complainant’s Counsel asserted that the Custodian stated he denied the Complainant’s request because it was not sufficiently specific. Counsel argued that the Custodian’s reliance upon the court decisions in MAG, supra, and Bent, supra, is misplaced because the Complainant has not requested that the Custodian undertake an open-ended research project. Counsel stated that the Complainant was very specific and identified dates and times circumscribing the records sought. Counsel argued that the instant complaint is analogous to Paff, supra, because Counsel asserted that the Council held in that matter that the complainant identified a type of government record within a specific date; therefore, like here, the Complainant’s request was not open-ended.

As to the determination of whether the Complainant’s request is broad and unclear, the New Jersey Superior Court has held that “[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records ‘readily accessible for inspection, copying, or examination.’ N.J.S.A. 47:1A-1.*” (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005). The Court further held that “[u]nder OPRA, *agencies are required to disclose only ‘identifiable’ government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency’s files.*” (Emphasis added.) *Id.* at 549.

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),¹¹ the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records “accessible.” “As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency’s documents.”¹²

¹¹ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹² As stated in Bent, supra.

Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) the court cited MAG by stating that "...when a request is 'complex' because it fails to specifically identify the documents sought, then that request is not 'encompassed' by OPRA..." The court also quoted N.J.S.A. 47:1A-5.g in that "[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency." The court further stated that "...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency's need to...generate new records..."

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009) the Council held that "[b]ecause the Complainant's OPRA requests No. 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005)."

Based upon established prior Court and GRC decisions, the Complainant's request is not overly broad since he identifies the records sought by media, date, time and officer who created such records. Thus, the Complainant's request seeks specifically identifiable records.

Additionally, of paramount concern to the GRC with respect to the disclosure of the requested MVR media is the privacy interests of the citizenry. The New Jersey Superior Court, Appellate Division held that the GRC must enforce OPRA's declaration, in N.J.S.A. 47:1A-1, that "a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy." Serrano v. South Brunswick Twp., 358 N.J. Super. 352, 368 (App. Div. 2003). More recently, the New Jersey Supreme Court in Burnett v. County of Bergen, 198 N.J. 408, 422-423 (2009) made the following observations with respect to N.J.S.A. 47:1A-1:

"...[N.J.S.A. 47:1A-1] is neither a preface nor a preamble. It has no telltale "whereas" clauses that often appear in a preamble. It appears after OPRA's enactment clause, making the provision part of the body of the law. PRB Enterprises, Inc. v. S. Brunswick Planning Board, 105 N.J. 1, 5, 518 A.2d 1099 (1987)...[p]lus the very language expressed in the privacy clause reveals its substantive nature: it does not offer reasons why OPRA was adopted, as preambles typically do; instead, it focuses on the law's implementation. Specifically, it imposes an obligation on public agencies to protect against disclosure of personal information which would run contrary to reasonable privacy interests." *Id.* at 422-423.

The Council examined the issue concerning disclosure of MVR media in Gorman v. Gloucester City Police Department, GRC Complaint No. 2004-108 (October 2008). In that complaint the Council conducted an *in camera* examination of the MVR tape that was withheld from disclosure. Because the *in camera* examination raised substantial issues relevant to a citizen's privacy interest, in deciding Gorman, the Council turned to its decision in Merino v. Ho-Ho-Kus, GRC Complaint No. 2003-110 (February 2004). In that decision, the Council addressed the citizen's reasonable expectation of privacy under N.J.S.A. 47:1A-1 and, after stating that the GRC is required to safeguard from public access a citizen's personal information pursuant to the court's decision in Serrano, *supra*, turned to a common law test to determine whether, on balance, certain records should be disclosed.

In the instant matter (like in Gorman, *supra*), because privacy interests of citizens is at issue, it is necessary for the GRC conduct an *in camera* examination of the requested MVR media and then employ the common law balancing test established by the New Jersey Supreme Court in Doe v. Poritz, 142 N.J. 1 (1995) and subsequently applied by the Council in Merino, *supra*. This balancing test is applicable to cases in which privacy interests are implicated and it allows the GRC to exercise its discretion in determining whether an individual's privacy interest is outweighed by any factors militating in favor of disclosure of a government record, including the Complainant's stated need for access to such information.

Thus, the Custodian must disclose the requested MVR media to the GRC so that an *in camera* examination may be conducted.

Item No. 2, Item No. 3 and Item No. 4 of GRC Complaint No. 2008-280 records request – Telephone and police radio transmission audio recordings for: April 14, 2008 from 9:00 am to 9:30 am (Item No. 2), May 8, 2008 from 9:00 pm to 9:20 pm (Item No. 3) and November 21, 2008 from 8:00 am to 8:15 am (Item No. 4).

Item No. 1 through Item No. 6 of GRC Complaint No. 2008-181 records request –

1. Mobile to mobile data terminal (“MDT”) transmission for August 4, 2007 from 4:00 pm to 4:30 pm.
2. All radio transmissions for August 4, 2007 from 4:00 pm to 4:30 pm.
3. All recorded telephone tapes for August 4, 2007 from 4:00 pm to 4:30 pm.
4. Police radio transmission and Fire Department band tapes for September 12, 2007 from 3:15 pm to 3:35 pm.
5. Police telephone tapes from all recorded phone lines for September 12, 2007 from 3:15 pm to 3:35 pm.
6. Police MDT messages for September 12, 2007 from 3:15 pm to 4:15 pm.

The Custodian certified that the Complainant's requests are for police radio, telephone and data transmissions made during a period of time defined by the Complainant. The Custodian certified that the Complainant's request for these items is too broad and does not identify a specific identifiable government record within the meaning of OPRA, but instead seeks recordings of blocks of time rather than specific and identifiable records. In support of his position, the Custodian cited New Jersey Builders, *supra*, MAG, *supra*, and Bent, *supra*.

The Custodian also stated that the Complainant's requests may encompass sensitive and personal information such as social security numbers, driver's license numbers and similar information of a personal nature. The Custodian further stated that he cannot redact information from all recorded phone lines and radio transmissions and that retrieving the records that the Complainant requests would be labor intensive and substantially disrupt agency operations pursuant to N.J.S.A. 47:1A-5.g.

The Complainant's Counsel argued that unlike the requestors in MAG, supra, and Bent, supra, the Complainant did not request that the Custodian undertake an open-ended research project. Counsel asserted that the Complainant was very specific and identified dates and times circumscribing the records sought. Counsel further argued that there is no evidence that the Custodian reviewed any of the requested information; therefore the Custodian cannot now assert that confidential information is contained within the requested records. Counsel claimed the instant complaint is analogous to Paff, supra, because Counsel asserted that the Council held in that matter that the complainant identified a type of government record within a specific date; therefore like here, the Complainant's request was not open-ended. The Complainant's Counsel also cites three (3) cases that he argued the GRC should rely upon in adjudicating the instant complaint: Paff, supra, O'Shea, supra, nor Rivera, supra. Counsel argued that all of the cases are analogous to the instant Complaint, but that Rivera is particularly noteworthy because in Rivera the Complainant requested telephone recordings for time periods ranging from less than one (1) hour to eleven (11) hours and the GRC did not find the requests overly broad or unclear.

The Complainant's Counsel further argued that the Custodian's statement that retrieving the information would substantially disrupt agency operations is not applicable in the instant matter because the Custodian under such circumstances has an obligation to attempt to reach a reasonable solution with the Complainant and the Custodian did not attempt to reach such a solution with the Complainant. Counsel also noted that the Custodian cannot escape the burden of reviewing the records prior to any disclosure and making redactions as necessary.

The Custodian's Counsel argued that, contrary to the Complainant's contention, Paff, supra, is not applicable in this matter because in Paff the complainant requested resolutions and minutes relating to certain public meetings whereas in the instant complaint the Complainant refers only to a time frame and not an externally fixed event such as a public meeting. Further, Counsel argued that Rivera, supra, and O'Shea, supra, cited by the Complainant do not address the Custodian's argument that a request for recordings covering a period of time defined by the Complainant does not constitute a request for a specifically identifiable government record within the meaning of OPRA.

In the Complainant's requests for Item No. 2 through 4 of the records relevant to GRC Complaint No. 2008-280 and the Complainant's requests for Item No. 2 through 5 of the records relevant to GRC Complaint No. 2008-281, the Complainant sought segments of police telephone and radio audio recordings spanning a fixed time period that he defined. With respect to Item No. 1 and 6 of the records relevant to GRC Complaint No. 2008-281 the Complainant sought segments of MDT message recordings for mobile to mobile and "police" transmissions, respectively.

In the above-referenced requests, despite the Custodian's request that he do so, the Complainant failed to identify the records he sought or even to make an attempt to identify the records by incident number, name of the person or persons involved, location of incident or even the type of incident in generic terms. Yet the Complainant knows enough about the records he is targeting to substantially narrow the scope of the time period encompassing several of the records. This is clear because the Complainant significantly reduced the time parameters in several of the records relevant to the instant complaint from those of an earlier complaint wherein he had requested the same recordings.¹³ The Complainant reduced the number of MVR recordings requested for April 14, 2008 from those made by all officers using such equipment down to those made by one (1) specific officer and he reduced the amount of recording time requested by almost seventy percent (70%). Also, the Complainant reduced the amount of telephone and police radio recording times requested for April 14, 2008 and May 8, 2008 by over eighty-five percent (85%) and almost eighty-seven percent (87%), respectively. The fact that the Complainant was able to decrease the time parameters of his requests so drastically supports the Custodian's position that the Complainant must be required to identify a *specific identifiable record*; otherwise the Custodian is forced to review and redact unnecessarily large segments of storage media on which the record is maintained.

Further, except for Item No. 5 of the records relevant to GRC Complaint No. 2008-281, the Complainant provided neither the telephone line(s) or number(s), nor the frequency number(s) or generic description(s) of the radio frequencies, from which he sought the recordings. For MDT transmissions, the Complainant failed to identify the transmitting or receiving terminal or terminals.

As made clear in MAG, *supra*, and its progeny (see analysis on pages 9 and 10), "...[u]nder OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt ..." (Emphasis added.) MAG, *supra*, at 549. Therefore, "...[t]o qualify under OPRA...the request must reasonably identify a record and not generally data, information or statistics." Bent, *supra*, at 37.

The Complainant's Counsel argued that unlike the requestors in MAG, *supra*, and Bent, *supra*, the Complainant was very specific and identified dates and times circumscribing the records he sought. The Complainant's Counsel argued that instead Paff, *supra*, Rivera, *supra*, and O'Shea, *supra*, are analogous to the instant Complaint and therefore should be followed by the GRC in this adjudication.

However in the withdrawn Rivera complaint, unlike here, the Custodian never denied the Complainant access to the records. The Custodian was prepared to disclose the requested records upon the Complainant's payment of a special service charge and the issue was whether the special service charge was reasonable and warranted. The only similarity between Rivera and the instant complaint is in the nature of the request. In Rivera, the complainant requested police telephone recordings for much longer periods of time than were requested in the instant complaint, but because the custodian decided to

¹³ See Rivera v. Wall Police Department, GRC Consolidated Complaint Nos. 2008-142 and 2008-143 (November 2009).
Richard Rivera v. Wall Police Department (Monmouth), 2008-280 & 2008-281 – Findings and Recommendations of the Executive Director

disclose the requested records the Council never had to adjudicate the issue of the validity of the request.

Although O'Shea had a fact pattern very similar to Paff, it is unnecessary to analyze O'Shea because the Council cited to Paff as precedent for its decision in O'Shea. In Paff, the Complainant identified the specific type of records sought and the dates said records were made by reference to an event fixed in time. All the Custodian had to do was check the meeting schedule and retrieve the records made on the pertinent meeting dates. Accordingly, the Council found that "...[b]ecause the Complainant identifies a type of government record...within a specific date...MAG and Bent do not apply to the request relevant to this complaint." The test of Paff, therefore, is a two-pronged one: the Complainant must identify (1) the record and (2) the specific date. Here, although the Complainant identified the specific date, he failed to identify the records. Instead, the Complainant identified the media upon which the records were recorded and, in effect, requested any and all records that happened to be captured on such media over a given period of time. Accordingly, because the facts of the instant complaint are materially different than the facts of Paff, Paff cannot be asserted to defeat the Custodian's contention that the Complainant's request is too broad and does not identify a specific identifiable government record pursuant to MAG and Bent.

Therefore, because the Complainant's requests for Item No. 2 through Item No. 4 of the records relevant to GRC Complaint Number 2008-280 and the Complainant's requests for Item No. 1 through Item No. 6 of the records relevant to GRC Complaint Number 2008-281 are overbroad and fail to specifically identify the records sought, and because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to conduct research to locate records potentially responsive to the Complainant's request pursuant to the Superior Court's decisions in MAG, *supra*, Bent, *supra*, New Jersey Builders, *supra*, and the Council's decision in Schuler, *supra*.

Because the Custodian did not unlawfully deny the Complainant access to any of the records relevant to the complaints, it is unnecessary for the Council to analyze whether the Custodian's retrieval of the records would substantially disrupt agency operations or whether the Custodian could redact information from all recorded phone lines and radio transmissions pursuant to N.J.S.A. 47:1A-5.g.

Whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees?

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Following the Council's decision in Gorman v. Gloucester City Police Department, GRC Complaint No. 2004-108 (October 2008) because privacy interests of citizens is at issue, it is necessary for the GRC to conduct an *in camera* examination of the requested mobile video recording media and then employ the common law balancing test established by the New Jersey Supreme Court in Doe v. Poritz, 142 N.J. 1 (1995) and subsequently applied by the Council in Merino v. Ho-Ho-Kus, GRC Complaint No. 2003-110 (February 2004). Therefore, the Custodian must disclose the requested mobile video recording media to the GRC so that an *in camera* examination may be conducted.
2. **The Custodian must deliver¹⁴ to the Council in a sealed envelope a copy of the requested unredacted mobile video recording media document (see #1 above), a record index¹⁵, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4¹⁶, that the record provided is the record requested by the Council for the *in camera* examination. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. Because the Complainant's requests for Item No. 2 through Item No. 4 of the records relevant to GRC Complaint Number 2008-280 and the Complainant's requests for Item No. 1 through Item No. 6 of the records relevant to GRC Complaint Number 2008-281 are overbroad and fail to specifically identify the records sought, and because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to conduct research to locate records potentially responsive to the Complainant's request pursuant to the Superior Court's decisions in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and the Council's decision in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008).
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

¹⁴ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

¹⁵ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

¹⁶ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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

Approved By: Catherine Starghill, Esq.
Executive Director

April 1, 2010