



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**

**May 28, 2013 Government Records Council Meeting**

Virginia Ann Murphy  
Complainant

Complaint No. 2012-96

v.

Township of Washington (Gloucester)  
Custodian of Record

At the May 28, 2013 public meeting, the Government Records Council (“Council”) considered the May 21, 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:

1. The Council should decline to reconsider this complaint on the basis of “mistake.” The Council’s Interim Order was based on the evidence submitted. The Custodian should have certified in the Statement of Information that no “unedited” video existed. Thus, the Council considered the significance of probative, competent evidence on the record at that time and did not arbitrarily and capriciously order disclosure of the unedited video. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. Since the Township has submitted sufficient legal certifications supporting the argument that no record, responsive exists, the Council’s Order is rendered moot. Thus, although Custodian failed to bear her burden of proving a lawful denial of access to the requested unedited video pursuant to N.J.S.A. 47:1A-6 by failing to specifically certify in the Statement of Information that the video did not exist, the Council should abandon its compliance order on the basis that the record ordered to be provided to the Complainant does not exist.
3. Although the Custodian failed to bear her burden of proving a lawful denial of access to the requested unedited video, compliance was rendered moot because both the Custodian and Mayor certified that no unedited video existed. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions did not rise to the level of a knowing and willful



violation of OPRA and unreasonable denial of access under the totality of the circumstances.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the  
Government Records Council  
On The 28<sup>th</sup> Day of May, 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: June 11, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
May 28, 2013 Council Meeting**

**Virginia Ann Murphy<sup>1</sup>  
Complainant**

**GRC Complaint No. 2012-96**

**v.**

**Township of Washington (Gloucester)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copy via pickup of the unedited video of the Capital Roads Presentation held on March 14, 2012.

**Request Made:** March 15, 2012

**Response Made:** March 21, 2012

**GRC Complaint Filed:** April 5, 2012<sup>3</sup>

**Background**

**April 30, 2013 Council Meeting:**

At its April 30, 2013 public meeting, the 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 edited findings and recommendations. The Council, therefore, found that:

1. The Custodian failed to bear her burden of proving a lawful denial of access to the requested unedited video pursuant to N.J.S.A. 47:1A-6, Meyers v. Borough of Fair Lawn (Bergen), GRC Complaint No. 2005-127 (May 2006), and Burnett v. County of Gloucester, 415 N.J. Super. 506 (App. Div. 2010). Thus, the Custodian must obtain same from the Mayor and disclose the record accordingly.
  
2. **The Custodian shall comply with item No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each**

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<sup>1</sup> Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Clinton, NJ). Mr. Luers entered his appearance on May 22, 2013.

<sup>2</sup> Donna Heaton, Custodian of Records. Represented by John J. Armano, Esq., (Sewell, NJ).

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

**redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>4</sup> to the Executive Director.<sup>5</sup>**

3. 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.

Procedural History:

On May 1, 2013, the Council distributed its Interim Order to all parties. On May 7, 2013, the Custodian's Counsel requested that the Council reconsider its April 30, 2013 Interim Order based on mistake.

Request for Reconsideration:

Counsel requests that the Council reconsider its Interim Order requiring disclosure of an unedited video of the Capital Roads Presentation held on March 14, 2012, due to the fact that no record responsive exists. Counsel asserts that the video provided to the Complainant is the only video that exists. Counsel provides legal certifications from the Custodian and Mayor attesting to the same.

The Mayor certifies that she personally contracted with a videographer to tape only the presentation portion of her meeting that was provided to her on a DVD. The Mayor certifies that upon receipt of the Complainant's OPRA request, she forwarded the DVD to the Custodian for duplication. The Mayor certifies that no other video or DVD exists and never existed.

The Custodian certifies that upon receipt of the Complainant's OPRA request, she contacted the Mayor and obtained the responsive DVD for duplication and disclosure. The Custodian certifies that she had no way of obtaining the responsive DVD other than by contacting the Mayor.

Objections:<sup>6</sup>

On May, 22 2013, the Complainant's Counsel submitted objections to the Custodian Counsel's request for reconsideration attaching the Complainant's legal certification. Counsel contends the request for reconsideration should be denied since the evidence is clear that the Mayor and Custodian previously failed to argue that no unedited video existed. Counsel argues that it is further clear that the unedited video exists because the Mayor was provided with an "edited copy." Counsel further asserts that the Mayor failed to certify that no longer video than

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<sup>4</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>5</sup> Satisfactory compliance requires that the Custodian deliver the record 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.

<sup>6</sup> The Complainant submitted her objections within the short extension of time granted by the GRC on May 21, 2013.

the one provided exists. Counsel asserts that the Mayor and/or Custodian should be ordered to contact the videographer and retrieve the unedited video. Counsel further asserts that if the videographer no longer has the video because of the Mayor and Custodian's delay in asking for same, this complaint should be referred to the Office of Administrative Law for a knowing and willful hearing.

The Complainant certifies that she attended the meeting in question and the videographer was present and recording the entire meeting. The Complainant asserts that the fact that the Mayor received an "edited" videotape strongly suggest that the videographer maintains an unedited video.

### Analysis

#### Reconsideration

Parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. *N.J.A.C. 5:105-2.10*. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. *N.J.A.C. 5:105-2.10(a) – (e)*.

Applicable case law holds that:

"[a] party should not seek reconsideration merely based upon dissatisfaction with a decision." *D'Atria v. D'Atria*, 242 *N.J. Super.* 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g., Cummings v. Bahr*, 295 *N.J. Super.* 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. *D'Atria, supra*, 242 *N.J. Super.* at 401. 'Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.' *Ibid.*" *In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey*, 2003 *N.J. PUC LEXIS* 438, 5-6 (N.J. PUC 2003).

Here, the Custodian's Counsel filed the request for reconsideration of the Council's April 30, 2013 Interim Order on May 7, 2013, four (4) business days from the issuance of the Council's Order.

In support of his request for reconsideration, the Custodian's Counsel submitted legal certifications from the Mayor and Custodian. Counsel requests that the Council reconsider its

April 30, 2013 Interim Order because the unedited video ordered to be disclosed does not exist. These facts are corroborated by a legal certification of the Mayor, who certifies that the only part of the meeting taped was the presentation. The Mayor further certified that the DVD the videographer provided to her was forwarded to the Custodian for disclosure pursuant to the Complainant's OPRA request. The Custodian also certified that she received this DVD from the Mayor as it was the only way to obtain the record to provide same to the Complainant. Therefore, compliance as ordered on April 30, 2013 cannot be satisfied because the Custodian cannot disclose an unedited video that includes the entire meeting if one does not exist.

However, prior to receipt of this reconsideration, the Custodian, failed to provide sufficient evidence to the GRC that no unedited version of the video existed. The Statement of Information ("SOI") indicates that the Township relied on an argument that the "unedited video" was not a government record because it was personally financed by the Mayor. The April 30, 2013 Order would have been unnecessary had the Township provided this information about what video existed in its SOI rather than after the issuance of the Order.

As to the Complainant Counsel's objections, the GRC finds no the evidence of record that an unedited video exists.

The Council should decline to reconsider this complaint on the basis of "mistake." The Council's Interim Order was based on the evidence submitted. The Custodian should have certified in the SOI that no "unedited" video existed. Thus, the Council considered the significance of probative, competent evidence on the record at that time and did not arbitrarily and capriciously order disclosure of the unedited video. Cummings, supra; D'Atria, supra; Comcast, supra.

However, regarding compliance of the Council's April 30, 2013 Interim Order, since the Township has submitted sufficient legal certifications supporting the argument that no record responsive exists, the Council's Order is rendered moot. Thus, although Custodian failed to bear her burden of proving a lawful denial of access to the requested unedited video pursuant to N.J.S.A. 47:1A-6 by failing to specifically certify in the SOI that the video did not exist, the Council should abandon its compliance order on the basis that the record ordered to be provided to the Complainant does not exist.

### **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).

Although the Custodian failed to bear her burden of proving a lawful denial of access to the requested unedited video, compliance was rendered moot because both the Custodian and Mayor certified that no unedited video existed. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Council should decline to reconsider this complaint on the basis of “mistake.” The Council’s Interim Order was based on the evidence submitted. The Custodian should have certified in the Statement of Information that no “unedited” video existed. Thus, the Council considered the significance of probative, competent evidence on the record at that time and did not arbitrarily and capriciously order disclosure of the unedited video. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. Since the Township has submitted sufficient legal certifications supporting the argument that no record, responsive exists, the Council’s Order is rendered moot. Thus, although Custodian failed to bear her burden of proving a lawful denial of access to the requested unedited video pursuant to N.J.S.A. 47:1A-6 by failing to

specifically certify in the Statement of Information that the video did not exist, the Council should abandon its compliance order on the basis that the record ordered to be provided to the Complainant does not exist.

3. Although the Custodian failed to bear her burden of proving a lawful denial of access to the requested unedited video, compliance was rendered moot because both the Custodian and Mayor certified that no unedited video existed. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso  
Senior Case Manager

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

May 21, 2013





State of New Jersey  
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

INTERIM ORDER

April 30, 2013 Government Records Council Meeting

Virginia Ann Murphy  
Complainant

Complaint No. 2012-96

v.

Township of Washington (Gloucester)  
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 to the requested unedited video pursuant to N.J.S.A. 47:1A-6, Meyers v. Borough of Fair Lawn (Bergen), GRC Complaint No. 2005-127 (May 2006), and Burnett v. County of Gloucester, 415 N.J. Super. 506 (App. Div. 2010). Thus, the Custodian must obtain same from the Mayor and disclose the record accordingly.
2. **The Custodian shall comply with item No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>1</sup> to the Executive Director.<sup>2</sup>**
3. 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 30<sup>th</sup> Day of April, 2013

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

<sup>2</sup> Satisfactory compliance requires that the Custodian deliver the record 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.

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: May 1, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Virginia Ann Murphy<sup>1</sup>  
Complainant**

**GRC Complaint No. 2012-96**

v.

**Township of Washington (Gloucester)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copy via pickup of the unedited video of the Capital Roads Presentation held on March 14, 2012.

**Request Made:** March 15, 2012

**Response Made:** March 21, 2012

**GRC Complaint Filed:** April 5, 2012<sup>3</sup>

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

**Request and Response:**

On March 15, 2012, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian. On March 21, 2012, the Custodian responded in writing stating that an extension of time would be necessary to determine whether the responsive video is subject to disclosure under OPRA. On March 29, 2012, the Complainant e-mailed the Custodian seeking a status update on her OPRA request. On March 30, 2012, the Custodian responded advising that she obtained a DVD copy of a recording, which only shows the presentation and not the full meeting. The Custodian further advised that she would have to make a copy but that the Township of Washington (“Township”) does not possess the capability to do so in house. The Complainant responded on the same day stating that she will accept the edited video but believes the Township is denying access to the unedited video and will file a complaint with the Government Records Council (“GRC”). On March 30, 2012, the Custodian responded stating that she is providing the edited video and that the Complainant’s request for the unedited video is denied because the Custodian does not possess the record.

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

<sup>2</sup> Donna Heaton, Custodian of Records. Represented by John J. Armano, Esq., (Sewell, 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 April 5, 2012, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”) arguing that an unedited video of the meeting should include the question and answer section; however, the Custodian provided an edited video containing only the presentation. The Complainant further notes that she reviewed the edited video and audio recording, however the public’s questions were not audible. The Complainant argues that if the Township’s position is that the unedited video is exempt from disclosure, the State should conduct a full investigation into the legality of the Township’s transmission of the meeting notice to the public and editing of a taped public meeting.<sup>5</sup>

### Statement of Information:

On June 13, 2012, the Custodian filed a Statement of Information (“SOI”) certifying that she received the Complainant’s OPRA request on March 15, 2012. The Custodian certifies that she initially responded in writing on March 21, 2012 advising that an extension of time was necessary. The Custodian certifies that she responded again on March 30, 2012, providing a copy of the edited video on DVD and further advising that she was not in possession of the unedited video.

The Custodian’s Counsel submits a letter brief contending that the privately paid for and privately made recording of the Mayor’s report is not a government record under OPRA, which provides that:

“‘Government record’ or ‘record’ means 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 in the course of his or its official business by any officer ...*” (Emphasis added.) N.J.S.A. 47: 1A-1.1.<sup>6</sup>

Counsel asserts that the government records applicable to the Complainant’s OPRA request are the minutes and not the video privately financed and made by the Mayor.

### Analysis<sup>7</sup>

#### Unlawful Denial of Access

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

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<sup>5</sup> The GRC notes that pursuant to N.J.S.A. 47:1A-7(b), the GRC does not have the authority to adjudicate complaints regarding the Open Public Meetings Act. *See also Donato v. Borough of Emerson*, GRC Complaint No. 2005-125 (March 2007).

<sup>6</sup> Counsel also includes the definition of a record under the common law; however, pursuant to N.J.S.A. 47:1A-7, the GRC only has the authority to adjudicate requests made pursuant to OPRA.

<sup>7</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.

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.

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 *by any officer ...*” (Emphasis added.) N.J.S.A. 47:1A-1.1.

Additionally, the location of the record is of no moment. In Meyers v. Borough of Fair Lawn (Bergen), GRC Complaint No. 2005-127 (May 2006), the Council determined that electronic correspondence stored in a government official’s personal e-mail account was a government record subject to disclosure when used for Borough business. The Council found that “the location of the records does not inhibit the Custodian from obtaining the records and providing access to the records pursuant to OPRA.”

In Burnett v. County of Gloucester, 415 N.J. Super. 506 (App. Div. 2010) the Appellate Division reviewed the Law Division’s ruling, interpreting Bent v. Township of Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), holding that the defendant did not have to disclose the records responsive to the plaintiff’s OPRA request because the records were not in the defendant’s possession. The Appellate Division held that the motion judge interpreted Bent, *supra* too broadly. The Appellate Division held:

“[w]e find the circumstances in Bent, *supra*, to be far removed from those existing in the present matter because ... the settlement agreements at issue were made by or on behalf of the [defendants] in the course of its official business. Were we to conclude otherwise, a governmental agency seeking to protect its records from scrutiny could simply ... relinquish possession to [third] parties, thereby thwarting the policy of transparency that underlies OPRA ... We reject any narrowing legal position in this matter that would provide grounds for impeding access to such documents.” *Id.* at 517.

Here, the Complainant argued that the Township unlawfully denied access to an unedited video of the Capital Roads Presentation held on March 14, 2012. In the SOI, the Custodian certified that she provided an edited video but was not in possession of an unedited copy of same. The Custodian’s Counsel submitted a letter brief emphasizing that the unedited video was personally financed and made by the Mayor. Counsel thus contended that the video did not meet the definition of a government record and that the official record available is the minutes from the meeting.

However, contrary to Counsel’s argument, any record created by a government official “... during the course of his ... official business ...” falls within the definition of a government

record. Per Counsel's argument, the unedited video of the meeting was created by the Mayor in her official capacity, regardless of financing for the video.

Moreover, the GRC is not satisfied that the unedited video is not a government record solely because the Mayor paid for the creation of the record, especially given that the Township received an edited version of the video presumably from the Mayor. By definition, under the facts of this case, the unedited video is a government record for purposes of OPRA and should have been obtained and provided to the Complainant.

Therefore, the Custodian failed to bear her burden of proving a lawful denial of access to the requested unedited video pursuant to N.J.S.A. 47:1A-6, Meyers, supra, and Burnett, supra. Thus, the Custodian must obtain same from the Mayor and disclose the record accordingly.

### **Knowing & Willful**

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

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian failed to bear her burden of proving a lawful denial of access to the requested unedited video pursuant to N.J.S.A. 47:1A-6, Meyers v. Borough of Fair Lawn (Bergen), GRC Complaint No. 2005-127 (May 2006), and Burnett v. County of Gloucester, 415 N.J. Super. 506 (App. Div. 2010). Thus, the Custodian must obtain same from the Mayor and disclose the record accordingly.
2. **The Custodian shall comply with item No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>8</sup> to the Executive Director.<sup>9</sup>**
3. 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.

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<sup>8</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>9</sup> Satisfactory compliance requires that the Custodian deliver the record 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.

Prepared By: Frank F. Caruso  
Senior Case Manager

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

April 23, 2013