



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  
*Commissioner*

**FINAL DECISION**

**December 20, 2013 Government Records Council Meeting**

William Budesheim  
Complainant

Complaint No. 2012-122

v.

Borough of Riverdale (Morris)  
Custodian of Record

At the December 20, 2013 public meeting, the Government Records Council (“Council”) considered the December 10, 2013 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 the Council should accept the Administrative Law Judge’s November 6, 2013 Initial Decision ordering, “...that the appeal of petitioner William Budesheim to the Government Records Council from the denial of the Riverdale Custodian of Records of his request for access to any Riverdale Police records, USPS investigations, or conversations between those two agencies relating to the bulk mailing of the Riverdale Newsletter is **DENIED.**”

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 20th Day of December, 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: December 23, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplementary Findings and Recommendations of the Executive Director  
December 20, 2013 Council Meeting**

**William Budesheim<sup>1</sup>  
Complainant**

**GRC Complaint No. 2012-122**

v.

**Borough of Riverdale (Morris)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

1. Copy of the police incident report concerning the United States Postal Service (“USPS”) investigation of bulk mailing of the Riverdale Newsletter.
2. The name of the USPS Postal Inspector who initiated the above investigation and the name of the person who requested Riverdale Police assistance.
3. The voice recording of the telephone conversations between the Post Office and the Riverdale Police Department.

**Custodian of Records:** Carol J. Talerico  
**Request Received by Custodian:** April 4, 2012  
**Response Made by Custodian:** April 4, 2012  
**GRC Complaint Received:** April 18, 2012

**Background**

At its August 28, 2012 public meeting, the Government Records Council (“Council”) considered the August 21, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that based on the inadequate evidence presented in this matter, the GRC is unable to determine whether or not the Custodian unlawfully denied access to the records responsive to the Complainant’s request. As such, this complaint was referred to the Office of Administrative Law for a hearing to resolve the facts to determine whether the Custodian unlawfully denied access, and if so, for a further determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

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

<sup>2</sup> Represented by Robert Oostdyk, Esq. (Riverdale, NJ).

William Budesheim v. Borough of Riverdale (Morris), 2012-122 – Supplementary Findings and Recommendations of the Executive Director

## Procedural History:

On August 20, 2012, the Council distributed its Interim Order to all parties. On April 22, 2013, this complaint was transmitted to the Office of Administrative Law (“OAL”). On November 8, 2013, OAL transmitted the Initial Decision back to the GRC.

## Analysis

### Administrative Law Judge’s Initial Decision

The Administrative Law Judge’s (“ALJ”) findings of fact are entitled to deference from the GRC because they are based upon the ALJ’s determination of the credibility of the parties. “The reason for the rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses and, consequently, is better qualified to judge their credibility.” In the Matter of the Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div. 1989), *certif. denied* 121 N.J. 615 (1990). The Appellate Division affirmed this principle, underscoring that, “under existing law, the [reviewing agency] must recognize and give due weight to the ALJ’s unique position and ability to make demeanor-based judgments.” Whasun Lee v. Board of Education of the Township of Holmdel, Docket No. A-5978-98T2 (App. Div. 2000), slip op. at 14. “When such a record, involving lay witnesses, can support more than one factual finding, it is the ALJ’s credibility findings that control, unless they are arbitrary or not based on sufficient credible evidence in the record as a whole.” Cavalieri v. Board of Trustees of Public Employees Retirement System, 368 N.J. Super. 527, 537 (App. Div. 2004).

The ultimate determination of the agency and the ALJ’s recommendations must be accompanied by basic findings of fact sufficient to support them. State, Dep’t of Health v. Tegnazian, 194 N.J. Super. 435, 442-43 (App. Div. 1984). The purpose of such findings “is to enable a reviewing court to conduct an intelligent review of the administrative decision and determine if the facts upon which the order is grounded afford a reasonable basis therefor.” *Id.* at 443. Additionally, the sufficiency of evidence “must take into account whatever in the record fairly detracts from its weight”; the test is not for the courts to read only one side of the case and, if they find any evidence there, the action is to be sustained and the record to the contrary is to be ignored (citation omitted). St. Vincent’s Hospital v. Finley, 154 N.J. Super. 24, 31 (App. Div. 1977).

The ALJ’s November 6, 2013 Initial Decision, set forth in full as “Exhibit A”, concluded that:

On the basis of the above and my *en camera* (sic) review, **I CONCLUDE** that there is an ongoing criminal investigation and that the records requested directly constitute that investigation...the investigation is not complete and diligent collection of additional evidence and truthful statements would be impaired by public release of these records to petitioner. Accordingly, **I CONCLUDE** that there are no disputed facts and the law requires denial of petitioner’s OPRA request at this time. The Custodian of Records did lawfully deny petitioner access to these particular records.

The GRC has reviewed the ALJ's Initial Decision and recommends that the Council accept said decision ordering "...that the appeal of petitioner William Budesheim to the Government Records Council from the denial of the Riverdale Custodian of Records of his request for access to any Riverdale Police records, USPS investigations, or conversations between those two agencies relating to the bulk mailing of the Riverdale Newsletter is **DENIED.**"

### Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Council should accept the Administrative Law Judge's November 6, 2013 Initial Decision ordering, "...that the appeal of petitioner William Budesheim to the Government Records Council from the denial of the Riverdale Custodian of Records of his request for access to any Riverdale Police records, USPS investigations, or conversations between those two agencies relating to the bulk mailing of the Riverdale Newsletter is **DENIED.**"

Prepared By: John E. Stewart, Esq.

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

December 10, 2013

# **EXHIBIT A**



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION ON MOTION**  
**FOR SUMMARY DECISION**

**WILLIAM BUDESHEIM,**

Petitioner,

v.

**BOROUGH OF RIVERDALE (MORRIS),**

Respondent.

OAL DKT. NO. GRC 05972-13

AGENCY DKT. NO. 2012-122

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**William Budesheim**, petitioner pro se

**Robert H. Oostdyk, Jr., Esq.**, for Borough of Riverdale (Murphy McKeon,  
attorneys)

Record Closed: November 1, 2013

Decided: November 6, 2013

BEFORE **GAIL M. COOKSON**, ALJ:

**STATEMENT OF THE CASE AND PROCEDURAL HISTORY**

This is an appeal by William Budesheim (petitioner or Budesheim) from denial of his request for access to the police incident report concerning the United States Postal Service (USPS) investigation of bulk mailing of the Riverdale Newsletter, and related records, under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, from the Custodian of Records for the Borough of Riverdale Carol J. Talerico (Custodian). The Custodian denied his request on or about April 4, 2012, and petitioner then filed a complaint to Government Records Council (GRC).

The Custodian's denial and later statement to the GRC stemmed from information received from the Chief of Police Kevin Smith. Chief Smith is the individual who made the determination that the records could not be released because they were part of an ongoing investigation release of which would be inimical to the investigation and the public interest. Chief Smith in turn had received advice from the Morris County Prosecutor's Office on whether the records were confidential and inaccessible under OPRA. On August 21, 2012, the Acting Executive Director prepared written Findings and Recommendations on the Budesheim GRC Complaint and found that the information produced by the Custodian and Chief Smith was not in the form requested and that insufficient evidence of how release of the records would be inimical to the public interest was not presented. On August 28, 2012, the GRC adopted the Findings and Recommendations of the Executive Director that it had inadequate evidence to be able to determine whether or not the Custodian unlawfully denied petitioner access to records responsive to his request.

On April 25, 2013, the GRC forwarded the matter to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -13 and N.J.S.A. 52:14F-1 to 15. The matter was assigned to the undersigned on May 3, 2013. On May 14, 2013, I convened the first of several telephonic status conference with the parties. I was advised at that time that petitioner is the Mayor of Riverdale under the municipal form of government of elected mayor and elected council. As such, I was concerned initially about the position of counsel for the Borough and whether there was a conflict in his ability to represent Riverdale in this dispute with its own Mayor. With several follow-up telephone conferences, it was agreed that the potential conflict might not arise if the matter could be brought to a decision "on the papers."

Specifically, I suggested and both parties agreed that I should obtain the allegedly confidential records *en camera* with each party merely providing the legal argument supporting their respective positions. Under cover of July 18, 2013, Kevin D. Smith, Police Chief of Riverdale, produced directly to the undersigned what he referred to as the ongoing investigation report to which petitioner sought access. Unfortunately, it was so heavily redacted that it served little use in my *en camera* review of the merits

of the refusal to produce it to petitioner. Accordingly, I asked Riverdale counsel to advise the Chief that I needed the report in its un-redacted format. Without providing a copy to that counsel or to anyone else, I did receive the full investigation report under cover of August 8, 2013, which will remain sealed at the conclusion of this OAL proceeding.

Thereafter, I requested that both respondent and petitioner submit their arguments under OPRA as to the standards of my review and points of consideration on the exemption for pending criminal investigations. If my *en camera* review concluded that the matter was properly characterized as coming within that exemption, then I would issue an Initial Decision setting forth my reasons and closing the disputed matter at the Office of Administrative Law. If my *en camera* review concluded that the report was not entitled to the protections of that exemption, then I would be back in touch with the parties to schedule a hearing on the issue of whether the petitioner was unlawfully denied access to it by the Custodian.

I received a Letter-Brief from respondent under cover of September 11, 2013. I had my office contact petitioner several times requesting his formal position in writing in response to the Letter-Brief of respondent dated September 11, 2013. To date, no responsive legal position has been forthcoming from him. Rather than wait any longer or dismiss the appeal as abandoned, I have determined to enter this Initial Decision for the legal reasons set forth herein. I have summarized the verbalized position of Budesheim and the logical extensions of his position.

### **MOTION UNDER CONSIDERATION**

Respondent moves for summary disposition on its denial to produce the requested police report to petitioner on the basis that the records are confidential and exempt from disclosure under OPRA.

Petitioner opposes the motion on the basis that he is entitled to the documents and to a hearing on why this alleged investigation has not been closed and yet has not

resulted in any criminal action by the Morris County Prosecutor's Office. Further, he argues that even if it is still "ongoing," the past is the past with respect to the underlying bulk mail events and his access to the records will not change those facts.

### **ANALYSIS AND CONCLUSIONS OF LAW**

If there is no genuine issue as to any material fact, a moving party is entitled to prevail on a motion for summary disposition as a matter of law. Brill v. The Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995). The purpose of summary decision is to avoid unnecessary hearings and their concomitant burden on public resources. Under the Brill standard, a fact-finding hearing should be avoided "when the evidence is so one-sided that one party must prevail as a matter of law." Id.

It is well-established that OPRA is based upon a public policy that government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions. N.J.S.A. 47:1A-5 requires that the custodian shall indicate the specific basis upon which s/he is unable to comply. The custodian of the government record has the burden of proving that the denial of access is authorized by law. N.J.S.A. 47:1A-6. Courier News v. Hunterdon County Prosecutor's Office, 358 N.J. Super. 373, 379-80 (App. Div. 2003) (whether release of a 9-1-1 recording that will be evidence in a criminal proceeding should be denied as confidential and inimical to the public interest). Thus, the exceptions must be narrowly construed so that they do not swallow the rule in favor of disclosure.

In this matter, the exception asserted as controlling the nondisclosure of the USPS is that commonly referred to as the "ongoing investigation" exception:

- a. Notwithstanding the provisions of P.L. 1963, c. 73 (C. 47:1A-1 et seq.) as amended and supplemented, where it shall appear that the record or records which are sought to be inspected, copied, or examined shall pertain to an investigation in progress by any public agency, the right of access provided for in P.L. 1963, c. 73 (C. 47:1A-1 et seq.) as amended and supplemented may be denied if the inspection, copying or examination of such record or records

shall be inimical to the public interest; provided, however, that this provision shall not be construed to allow any public agency to prohibit access to a record of that agency that was open for public inspection, examination, or copying before the investigation commenced. Whenever a public agency, during the course of an investigation, obtains from another public agency a government record that was open for public inspection, examination or copying before the investigation commenced, the investigating agency shall provide the other agency with sufficient access to the record to allow the other agency to comply with requests made pursuant to P.L. 1963, c. 73 (C. 47:1A-1 et seq.).

\* \* \*

Notwithstanding any other provision of this subsection, where it shall appear that the information requested or to be examined will jeopardize the safety of any person or jeopardize any investigation in progress or may be otherwise inappropriate to release, such information may be withheld. This exception shall be narrowly construed to prevent disclosure of information that would be harmful to a bona fide law enforcement purpose or the public safety. Whenever a law enforcement official determines that it is necessary to withhold information, the official shall issue a brief statement explaining the decision.

[N.J.S.A. 47:1A-3]

N.J.S.A. 47:1A-3 reflects a general legislative recognition of the public interest in law enforcement and other investigatory agencies maintaining the confidentiality of documents relevant to ongoing investigations. See Loigman v. Kimmelman, 102 N.J. 98, 106-08 (1986).

Furthermore, OPRA also encompasses an exemption for public records that are exempt from disclosure under the comparable federal Freedom of Information Act (FOIA), 5 U.S.C.A. § 552. N.J.S.A. 47:1A-5(a). FOIA provides that the disclosure requirements of that statute do not apply to "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C.A. § 552(b)(7)(A). The purpose of this exemption is to prevent premature disclosure of investigatory materials that could be used in a

federal law enforcement action. FBI v. Abramson, 456 U.S. 615, 621, 102 S. Ct. 2054, 2059, 72 L. Ed. 2d 376, 383 (1982). See Gannett N.J. Partners, LP v. County of Middlesex, 379 N.J. Super. 205, 214 (App. Div. 2005). Thus, the state OPRA and the federal FOIA disclosures statutes both recognize a law enforcement exemption for ongoing investigations that might be imperiled by premature disclosure.

I have been presented by Police Chief Smith the principal record sought by petitioner. It is the un-redacted investigation record. I have carefully reviewed the document and will only describe it in gross detail. It is ten pages and constructed as an organic record of the investigation as it has proceeded. When presented under cover letter of August 8, 2013, it had entries for dates when relevant inquiries took place commencing March 8, 2012. The most current entry is dated July 30, 2013. It is clear from those entries that the decision whether to prosecute has not been made yet by the Morris County Prosecutor's Office. Some of the delay has been attributed to collecting and collating the relevant pieces of information from various documentary and witness sources. Some of the delay has been the unavailability or change in personnel in the Prosecutor's Office. Contrary to petitioner's assertion, this investigation will not continue forever – criminal charges will either be brought or the criminal aspects will be dropped. On the basis of the above and my *en camera* review, I **CONCLUDE** that there is an ongoing criminal investigation and that the records requested directly constitute that investigation. These are not collateral or previously public documents simply being used as part of the evidence in a current criminal investigation.

Similarly, petitioner understandably cannot or might not be able to envision the harm that could come from his access to these records because people "cannot change the past." Nevertheless, Chief Smith has made a compelling argument, which I do not take just on face value but which is supported by the confidential investigation report, that release at this juncture could definitely undermine, color, or suggest changes to people's recollections of that past. Furthermore, the investigation is not complete and diligent collection of additional evidence and truthful statements would be impaired by public release of these records to petitioner. Accordingly, I **CONCLUDE** that there are no disputed facts and the law requires denial of petitioner's OPRA request at this time.

The Custodian of Records did lawfully deny petitioner access to these particular records.

**ORDER**

It is hereby **ORDERED** that the appeal of petitioner William Budesheim to the Government Records Council from the denial of the Riverdale Custodian of Records of his request for access to any Riverdale Police records, USPS investigations, or conversations between those two agencies relating to the bulk mailing of the Riverdale Newsletter is **DENIED**.

I hereby **FILE** my initial decision with the **GOVERNMENT RECORDS COUNCIL** for consideration.

This recommended decision may be adopted, modified or rejected by the **GOVERNMENT RECORDS COUNCIL**, who by law is authorized to make a final decision in this matter. If the Government Records Council does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **EXECUTIVE DIRECTOR OF THE GOVERNMENT RECORDS COUNCIL, 101 South Broad Street, PO Box 819, Trenton, New Jersey 08625-0819**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 6, 2013



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DATE

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**GAIL M. COOKSON, ALJ**

Date Received at Agency:

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11/6/13

Mailed to Parties:

id



**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**  
*Commissioner*

**INTERIM ORDER**

**August 28, 2012 Government Records Council Meeting**

William Budesheim  
Complainant

Complaint No. 2012-122

v.

Borough of Riverdale (Morris)  
Custodian of Record

At the August 28, 2012 public meeting, the Government Records Council (“Council”) considered the August 21, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that based on the inadequate evidence presented in this matter; the GRC is unable to determine whether or not the Custodian unlawfully denied access to the records responsive to the Complainant’s request. As such, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts to determine whether the Custodian unlawfully denied access, and if so, for a further determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Interim Order Rendered by the  
Government Records Council  
On The 28<sup>th</sup> Day of August, 2012

Robin Berg Tabakin, Chair  
Government Records Council

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

Denise Parkinson Vetti, Secretary  
Government Records Council

**Decision Distribution Date: August 30, 2012**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**William Budesheim<sup>1</sup>  
Complainant**

**GRC Complaint No. 2012-122**

v.

**Borough of Riverdale (Morris)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. Copy of the police incident report concerning the United States Postal Service (“USPS”) investigation of bulk mailing of the Riverdale Newsletter.
2. The name of the USPS Postal Inspector who initiated the above investigation and the name of the person who requested Riverdale Police assistance.
3. The voice recording of the telephone conversations between the Post Office and the Riverdale Police Department.

**Request Made:** April 4, 2012

**Response Made:** April 4, 2012

**Custodian:** Carol J. Talerico, R.M.C.

**GRC Complaint Filed:** April 18, 2012<sup>3</sup>

**Background**

**April 4, 2012**

Complainant’s Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form. The Complainant indicates that the preferred method of delivery is via e-mail.

**April 4, 2012**

Response to the OPRA request. Riverdale Chief of Police Kevin Smith responds in writing via e-mail to the Complainant’s OPRA request on the same date the request was received by stating that the requested records are denied because they are part of an open investigation.

**April 4, 2012**

E-mail from the Complainant to Chief Smith. The Complainant suggests the Chief obtain legal advice.

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

<sup>2</sup> Represented by Robert Oostdyk, Esq. (Riverdale, NJ); however, there are no submissions from the Custodian’s Counsel to the GRC on file.

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

**April 18, 2012**

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

- Complainant’s OPRA request dated April 4, 2012
- Custodian’s response to the OPRA request dated April 4, 2012
- E-mail from the Complainant to Chief Smith dated April 4, 2012

The Complainant states that Chief Smith responded to his April 4, 2012 OPRA request on the same date the Complainant submitted the request. The Complainant states that Chief Smith claims the records responsive to his request are part of an ongoing investigation but that the Chief refuses to provide the status of the investigation. The Complainant further states that disclosure of the requested records cannot compromise the investigation because the investigation concerns a past event that cannot be changed or altered retroactively. The Complainant states that the Borough, by claiming that the records are part of an ongoing investigation, can deny him access to the records indefinitely.

The Complainant does not agree to mediate this complaint.

**April 30, 2012**

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

**May 7, 2012**

Letter from the GRC to the Custodian. The GRC informs the Custodian that an SOI dated May 3, 2012 that was submitted to the GRC for this complaint is unacceptable because it consists of two (2) separate SOIs: one (1) prepared and signed by the Custodian, and one (1) prepared and signed by Chief Smith who is also named as the Custodian. The GRC informs the Custodian that the GRC will accept only one (1) SOI for any given complaint. The GRC suggests that (a) the Custodian and Chief Smith prepare the SOI jointly and the Custodian sign it, or (b) the Custodian prepare and sign the SOI and have Chief Smith prepare a separate certification which can be appended to the SOI. The GRC informs the Custodian that the corrected SOI must be submitted to the GRC within five (5) business days. The GRC also informs the Custodian that the GRC will only return an incomplete SOI to the Custodian one time.

**May 9, 2012**

Memorandum from Chief Smith to the Custodian. Chief Smith informs the Custodian that the Complainant has requested records which are pertinent to the Police Department’s investigation assigned incident number 12-0477 which is three (3) pages in length. Chief Smith also informs the Custodian that the voice recordings of telephone conversations between the Post Office and the Police Department constitute two (2) separate recordings. Chief Smith further informs the Custodian that the record retention period for the former is one (1) year after final entry and the retention period for the latter is thirty-one (31) days. Chief Smith informs the Custodian that the records responsive to the request have not been destroyed and that none of the requested records were disclosed to the Complainant because they are part of an ongoing active investigation and exempt

from disclosure pursuant to N.J.S.A. 47:1A-1.1. and N.J.S.A. 47:1A-3.a. Chief Smith informs the Custodian that Assistant Prosecutor Robert Weber of the Morris County Prosecutor's Office advised Chief Smith to deny access to the requested records.

**May 14, 2012<sup>4</sup>**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated April 4, 2012
- Custodian's response to the OPRA request dated April 4, 2012
- E-mail from the Complainant to Chief Smith dated April 4, 2012
- Memorandum from Chief Smith to the Custodian dated May 9, 2012

The Custodian certifies that the date the Custodian received the OPRA request is written on the OPRA request.<sup>5</sup> The Custodian does not certify as to the date the Custodian responded to the OPRA request.

The Custodian certifies that she is unsure what records are responsive to the request because the records are held by the Riverdale Police Department. The Custodian also certifies that she does not know the number of pages that constitute the records responsive to the request. The Custodian also certifies that she does not know the records retention requirements for the requested records. The Custodian further certifies that she does not know the legal reason for denying the Complainant access to the requested records. The Custodian certifies that the records responsive to the request were denied by the Riverdale Chief of Police.

### **Analysis**

#### **Whether the Custodian unlawfully denied access to the requested records?**

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*" (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ..." (Emphasis added.) N.J.S.A. 47:1A-1.1

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<sup>4</sup> The Custodian did not certify to the search undertaken to locate the records responsive or whether any records responsive to the Complainant's OPRA request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).)

<sup>5</sup> The OPRA request is marked received on April 4, 2012.

OPRA also provides that:

“...where it shall appear that the record or records that are sought to be inspected, copied, or examined shall pertain to an investigation in progress by any public agency, the right of access provided for in [OPRA]...may be denied if the inspection, copying, or examination of such record or records shall be inimical to the public interest; provided, however, that this provision shall not be construed to allow any public agency to prohibit access to a record of that agency that was open for public inspection, examination, or copying before the investigation commenced.” N.J.S.A. 47:1A-3.a.

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

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

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

In this complaint the Custodian submitted an unacceptable SOI to the GRC and it was returned to the Custodian for correction. The GRC not only returned the SOI but also suggested two (2) ways in which it could be cured:

1. That the Custodian and Chief Smith prepare the SOI together and that the Custodian signs it.
2. That the Custodian prepares and signs the SOI and has Chief Smith provide a separate certification which can be appended to the SOI.

The Custodian was informed by the GRC that “[t]he GRC will only return an incomplete Statement of Information once to records custodians.” (Emphasis in original).

On May 14, 2012, the Custodian resubmitted the SOI to the GRC. The resubmitted SOI was signed by the Custodian and included a memorandum from Chief Smith to the Custodian dated May 9, 2012, which set forth certain information about the requested records, including the statutes that the Custodian could assert in her legal argument as a reason for denying the request.<sup>6</sup>

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<sup>6</sup> The memorandum was not drafted in the form of a legal certification as suggested by the GRC, but rather was an internal communication that appeared advisory in nature. Furthermore, the Custodian failed to include any of the information provided within Chief Smith’s memorandum in her SOI, the jurat of which predated the date of the Chief’s memorandum.

The Custodian certified that she disavows any knowledge about the records responsive to the Complaint, including the legal reason for denying said records. Moreover, notwithstanding the GRC's suggestion that Chief Smith prepare a certification that the Custodian could append to the SOI, the Chief failed to provide such a certification and the Custodian failed to demand one. The GRC is convinced that Chief Smith did not inadvertently fail to certify his statement because he stated that he was acting under advice of legal counsel when he prepared it. Although the Chief mentioned that the requested records were not disclosed to the Complainant because they are part of an ongoing active investigation and exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. and N.J.S.A. 47:1A-3.a., the Chief did not explain how or why the disclosure of said records would be inimical to the public interest, which is a necessary element of the statute he cited. As such, Chief Smith's uncertified explanation for denying the Complainant access to the requested records does not rise to the level of clear and convincing evidence.

Therefore, based on the inadequate evidence presented in this matter, the GRC is unable to determine whether or not the Custodian unlawfully denied access to the records responsive to the Complainant's request. As such, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts to determine whether the Custodian unlawfully denied access, and if so, for a further determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that based on the inadequate evidence presented in this matter; the GRC is unable to determine whether or not the Custodian unlawfully denied access to the records responsive to the Complainant's request. As such, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts to determine whether the Custodian unlawfully denied access, and if so, for a further determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Prepared By: John E. Stewart, Esq.

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

August 21, 2012