



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

FINAL DECISION

February 28, 2012 Government Records Council Meeting

Michelle O'Callaghan
Complainant

Complaint No. 2010-44

v.

Lower Township Police Department (Cape May)
Custodian of Record

At the February 28, 2012 public meeting, the Government Records Council ("Council") considered the February 21, 2012 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. The weight of the evidence of record militates toward a finding that the Custodian complied with the Council's December 20, 2011 Interim Order by disclosing all records required to be disclosed under the terms of the Council's Order in a timely manner.
2. Although the Custodian failed to respond to each item contained in the Complainant's OPRA request and failed to sign and date the request, and although the Custodian imposed an impermissible limitation on access by requiring the Complainant to complete and return the agency's Public Records Request Response form before the requested records would be disclosed, and although the Custodian failed to articulate a lawful exception for denying the Complainant access to Request Item #2, the Custodian did disclose all records required to be disclosed under the terms of the Council's December 20, 2011 Interim Order in a timely manner. Further, there is no evidence in the record to suggest that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, 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 28th Day of February, 2012

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Denise Parkinson Vetti, Esq., Secretary
Government Records Council

Decision Distribution Date: March 1, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
February 28, 2012 Council Meeting**

**Michelle O’Callaghan¹
Complainant**

GRC Complaint No. 2010-44

v.

**Lower Township Police Department (Cape May)²
Custodian of Records**

Records Relevant to Complaint: Copies of the following records:

1. Lower Township Police Department’s policy of acceptable conduct for police officers.
2. Tape or compact disc (“CD”) of the Complainant’s telephone conversations with communications officers and police officers on January 31, 2010 periodically from approximately 6:00 p.m. to 10:00 p.m.³
3. Audio or written record by and between communications officers, police officers and supervisors regarding an incident reported by the Complainant’s son.
4. Reports of incidents occurring at 18 Ellery Road, Villas, NJ from July 2009 to February 2, 2010.

Request Made: February 2, 2010

Response Made: February 2, 2010

Custodian: Brian Marker, Police Captain

GRC Complaint Filed: March 4, 2010⁴

Background

December 20, 2011

At the December 20, 2011 public meeting, the Government Records Council (“Council”) considered the December 13, 2011 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. Although the Custodian provided the Complainant with a written response to her OPRA request, the Custodian failed to respond to each item contained in the Complainant’s OPRA request and failed to sign and date the response. As

¹ No legal representation listed on record.

² Represented by Michael J. Donohue, Esq., Blaney & Donohue, P.A. (Wildwood, NJ).

³ The Complainant stated that Officer Boyle of the Lower Township Police Department informed her that these communications were recorded.

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

such, the Custodian's response that the Custodian will contact the Complainant with information about her request was legally insufficient and violated N.J.S.A. 47:1A-5.g. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).

2. Because the Custodian required that the Complainant complete and return the agency's Public Records Request Response form before the requested records would be disclosed, the Custodian imposed an impermissible limitation on access which resulted in the Custodian's failure to make the records readily accessible in violation of N.J.S.A. 47:1A-1. and N.J.S.A. 47:1A-5.i.
3. Because the Custodian certified in his Statement of Information dated March 10, 2010 that there are no such records titled in the manner the Complainant described, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to said records pursuant to N.J.S.A. 47:1A-6. and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. Because the Custodian did not articulate a lawful exception for denying the Complainant access to the records which constitute Item No. 2 of the Complainant's OPRA request, the Custodian failed to bear his burden of proving that the denial of access was authorized by law in violation of N.J.S.A. 47:1A-6.
5. The Custodian shall disclose to the Complainant the records of the Complainant's initial telephone call to the Police Department on January 31, 2010 as well as the records of three (3) additional telephone calls between the Complainant and the Lower Township Police Department from 6:00 p.m. to 10:00 p.m. on that date.
6. **The Custodian shall comply with paragraph #5 above within five (5) business days from receipt of the Council's Interim Order by either (a) disclosing said records to the Complainant and simultaneously providing certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director, or (b) providing a certification, in accordance with N.J. Court Rule 1:4-4, to the Executive Director averring that the record that was disclosed to the Complainant on April 20, 2010 was a complete and accurate record of the Complainant's telephone conversations with members of the Lower Township Police Department on January 31, 2010.**
7. The Custodian certified that the records responsive to request Item Numbers 3 and 4 were disclosed to the Complainant on February 26, 2010, and because there is no credible evidence in the record to refute said certification, there was no unlawful denial of access with respect to these two (2) requested items pursuant to N.J.S.A. 47:1A-5.g. and Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).

8. Because the amount charged by the Custodian for the thirty-nine (39) pages of records responsive to request Item Numbers 3 and 4 is within the parameters of N.J.S.A. 47:1A-5.b., which was the statute in effect at the time the Complainant filed her request, the Custodian did not unlawfully charge the Complainant an excessive fee for providing said records. See Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), and Hascup v. Waldwick Board of Education, GRC Complaint No. 2005-192 (April 2007).
9. 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.

December 21, 2011

Council's Interim Order distributed to the parties.

December 27, 2011

E-mail from the Custodian's Counsel to the GRC. The Custodian's Counsel informs the GRC that he was unaware of the Council's Interim Order because the GRC sent a copy of the Order to the former Solicitor, Anthony P. Monzo, Esq., instead of sending a copy of the Order to him. Counsel states that the Custodian recently provided him with a copy of the Order and that he will meet with the Custodian on December 29, 2011 to ensure compliance with the terms of the Order.

December 27, 2011

E-mail from the GRC to the Custodian's Counsel. The GRC informs Counsel that the GRC's records listed Mr. Monzo as the attorney of record for the Township because the GRC had neither a substitution of attorney form on file for the instant complaint nor any communication from the Township informing the GRC that there was a change in the Custodian's Counsel. The GRC further informs Counsel that the Custodian must comply with the terms of the Council's Order by December 30, 2011 and that if an extension of time is needed to comply with the Order, such extension of time should be requested by the Custodian.

December 28, 2011

Letter from the Custodian's Counsel to the GRC. Custodian's Counsel requests a ten (10) day extension of time to comply with the Council's Order.

December 28, 2011

E-mail from the GRC to the Custodian's Counsel. The GRC grants the Custodian a ten (10) day extension of time to comply with the Council's Order.

December 29, 2011

E-mail from the GRC to the Complainant. The GRC confirms a telephone conversation earlier this date between the Complainant and the GRC wherein the Complainant requested that the GRC check the records when received from the Custodian to make sure the Custodian disclosed all of the records ordered to be disclosed.

The GRC informs the Complainant that the records ordered for disclosure are disclosed directly to the Complainant and that she should contact the GRC if she fails to receive from the Custodian all of the records ordered for disclosure.

January 9, 2012

Letter from the Custodian's Counsel with the following attachments:

- Custodian's certification in response to the Council's Interim Order
- Counsel's certification of facsimile signature

The Custodian certifies that on January 9, 2011 he sent to the Complainant by certified mail a CD containing the recording of the Complainant's initial telephone call to the Lower Township Police Department dated January 31, 2010 and a recording of three (3) additional telephone calls between the Complainant and the Lower Township Police Department generated between 6:00 p.m. and 10:00 p.m. on January 31, 2010. The Custodian further certifies that the records he disclosed are in full compliance with the terms of the Council's December 21, 2012 Interim Order.⁵

January 12, 2012

Telephone call from the Complainant to the GRC. The Complainant states that she never received the records which were ordered to be disclosed to her pursuant to the Council's December 21, 2012 Order.

January 12, 2012

Telephone call from the GRC to the Custodian's Counsel. The GRC informs Counsel that the Complainant informed the GRC that she has not yet received the requested records in compliance with the Council's Order. Counsel informs the GRC that the records were mailed to the Complainant on January 9, 2012 and that he will attempt to locate the tracking form to check the status of delivery.

January 13, 2012

E-mail from the Custodian's Counsel to the GRC. The Custodian's Counsel provides the GRC with a United States Postal Service ("USPS") tracking form which indicates that delivery of First-Class Mail® was attempted in Norwood, Pennsylvania on January 10, 2012.⁶ The tracking form also states that notice of attempted delivery was left at the address. Counsel states that the tracking form was for delivery of a CD containing the records that were ordered by the Council to be disclosed to the Complainant. Counsel further states that if the records are not delivered by the USPS soon, he will obtain a duplicate copy of the records on CD and re-mail it to the Complainant.

January 13, 2012

Telephone call from the GRC to the Complainant. The GRC informs the Complainant that the Custodian's Counsel provided the GRC with a copy of a USPS tracking form which reveals the USPS attempted to make delivery of the requested

⁵ The Custodian means the Council's December 20, 2011 Interim Order.

⁶ The Complainant lives in Norwood, Pennsylvania.

records on January 10, 2012.⁷ The Complainant states that she works on weekdays and is not available to accept deliveries at her home. The GRC informs the Complainant that the USPS has the parcel containing her requested records and suggests to the Complainant that she make arrangements with the USPS to receive delivery of the parcel on a weekend day. The Complainant states that she will make arrangements with the USPS for delivery of the parcel.

January 13, 2012

E-mail from the GRC to the Custodian's Counsel. The GRC informs Counsel that the GRC conducted a telephone conversation with the Complainant wherein the GRC informed the Complainant that the USPS attempted to deliver the requested records to her but found no one at home and that the Complainant stated she will make arrangements with the USPS for delivery of the parcel.

January 16, 2012

E-mail from the Complainant to the GRC. The Complainant states that she received the parcel that was mailed to her by the Custodian's Counsel but that the CD she received did not contain all of the records that the Council ordered to be disclosed to her. Specifically, the Complainant states she did not receive a copy of a recorded telephone call by and between the police and the Complainant, the Complainant's daughter, and Lauren Swanson.⁸ The Complainant also states that she did not receive from the Custodian the telephone recordings in which the Lower Township Police threatened to arrest the Complainant and the Complainant's daughter.

January 18, 2012

E-mail from the GRC to the Complainant. The GRC informs the Complainant that the records that the Council ordered for disclosure encompassed the Complainant's telephone conversations with communications and police officers on January 31, 2010 between 6:00p.m. and 10:00 p.m. The GRC also informs the Complainant that the Custodian certified that the CD that was disclosed to the Complainant in compliance with the Council's Order contained the Complainant's initial phone call to the police as well as three (3) additional phone conversations between the Complainant and the police during the relevant time period. The GRC further informs the Complainant that a phone call by and between the Complainant, the Complainant's daughter and/or Lauren Swanson is not a record relevant to the complaint because the Complainant's OPRA request did not mention her daughter or Ms. Swanson as parties to a requested telephone conversation. The GRC informs the Complainant to file another OPRA request for those records. The GRC also informs the Complainant that the alleged telephone call between the Complainant and the police wherein the police threatened to arrest the Complainant is a record that should have been disclosed if that record was made during the relevant times indicated in the complaint. The GRC asks the Complainant to check her telephone records to ascertain that the alleged telephone call was placed on the date and time relevant to the Complaint and reply back to the GRC within three (3) business days.⁹

⁷ January 10, 2012 was a Tuesday.

⁸ Lauren Swanson is unknown to the GRC.

⁹ The Custodian and Custodian's Counsel were both copied on this e-mail and asked to check the Police Department records to make certain that all records ordered for disclosure were disclosed to the Complainant.
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January 20, 2012

E-mail from the Complainant to the GRC. The Complainant informs the GRC that she re-checked the CD recording of the telephone calls made to and from the Lower Township Police Department but not all of the requested telephone recordings are included on the CD. The Complainant further states that she will wait until January 23, 2012 to see if the records that are alleged to be missing are delivered from the Custodian to her.

January 23, 2012

E-mail from the Custodian's Counsel to the GRC attaching a certification from the Custodian. The Custodian certifies that an Internal Affairs investigation conducted by the Lower Township Police Department revealed that during the time period relevant to the Complainant's request a Lower Township Police officer spoke on a cell phone owned by the Complainant's son to a third party who was in the presence of the Complainant. The Custodian also certifies that Internal Affairs records indicate that during the telephone conversation the officer said that if the Complainant came to Lower Township and there was an altercation, the Complainant would be subject to arrest. The Custodian further certifies that the telephone conversation conducted over the cell phone was not conducted on a Police Department telephone and was not recorded. The Custodian also certifies that all recorded telephone conversations relevant to the complaint have been disclosed to the Complainant.

January 23, 2012¹⁰

E-mail from the Complainant to the GRC. The Complainant disputes the veracity of the Custodian's certification and contends that she did not receive from the Custodian the records of telephone calls recorded by Police Department equipment wherein members of the Lower Township Police Department threaten to arrest the Complainant and the Complainant's daughter.

Analysis

Whether the Custodian complied with the Council's December 20, 2011 Interim Order?

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

¹⁰ Other correspondence was received from the parties which is not relevant to this complaint or restates the facts/assertions already presented to the GRC.
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in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

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

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

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

At its December 20, 2011 public meeting, the Council determined that within five (5) business days from receipt of the Council’s Order the Custodian must comply with the Council’s Order by (a) disclosing to the Complainant the records of the Complainant’s initial telephone call to the Lower Township Police Department on January 31, 2010 as well as the records of three (3) additional telephone calls between the Complainant and the Police Department from 6:00 p.m. to 10:00 p.m. on that date and simultaneously providing certified confirmation of compliance to the Executive Director, or (b) providing a certification to the Executive Director averring that the record that was disclosed to the Complainant on April 20, 2010 was a complete and accurate record of the Complainant’s telephone conversations with members of the Lower Township Police Department on January 31, 2010. The Custodian sought, and the GRC granted, a ten (10) business day extension of time for the Custodian to comply with the Council’s Order, thereby extending the due date for compliance with the terms of the Order to January 12, 2012.

The Custodian’s Counsel provided the GRC with a certification executed by the Custodian dated January 9, 2012, wherein the Custodian certified that a CD containing records of the Complainant’s initial telephone call to the Lower Township Police Department on January 31, 2010 and the records of three (3) additional telephone calls between the Complainant and the Police Department from 6:00 p.m. to 10:00 p.m. on that same date were disclosed to the Complainant via certified mail on January 9, 2012. The Custodian therefore certified that he disclosed the records ordered for disclosure within the time frame for compliance with the Council’s Order, as extended.

Although the Custodian complied in a timely manner with the terms of the Council’s December 20, 2011 Interim Order, certifying that he disclosed all of the records responsive to the Order, the Complainant contends that the Custodian failed to disclose all of the records. Specifically, the Complainant asserts that the Custodian failed to disclose a copy of telephone recordings made within the relevant time period wherein the Lower Township Police threatened to arrest the Complainant and the Complainant’s daughter.

Because conflicting facts were raised in this complaint, the GRC by e-mail dated January 18, 2012 asked the Complainant and the Custodian to double-check their telephone records for the date and time relevant to the complaint to determine if evidence of other telephone calls might exist.

The Custodian responded to the GRC's request by forwarding a legal certification dated January 23, 2012, wherein the Custodian certified that he located a reference in an Internal Affairs investigation to a telephone conversation conducted during the time period relevant to the Complainant's request in which an officer of the Lower Township Police Department spoke to a third party who was in the presence of the Complainant. The Custodian further certified that the Internal Affairs records indicate that during the telephone conversation the officer said that if the Complainant came to Lower Township and there was an altercation, the Complainant would be subject to arrest; however, the Custodian certified that the cell phone the officer used was owned by the Complainant's son. The Custodian subsequently certified that, as such, the telephone conversation the officer conducted over the cell phone was not conducted on a Police Department telephone and was not recorded; therefore, no record of the telephone conversation exists.

The Complainant responded to the GRC's request via e-mail dated January 23, 2012 asserting that "[p]olice business is done on police equipment;" however she did not provide any evidence that subject telephone conversation was made using police equipment.

The evidence of record indicates that there is no dispute between the parties as to a telephone conversation having occurred in which a Lower Township Police officer stated that the Complainant could be subject to arrest should she become involved in an altercation in Lower Township; however, the Custodian certified that there is no recording of the statement because the officer made the statement over a privately owned telephone. Conversely, the Complainant contends that all police business is conducted using police equipment, but offers nothing to verify the accuracy of said statement.

Accordingly, the weight of the evidence of record militates toward a finding that the Custodian complied with the Council's December 20, 2011 Interim Order by disclosing all records required to be disclosed under the terms of the Council's Order in a timely manner.

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).

In the instant complaint, although the Custodian failed to respond to each item contained in the Complainant’s OPRA request and failed to sign and date the request; and although the Custodian imposed an impermissible limitation on access by requiring the Complainant to complete and return the agency’s Public Records Request Response form before the requested records would be disclosed; and although the Custodian failed to articulate a lawful exception for denying the Complainant access to Request Item #2; the Custodian did disclose all records required to be disclosed under the terms of the Council’s December 20, 2011 Interim Order in a timely manner. Further, there is no evidence in the record to suggest that the Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, 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. The weight of the evidence of record militates toward a finding that the Custodian complied with the Council’s December 20, 2011 Interim Order by disclosing all records required to be disclosed under the terms of the Council’s Order in a timely manner.
2. Although the Custodian failed to respond to each item contained in the Complainant’s OPRA request and failed to sign and date the request, and

although the Custodian imposed an impermissible limitation on access by requiring the Complainant to complete and return the agency's Public Records Request Response form before the requested records would be disclosed, and although the Custodian failed to articulate a lawful exception for denying the Complainant access to Request Item #2, the Custodian did disclose all records required to be disclosed under the terms of the Council's December 20, 2011 Interim Order in a timely manner. Further, there is no evidence in the record to suggest that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, 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, Esq.

Approved By: Catherine Starghill, Esq.
Executive Director

February 21, 2012



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

INTERIM ORDER

December 20, 2011 Government Records Council Meeting

Michelle O'Callaghan
Complainant

Complaint No. 2010-44

v.

Lower Township Police Department (Cape May)
Custodian of Record

At the December 20, 2011 public meeting, the Government Records Council ("Council") considered the December 13, 2011 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 Complainant with a written response to her OPRA request, the Custodian failed to respond to each item contained in the Complainant's OPRA request and failed to sign and date the response. As such, the Custodian's response that the Custodian will contact the Complainant with information about her request was legally insufficient and violated N.J.S.A. 47:1A-5.g. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. Because the Custodian required that the Complainant complete and return the agency's Public Records Request Response form before the requested records would be disclosed, the Custodian imposed an impermissible limitation on access which resulted in the Custodian's failure to make the records readily accessible in violation of N.J.S.A. 47:1A-1. and N.J.S.A. 47:1A-5.i.
3. Because the Custodian certified in his Statement of Information dated March 10, 2010 that there are no such records titled in the manner the Complainant described, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to said records pursuant to N.J.S.A. 47:1A-6. and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. Because the Custodian did not articulate a lawful exception for denying the Complainant access to the records which constitute Item No. 2 of the Complainant's OPRA request, the Custodian failed to bear his burden of proving that the denial of access was authorized by law in violation of N.J.S.A. 47:1A-6.



5. The Custodian shall disclose to the Complainant the records of the Complainant's initial telephone call to the Police Department on January 31, 2010 as well as the records of three (3) additional telephone calls between the Complainant and the Lower Township Police Department from 6:00 p.m. to 10:00 p.m. on that date.
6. **The Custodian shall comply with paragraph #5 above within five (5) business days from receipt of the Council's Interim Order by either (a) disclosing said records to the Complainant and simultaneously providing certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹, to the Executive Director,² or (b) providing a certification, in accordance with N.J. Court Rule 1:4-4, to the Executive Director averring that the record that was disclosed to the Complainant on April 20, 2010 was a complete and accurate record of the Complainant's telephone conversations with members of the Lower Township Police Department on January 31, 2010.**
7. The Custodian certified that the records responsive to request Item Numbers 3 and 4 were disclosed to the Complainant on February 26, 2010, and because there is no credible evidence in the record to refute said certification, there was no unlawful denial of access with respect to these two (2) requested items pursuant to N.J.S.A. 47:1A-5.g. and Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).
8. Because the amount charged by the Custodian for the thirty-nine (39) pages of records responsive to request Item Numbers 3 and 4 is within the parameters of N.J.S.A. 47:1A-5.b., which was the statute in effect at the time the Complainant filed her request, the Custodian did not unlawfully charge the Complainant an excessive fee for providing said records. See Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), and Hascup v. Waldwick Board of Education, GRC Complaint No. 2005-192 (April 2007).
9. 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 20th Day of December, 2011

Robin Berg Tabakin, Chair
Government Records Council

¹ "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."

² 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.

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: December 21, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 20, 2011 Council Meeting**

**Michelle O’Callaghan¹
Complainant**

GRC Complaint No. 2010-44

v.

**Lower Township Police Department (Cape May)²
Custodian of Records**

Records Relevant to Complaint: Copies of the following records:

1. Lower Township Police Department’s policy of acceptable conduct for police officers.
2. Tape or compact disc (“CD”) of the Complainant’s telephone conversations with communications officers and police officers on January 31, 2010 periodically from approximately 6:00 p.m. to 10:00 p.m.³
3. Audio or written record by and between communications officers, police officers and supervisors regarding an incident reported by the Complainant’s son.
4. Reports of incidents occurring at 18 Ellery Road, Villas, NJ from July 2009 to February 2, 2010.

Request Made: February 2, 2010

Response Made: February 2, 2010

Custodian: Brian Marker, Police Captain

GRC Complaint Filed: March 4, 2010⁴

Background

February 2, 2010

Complainant’s Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint listed above via an electronic submission and on an official OPRA request form submitted via FedEx®.⁵

¹ No legal representation listed on record.

² Represented by Anthony P. Monzo, Esq. (Cape May Court House, NJ); however, there are no submissions from the Custodian’s Counsel to the GRC on file.

³ The Complainant stated that Officer Boyle of the Lower Township Police Department informed her that these communications were recorded.

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

⁵ The e-mail’s subject line is titled “OPRA Request.” Although the Complainant asserts in her Denial of Access Complaint that she submitted this OPRA request on February 1, 2010, the website printouts she provided to the GRC marked as Exhibit A and Exhibit B are dated February 2, 2010. The latter date therefore is the date the GRC will use in the adjudication of this complaint.

February 2, 2010

Custodian's response to the OPRA request.⁶ The Custodian responds in writing to the Complainant's OPRA request on the same day the request was received with an electronic form letter that thanks the Complainant for submitting her records request and informs the Complainant that the Custodian will contact her soon with information about her request. The response is not signed or dated by the Custodian.⁷

February 23, 2010

Letter from the Custodian to the Complainant. The Custodian informs the Complainant that the requested records are ready to be mailed to her but that she must first complete the enclosed Public Records Request Response form⁸ and return it with payment of the copying fee to the Custodian.

March 4, 2010

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

- Complainant's OPRA request (marked "Exhibit A") dated February 2, 2010
- Custodian's response to the OPRA request (marked "Exhibit B")⁹
- Complainant's duplicate request on an official OPRA request form (marked "Exhibit C") dated February 2, 2010
- FedEx® shipping label addressed from the Complainant to the Custodian (marked "Exhibit D") dated February 2, 2010
- Letter from the Complainant to the Lower Township Police Department dated February 2, 2010¹⁰
- FedEx® tracking form showing a delivery in Cape May, NJ (marked "Exhibit E") dated February 3, 2010
- Letter from the Custodian to the Complainant dated February 23, 2010
- Copy of check number 358 in the amount of \$9.80 issued by the Complainant to the Custodian dated February 23, 2010
- Lower Township Police Department Public Records Request Response form completed by the Complainant dated February 23, 2010¹¹

⁶ The Custodian certified in the Statement of Information that he received the Complainant's OPRA request on February 8, 2010; however, this was in reference to the Complainant's duplicate request submitted via FedEx®.

⁷ The copy of the e-mail string that included the Complainant's electronic request and was attached to the Complainant's Denial of Access Complaint as well as the Custodian's SOI revealed that the electronic request was received by Karen F. Wolf and forwarded as an OPRA request to Joanne Budd on the same date it was received. Notations on the e-mail string reveal that both Ms. Wolf and Ms. Budd are employees of the Lower Township Police Department.

⁸ The enclosed Public Records Request Response form contains a statement to be signed by the Complainant acknowledging receipt of all of the requested records. The form also contains an invoice section stating that a \$9.80 copying fee is payable to the Custodian.

⁹ This response is undated but the Complainant states that she received such response on the same date she filed her OPRA request.

¹⁰ This letter was a complaint about alleged police misconduct, and was only relevant to the Denial of Access Complaint with respect to the timing of an internal affairs investigation because some of the requested records were withheld from disclosure by the Custodian based upon said investigation.

¹¹ The complaint contained other attachments not relevant to the denial of access issue.

The Complainant states that she sent an OPRA request for the records relevant to this complaint to the Custodian on February 1, 2010 via the Custodian's website and that she received a receipt for the OPRA request on that same date. The Complainant also states that she sent a duplicate request on an official OPRA request form via FedEx® on February 2, 2010. The Complainant states that she also sent a letter to the Police Department dated February 2, 2010 wherein she alleged misconduct by members of the Police Department.¹²

The Complainant states that she never received a written response to her OPRA requests; however, she states that she did receive a telephone call from Lower Township Police Captain Lou Russo on February 13, 2010 wherein Captain Russo informed her that the Police Department received her OPRA request and would disclose a redacted record of the calls for service. Captain Russo further informed the Complainant that the other records requested would not be disclosed because they were being used in an internal affairs investigation. The Complainant also states that Captain Russo informed her that the balance of the records would be disclosed to her once the internal affairs investigation was complete.¹³

The Complainant states that she received a telephone call from Lower Township Police Captain Marker on February 22, 2010. The Complainant states that Captain Marker informed her that the requested record regarding calls for service was ready for her to pick up at the Police Department. The Complainant further states that on February 23, 2010, she had a telephone conversation with someone from the Lower Township Police Department in which she was told to remit a check in the amount of \$9.80 for the requested records. The Complainant states that she immediately mailed the check to the Lower Township Police Department.

The Complainant states that on February 25, 2010, she received a letter from the Lower Township Police Department which informed her that the requested records were ready to be mailed to her but that she had to first complete a Public Records Request Response form which was enclosed with the letter. The Complainant states that the letter made it clear that receipt by the Custodian of the Public Records Request Response form was a condition precedent to disclosure of the requested records.

The Complainant states that the police should have responded to her OPRA request in seven (7) days. The Complainant expresses concern about the Public Records Request Response form because she believes that it required her to acknowledge receipt of all of the requested records; however, the Complainant states that she did not receive all of the records that she requested. The Complainant further questions the copying fee of \$9.80 for what she states is merely a computer printout. The Complainant states that she did not receive the requested record regarding calls for service until March 2, 2010 and further states that when she did receive this record it was incomplete because it did not contain the two (2) January 31, 2010 telephone conversations between the

¹² This is only relevant with respect to one of the reasons for the Custodian's denial of the Complainant's request.

¹³ The Complainant filed an internal affairs complaint against the Lower Township Police Department on February 2, 2010.

Complainant and the Police Department regarding threats made to the Complainant. Finally, the Complainant states that the Lower Township Police Department withheld records that should have been disclosed to her.¹⁴

The Complainant does not agree to mediate this complaint.

March 5, 2010

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

March 10, 2010

Custodian’s SOI with the following attachments:

- West Publishing Company copy of N.J.S.A. 40A:14-18.1 dated effective January 9, 1997
- New Jersey Attorney General’s Internal Affairs Policy & Procedure guidelines pages 11-16 through 11-18, 11-27 and 11-46 through 11-47 dated November 2000
- Complainant’s OPRA request dated February 2, 2010
- Complainant’s duplicate records request on an official OPRA request form dated February 2, 2010
- Letter from the Complainant to the Lower Township Police Department dated February 2, 2010
- Cape May County Emergency Management Communications Center Emergency Proclamation dated February 12, 2010
- Public Records Request Response form dated February 19, 2010
- Letter from the Custodian to the Complainant dated February 23, 2010
- Agency log book page dated February 26, 2010¹⁵

The Custodian certifies that his search for the requested records entailed examining the Initial General Complaint Reports which are stored on the Police Department’s computer system. The Custodian further certifies that the search for taped telephone conversations involved locating the DVD for the time period of the telephone calls and copying the pertinent records onto a CD. The Custodian also certifies that the records that may have been responsive to the request were not destroyed and are not scheduled for destruction 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 he received the Complainant’s OPRA request submitted via FedEx® on February 8, 2010 and that the response to the Complainant’s request was made sometime during the second week of February 2010 via a telephone call to the Complainant. The Custodian certifies that he called the Complainant for two reasons: (1) to determine whether the request made by the Complainant was an OPRA request or a request for discovery, and (b) to inform the Complainant that the Police

¹⁴ The Complainant raises other issues in the complaint but said issues are not relevant to the denial of access to government records.

¹⁵ This date reflects the entry made for this Complainant. There were other entries made on the log book page for different requestors which are not relevant to this complaint.

Department was in a state of emergency at the time and was powered by a backup generator. The Custodian certifies that the Police Department had no internet or mail service available for several days.¹⁶

The Custodian certifies that Captain Russo made a second response to the OPRA request on February 19, 2010, by leaving a telephone message informing the Complainant that those requested records that were not a part of an ongoing investigation would be disclosed to the Complainant and that the records that were a part of the investigation could not be disclosed until the investigation was completed.

The Custodian certifies that request Item No. 1 does not exist and therefore cannot be disclosed to the Complainant.

The Custodian further certifies that the Complainant filed an internal affairs complaint against the Police Department which was received on February 19, 2010.¹⁷ The Custodian certifies that the New Jersey Attorney General's Internal Affairs Policy and Procedure guidelines which were adopted by the Police Department pursuant to N.J.S.A. 40A:14-18.1 mandate the confidentiality of the nature and source of internal allegations, the progress of internal affairs investigations and the resulting materials. The Custodian states that these confidentiality provisions are applicable to OPRA by operation of N.J.S.A. 47:1A-9.a. As such, the Custodian certifies that request Item No. 2 contains confidential material and cannot be disclosed to the Complainant. The Custodian also certifies that the internal affairs file and its contents constitute a personnel file and as such is therefore exempt from disclosure pursuant to N.J.S.A. 47:1A-9.a. The Custodian further certifies that if the Complainant's allegations against the Police Department result in a criminal prosecution, the records which comprise request Item No. 2 may be exempt from disclosure as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1. The Custodian certifies that the records are subject to disclosure when the internal investigation is complete.

The Custodian certifies that request Items No. 3 and No. 4 constitute the following records: Initial General Complaint Reports 2010-2323, 2327 and 2328, as well as all Initial General Complaint Reports for 18 Ellery Road, Villas, NJ from 2004 until the date of the OPRA request. The Custodian certifies that these records, which totaled thirty-nine (39) pages, were disclosed to the Complainant in unredacted form.

April 9, 2010

Letter from the Complainant to the GRC, responding to the Custodian's SOI.¹⁸ The Complainant emphasizes that the Custodian certified that the internal affairs investigation was triggered on February 19, 2010, which was thirteen (13) business days after she filed her February 1, 2010 OPRA request. The Complainant contends that the Custodian unlawfully denied her access to the requested records because the Custodian had seven (7) business days from the date of her OPRA request to grant or deny access to

¹⁶ In support of this certified statement, the Custodian attached a copy of a Cape May County Emergency Proclamation dated February 12, 2010 which proclaimed that the county was under a state of emergency due to a winter snow storm from February 5, 2010 until February 15, 2010.

¹⁷ The letter in which the allegations appear is dated February 2, 2010.

¹⁸ The Complainant restates many of the arguments made in the Denial of Access Complaint.

the records and the passing of the seventh business day predated the date the internal affairs investigation commenced.

April 20, 2010

Letter from the Lower Township Chief of Police to the Complainant. The Chief of Police informs the Complainant that the internal investigation is complete. The Chief states that one (1) allegation of a violation of Police Department policies and procedures was sustained and all other allegations were either unfounded or the officers acted properly.¹⁹

August 4, 2011

E-mail from the GRC to the Complainant. The GRC asks the Complainant if she received any of the records that were being withheld from disclosure pending completion of the internal affairs investigation.

August 9, 2011

E-mail from the Complainant to the GRC. The Complainant forwards a copy of an e-mail and letter to her from the Custodian dated April 20, 2010. In such letter, the Custodian states that the internal affairs investigation is complete and one (1) allegation of a violation of Police Department policies and procedures was sustained. The Custodian states that he has disclosed to the Complainant the requested telephone conversation record dated January 31, 2010.

The Complainant asserts that the disclosed record is incomplete because she did not receive a record of her initial call to the Police Department on January 31, 2010. The Complainant also attaches a cell phone log which displays three (3) telephone calls between her and the Lower Township Police Department on January 31, 2010: one outgoing telephone call at 6:56 p.m., a second outgoing telephone call at 9:06 p.m. and an incoming telephone call at 9:58 p.m. The Complainant states she never received these records.

Analysis

Whether the Custodian's response to the Complainant's OPRA request was sufficient?

OPRA provides that:

“...[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefore 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.

¹⁹ This letter is only relevant to the Denial of Access Complaint to the extent that it reveals that there were no criminal investigations commenced by the Lower Township Police Department as a result of the Complainant's allegations.

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. OPRA specifically states that a custodian “shall indicate the specific basis [for denial of access]...” N.J.S.A. 47:1A-5.g. Further, in Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), the GRC held that:

“[a]lthough the Custodian responded in writing to the Complainant’s...OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., *the Custodian’s response was legally insufficient because he failed to respond to each request item individually*. Therefore, the Custodian has violated N.J.S.A. 47:1A-5.g.” (Emphasis added.)

In this complaint, the evidence of record indicates that the Complainant submitted her OPRA request electronically via the Township’s website on February 2, 2010. The evidence further indicates that the Complainant’s request was titled “OPRA Request” and listed the specific government records sought. Further, the evidence of record indicates that the Custodian responded to the OPRA request on February 2, 2010, the same day the request was received, with an electronic form letter thanking the Complainant for submitting her records request and informing the Complainant that the Custodian will contact her soon with information about her request.

Although the Custodian certified that he did not receive the Complainant’s OPRA response until February 8, 2010, which the evidence of record shows was the date that Senior Police Clerk Ellen Will acknowledged receipt of the official OPRA request form submitted by the Complainant, the evidence of record indicated that the official OPRA request form was a duplicate of the Complainant’s original OPRA request which was submitted electronically on February 2, 2010.

In Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009), the Appellate Division held that although requestors shall continue to use public agencies’ OPRA request forms when making requests, no custodian shall withhold such records if the written request for such records, not presented on the official form, contains the requisite information prescribed in the section of OPRA requiring custodians to adopt a form.

The Complainant’s electronic request dated February 2, 2010 was titled “OPRA Request” and listed the government records sought. As such, the electronic request is a valid OPRA request pursuant to Renna, supra. Further, the evidence of record reveals that the electronic request was received by Karen F. Wolf and forwarded as an OPRA request to Joanne Budd on the same date it was received.

The evidence of record further reveals that on February 2, 2010 the Custodian sent the Complainant an electronic form letter response to the OPRA request. The response addressed the Complainant by name and thanked her for submitting the OPRA request but it failed to grant or deny access to each of the items sought by the Complainant. Instead, the Custodian stated that the Custodian will contact her soon with information about her request. Moreover, the Custodian’s response was not signed or

dated. The Complainant stated that she received this response to the OPRA request on the same day the OPRA request was received by the Custodian.

Here, the Custodian responded to the Complainant's OPRA request in writing within the statutorily mandated seven (7) business days; however, the Custodian's response failed to address each item contained in the Complainant's OPRA request and failed to specify a date certain on which the Complainant could expect access to be granted or denied. Furthermore, the Custodian failed to sign and date the response.

Therefore, although the Custodian provided the Complainant with a written response to her OPRA request, the Custodian failed to respond to each item contained in the Complainant's OPRA request and failed to sign and date the response. As such, the Custodian's response to the effect that the Custodian will contact the Complainant soon with information about her request was legally insufficient and violated N.J.S.A. 47:1A-5.g. and Paff, supra.

Whether the Custodian may withhold records from disclosure contingent upon the Complainant's completion of an agency-generated "Public Records Request Response" form?

OPRA provides that

"[a] copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation, or...upon payment of the actual cost of duplicating the record..." N.J.S.A. 47:1A-5.b.

OPRA further 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...The requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied..." N.J.S.A. 47:1A-5.i.

By letter dated February 23, 2010, the Custodian informed the Complainant that the requested records were ready and would be made available upon (a) payment of \$9.80 in accrued copying charges and (b) receipt by the Custodian of an enclosed Public Records Request Response form signed by the Complainant. The Public Records Request Response form contains an acknowledgment section which must be signed by a requestor. In the instant case, the Custodian informed the Complainant that she must sign

the form acknowledging that she received the records and return the form to the Custodian before the Custodian would mail the records to the Complainant.²⁰

The Custodian could have properly withheld disclosure of the requested records until the Complainant paid the copying charges because N.J.S.A. 47:1A-5.b. provides that “[a] copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation, or...upon payment of the actual cost of duplicating the record...”²¹ Once payment of the copying charges has been made, however, the promised records must be delivered to the requestor without further ado. Although OPRA does not prohibit a custodian from asking a requestor to sign a receipt for records that are delivered to the requestor, disclosure of records cannot be made *conditional* upon the execution of such a receipt.

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access ...shall be construed in favor of the public’s right of access...” N.J.S.A. 47:1A-1.

OPRA further 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...The requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied...” N.J.S.A. 47:1A-5.i.

Here, although the Custodian informed the Complainant that the requested records were available for delivery to the Complainant upon payment by the Complainant of a \$9.80 copying charge fee, the Custodian imposed a further condition on disclosure of the records; to wit, completion and return by the Complainant of the agency’s Public Records Request Response form. The imposition of a requirement that the Complainant complete and return the agency’s form, which contains an acknowledgement that the Complainant received all of the records responsive to her request, is an impermissible limitation on access pursuant to N.J.S.A. 47:1A-1.

Accordingly, because the Custodian required that the Complainant complete and return the agency’s Public Records Request Response form before the requested records would be disclosed, the Custodian imposed an impermissible limitation on access which

²⁰ This form is also inconsistent on its face because it provides that the records are available upon payment of the copying charges listed on the form, yet further down on the form it requires the Complainant to sign acknowledging that she has already received the records.

²¹ This was the provision of OPRA in effect at the time of the request and is cited in its entirety *infra*. Michelle O’Callaghan v. Lower Township Police Department (Cape May), 2010-44 – Findings and Recommendations of the Executive Director

resulted in the Custodian's failure to make the records readily accessible in violation of N.J.S.A. 47:1A-1. and N.J.S.A. 47:1A-5.i.

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 also provides that:

"A government record shall not include ... *criminal investigatory records...*" (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 further provides that:

"[t]he provisions of this act...shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to...regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor ..." N.J.S.A. 47:1A-9.a.

N.J.S.A. 40A:14-18.1 provides that:

"Every law enforcement agency shall adopt and implement guidelines which shall be consistent with the guidelines governing the "Internal Affairs Policy and Procedures" of the Police Management Manual promulgated by the Police Bureau of the Division of Criminal Justice in the Department of Law and Public Safety, and shall be consistent with any tenure or civil service laws, and shall not supersede any existing contractual agreements."

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 this complaint, the evidence of record reveals that the Complainant requested several records from the Custodian on February 2, 2010. The Complainant contends that she only received computer printouts of initial general complaint reports from 2004 to the date of her request. The Complainant asserts that the report for January 31, 2010 was incomplete because she did not receive a record of her initial call to the Police Department. The Complainant also asserts that she did not receive records of three (3) telephone calls between her and the Lower Township Police Department on January 31, 2010. The Complainant states that the missing telephone calls were outgoing at 6:56 p.m. and 9:06 p.m. and incoming at 9:58 p.m.

Request Item #1 – Lower Township Police Department’s policy of acceptable conduct for police officers

The Custodian certified in the SOI that no such policy exists. Further, the Complainant provided no evidence to refute the Custodian’s certification.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The custodian responded stating that there was no record of any telephone calls made to the complainant. The custodian subsequently certified that no records responsive to the complainant’s request existed and the complainant did not provide any evidence to refute the custodian’s certification. The GRC determined that although the custodian failed to respond to the OPRA request in a timely manner, the custodian did not unlawfully deny access to the requested records because the custodian certified that no records responsive to the request existed.

In the instant complaint, because the Custodian certified in his SOI dated March 10, 2010 that there are no such records titled in the manner the Complainant described, and because there is no credible evidence in the record to refute the Custodian’s certification, the Custodian did not unlawfully deny access to said records pursuant to N.J.S.A. 47:1A-6 and Pusterhofer, supra.

Request Item #2 – Tape or CD of the Complainant’s telephone conversations with communications officers and police officers on January 31, 2010 periodically from approximately 6:00 p.m. to 10:00 p.m.

The Complainant asserted that she neither received a record of her initial telephone call nor a record of three (3) additional telephone calls between her and the Lower Township Police Department which took place on January 31, 2010 between 6:00 p.m. to 10:00 p.m. The Custodian certified that the Complainant filed an internal affairs

complaint against the Police Department which was received on February 19, 2010.²² The Custodian further certified that the confidentiality provisions of the Attorney General's Internal Affairs Policy and Procedure guidelines adopted by the Police Department pursuant to N.J.S.A. 40A:14-18.1 are applicable to OPRA by operation of N.J.S.A. 47:1A-9.a. As such, the Custodian certified that Item No. 2 of the records relevant to the complaint, which contains such confidential material, could not be disclosed to the Complainant. The Custodian also certified that the internal affairs file is exempt from disclosure pursuant to N.J.S.A. 47:1A-10, because it is a personnel file, and that it may be exempt from disclosure as criminal investigatory material pursuant to N.J.S.A. 47:1A-1.1. The Custodian certified that for all of these reasons Item No. 2 of the records relevant to the complaint cannot be disclosed to the Complainant.

The Complainant asserted, however, that if the Custodian did not receive her February 2, 2010 letter containing allegations against the Police Department until February 19, 2010, as the Custodian certified, then he had no lawful reason to withhold disclosure of request Item No. 2 and such records should have been disclosed to her within seven (7) business days from the date the Custodian received her OPRA request.

Because custodians have the duty to make government records readily accessible for inspection, copying, or examination with certain exceptions, and because the Custodian did not articulate a lawful exception for denying the Complainant access to the records which constitute Item No. 2 of the Complainant's OPRA request, the Custodian failed to bear his burden of proving that the denial of access was authorized by law in violation of N.J.S.A. 47:1A-6.

The Complainant stated that the Custodian subsequently disclosed Item No. 2 of the records relevant to the complaint on April 20, 2010, upon the conclusion of the internal affairs investigation. The Complainant contends, however, that the disclosed record is incomplete because she did not receive a record of her initial telephone call to the Police Department on January 31, 2010 or records of three (3) additional telephone calls between her and the Lower Township Police Department from 6:00 p.m. to 10:00 p.m. on that date.

Accordingly, the Custodian shall disclose to the Complainant the records of the Complainant's initial telephone call to the Police Department on January 31, 2010, as well as the records of three (3) additional telephone calls between the Complainant and the Lower Township Police Department from 6:00 p.m. to 10:00 p.m. that date.

Request Item #3 – Verbal or written record by and between communications officers, police officers and supervisors regarding an incident reported by the Complainant's son

Request Item #4 – Reports of incidents occurring at 18 Ellery Road, Villas, NJ from July 2009 to February 2, 2010

²² The Custodian certified that, due to a winter storm emergency, the Police Department had no internet or mail service available for several days and this likely contributed to the delay in delivery of the Complainant's February 2, 2010 letter alleging police misconduct.
Michelle O'Callaghan v. Lower Township Police Department (Cape May), 2010-44 – Findings and Recommendations of the Executive Director

The Custodian certified that the following records were determined to be responsive to the Complainant's request for Items No. 3 and No. 4 of the records relevant to the complaint:

- Initial General Complaint Report 2010-2323
- Initial General Complaint Report 2010-2327
- Initial General Complaint Report 2010-2328
- All Initial General Complaint Reports for 18 Ellery Road, Villas, NJ from 2004 until the date of the OPRA request

The Custodian certified that on February 26, 2010 the above listed records, which totaled thirty-nine (39) pages, were disclosed to the Complainant in unredacted form. The Complainant has provided no evidence to refute this certification.

The Custodian's actions are therefore similar to those of the custodian in Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005). In Burns, the custodian certified that a record responsive to the complainant's request was provided to the complainant and the Council subsequently held that because the custodian certified that the complainant was in receipt of the records responsive to the request there was no unlawful denial of access.

In the instant complaint, the Custodian certified that the records responsive to request Item Numbers 3 and 4 were disclosed to the Complainant on February 26, 2010, and because there is no credible evidence in the record to refute said certification, there was no unlawful denial of access with respect to these two (2) requested items pursuant to N.J.S.A. 47:1A-5.g. and Burns, *supra*.

Whether the copying fee assessed by the Custodian is warranted and reasonable pursuant to OPRA?

OPRA sets forth the amount to be charged for a government record in printed form. Specifically, OPRA states:

“[a] copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation, or if a fee is not prescribed by law or regulation, upon payment of the actual cost of duplicating the record. Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record embodied in the form of printed matter shall not exceed the following: first page to tenth page, \$0.75 per page; eleventh page to twentieth page, \$0.50 per page; all pages over twenty, \$0.25 per page.” N.J.S.A. 47:1A-5.b.²³

²³ This is the OPRA provision that was in effect at the time the Complainant filed her OPRA request. On September 10, 2010, the Governor signed legislation that changed OPRA's copy fee provision in N.J.S.A. 47:1A-5.b. to provide as follows: “[a] copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation. Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record embodied in the form of printed matter shall be \$0.05 per letter size page or smaller, and \$0.07 per legal size page or larger. If a public agency can demonstrate that its actual costs for duplication of a government record exceed the foregoing Michelle O'Callaghan v. Lower Township Police Department (Cape May), 2010-44 – Findings and Recommendations of the Executive Director

The Complainant stated that the Custodian charged her \$9.80 in copying fees to duplicate the records that comprised request Item Numbers 3 and 4, which she characterized as “a computer printout.” Conversely, the Custodian certified that the records requested by the Complainant totaled thirty-nine (39) pages and there is no credible evidence in the record to refute said certification. The Complainant questioned the copying fee imposed by the Custodian.

Pursuant to OPRA, the *maximum* amount that the Custodian could have charged the Complainant for providing copies of thirty-nine (39) pages of records was \$17.25.²⁴ The Custodian only charged the Complainant \$9.80 for the records, which amount is well within the outside limits provided by the provision of OPRA that was in effect at the time of the Complainant’s request.

In Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), where the Complainant objected to paying \$0.11 per page for copies of stored images, the Council held that “...[t]he facts in this complaint suggest that the contract rate for microfilm copies of the records requested (publicly recorded real estate records) is reasonable since the \$0.11 per image (or per individual microfilm record) *is less than the OPRA enumerated copy rates for paper copies* (\$0.75/0.50/0.25)...” (Emphasis added.) See also Hascup v. Waldwick Board of Education, GRC Complaint No. 2005-192 (April 2007), upholding a custodian’s charge of statutory fees pursuant to N.J.S.A. 47:1A-5.b.

Accordingly, because the amount charged by the Custodian for the thirty-nine (39) pages of records responsive to request Item Numbers 3 and 4 is within the parameters of N.J.S.A. 47:1A-5.b, which was the statute in effect at the time the Complainant filed her request, the Custodian did not unlawfully charge the Complainant an excessive fee for providing said records. See Spaulding, supra, and Hascup, supra.

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.

rates, the public agency shall be permitted to charge the actual cost of duplicating the record. The actual cost of duplicating the record, upon which all copy fees are based, shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy except as provided for in subsection c. of this section. Access to electronic records and non-printed materials shall be provided free of charge, but the public agency may charge for the actual costs of any needed supplies such as computer discs.”

²⁴ This calculation is based upon ten (10) pages at \$.75 per page, which totals \$7.50; ten (10) pages at \$.50 per page, which totals \$5.00; and nineteen (19) pages at \$.25 per page, which totals \$4.75 for a combined total of \$17.25.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian provided the Complainant with a written response to her OPRA request, the Custodian failed to respond to each item contained in the Complainant's OPRA request and failed to sign and date the response. As such, the Custodian's response that the Custodian will contact the Complainant with information about her request was legally insufficient and violated N.J.S.A. 47:1A-5.g. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. Because the Custodian required that the Complainant complete and return the agency's Public Records Request Response form before the requested records would be disclosed, the Custodian imposed an impermissible limitation on access which resulted in the Custodian's failure to make the records readily accessible in violation of N.J.S.A. 47:1A-1. and N.J.S.A. 47:1A-5.i.
3. Because the Custodian certified in his Statement of Information dated March 10, 2010 that there are no such records titled in the manner the Complainant described, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to said records pursuant to N.J.S.A. 47:1A-6. and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. Because the Custodian did not articulate a lawful exception for denying the Complainant access to the records which constitute Item No. 2 of the Complainant's OPRA request, the Custodian failed to bear his burden of proving that the denial of access was authorized by law in violation of N.J.S.A. 47:1A-6.
5. The Custodian shall disclose to the Complainant the records of the Complainant's initial telephone call to the Police Department on January 31, 2010 as well as the records of three (3) additional telephone calls between the Complainant and the Lower Township Police Department from 6:00 p.m. to 10:00 p.m. on that date.
6. **The Custodian shall comply with paragraph #5 above within five (5) business days from receipt of the Council's Interim Order by either (a) disclosing said records to the Complainant and simultaneously providing certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4²⁵, to the Executive Director,²⁶ or (b) providing a certification, in**

²⁵ "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."

²⁶ 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 Michelle O'Callaghan v. Lower Township Police Department (Cape May), 2010-44 – Findings and Recommendations of the Executive Director

accordance with N.J. Court Rule 1:4-4, to the Executive Director averring that the record that was disclosed to the Complainant on April 20, 2010 was a complete and accurate record of the Complainant's telephone conversations with members of the Lower Township Police Department on January 31, 2010.

7. The Custodian certified that the records responsive to request Item Numbers 3 and 4 were disclosed to the Complainant on February 26, 2010, and because there is no credible evidence in the record to refute said certification, there was no unlawful denial of access with respect to these two (2) requested items pursuant to N.J.S.A. 47:1A-5.g. and Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).
8. Because the amount charged by the Custodian for the thirty-nine (39) pages of records responsive to request Item Numbers 3 and 4 is within the parameters of N.J.S.A. 47:1A-5.b., which was the statute in effect at the time the Complainant filed her request, the Custodian did not unlawfully charge the Complainant an excessive fee for providing said records. See Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), and Hascup v. Waldwick Board of Education, GRC Complaint No. 2005-192 (April 2007).
9. 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, Esq.

Approved By: Catherine Starghill, Esq.
Executive Director

December 13, 2011