



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

January 29, 2013 Government Records Council Meeting

Melissa Ann Michalak
Complainant

Complaint No. 2010-220

v.

Borough of Helmetta (Middlesex)
Custodian of Record

At the January 29, 2013 public meeting, the Government Records Council (“Council”) considered the January 22, 2013 *In Camera* 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. Although the Custodian provided the GRC with a legal certification, the unredacted records requested for the *in camera* inspection and a document index on February 6, 2012, the Custodian failed to provide certified confirmation of compliance to the Executive Director that she provided the Complainant with the responsive call logs until March 7, 2012. Therefore, the Custodian failed to fully comply with the Council’s January 31, 2012 Interim Order.
2. The Custodian lawfully denied access to the requested incident reports because they meet the two-prong test provided for in N.J.S.A. 47:1A-1.1. and are thus exempt from disclosure as criminal investigatory records.
3. Chief Lewis’ failure to respond in writing within the statutorily mandated time frame resulted in a “deemed” denial of the Complainant’s OPRA request. Additionally, the Custodian unlawfully denied access to the requested dispatch log reports and failed to fully comply with the Council’s January 31, 2012 Interim Order. However, the Custodian lawfully denied access to the requested incident reports. Additionally, the evidence of record does not indicate that Chief Lewis and the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that Chief Lewis’ untimely response and the Custodian’s denial of access did 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 29th Day of January, 2013

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: February 6, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
January 29, 2013 Council Meeting**

**Melissa Ann Michalak¹
Complainant**

GRC Complaint No. 2010-220

v.

**Borough of Helmetta (Middlesex)²
Custodian of Records**

Records Relevant to Complaint: Copies of any and all reports including dispatch call logs where the Complainant was the caller/victim from July 2009 to present, specific to incidents occurring on July 25, 2010 and July 31, 2010.

Request Made: August 11, 2010

Response Made: None³

Custodian: Sandra Bohinski

GRC Complaint Filed: August 31, 2010⁴

Records Submitted for *In Camera* Examination:

- Incident Report No. L28 dated July 7, 2009.
- Incident Report No. L36 dated July 25, 2010.
- Incident Report No. L24 dated July 31, 2010.

Background

January 31, 2012

Government Records Council's Interim Order. At its January 31, 2012 public meeting, the Government Records Council ("Council") considered the January 24, 2012 Executive Director's Findings and Recommendations 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. Chief Lewis' 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

¹ No legal representation listed on record.

² Represented by David A. Clark, Esq., of Gluck, Walrath, L.L.P. (Trenton, NJ).

³ The evidence of record indicates that Chief Cully D. Lewis responded verbally to the Complainant denying access to the requested records; however, there is no specific date on record.

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

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 (Interim Order dated October 31, 2007). *See* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-106 (February 2009).

2. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the three (3) incident reports to determine the validity of the Custodian's assertion that the records are criminal investigatory in nature pursuant to N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), a document or redaction index⁶, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4⁷, that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. The Custodian has unlawfully denied access to the requested dispatch log reports on the basis that the Spotswood Police Department, with which the Borough had an interlocal agreement, held the responsive dispatch records. N.J.S.A. 47:1A-6. The Custodian had an obligation to obtain the responsive records from the Spotswood Police Department and provide same to the Complainant pursuant to Burnett v. County of Gloucester, 415 N.J. Super. 506 (App. Div. 2010) and Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (December 2005). **Thus, the Custodian shall obtain the responsive dispatch logs from the Spotswood Police Department and provide same to the Complainant.**
5. **The Custodian shall comply with Item No. 4 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁸, to the Executive Director.⁹**

⁵ The *in camera* records 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.

⁶ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁷ "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."

⁸ "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."

⁹ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

6. The Council defers analysis of whether Chief Lewis and 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.

February 2, 2012

Council's Interim Order ("Order") distributed to the parties.

February 6, 2012

E-mail from the Custodian to the GRC. The Custodian states that she received copies of the reports ordered to be submitted for an *in camera* review and will provide nine (9) copies of same via Overnight Mail. The Custodian states that she is redacting social security numbers.

The Custodian further states that she is receiving a copy of the responsive call log from Spotswood Police Department ("SPD") on this day and will contact the Complainant regarding delivery of the logs.

February 6, 2012

Certification of the Custodian in response to the Council's Interim Order with the following attachments:

1. Incident Report No. L28 dated July 7, 2009.
2. Incident Report No. L36 dated July 25, 2010.
3. Incident Report No. L24 dated July 31, 2010.

The Custodian certifies that pursuant to the Council's January 31, 2012 Interim Order, attached are nine (9) copies of the three (3) incident reports responsive to the Complainant's OPRA request. The Custodian certifies that she redacted the social security numbers of two (2) individuals. The Custodian further certifies that the responsive incident reports are required to be maintained for one (1) year in accordance with the Records Destruction Schedule established and approved by Records, Management Services ("RMS").

The Custodian certifies that she worked with Chief Cully Lewis ("Chief Lewis"), who is now retired, to provide a response to the Complainant's OPRA request. The Custodian certifies that after reviewing the Complainant's OPRA request, they determined that the responsive records were exempt from disclosure as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1.

The Custodian further certifies that she will provide the Complainant with the responsive call logs once the SPD forwards same. The Custodian certifies that she has already submitted a request to the SPD to obtain the records.

March 5, 2012

Letter from the GRC to the Custodian. The GRC states that its regulations provide that "[t]he Council, acting through its Executive Director, may require custodians to submit, within prescribed time limits, additional information deemed necessary for the

Council to adjudicate the complaint.” *N.J.A.C.* 5:105-2.4(1). The GRC states that it has reviewed the parties’ submissions and has determined that additional information is required.

The GRC states that as part of the Custodian’s certified confirmation of compliance dated February 6, 2012, she contended that the (3) responsive incident reports provided for an *in camera* review are criminal investigatory in nature. N.J.S.A. 47:1A-1.1. Moreover, the GRC states that the Custodian noted that the call logs would be provided to the Complainant once same were received from the SPD.

The GRC thus requests a legal certification, pursuant to N.J. Court Rule 1:4-4, in response to the following questions:

1. Whether the reports responsive to the Complainant’s OPRA request were part of or are currently part of a criminal investigation?
2. Whether there are any statutes, regulations or Attorney General Guidelines requiring that the responsive reports be made, maintained or kept on file?
3. Whether the Custodian provided the Complainant with the responsive dispatch call logs and on what date?

The GRC requests that the Custodian provide the requested legal certification and any supporting documentation by close of business on March 8, 2012. The GRC further advises that submissions received after this deadline date may not be considered by the Council for adjudication.

March 7, 2012

Custodian’s legal certification. The Custodian certifies that she coordinated with Chief Lewis to respond to the Complainant’s OPRA request. The Custodian certifies that Chief Lewis advised that the request be denied under N.J.S.A. 47:1A-1.1. because the responsive records were part of an ongoing criminal investigation. The Custodian certifies that after Chief Lewis retired, Sergeant Harold Messler (“Sgt. Messler”), the Borough of Helmetta’s (“Borough”) highest ranked law enforcement officer, advised her that the records are no longer part of an ongoing criminal investigation.

The Custodian certifies that she is not aware of any statutes, regulations or Attorney General guidelines requiring that the reports be made, maintained or kept on file by the Borough.

The Custodian further certifies that the Complainant retrieved the responsive call logs from the Custodian’s office on February 7, 2012.

Analysis

Whether the Custodian complied with the Council's January 31, 2012 Interim Order?

At its January 31, 2012 public meeting, the Council determined that because the Custodian has asserted that access to the requested reports were lawfully denied because same were criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1., the Council must determine whether the legal conclusion asserted by the Custodian is properly applied to the records at issue pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005). Therefore, the GRC must conduct an *in camera* review of the requested records to determine the validity of the Custodian's assertion that the requested record was properly denied.

The Council therefore ordered the Custodian to deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted records, a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery was to be received by the GRC within five (5) business days from receipt of the Council's Interim Order or on February 9, 2012.

Moreover, the Custodian was ordered to obtain the responsive dispatch call logs from the SPD and provide same to the Complainant. The Custodian was further required to submit certified confirmation of compliance to the Executive Director within five (5) business days from receipt of the Council's Interim Order or on February 9, 2012.

In regard to the first part of compliance, the Custodian provided nine (9) copies of the records required to be submitted for an *in camera* review and a document index to the GRC on February 6, 2012. In regard to the second part of compliance, the Custodian noted on February 6, 2012 that she would provide the call logs as soon as she received same from the SPD. The Custodian provided the call logs to the Complainant on February 7, 2012 but did not certify to same until March 7, 2012.

Thus, although the Custodian provided the GRC with a legal certification, the unredacted records requested for the *in camera* inspection and a document index on February 6, 2012, the Custodian failed to provide certified confirmation of compliance to the Executive Director that she provided the Complainant with the responsive call logs until March 7, 2012. Therefore, the Custodian did not fully comply with the Council's January 31, 2012 Interim Order.

Whether the Custodian unlawfully denied the Complainant access to the three (3) responsive incident reports?

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

OPRA defines a criminal investigatory record as:

“... a record *which is not required by law to be made, maintained or kept on file* that is *held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding.*” (Emphasis added.) N.J.S.A. 47:1A-1.1.

Thus, a record which is not required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding is encompassed within the definition of a criminal investigatory record set forth at N.J.S.A. 47:1A-1.1 and is therefore exempt from disclosure under OPRA.

In the instant complaint, the Custodian asserted in the SOI that she lawfully denied the Complainant access to the requested incident reports because same are exempt from disclosure as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1. Thus, the GRC must determine whether the requested incident reports are criminal investigatory records exempt from disclosure under OPRA.

In Morgano v. Essex County Prosecutor’s Office, GRC Complaint No. 2007-156 (October 2008), the Council held in pertinent part that “[t]he record requested ... a police arrest report, is required to be maintained or kept on file by the [Records Management Services (“RMS”)], therefore it is a government record subject to disclosure pursuant to N.J.S.A. 47:1A-1.1.” *See also* Bart v. City of Passaic (Passaic), GRC Complaint No. 2007-162 (Interim Order dated February 27, 2008).

However, in light of recent developments in the law, the Council now reverses its decision in Morgano, *supra*, and Bart, *supra*, and determines that the RMS record retention schedules do not operate as “law” under OPRA pursuant to N.J.S.A. 47:1A-1.1 to render criminal investigatory records disclosable under OPRA. The GRC’s order for disclosure of arrest reports in Morgano, *supra*, still rests on the observation that most information subject to disclosure under N.J.S.A. 47:1A-3(b) and thus arrest reports should be disclosed with appropriate redactions for ease of disclosure.

Prior to the 2002 passage of the OPRA, individuals seeking access to government documents could file pursuant to the Right-to-Know Law (previously codified at N.J.S.A. 47:1A-1 et seq.) or the common law. Under the Right-to-Know Law, individuals had the right to inspect and copy records “required by law to be made, maintained or kept on file by public officials.” State v. Marshall, 148 N.J. 89, 272 (1997). In the context of criminal investigatory records, the New Jersey Supreme Court held that “[t]he Right-to-Know Law does not provide ... the right to inspect the law-enforcement files ... because no law or regulation requires that such files ‘be made, maintained or kept.’” *Id.*; *see also* Daily Journal v. Police Dep’t of the City of Vineland, 351 N.J. Super. 110, 121 (App. Div.

2002); River Edge Savings & Loan Ass'n v. Hyland, 165 N.J. 540, 545 (App. Div. 1979). Thus, the Court considered criminal investigatory records outside of the set of documents required to be produced under the Right-to-Know Law.

The pre-OPRA case law permitted production of some of these criminal investigatory records only after balancing the State's interest against the individual's and the public's interest in disclosure. Marshall, 148 N.J. at 273-74; Daily Journal, 351 N.J. Super. at 122-23. This common law "balancing test" required that the person seeking access demonstrate standing by showing an interest in the subject matter of the material, and then an "exquisite weighing process" involving six non-dispositive factors. Daily Journal, 351 N.J. Super. at 123 (quoting Beck v. Bluestein, 194 N.J. Super. 247, 263 (App. Div. 1984)); *see also* Loigman v. Kimmelman, 102 N.J. 98, 113 (1986).

This background framed the legislature's passage of OPRA in 2002. The bills originally introduced in the Assembly and Senate did not contain a general exemption for "criminal investigatory records." Senate No. 2003, 209th Sess. (N.J. 2000); Assembly No. 1309, 209th Sess. (N.J. 2000). However, at a public hearing on March 9, 2000 before the Senate Judiciary Committee, several witnesses expressed concern over the lack of clarity in the original OPRA legislation as to whether, as a general matter, prior exemptions that had been enacted by Executive Order or through case law under the Right-to-Know law would survive the passage of OPRA. *See, e.g.*, Transcript of Public Hearing on Senate Bill Nos. 161, 351, 573, and 866, at 23 (Mar. 9, 2000), *available at* <http://www.njleg.state.nj.us/legislativepub/Pubhear/030900gg.PDF> (statement of William J. Kearns, Esq., N.J. State League of Municipalities). The Judiciary Committee members unequivocally suggested that these exemptions would survive or would be provided for in a contemporaneously passed Executive Order. *Id.* at 29-30 ("In other words, we contemplated this as all of those protections that are provided in statutes, in legislative resolutions, and executive orders would remain in place.")(statement of Sen. Martin).

The exemption from disclosure for "criminal investigatory records" was then introduced in a May 3, 2001 floor amendment to the Senate bill by OPRA's co-sponsor, Senator Martin, and remains in that form in the law. In Senator Martin's statement accompanying the floor amendment he noted that "[t]he amendments *exempt criminal investigatory records of a law enforcement agency from the statutory right of access.* However, a common law right of access could be asserted to these and other records not accessible under the statute." (Emphasis added.) Statement to Senate No. 2003, 209th Sess. (N.J. May 3, 2011). This statement was reflected in the final structure of OPRA, which provided an exemption for "criminal investigatory records," but noted that "[n]othing contained in [OPRA] ... shall be ... construed as limiting the common law right of access to a government record, *including criminal investigatory records of a law enforcement agency.*" (Emphasis added.) N.J.S.A. 47:1A-8.

In addition, the May 3, 2001 floor amendment adopted the definition of "criminal investigatory records" in terms that mimicked the language used by the prior Right-to-Know Law. Specifically, a "criminal investigatory record" was defined to entail "a record *which is not required by law to be made, maintained or kept on file* that is held by a law enforcement agency which pertains to any criminal investigation or related civil

enforcement proceeding.” (Emphasis added.) Senate No. 2003 § 2, 209th Sess. (N.J. as amended, May 3, 2011).

Finally, in his message upon signing the final version of OPRA, Governor McGreevey mentioned only limited exemptions explicitly but included “exemptions for victims’ records, emergency and security information, *criminal investigatory records and other appropriate areas that warrant confidentiality.*” (Emphasis added.) Statement of Gov. James E. McGreevey upon passage of OPRA at 1 (Aug. 13, 2002).

The Legislature’s specific statement that the floor amendment was intended to keep criminal investigatory records as exempt from disclosure and its mimicking of the Right-to-Know Law in the definition of “criminal investigatory records” strongly suggests its intent to maintain the prior exemption as defined by the courts.

The courts’ subsequent interpretation of OPRA confirms this view. In Daily Journal v. Police Department of the City of Vineland, one of the last cases decided under the Right-to-Know Law, the Appellate Division analyzed the then-recently enacted OPRA statute as part of its application of the common law balancing test. The Court noted the exemption for and definition of “criminal investigatory records” under OPRA and found that the preservation of the common law balancing test was a “clear legislative acknowledgement that a compelling public interest is served by protecting the private interests of such citizens.” 351 N.J. Super. at 130. In other words, the Appellate Division viewed OPRA’s exemption from disclosure for criminal investigatory records as an endorsement of the common law balancing test as the means to gain access to criminal investigatory records. The courts have continued to apply the pre-OPRA exemption and common-law balancing test as developed under the Right-to-Know Law. *See, e.g., R.O. v. Plainsboro Police Dep’t*, No. A-5906-07T2, 2009 N.J. Super. Unpub. LEXIS 1560 (App. Div. June 17, 2009); Bent v. Township of Stafford Police Dep’t, 381 N.J. Super. 30 (App. Div. 2005).

The definition of “criminal investigatory records” under OPRA excludes documents that are required to be “maintained or kept on file” by a public official from the scope of the exemption. This definition becomes problematic because the New Jersey State Records Committee has, pursuant to statutorily granted authority, created a record retention schedule through the RMS that requires police and other agencies to “maintain” various criminal investigatory records. N.J.S.A. 47:3-20; N.J.A.C. 15:3-2.1(b); *see also N.J. Land Title Ass’n v. State Records Comm.*, 315 N.J. Super. 17, 26 (App. Div. 1998)(discussing the Legislature’s delegation of authority to the Committee in order to “centraliz[e] control of the State’s public records in a single agency whose expertise would assure uniformity in the decision-making process concerning the retention and disposition of those records.”).

Although the RMS schedule is likely sufficient to make the retention of such records mandatory,¹⁰ there are two strong arguments that the Legislature intended

¹⁰ *See O’Shea v. Township of W. Milford*, 410 N.J. Super. 371 (App. Div. 2009), wherein the Appellate Division found that the Attorney General’s guidance document requiring the completion of Use of Force Melissa Ann Michalak v. Borough of Helmetta (Middlesex), 2010-220 – *In Camera* Findings and Recommendations of the Executive Director

criminal investigatory records to be exempted from disclosure under OPRA despite the RMS requirements. First, the directive for the creation of the RMS schedules was passed by the legislature in 1953. Thus, when the New Jersey Supreme Court decided State v. Marshall, 148 N.J. 89, 272 (1997), the RMS schedules were in place, but the Court still concluded that “no law or regulation requires that [criminal investigatory records] ‘be made, maintained or kept.’” Marshall, 148 N.J. at 272. The Legislature’s passage of OPRA with this language can be construed as its acquiescence to the Marshall decision and the Court’s holding that no law requires that criminal investigatory records be maintained. See, e.g., Dep’t of Children & Families v. T.B., 207 N.J. 294, 307 (2011)(noting that “acquiescence on the part of Legislature,” or its “continued use of same language” is evidence that the legislature intended to maintain the construction given to a statute by prior case law)(citing Asbury Park Press, Inc. v. City of Asbury Park, 19 N.J. 183, 190 (1955)).

Additionally, the apparently wide scope of the RMS schedules would potentially take all documents that could be classified as “criminal investigatory records” outside of the definition set in OPRA and would therefore render the exemption meaningless. The courts have disfavored statutory constructions that render portions of a statute superfluous. See, e.g., N.J. Ass’n of School Administrators v. Schundler, 211 N.J. 535, (2012) at 553 (“[L]egislative language must not, if reasonably avoidable, be found to be inoperative, superfluous or meaningless.”)(quoting Franklin Tower One, L.L.C. v. N.M., 157 N.J. 602, 613 (1999)).

Therefore, it can be concluded that in passing OPRA, the Legislature intended to preserve the then-existing state of the law with respect to the disclosure of criminal investigatory records, *i.e.*, that the RMS record retention schedules do not operate to render criminal investigatory records disclosable under OPRA.

However, in North Jersey Media Group, Inc. v. Paramus, Docket No. BER-L-2818-11 (June 15, 2011), the Law Division was tasked with determining whether the responsive records were exempt as criminal investigatory records based on retention schedules set forth by RMS. The Court noted that:

“... in establishing legal support ‘[a] decision of the [GRC] shall not have value as a precedent for any case initiated in Superior Court.’ N.J.S.A. 47:1A-7. However, ‘we review final agency decisions with deference and that we will not ordinarily overturn such determinations unless they were arbitrary, capricious or unreasonable, or violated legislative policies expressed or implied in the act of governing the agency.’ Serrano v. South Brunswick Twp., 358 N.J. Super. 352, 363 (App. Div. 2003)(citing Campbell v. Dep’t of Civil Serv., 39 N.J. 556, 562 (1963)).” *Id.* at pg. 12.

Thus, in order to make a determination whether retention schedules effectively had the force of law, the Court looked to the Appellate Division’s decision in N.J. Land Title, *supra*, and the GRC’s decision in Bart v. City of Passaic (Passaic), GRC Complaint No.

Reports had the “force of law” for police departments because the Attorney General has the authority to issue such policy and directives. *Id.* at 382.

2007-162 (Interim Order dated February 27, 2008)(holding that arrest reports are government records under N.J.S.A. 47:1A-1.1. because they are required to retained until the final disposition of a relevant case per Records Series No. 0007-0000).

Regarding N.J. Land Title, the Court noted that although case law is sparse on the issue of the effect of retention schedules, this case appears to have answered the question of whether retention schedules carry the force of law in the affirmative. The Court reasoned that although it the Appellate Division "... did not directly state that [RMS] requirements, as approved by the State Records Committee, are law, based on the holding and reasons for the holding, the requirements at the least *appear* to carry the force of law." (Emphasis added.) *Id.* at pg. 28.

Regarding Bart, *supra*, the Court reasoned that RMS is responsible for ensuring that "government records are maintained in accordance with the State's public records laws ..." and thus developed retention schedules requiring police departments to maintain the responsive records for a certain amount of time. The Court further noted that, in Bart, *supra*, the Council determined that records required by RMS to be maintained or kept on file are considered government records as they are required by law to be made, maintained or kept on file. The Court reasoned that the Council's holding in Bart, *supra*, "has not been contradicted by any court of competent jurisdiction." *Id.* at pg. 17.

The NJMG Court thus held that the records "... are government records as they are required by [RMS] to be kept on file. N.J.S.A. 47:1A-1.1.; [RMS] Municipal Police Departments M900000-004, Records Series No. 0010-0000 ...; [RMS] Municipal Police Departments M900000-004, Records Series No. 0102-0001 through No. 0102-0003 ... they are not criminal investigatory records" *Id.* at pg. 22. The Court finally held that "[a]s defendants ... have failed to satisfy their burden to show the denial of access was proper, N.J.S.A. 47:1A-6, access to the requested records is not precluded pursuant to the criminal investigatory exemption." *Id.* at Pg. 29.

In an unpublished decision in North Jersey Media Group, Inc. v. Paramus, 2012 N.J. Super. Unpub. Lexis 1685 (App. Div. 2012), the Appellate Division subsequently affirmed the Law Division's decision "... substantially for the reasons articulated ..." therein that the requested police dispatch audio recordings and police video recordings were not considered "criminal investigatory" records because said records were required to be maintained by defendants pursuant to their retention schedules set forth by RMS. The Appellate Division further noted that the Court "concluded the [RMS] requirements carry the force of law." *Id.* at 5.

However, N.J. Court Rule 1:36-3 states that:

"No unpublished opinion shall constitute precedent or be binding upon any court. Except for appellate opinions not approved for publication that have been reported in an authorized administrative law reporter, and except to the extent required by res judicata, collateral estoppel, the single controversy doctrine or any other similar principle of law, no unpublished opinion shall be cited by any court. No unpublished opinion shall be cited to any court by counsel unless the court and all other parties are served

with a copy of the opinion and of all contrary unpublished opinions known to counsel.” *Id.*

Therefore, although North Jersey, *supra*, stands for the proposition that records retention schedules carry the force of law, this unpublished opinion does not constitute precedent, nor is it binding upon the GRC.

In the instant complaint, the GRC ordered an *in camera* review to determine whether the responsive incident reports were criminal investigatory in nature. However, an *in camera* review is no longer necessary because the Custodian certified that the records were part of an on-going criminal investigation and that she was not aware of any statutes, regulations or Attorney General guidelines requiring that the reports be made, maintained or kept on file by the Borough. Thus, the requested incident reports meet the two-prong test of determining whether a record is criminal investigatory in nature and are exempt from disclosure as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1.

Thus, the Custodian lawfully denied access to the requested incident reports because they meet the two-prong test provided in N.J.S.A. 47:1A-1.1 and are thus exempt from disclosure under OPRA as criminal investigatory records.

Whether Chief Lewis’ untimely response and 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 (Felder 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)).

Chief Lewis' failure to respond in writing within the statutorily mandated time frame resulted in a "deemed" denial of the Complainant's OPRA request. Additionally, the Custodian unlawfully denied access to the requested dispatch log reports and failed to fully comply with the Council's January 31, 2012 Interim Order. However, the Custodian lawfully denied access to the requested incident reports. Additionally, the evidence of record does not indicate that Chief Lewis and the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that Chief Lewis' untimely response and the Custodian's denial of access did 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. Although the Custodian provided the GRC with a legal certification, the unredacted records requested for the *in camera* inspection and a document index on February 6, 2012, the Custodian failed to provide certified confirmation of compliance to the Executive Director that she provided the Complainant with the responsive call logs until March 7, 2012. Therefore, the Custodian failed to fully comply with the Council's January 31, 2012 Interim Order.
2. The Custodian lawfully denied access to the requested incident reports because they meet the two-prong test provided for in N.J.S.A. 47:1A-1.1. and are thus exempt from disclosure as criminal investigatory records.
3. Chief Lewis' failure to respond in writing within the statutorily mandated time frame resulted in a "deemed" denial of the Complainant's OPRA request. Additionally, the Custodian unlawfully denied access to the requested dispatch log reports and failed to fully comply with the Council's January 31, 2012 Interim Order. However, the Custodian lawfully denied access to the requested incident reports. Additionally, the evidence of record does not indicate that Chief Lewis and the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that Chief Lewis' untimely response and the Custodian's denial of access did 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: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

January 22, 2013



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

RICHARD E. CONSTABLE, III
Acting Commissioner

INTERIM ORDER

January 31, 2012 Government Records Council Meeting

Melissa Ann Michalak
Complainant

Complaint No. 2010-220

v.

Borough of Helmetta (Middlesex)
Custodian of Record

At the January 31, 2012 public meeting, the Government Records Council ("Council") considered the January 24, 2012 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. Chief Lewis' 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 (Interim Order dated October 31, 2007). See Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-106 (February 2009).
2. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the three (3) incident reports to determine the validity of the Custodian's assertion that the records are criminal investigatory in nature pursuant to N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4³, that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

¹ The *in camera* records 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 record 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."

4. The Custodian has unlawfully denied access to the requested dispatch log reports on the basis that the Spotswood Police Department, with which the Borough had an interlocal agreement, held the responsive dispatch records. N.J.S.A. 47:1A-6. The Custodian had an obligation to obtain the responsive records from the Spotswood Police Department and provide same to the Complainant pursuant to Burnett v. County of Gloucester, 415 N.J. Super. 506 (App. Div. 2010) and Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (December 2005). **Thus, the Custodian shall obtain the responsive dispatch logs from the Spotswood Police Department and provide same to the Complainant.**
5. **The Custodian shall comply with Item No. 4 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁴, to the Executive Director.⁵**
6. The Council defers analysis of whether Chief Lewis and 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 31st Day of January, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: February 2, 2012

⁴ "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 Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 31, 2012 Council Meeting**

**Melissa Ann Michalak¹
Complainant**

GRC Complaint No. 2010-220

v.

**Borough of Helmetta (Middlesex)²
Custodian of Records**

Records Relevant to Complaint: Copies of any and all reports including dispatch call logs where the Complainant was the caller/victim from July 2009 to present, specific to incidents occurring on July 25, 2010 and July 31, 2010.

Request Made: August 11, 2010

Response Made: None³

Custodian: Sandra Bohinski

GRC Complaint Filed: August 31, 2010⁴

Background

August 11, 2010

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.

August 16, 2010

Letter from Chief Cully D. Lewis ("Chief Lewis") to Ms. Patricia Aiken ("Ms. Aiken"), of the Excessive Discipline Protection Database. Chief Lewis states that the Complainant submitted an OPRA request to the Borough of Helmetta ("Borough"). Chief Lewis states that he spoke with the Complainant and advised that he would provide a list of dates that the Complainant made reports to the Borough Police Department.

August 31, 2010

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

- Complainant's OPRA request dated August 11, 2010.

¹ No legal representation listed on record.

² Represented by David A. Clark, Esq., of Gluck, Walrath, L.L.P. (Trenton, NJ).

³ The evidence of record indicates that Chief Cully D. Lewis responded verbally to the Complainant denying access to the requested records; however, there is no specific date on record.

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

- Letter from Chief Lewis to Ms. Aiken dated August 16, 2010.

The Complainant states that she submitted an OPRA request to the Borough on August 11, 2010. The Complainant states that she spoke with Chief Lewis via telephone on an unspecified date, who stated that access to the responsive police reports was denied. The Complainant states that Chief Lewis further advised that he could only provide the Complainant with a list of dates that the Complainant reported incidents.

The Complainant states that she subsequently spoke with an unidentified Court clerk who offered to speak with Chief Lewis and get back to the Complainant. The Complainant stated that she received no further responses from the Borough.⁵

The Complainant does not agree to mediate this complaint.

August 31, 2010

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

September 3, 2010

Custodian’s SOI attaching the Complainant’s OPRA request dated August 11, 2010.

The Custodian certifies that no search was undertaken to locate the responsive records because such records are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. and the Borough does not maintain the requested dispatch call logs. The Custodian certifies that the calls are routed through the Spotswood Police Department (“SPD”), which maintains the records.

The Custodian also certifies that no records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management.

The Custodian certifies that she received the Complainant’s OPRA request on August 12, 2010. The Custodian certifies that she coordinated with Chief Lewis to provide a response to the Complainant’s OPRA request. The Custodian certifies that the following records are responsive to the Complainant’s OPRA request:

⁵ The Complainant states that after receiving no response, the Complainant hired an attorney who recently requested discovery from the Borough.
Melissa Ann Michalak v. Borough of Helmetta (Middlesex), 2010-220 – Findings and Recommendations of the Executive Director

(A) List of all records responsive to the OPRA request	(B) DARM Schedule for the responsive records	(C) List of all records provided to Complainant	(D) General nature description of redactions	(E) General nature description of records for which access was denied.	(F) List the legal explanation and statutory citation for the denial of access to records
Police investigation reports relating to incidents on July 11, 2009, July 25, 2010 and July 31, 2010 and dispatch call logs.	Records Retention Requirement: 1 year for incident reports, destroy thereafter.	None.	None.	<p>Incidents reported to the Borough Police Department:</p> <p>July 11, 2009 – Complainant alleged that neighbor made comments regarding Complainant’s ex-husband.</p> <p>July 25, 2010 – Complainant alleged that neighbor made comments regarding Complainant’s daughter and dog.</p> <p>July 31, 2010 – Complainant called police regarding unwanted person at Complainant’s door.</p>	Police investigative records are exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> . The Borough also does not maintain the responsive dispatch call logs for these incidents because the SPD operates the dispatch system and maintains the call logs.

The Custodian certifies that after reviewing the subject OPRA request, the Custodian determined that the responsive records were criminal investigatory records exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. The Custodian further certifies that the Borough does not maintain the requested dispatch call logs since its dispatch system is operated by the SPD. The Custodian certifies that the call logs are maintained and controlled by the SPD and therefore the Borough is not in possession of same.

The Custodian certifies that within the statutorily mandated time frame, Chief Lewis contacted the Complainant and advised that the responsive records were exempt

from disclosure as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1. and that the call logs were not maintained by the Borough. The Custodian certifies that as an accommodation, Chief Lewis created a list of reported incidents and provided it to the Complainant.

November 14, 2011

E-mail from the GRC to the Custodian. The GRC states that it is in need of additional information. The GRC states that the Custodian certified in the SOI that the SPD operates the Borough's dispatch system; however, the nature of the agreement between the Borough and the SPD is unclear. The GRC requests that the Custodian legally certify to the following:

Whether the SPD operates the Borough's dispatch system as part of a shared services agreement pursuant to N.J.S.A. 40A:65-1 et seq. (or the previous Interlocal Services Act at N.J.S.A. 40:8A-1 et seq.)?

The GRC requests that the Custodian submit the requested legal certification by close of business on November 16, 2011.

November 14, 2011

Custodian's legal certification. The Custodian certifies that she received the Complainant's OPRA request on August 12, 2010. The Custodian certifies that she contacted Chief Lewis (who has since retired) and provided him with a copy of the Complainant's OPRA request. The Custodian certifies that Chief Lewis advised the Custodian that he responded to the Complainant via e-mail on August 16, 2010.

The Custodian certifies that the Borough is not in possession of any dispatch call logs since the dispatch system is operated by the SPD. The Custodian certifies that Borough and the Borough of Spotswood have been in an interlocal agreement for many years for dispatch services.

November 17, 2011

E-mail from the GRC to the Custodian. The GRC states that it is in receipt of the Custodian's legal certification. The GRC states that in said certification, the Custodian certifies that Chief Lewis responded to the Complainant via e-mail on August 16, 2010; however, a copy of this e-mail has not been provided to the GRC.

The GRC requests that the Custodian provide a copy of the e-mail by close of business on November 21, 2011.

November 18, 2011

E-mail from the Custodian to the GRC. The Custodian requests an extension of time to submit the requested e-mail.

November 21, 2011

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension of time until November 28, 2011 to submit the requested e-mail.

November 23, 2011

E-mail from the Custodian to Andrew Ely (“Mr. Ely”), Police Director. The Custodian requests that Mr. Ely check the Police Department’s computers and files in an attempt to locate the requested e-mail. The Custodian states that the GRC has requested the e-mail and she has not been able to reach Chief Lewis.

November 23, 2011

E-mail from Mr. Ely to the Custodian. Mr. Ely confirms that he will search the Police Department computers and files. Mr. Ely further states that he will attempt to contact Chief Lewis.

November 28, 2011

E-mail from the Custodian to the GRC. The Custodian requests another extension of time to submit the requested e-mail as Chief Lewis was out of the State until November 27, 2011.

December 6, 2011

E-mail from the GRC to the Custodian. The GRC states that it is in receipt of the Custodian’s request for an extension of time to submit the requested e-mail. The GRC requests that the Custodian advise as to the status of submitting same.

December 7, 2011

E-mail from the Custodian to the GRC. The Custodian states that after consulting with Chief Lewis and Mr. Ely, the requested e-mail cannot be located.

Analysis

Whether Chief Lewis properly responded to the Complainant’s OPRA request?

OPRA provides 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.

Further, OPRA provides that:

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

OPRA 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.⁶ 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 (Interim Order dated October 31, 2007).

In this complaint, the Complainant asserts that she submitted an OPRA request to the Custodian on August 11, 2010. The evidence of record indicates that the Custodian forwarded the OPRA request to Chief Lewis and he subsequently verbally responded to the Complainant denying access to the requested records.

The Complainant attached to the Denial of Access Complaint a letter from Chief Lewis to Ms. Aiken acknowledging that he responded to the Complainant verbally. The Custodian further corroborated Chief Lewis' verbal response in the SOI. However, the Custodian subsequently certified on November 14, 2011 that Chief Lewis responded to the Complainant via e-mail on August 16, 2010 but the Custodian did not include a copy of the e-mail with the certification. The GRC requested that the Custodian locate and produce same. The Custodian advised the GRC on December 7, 2011 that she could not locate the e-mail.

OPRA requires that a custodian must respond in writing within seven (7) business days after receipt of an OPRA request. N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. or the request is "deemed" denied. In this instance, the Custodian forwarded the Complainant's OPRA request to Chief Lewis, who subsequently responded verbally and apparently in writing to said request. However, the Borough failed to provide to the GRC a copy of the e-mail from Chief Lewis to the Complainant dated August 16, 2010. Thus, because there is no evidence in the record to establish that Chief Lewis responded in writing to the Complainant's OPRA request on August 16, 2010, the Complainant's OPRA request is "deemed" denied.

Therefore, Chief Lewis' 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, supra. See Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-106 (February 2009).

⁶ 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.

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 ... A government record shall not include the following ... criminal investigatory records ... ‘*Criminal investigatory record*’ means a record *which is not required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding.*” (Emphasis added.) N.J.S.A. 47:1A-1.1.

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

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

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

Incident reports

The Complainant’s OPRA request sought copies of “all reports ... where the Complainant was the caller/victim from July 2009 to present specific to incidents occurring on July 25, 2010 and July 31, 2010.” Chief Lewis verbally responded denying access to same as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1. The Custodian subsequently certified in the SOI that three (3) reports responsive to the Complainant’s OPRA request exist. The Custodian further argued that these three (3) reports are exempt from disclosure as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1.

In Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council⁷ in which the Council dismissed the complaint by accepting the custodian's legal conclusion for the denial of access without further review. The Court stated that:

“OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records...When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.”

The Court also stated that:

“[t]he statute also contemplates the GRC’s *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7f. This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.”

Further, the Court stated that:

“[w]e hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal...There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC’s obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7f, which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.”

Therefore, pursuant to Paff, *supra*, the GRC must conduct an *in camera* review of the three (3) incident reports to determine the validity of the Custodian’s assertion that the records are criminal investigatory in nature pursuant to N.J.S.A. 47:1A-1.1.

Dispatch Log reports

The Complainant’s OPRA request also sought dispatch log reports wherein the Complainant was the caller. The Custodian certified in the SOI that dispatch call logs are not maintained by the Borough Police Department. The Custodian further certified that the SPD operates the dispatch system for the Borough; thus, thus the SPD maintains those records. The GRC subsequently requested that the Custodian legally certify to whether the Borough has entered into a shared services agreement with the SPD pursuant

⁷ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).
Melissa Ann Michalak v. Borough of Helmetta (Middlesex), 2010-220 – Findings and Recommendations of the Executive Director

to N.J.S.A. 40A:65-1 et seq. (or the previous Interlocal Services Act at N.J.S.A. 40:8A-1 et seq.). The Custodian certified on November 14, 2011 that the Borough and the Borough of Spotswood have been in an interlocal agreement for many years for dispatch services.

The instant complaint raises a novel issue. In this instance, the Borough has certified that the SPD operates a dispatch system on behalf of the Borough pursuant to an interlocal agreement. Thus, the issue here is whether a public agency is obligated to obtain records responsive to an OPRA request from another public agency with which it has an interlocal agreement for or with whom it is sharing services.

In Burnett v. County of Gloucester, 415 N.J. Super. 506 (App. Div. 2010), plaintiff appealed a summary judgment against him holding that production of records was not required because the same were not in the County's possession. The trial Court, relying on Bent v. Township of Stafford Police Department, 381 N.J. Super. 30, (App. Div. 2005), held that "... the requested documents were not in the custodian's possession, and the Clerk had no obligation to seek them from sources beyond the County's files." *Id.* at 511.

The Appellate Division reversed and remanded, holding that the trial court interpreted Bent too broadly. The Court reasoned that:

"[i]n Bent, the requester sought records and information regarding a criminal investigation of his credit card activities conducted jointly by the Stafford Township Police Department (STPD), the United States Attorney for New Jersey and a special agent of the Internal Revenue Service. As part of his request, Bent sought 'discrete records of the 1992 criminal investigation conducted by the STPD,' which were fully disclosed. *Id.* at 38 ... Additionally, he sought a '[c]opy of contact memos, chain of custody for items removed or turned over to third parties of signed Grand Jury reports and recommendations.' Bent v. Stafford Twp. Police Dept., GRC 2004-78, final decision (October 14, 2004). Affirming the determination of the [GRC], we stated: 'to the extent Bent's request was for records that either did not exist or were not in the custodian's possession, there was, of necessity, no denial of access at all.' Bent, *supra*, 381 N.J. Super. at 38 ... We continued by stating:

'Of course, even if the requested documents did exist, the custodian was under no obligation to search for them beyond the township's files. OPRA applies solely to documents 'made, maintained or kept on file in the course of [a public agency's] official business,' as well as any document 'received in the course of [the agency's] official business.' N.J.S.A. 47:1A-1.1. Contrary to Bent's assertion, although OPRA mandates that 'all government records ... be subject to public access unless exempt,' the statute itself neither specifies nor directs the type of record that is to be 'made, maintained or kept on file.' In fact, in interpreting OPRA's predecessor statute, the Right to Know Law, we found no

requirement in the law concerning ‘the making, maintaining or keeping on file the results of an investigation by a law enforcement official or agency into the alleged commission of a criminal offense ... Thus, even if the requested documents did exist in the files of outside agencies, Bent has made no showing that they were, by law, required to be ‘made, maintained or kept on file’ by the custodian so as to justify any relief or remedy under OPRA. N.J.S.A. 47:1A-1.1.’

... the circumstances presented in Bent [are] far removed from those existing in the present matter because, as we have previously concluded, the settlement agreements at issue here were ‘made’ by or on behalf of the Board in the course of its official business. Were we to conclude otherwise, a governmental agency seeking to protect its records from scrutiny could simply delegate their creation to third parties or relinquish possession to such parties, thereby thwarting the policy of transparency that underlies OPRA. N.J.S.A. 47:1A-1.” *Id.* at 516-517.

Moreover, in Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (December 2005), the complainant requested e-mails located on the Mayor’s home computer made to various individuals regarding Borough business. The custodian alleged that due to the location of the records, they were not government records. The GRC found that the definition of a government record is not restricted by the physical location of the record. The GRC further found that the records requested should be released in accordance with OPRA, to the extent that the records fell within the definition of a government record as provided in OPRA. Thus, the location of a record is immaterial to that document’s status as a government record. Meyers, *supra*.

Both Burnett and Meyers apply in the instant complaint. Specifically, the Borough entered into an interlocal agreement with the SPD to operate the Borough’s dispatch log. Similar to a third party agreement between a public agency and a private entity such as an insurance broker, the records responsive in this matter were records “made, maintained or kept on file” for the Borough by the SPD pursuant to said agreement. As in Burnett, *supra*, the responsive dispatch logs were created on behalf of the Borough by the SPD. Additionally, as previously held in Meyers, the location of the requested records is immaterial; thus, the Custodian had an obligation to obtain the responsive logs from the SPD for disclosure.

Therefore, the Custodian has unlawfully denied access to the requested dispatch log reports on the basis that the SPD, with which the Borough had an interlocal agreement, held the responsive dispatch records. N.J.S.A. 47:1A-6. The Custodian had an obligation to obtain the responsive records from the SPD and provide same to the Complainant pursuant to Burnett, *supra*, and Meyers, *supra*. The Custodian shall obtain the responsive dispatch logs from the SPD and provide same to the Complainant.

Whether Chief Lewis' untimely response and 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?

The Council defers analysis of whether Chief Lewis and 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. Chief Lewis' 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 (Interim Order dated October 31, 2007). *See* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-106 (February 2009).
2. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the three (3) incident reports to determine the validity of the Custodian's assertion that the records are criminal investigatory in nature pursuant to N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver⁸ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), a document or redaction index⁹, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4¹⁰, that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. The Custodian has unlawfully denied access to the requested dispatch log reports on the basis that the Spotswood Police Department, with which the Borough had an interlocal agreement, held the responsive dispatch records. N.J.S.A. 47:1A-6. The Custodian had an obligation to obtain the responsive records from the Spotswood Police Department and provide same to the Complainant pursuant to Burnett v. County of Gloucester, 415 N.J. Super. 506 (App. Div. 2010) and Meyers v. Borough of Fair Lawn, GRC Complaint No.

⁸ The *in camera* records 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.

⁹ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

¹⁰ "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."

2005-127 (December 2005). **Thus, the Custodian shall obtain the responsive dispatch logs from the Spotswood Police Department and provide same to the Complainant.**

5. **The Custodian shall comply with Item No. 4 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹¹, to the Executive Director.¹²**
6. The Council defers analysis of whether Chief Lewis and 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: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

January 24, 2012

¹¹ "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."

¹² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.