



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

April 30, 2013 Government Records Council Meeting

Paul Marinaccio  
Complainant

Complaint No. 2011-226

v.

Borough of Fanwood (Union)  
Custodian of Record

At the April 30, 2013 public meeting, the Government Records Council (“Council”) considered the April 23, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian failed to bear her burden of proving a lawful denial of access because the Custodian’s claimed exemption, N.J.S.A. 10:4-12(b)(7), is not applicable to the requested records. *See* N.J.S.A. 47:1A-6.
2. The Custodian violated OPRA because the Custodian provided a negligent copy of the audio recording responsive to request Item No. 1 when a complete record existed. *See* N.J.S.A. 47:1A-1 and Lopez v. County of Hudson, GRC Complaint No. 2009-267 (March 2011).<sup>1</sup> However, the Council declines to order the Custodian to provide an additional copy of the audio recording responsive to request Item No. 1 because she already made a copy available to the Complainant on April 11, 2012.
3. The Complainant’s request is overly broad and is invalid under OPRA because the Complainant’s request for Item No. 2 fails to identify specific government records sought. *See* MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
4. The Custodian violated N.J.S.A. 47:1A-6 by failing to provide a lawful basis of denial to the requested records. However, the Custodian made a copy of the requested CD responsive to request Item No. 1 available to the Complainant on April 11, 2012. The Custodian also provided the records responsive to request Item No. 3, as evidenced by the Complainant’s letter to the GRC dated March 20, 2013. Lastly, the Complainant’s request for records responsive to Item No. 2 fails to specifically

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<sup>1</sup> The requested audio existed at the time of the Complainant’s request. The Custodian negligently copied the requested audio.

identify a government record. 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 30<sup>th</sup> Day of April, 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: May 3, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
April 30, 2013 Council Meeting**

**Paul Marinaccio<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-226**

**v.**

**Borough of Fanwood (Union)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. All audio recordings recorded and all sound bites downloaded between 5:00 p.m. and 6:00 p.m. on January 17, 2009 by Police Officer Marc Gottlick (“Officer Gottlick”) and any equipment used by and or assigned to Officer Gottlick during that period.
2. Police call printout and audio compact disc (“CD”) of the call mailed to the Complainant or audio sound file of the call and scanned copy of the printout mailed to the Complainant.
3. All police reports and follow-up reports related to case no. FAN 2009-000712 and ticket complaint no. 2009-000411.

**Request Made:** May 25, 2011

**Response Made:** June 7, 2011

**GRC Complaint Filed:** June 27, 2011<sup>3</sup>

**Background<sup>4</sup>**

**Request and Response:**

On May 25, 2011, the Complainant filed his Open Public Records Act (“OPRA”) request seeking the record listed above. On June 7, 2011, the seventh (7<sup>th</sup>) business day following receipt, the Custodian denied the Complainant access to the requested records pursuant to N.J.S.A. 10:4-12(b)(7), as the requested records relate to pending litigation.

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

<sup>2</sup> Eleanor McGovern, Custodian of Records. Represented by Dennis Estis, Esq., of Greenbaum, Rowe, Smith & Davis (Woodbridge, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

<sup>4</sup> The parties may have submitted additional correspondence, or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

### Denial of Access Complaint:

On June 27, 2011, the Complainant filed his Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant argues that the Custodian’s denial pursuant to N.J.S.A. 10:4-12(b)(7) is not applicable in the instant complaint because the statute is related to the Open Public Meetings Act (“OPMA”).

### Statement of Information:

On July 15, 2011, the Custodian filed her Statement of Information (“SOI”). The Custodian certifies that she could not provide the requested records to the Complainant because of the pending litigation matter pursuant to N.J.S.A. 10:4-12(b)(7). The Custodian also certifies that after her initial response on June 7, 2011, the Police Department was able to copy and produce the records responsive to request Item No. 1 and No. 3. The Custodian further certifies that she will provide copies of the records responsive to request Item No. 1 and No. 3 upon receipt of \$10.15. The Custodian argues that the Complainant’s underlying incident is still in litigation and she does not want to release information if it can be obtained through discovery. Lastly, the Custodian argues that she is unclear as to what records the Complainant is seeking in response to request Item No. 2.

### Additional Information:

On May 26, 2012, the Complainant sent an e-mail to the GRC asserting that he received the CD in response to request Item No. 1. The Complainant also states that there is no substantive audio on this CD and he can only hear static. Further, on March 20, 2013, the Complainant sent a facsimile to the GRC stating that the audio recording responsive to request Item No. 1 was not clear. The Complainant asserts that since he paid \$10.00 for an unclear audio recording in response to request Item No. 1, he wishes to be reimbursed.<sup>5</sup> The Complainant also includes copies of the records responsive to request Item No. 3.

### Analysis<sup>6</sup>

#### Unlawful Denial of Access

##### *Whether the Custodian properly denied the responsive records*

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.

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<sup>5</sup> The Council declines to address the appropriateness of fees or whether they should be reimbursed because the Complainant failed to address this issue in his Denial of Access Complaint. Further the Complainant failed to amend his Denial of Access Complaint to address this issue.

<sup>6</sup> There may be other OPRA issues in this matter; however, the Council’s analysis is based solely on the claims made in the Complainant’s Denial of Access Complaint.

N.J.S.A. 10:4-12(b)(7) states in pertinent part that “[a] public body may exclude the public only from that portion of a meeting at which the public body discusses “... [a]ny pending or anticipated litigation or contract negotiation other than in subsection b. (4) herein in which the public body is, or may become a party.” N.J.S.A. 10:4-12(b)(7) is clearly not applicable to the disclosure of the requested records in the instant complaint.

Here, the Complainant requested an audio recording, police call printouts and police reports. The Custodian timely responded in writing via e-mail to the Complainant’s OPRA request stating that the requested records are denied pursuant to N.J.S.A. 10:4-12(b)(7). The Complainant argued in the Denial of Access Complaint that N.J.S.A. 10:4-12(b)(7) relates to OPMA and is not applicable in the instant complaint. The Custodian certified that in the SOI that the Complainant’s underlying incident is still in litigation and she does not want to release information if it could be obtained through discovery.

Therefore, the Custodian failed to bear her burden of proving a lawful denial of access because the Custodian’s claimed exemption, N.J.S.A. 10:4-12(b)(7), is not applicable to the requested records. See N.J.S.A. 47:1A-6.

The Council notes that the Custodian argued in the SOI that the Complainant’s underlying incident is still in litigation and that she does not want to release information if it can be obtained through discovery. However, the Council has previously held that a custodian’s denial on the ground that the Complainant could obtain the records through discovery is not a lawful basis for a denial of access. See Mid-Atlantic Recycling Technologies v. City of Vineland, 222 F.R.D. 81 (D.N.J. 2004).

*Whether the Custodian negligently recorded the responsive audio recording to request Item No. 1.*

In Lopez v. County of Hudson, GRC Complaint No. 2009-267 (March 2011) the custodian provided records to the complainant which were partially illegible, but provided the fully legible records as part of the SOI and thus legible records existed at the time of the complainant’s OPRA request. The Council held “the [c]ustodian’s provision of illegible records to the [c]omplainant in response to the OPRA request when legible records existed constituted a limitation on the right of access accorded by OPRA pursuant to N.J.S.A. 47:1A-1 and a violation of OPRA.”

N.J.A.C. 1:1-15.2(a) and (b) state that official notice may be taken of judicially noticeable facts (as explained in N.J.R.E. 201 of the New Jersey Rules of Evidence), as well as of generally recognized technical or scientific facts within the specialized knowledge of the agency or the judge. The Appellate Division has held that it was appropriate for an administrative agency to take notice of an appellant’s record of convictions because judicial notice could have been taken of the records of any court in New Jersey and appellant’s record of convictions were exclusively in New Jersey. See Sanders v. Division of Motor Vehicles, 131 N.J. Super. 95 (App. Div. 1974).

Thus, the GRC takes judicial notice of the Custodian's certification submitted to the GRC in Marinaccio v. Borough of Fanwood (Union), GRC Complaint No. 2011-14 (September 2012). In that complaint, the Custodian certified that she has been holding an additional copy of the audio recording responsive to request Item No. 1 since April 11, 2012, which replaces the audio recording the Complainant received earlier and was unable to understand.

The Custodian certified in her SOI that upon receipt of \$10.15 a copy of the audio recording responsive to request Item No. 1 would be provided, and the Complainant asserted in an e-mail to the GRC on May 26, 2012, that he received a copy of the CD in response to request Item No. 1.<sup>7</sup> The Complainant also asserted that there is no substantive audio on this CD and he can only hear static.

The facts in this case are similar to Lopez, supra. The evidence of record indicates that the Custodian provided the Complainant with a copy of the audio recording responsive to request Item No. 1. The evidence of record also indicates that after the Complainant informed the Custodian that the CD was negligently copied, the Custodian made a new CD available to the Complainant on April 11, 2012.

Therefore, the Custodian violated OPRA because the Custodian provided a negligent copy of the audio recording responsive to request Item No. 1 when a complete record existed. See N.J.S.A. 47:1A-1 and Lopez v. County of Hudson, GRC Complaint No. 2009-267 (March 2011).<sup>8</sup> However, the Council declines to order the Custodian to provide an additional copy of the audio recording responsive to request Item No. 1 because she already made a copy available to the Complainant on April 11, 2012.

Further the GRC declines to order disclosure of the records responsive to request Item No. 3 because the Complainant stated in his letter to the GRC dated March 20, 2013, that the Custodian provided him three (3) pages of the records responsive.<sup>9</sup>

### **Broad and Unclear**

The New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.'* N.J.S.A. 47:1A-1." (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). As the court noted in invalidating MAG's request under OPRA:

“Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case

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<sup>7</sup> The \$10.15 also included three (3) pages of the records responsive to request Item No. 3.

<sup>8</sup> The requested audio existed at the time of the Complainant's request. The Custodian negligently copied the requested audio.

<sup>9</sup> The Complainant includes one (1) page of a summons and two (2) pages of an investigative report.

prosecuted by the agency in the past. Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted." *Id.* at 549.

The Court further held that "[u]nder OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files." (Emphasis added.) *Id.*

In addition, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),<sup>10</sup> the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."<sup>11</sup>

Moreover, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), the court enumerated the responsibilities of a custodian and a requestor as follows:

"OPRA identifies the responsibilities of the requestor and the agency relevant to the prompt access the law is designed to provide. The custodian, who is the person designated by the director of the agency, N.J.S.A. 47:1A-1.1, must adopt forms for requests, locate and redact documents, isolate exempt documents, assess fees and means of production, identify requests that require "extraordinary expenditure of time and effort" and warrant assessment of a "service charge," and, when unable to comply with a request, "indicate the specific basis." N.J.S.A. 47:1A-5(a)-(j). The requestor must pay the costs of reproduction and submit the request with information that is essential to permit the custodian to comply with its obligations. N.J.S.A. 47:1A-5(f), (g), (i). *Research is not among the custodian's responsibilities.*" (Emphasis added), NJ Builders, 390 N.J. Super. at 177.

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

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<sup>10</sup> Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

<sup>11</sup> As stated in Bent, *supra*.

records...” Accordingly, the test under MAG then, is whether a requested record is a *specifically identifiable* government record.

Under such rationale, the GRC has repeatedly found that blanket requests are not valid OPRA requests. In the matter of Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009), the relevant part of the Complainant’s request sought:

- Item No. 2: “From the Borough Engineer’s files: all engineering documents for all developments or modifications to Block 25, Lot 28; Block 25, Lot 18; Block 23, Lot 1; Block 23, Lot 1.02.
- Item No. 3: From the Borough Engineer’s files: all engineering documents for all developments or modifications to North St., to the south and east of Wilson St.
- Item No. 4: From the Borough Attorney’s files: all documents related to the development or modification to Block 25, Lot 28; Block 25, Lot 18; Block 23, Lot 1; Block 23, Lot 1.02.
- Item No. 5: From the Borough Attorney’s files: all documents related to the development or modification to North Street, to the south and east of Wilson St.”

In reviewing the complainant’s request, the Council found that “[b]ecause the Complainant’s OPRA requests # 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG, *supra* and Bent, *supra*.

Here, the Complainant’s request for Item No. 2 sought “police call printout and audio CD of the call mailed to the Complainant or audio sound file of the call and scanned copy of the printout mailed to the Complainant.” The Custodian argued in the SOI that she is unclear as to what records the Complainant is seeking in request Item No. 2. The Complainant’s request for a “police call printout” is unclear. Further, the Complainant’s request for “audio CD of the call made to the Complainant” fails to identify a date or time of the call or an incident number. Thus, the Complainant request for Item No. 2 is invalid under OPRA.

Therefore, the Complainant’s request is overly broad and is invalid under OPRA because the Complainant’s request for Item No. 2 fails to identify specific government records sought. See MAG, *supra* and Bent, *supra*, New Jersey Builders Association, *supra* and Schuler, *supra*.

### **Knowing & Willful**

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).

The Custodian violated N.J.S.A. 47:1A-6 by failing to bear her burden of proving a lawful denial of access to the requested records. However, the Custodian made a copy of the requested CD responsive to request Item No. 1 available to the Complainant on April 11, 2012. The Custodian also provided the records responsive to request Item No. 3, as evidenced by the Complainant’s letter to the GRC dated March 20, 2013. Lastly, the Complainant’s request for records responsive to Item No. 2 fails to specifically identify a government record. 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 Custodian failed to bear her burden of proving a lawful denial of access because the Custodian’s claimed exemption, N.J.S.A. 10:4-12(b)(7), is not applicable to the requested records. *See* N.J.S.A. 47:1A-6.
2. The Custodian violated OPRA because the Custodian provided a negligent copy of the audio recording responsive to request Item No. 1 when a complete record existed. *See* N.J.S.A. 47:1A-1 and Lopez v. County of Hudson, GRC Complaint No. 2009-267 (March 2011).<sup>12</sup> However, the Council declines to order the Custodian to provide an additional copy of the audio recording responsive to request Item No. 1 because she already made a copy available to the Complainant on April 11, 2012.

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<sup>12</sup> The requested audio existed at the time of the Complainant’s request. The Custodian negligently copied the requested audio.

3. The Complainant's request is overly broad and is invalid under OPRA because the Complainant's request for Item No. 2 fails to identify specific government records sought. *See* MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
4. The Custodian violated N.J.S.A. 47:1A-6 by failing to provide a lawful basis of denial to the requested records. However, the Custodian made a copy of the requested CD responsive to request Item No. 1 available to the Complainant on April 11, 2012. The Custodian also provided the records responsive to request Item No. 3, as evidenced by the Complainant's letter to the GRC dated March 20, 2013. Lastly, the Complainant's request for records responsive to Item No. 2 fails to specifically identify a government record. 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: Harlynn A. Lack, Esq.  
Case Manager

Approved By: Brandon D. Minde, Esq.  
Executive Director

April 23, 2013