



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

**CHRIS CHRISTIE**  
*Governor*

**KIM GUADAGNO**  
*Lt. Governor*

**LORI GRIFA**  
*Commissioner*

**FINAL DECISION**

**June 29, 2010 Government Records Council Meeting**

Richard Rivera  
Complainant

Complaint No. 2010-12

v.

City of Atlantic City Police Department (Atlantic)  
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 made available to the Complainant all records responsive to the Complainant’s October 5, 2009 OPRA request in unredacted form; to wit, the Atlantic City Police Department use of force reports for 2008, and provided certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4 to the Executive Director within the time provided for such compliance, as extended, the Custodian has complied with the terms of the Council’s April 8, 2010 Interim Order.
2. Although the Custodian’s failure to provide a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days resulted in a “deemed” denial, because the Custodian in a timely manner complied with the Council’s Interim Order dated April 8, 2010, and forwarded a certification to the GRC in which the Custodian averred that the requested records had been made available to the Complainant in unredacted form, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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 29<sup>th</sup> 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 13, 2010**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Richard Rivera<sup>1</sup>  
Complainant**

**GRC Complaint No. 2010-12**

v.

**City of Atlantic City Police Department (Atlantic)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** On site inspection of use of force reports for 2008.<sup>3</sup>

**Request Made:** October 5, 2009<sup>4</sup>

**Response Made:** October 16, 2009

**Custodian:** Rosemary Adams, Clerk

**GRC Complaint Filed:** January 13, 2010<sup>5</sup>

**Background**

**April 8, 2010**

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

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<sup>1</sup> Represented by Walter M. Luers, Esq. (Oxford, NJ). Mr. Luers did not enter his appearance in this matter until January 27, 2010.

<sup>2</sup> Represented by Ben Kaufman, Esq. (Atlantic City, NJ). Mr. Kaufman did not enter his appearance in this matter until April 13, 2010.

<sup>3</sup> There were other records requested that are not relevant to this complaint.

<sup>4</sup> The Complainant filed a previous Denial of Access Complaint for this same OPRA request which was assigned complaint identification number 2009-288. The Complainant withdrew GRC Complaint No. 2009-288 in writing to the GRC on November 23, 2009 and the Council administratively dismissed the complaint on December 16, 2009.

<sup>5</sup> The GRC received the Denial of Access Complaint on said date.

2. Because the Superior Court in O’Shea v. Township of West Milford, 410 N.J. Super. 371 (App. Div. 2009) found that use of force reports cannot be exempt from disclosure under OPRA as criminal investigatory records because they are required to be made, and because the Custodian failed to otherwise cite a legal basis for exempting the requested records from access, the Custodian failed to meet her burden of proving that denial of access to the requested records is authorized by law pursuant to N.J.S.A. 47:1A-6., and the Custodian shall therefore disclose to the Complainant the use of force reports for 2008 in unredacted form, except for the names of subjects not arrested on those cases where there was an arrest made or where charges were made.
3. **The Custodian shall comply with paragraph #2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, if any, including a detailed document index explaining the lawful basis for any redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
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.

**April 13, 2010**

Council’s Interim Order distributed to the parties.

**April 13, 2010**

E-mail from the Custodian’s Counsel to the GRC. Counsel confirms an earlier telephone conversation this date with the GRC wherein Counsel requested an extension of time for the Custodian to comply with the Council’s Interim Order.

**April 13, 2010**

E-mail from the GRC to the Custodian’s Counsel. The GRC grants the Custodian an additional five (5) business day extension of time to comply with the Council’s Interim Order. The GRC informs Counsel that the Custodian has until the end of business on April 27, 2010 to comply with the terms of the Council’s Interim Order.

**May 5, 2010**

E-mail from the Custodian’s Counsel to the GRC. Counsel asks for a confirmation from the GRC that the Custodian has complied with the terms of the Council’s April 8, 2010 Interim Order.

**May 5, 2010**

E-mail from the GRC to the Custodian’s Counsel. The GRC informs the Custodian’s Counsel that the Custodian has failed to comply with the terms of the Council’s Interim Order.

**May 5, 2010**

E-mail from the Custodian's Counsel to the GRC. Counsel requests an extension of time until May 7, 2010 for the Custodian to comply with the Council's Interim Order.

**May 5, 2010**

E-mail from the GRC to the Custodian's Counsel. The GRC informs Counsel that the Executive Director of the GRC grants the Custodian an additional extension of time until May 7, 2010 for the Custodian to comply with the Council's Interim Order.

**May 6, 2010**

Custodian's response to the Council's Interim Order. The Custodian certified that the records described in Paragraph No. 2 of the Council's April 8, 2010 Interim Order were made available to the Complainant in unredacted form.

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

At its April 8, 2010 public meeting, the Council determined that the Custodian failed to meet her burden of proving that denial of access to the records requested by the Complainant was authorized by law. Accordingly, the Council ordered the Custodian to disclose to the Complainant said records with any appropriate redactions, a detailed document index explaining the lawful basis for any redaction, and certified confirmation of compliance to the GRC's Executive Director within five (5) business days from receipt of the Council's Interim Order.

Upon receipt of the Council's April 8, 2010 Interim Order on April 13, 2010, the Custodian's Counsel contacted the GRC to state that the Custodian would need more time in order to comply with the Interim Order. The GRC granted the Custodian an additional five (5) business days which extended the compliance deadline until the end of business on April 27, 2010. On May 5, 2010, the Custodian's Counsel asked for a confirmation from the GRC that the Custodian complied with the terms of the Council's April 8, 2010 Interim Order. After the GRC informed Counsel that the Custodian had not complied with the terms of the Interim Order, Counsel requested an extension of time until May 7, 2010 for the Custodian to comply with the terms of said Order. The GRC Executive Director granted the requested extension of time and the Custodian on the following day forwarded a certification to the GRC in which the Custodian averred that the records described in Paragraph No. 2 of the Council's Interim Order, the Atlantic City Police Department use of force reports for 2008, had been made available to the Complainant in unredacted form.

Accordingly, because the Custodian made available to the Complainant all records responsive to the Complainant's October 5, 2009 OPRA request in unredacted form; to wit, the Atlantic City Police Department use of force reports for 2008, and provided certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4

to the Executive Director within the time provided for such compliance, as extended, the Custodian has complied with the terms of the Council's April 8, 2010 Interim Order.

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

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

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

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

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86, 107 (App. Div. 1996).

Here, the Custodian unlawfully denied the Complainant access to the records relevant to the complaint. Thereafter, the Council by Interim Order dated April 8, 2010 directed the Custodian to disclose the records responsive to the Complainant's October 5, 2009 OPRA request with any appropriate redactions and a detailed document index explaining the lawful basis for any such redaction and also forward certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days from receipt of said Order. Subsequently the Custodian, in a timely manner, forwarded a certification to the GRC in which the Custodian averred that the records described in Paragraph No. 2 of the Council's Interim Order, had been made available to the Complainant in unredacted form.

Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, because the Custodian in a timely manner complied with the Council's Interim Order dated April 8, 2010, and forwarded a certification to the GRC in which the Custodian averred that the requested records had been made available to the Complainant in unredacted form, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian made available to the Complainant all records responsive to the Complainant's October 5, 2009 OPRA request in unredacted form; to wit, the Atlantic City Police Department use of force reports for 2008, and provided certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4 to the Executive Director within the time provided for such compliance, as extended, the Custodian has complied with the terms of the Council's April 8, 2010 Interim Order.
  
2. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, because the Custodian in a timely manner complied with the Council's Interim Order dated April 8, 2010, and forwarded a certification to the GRC in which the Custodian averred that the requested records had been made available to the Complainant in unredacted form, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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 No. 2010-12

v.

City of Atlantic City Police Department (Atlantic)  
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. The Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Superior Court in O’Shea v. Township of West Milford, 410 N.J. Super. 371 (App. Div. 2009) found that use of force reports cannot be exempt from disclosure under OPRA as criminal investigatory records because they are required to be made, and because the Custodian failed to otherwise cite a legal basis for exempting the requested records from access, the Custodian failed to meet her burden of proving that denial of access to the requested records is authorized by law pursuant to N.J.S.A. 47:1A-6., and the Custodian shall therefore disclose to the Complainant the use of force reports for 2008 in unredacted form, except for the names of subjects not arrested on those cases where there was an arrest made or where charges were made.
3. **The Custodian shall comply with paragraph #2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, if any, including a detailed document index explaining the lawful basis for any redaction, and simultaneously provide**





**certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4<sup>1</sup>, to the Executive Director.**

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

Interim Order Rendered by the  
Government Records Council  
On The 8<sup>th</sup> 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 13, 2010**

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<sup>1</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Richard Rivera<sup>1</sup>  
Complainant**

**GRC Complaint No. 2010-12**

v.

**City of Atlantic City Police Department (Atlantic)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** On site inspection of use of force reports for 2008.<sup>3</sup>

**Request Made:** October 5, 2009<sup>4</sup>

**Response Made:** October 16, 2009

**Custodian:** Rosemary Adams, Clerk

**GRC Complaint Filed:** January 13, 2010<sup>5</sup>

**Background**

**October 5, 2009**

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

**October 16, 2009**

The Custodian responds in writing to the Complainant's OPRA request on the eighth (8<sup>th</sup>) business day following receipt of such request. The Custodian acknowledges receipt of the Complainant's OPRA request and requests a two (2) week extension of time in order to retrieve all of the requested records.

**October 23, 2009**

E-mail from the Complainant to the Custodian. The Complainant informs the Custodian that he will withdraw his complaint if the requested records are disclosed to

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<sup>1</sup> Represented by Walter M. Luers, Esq. (Oxford, NJ). Mr. Luers did not enter his appearance in this matter until January 27, 2010.

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

<sup>3</sup> There were other records requested that are not relevant to this complaint.

<sup>4</sup> The Complainant filed a previous Denial of Access Complaint for this same OPRA request which was assigned complaint identification number 2009-288. The Complainant withdrew GRC Complaint No. 2009-288 in writing to the GRC on November 23, 2009 and the Council administratively dismissed the complaint on December 16, 2009.

<sup>5</sup> The GRC received the Denial of Access Complaint on said date.

him prior to the date the Custodian's Statement of Information ("SOI") is due to the GRC.

**October 30, 2009**

E-mail from the Custodian to the Complainant. The Custodian informs the Complainant, *inter alia*, that the records relevant to the complaint are being redacted and will be available to the Complainant on November 2, 2009.

**January 13, 2010**

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:<sup>6</sup>

- Complainant's OPRA request dated October 5, 2009
- Custodian's response to the OPRA request dated October 16, 2009
- E-mail from the Complainant to the Custodian dated October 23, 2009
- E-mail from the Custodian to the Complainant dated October 30, 2009

The Complainant states that he submitted the instant complaint because disclosure of the requested records was promised to him as an inducement to withdraw a previous complaint for the same records. The Complainant states that, although he received some of the requested records after he withdrew the previous complaint, the Custodian failed to disclose the records relevant to this complaint.

The Complainant states that he submitted his OPRA request to the Custodian on October 5, 2009 and that the Custodian responded to his request on October 16, 2009, requesting a two (2) week extension of time to retrieve the requested records. The Complainant contends that by the time the Custodian requested an extension of time, the statutorily mandated time for responding to the Complainant's OPRA request had expired. The Complainant argues that the requested records are disclosable and that the same type of records he previously requested for other years were disclosed to him by the Custodian.

The Complainant does not agree to mediate this complaint.

**February 3, 2010**

Request for the SOI sent to the Custodian.

**February 17, 2010**

Letter from the GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for an SOI on February 3, 2010, but to date has not received a response. Further, the GRC states that if the SOI is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

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<sup>6</sup> The Complainant also submitted pages from the Custodian's SOI in a previous complaint which are not relevant to the instant complaint and he submitted documentation from a previous OPRA request to serve as examples in the instant complaint.

## 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 that:

“A government record shall not include ... *criminal investigatory records...*” (Emphasis added) N.J.S.A. 47:1A-1.1.

OPRA states that:

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

OPRA further states that:

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

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

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

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In the instant complaint, the GRC twice tried to obtain a completed SOI from the Custodian. The GRC sent a request for the SOI to the Custodian on February 3, 2010. After the Custodian failed to return the completed SOI to the GRC, the GRC sent a letter to the Custodian dated February 17, 2010, wherein the GRC informed the Custodian that if the completed SOI was not submitted to the GRC within three (3) business days, the GRC would adjudicate the complaint based solely on the information provided by the Complainant.

The Complainant stated that he submitted his OPRA request to the Custodian on October 5, 2009 and that the Custodian responded to his request on October 16, 2009, requesting a two (2) week extension of time to retrieve the requested records. The evidence of record reveals, however, that the Custodian requested the extension of time beyond the statutorily mandated seven (7) business day time frame for responding to the Complainant’s OPRA request.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i, a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.<sup>7</sup> Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Therefore, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g.,

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

N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

The Complainant further argued that the records relevant to the complaint should have been disclosed to him by the Custodian as promised and that identical records previously requested for other years had been disclosed to him by the Custodian.

N.J.S.A. 47:1A-1.1. 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. Further, pursuant to N.J.S.A. 47:1A-6., the Custodian has the burden of proving that the denial of access is authorized by law. In the instant complaint, the Custodian not only denied the Complainant access to records that are, barring any lawful exemptions, disclosable but also failed to cite a legal basis for exempting the requested records from public access.

Here, the Complainant requested an on site inspection of Atlantic City's use of force reports for 2008. Pursuant to the *New Jersey Attorney General's Guidelines on Use of Force* ("AG Guidelines") revised June 2000, a use of force report must be prepared in all instances when physical, mechanical or deadly force is used by a law enforcement officer. Such a report may be in the form of either the AG Guidelines "Model Use of Force Report" or an agency-designed report.

In a recent Superior Court decision, O'Shea v. Township of West Milford, 410 N.J. Super. 371 (App. Div. 2009), the court addressed the issue of access to use of force reports.<sup>8</sup> In O'Shea, the requestor sought a municipality's use of force reports for a multi-year period. The custodian denied the request by asserting that such reports are considered criminal investigatory records and as such are exempt from disclosure under OPRA. The trial court disagreed and held that use of force reports are not exempt from the disclosure requirements of OPRA as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1., and ordered the municipality to grant the requestor access to the requested use of force reports in unredacted form, except for the names of subjects not arrested on those cases where there was an arrest made or where charges were made.

In upholding the trial judge's decision regarding access to the records, the Appellate Division analyzed the OPRA definition of a criminal investigatory record and determined that a use of force report, in order to constitute a criminal investigatory record and thus be exempt from disclosure, must satisfy both prongs of a dual-prong test. First, the report must not be required by law to be made; second, it must pertain to a criminal investigation or related civil enforcement proceeding. With respect to the first prong, the court determined that:

“...there are no specific “statutes” or “administrative rules” that require [use of force reports] to be completed or maintained by a Township's police department. We hold, however, that [the AG Guidelines], that

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<sup>8</sup> In this decision the court expressly invalidated the Council's finding in Serrano v. New Brunswick Police Department Custodian of Records, GRC Complaint no. 2004-151 (April 2005).

requires the completion of [use of force reports] and their maintenance in the files of police departments, has the force of law for police entities.” *Id.* at 382.

Therefore, because the court found that use of force reports were required to be made, the first prong of the test could not be met. Thus the court found:

“The [use of force reports]...are nominally subject to OPRA, and there is no governing policy or statement containing specific provisions for exempting them from OPRA’s general rule of disclosure...” *Id.* at 385.<sup>9</sup>

Accordingly, because the Superior Court in *O’Shea, supra*, found that use of force reports cannot be exempt from disclosure under OPRA as criminal investigatory records because they are required to be made, and because the Custodian failed to otherwise cite a legal basis for exempting the requested records from access, the Custodian failed to meet her burden of proving that denial of access to the requested records is authorized by law pursuant to N.J.S.A. 47:1A-6., and the Custodian shall therefore disclose to the Complainant the use of force reports for 2008 in unredacted form, except for the names of subjects not arrested on those cases where there was an arrest made or where charges were made.

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

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

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

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

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<sup>9</sup>The Appellate Division also found that the second prong of the test, to wit; that the records must pertain to a criminal investigation or related civil enforcement proceeding, was not met. The court stated that a use of force report must be prepared in all instances involving the use of force and not just those instances involving an arrest; therefore, the second prong cannot be satisfied “...[i]n the absence of a factual showing that [the use of force report] pertained to an actual criminal investigation or to an existing related civil enforcement proceeding...” *O’Shea* at 385-386.

2. Because the Superior Court in O'Shea v. Township of West Milford, 410 N.J. Super. 371 (App. Div. 2009) found that use of force reports cannot be exempt from disclosure under OPRA as criminal investigatory records because they are required to be made, and because the Custodian failed to otherwise cite a legal basis for exempting the requested records from access, the Custodian failed to meet her burden of proving that denial of access to the requested records is authorized by law pursuant to N.J.S.A. 47:1A-6., and the Custodian shall therefore disclose to the Complainant the use of force reports for 2008 in unredacted form, except for the names of subjects not arrested on those cases where there was an arrest made or where charges were made.
3. **The Custodian shall comply with paragraph #2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if any, including a detailed document index explaining the lawful basis for any redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4<sup>10</sup>, to the Executive Director.**
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.

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

Approved By: Catherine Starghill, Esq.  
Executive Director

April 1, 2010

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<sup>10</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."