



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

December 20, 2013 Government Records Council Meeting

Michael DeFrancisci
Complainant

Complaint No. 2013-181

v.

Town of Secaucus (Hudson)
Custodian of Record

At the December 20, 2013 public meeting, the Government Records Council (“Council”) considered the December 10, 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 did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian violated OPRA because although he disclosed to the Complainant a redacted New Jersey Police Crash Investigation Report on May 10, 2013, he failed to include a document index explaining the lawful basis for each redaction. N.J.S.A. 47:1A-5(g). See also Paff v. Gloucester City (Camden), GRC Complaint No. 2009-102 (May 2011).
3. By failing to disclose to the Complainant the information required to be disclosed for an arrest made in connection with the hit and run fatality on August 13, 2012, the Custodian violated N.J.S.A. 47:1A-3(b).
4. With the exception of certain segments of the arrest report, the Custodian did not unlawfully deny access to the records responsive to the request that were withheld from disclosure because those records are criminal investigatory records, not government records subject to public access under OPRA. N.J.S.A. 47:1A-1.1. See also Nance v. Scotch Plains Township Police Department, GRC Complaint No. 2003-



125 (January 2005), and Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004).

5. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), failed to provide the Complainant with a redaction index explaining the lawful basis for each redaction made to the accident report disclosed on May 10, 2013, and failed to disclose information regarding an arrestee which must be disclosed pursuant to N.J.S.A. 47:1A-3(b), the Custodian did provide the Complainant with all unredacted records responsive to the request not otherwise exempt from disclosure. 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 do not rise to the level of a knowing and willful violation of OPRA and an 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 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**

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

**Michael DeFrancisci¹
Complainant**

GRC Complaint No. 2013-181

v.

**Town of Secaucus (Hudson)²
Custodial Agency**

Records Relevant to Complaint: All investigative reports regarding the hit and run fatality of Anthony Devito on August 13, 2012.

Custodian of Records: Michael Marra

Request Received by Custodian: April 5, 2013

Response Made by Custodian: April 30, 2013 and May 10, 2013

GRC Complaint Received: June 18, 2013

Background³

Request and Response:

On April 5, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request seeking the above-listed records. On April 30, 2013, the seventeenth (17th) business day following receipt of said request, the Custodian responded in writing to the request informing the Complainant that the August 13, 2012 motor vehicle accident investigation is still an ongoing investigation and the record that can be disclosed will only be disclosed after it has been redacted to protect the investigation. The Custodian further informed the Complainant that, “[w]e expect this information to be available by the end of next week.”⁴ On May 10, 2013, the Custodian forwarded to the Complainant a redacted three (3) page New Jersey Police Crash Investigation Report (“accident report”).⁵

Denial of Access Complaint:

On June 18, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant states that he provided his OPRA

¹ No legal representation listed on record.

² Represented by Edward J. Florio, Esq., of Florio & Kenny, L.L.P. (Hoboken, NJ).

³ 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.

⁴ The end of the following week was Friday, May 10, 2013.

⁵ The Custodian did not provide a redaction index.

request to the Custodian on February 28, 2013, and thereafter waited for fifty-seven (57) days but received no response from the Custodian. The Complainant states that he telephoned the Custodian on April 26, 2013, to check on the status of his request and the Custodian informed him that he would look into the matter. The Complainant states that the Custodian telephoned him later the same day to inform him that the request was being processed by the Police Department. The Complainant states that on April 30, 2013, the Custodian informed him in writing that the accident was still an ongoing investigation and that any records that could be disclosed would be redacted. The Complainant further states that on May 10, 2013, the Custodian disclosed a redacted three-page accident report.

The Complainant contends that it took the Custodian seventy-four (74) days to provide him with a partial list of the documents he requested; therefore, the Custodian violated OPRA. The Complainant also states that no index of the withheld documents was provided to him.

Statement of Information:

On October 7, 2013, the Custodian filed a Statement of Information (“SOP”). The Custodian certifies that he received the Complainant’s OPRA request on April 5, 2013, and that he responded to the request on May 10, 2013 and October 4, 2013.

The Custodian certifies that he did not knowingly and willfully violate OPRA because he states that he received the Complainant’s request on April 5, 2013, and immediately forwarded the request to the Police Department with instructions to provide him with all relevant records. The Custodian certifies that the only record the Police Department provided was the redacted accident report. The Custodian further certifies that on May 10, 2013, he sent the record received from the Police Department to the Complainant.

The Custodian’s Counsel states that in response to the Denial of Access Complaint, the following records were determined to be responsive to the Complainant’s request:

1. Arrest report for arrest occurring on August 23, 2012 (one page).
2. Accident report (three pages).
3. Continuation reports (four pages).
4. Supplementary investigation report dated August 13, 2012, detailing criminal investigation of accident (three pages).
5. Supplementary investigation report dated August 13, 2012, detailing criminal investigation of accident and containing witness interviews (one page).
6. Supplementary investigation report dated August 13, 2012, prepared by D. Dobosz detailing criminal investigation (one page).
7. Supplementary investigation report dated August 13, 2012, prepared by M. Viggiani detailing criminal investigation (one page).
8. Supplementary investigation report dated August 13, 2012, detailing criminal investigation (two page).
9. Vehicle/Property Report dated August 13, 2012, submitting victim property into evidence (one page).

10. Vehicle/Property Report dated August 13, 2012, submitting human remains, car debris and photographs into evidence (one page).
11. Vehicle/Property Report dated August 13, 2012, concerning a vehicle involved in the accident (two pages).
12. Supplementary investigation report dated August 15, 2012, detailing criminal investigation (one page).
13. Vehicle/Property Report dated August 16, 2012, submitting handwritten notes into evidence (two pages).
14. Supplementary investigation report dated August 17, 2012, detailing criminal investigation of accident and containing witness interviews (one page).
15. Supplementary investigation report dated August 18, 2012, detailing criminal investigation of accident and containing witness interviews (one page).
16. Vehicle/Property Report dated August 20, 2012, submitting DNA card into evidence (one page).
17. Vehicle/Property Report dated August 21, 2012, submitting digital pictures into evidence (one page).
18. Supplementary investigation report dated August 21, 2012, detailing criminal investigation (two pages).
19. Supplementary investigation report dated August 22, 2012, prepared by D. Degennaro detailing criminal investigation (one page).
20. Supplementary investigation report dated August 22, 2012, prepared by D. Degennaro detailing criminal investigation (one page).⁶
21. Supplementary investigation report dated August 23, 2012, prepared by D. Degennaro detailing criminal investigation (one page).
22. Supplementary investigation report dated August 23, 2012, prepared by D. Degennaro detailing criminal investigation (one page).⁷
23. Supplementary investigation report dated August 23, 2012, prepared by M. Torres detailing criminal investigation (one page).
24. Supplementary investigation report dated August 28, 2012, detailing criminal investigation (one page).
25. Supplementary investigation report dated August 29, 2012, detailing criminal investigation of accident and containing witness interviews (two pages).
26. Supplementary investigation report dated August 31, 2012, detailing criminal investigation (one page).
27. Supplementary investigation report dated September 3, 2012, detailing criminal investigation (one page).
28. Supplementary investigation report dated September 4, 2012, detailing criminal investigation (one page).
29. Supplementary investigation report dated September 11, 2012, detailing criminal investigation (one page).
30. Supplementary investigation report dated November 2, 2012, detailing criminal investigation (one page).
31. Vehicle/Property Report dated November 2, 2012, submitting autopsy report into evidence (one page).

⁶ This record could be a duplication of #19.

⁷ This record could be a duplication of #21.

32. Vehicle/Property Report dated August 16, 2012, submitting handwritten notes into evidence (two pages).
33. Undated Vehicle/Property Report submitting footage of highway intersection into evidence (one page).
34. Undated Vehicle/Property Report submitting photographs of accident scene (one page).

Counsel also states that a document index was prepared for each record responsive to the request. Counsel further states that unredacted copies of the accident report and an arrest report, pursuant to N.J.S.A. 39:4-131 and N.J.S.A. 47:1A-3(b), respectively, were disclosed to the Complainant on October 4, 2013. Counsel asserts that all of the remaining records determined to be responsive to the request are exempt from access pursuant to N.J.S.A. 47:1A-1.1, because they are criminal investigatory records. Counsel cites Nance v. Scotch Plains Township Police Department, GRC Complaint No. 2003-125 (January 2005) and Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004) as legal authority in support of the Custodian's denial. Counsel states that as an alternative basis for denial, the Custodian properly denied access to the records because they pertain to an investigation in progress by the Police Department, and disclosure would be inimical to the public interest pursuant to N.J.S.A. 47:1A-3.⁸

Additional Information:

On October 17, 2013, the Complainant submitted to the GRC a response to the SOI. The Complainant states that although the Custodian had an obligation to respond to the OPRA request in a timely manner, he failed to do so. The Complainant also asserts that the Custodian failed to provide a redaction index to accompany the accident report disclosed to the Complainant on May 10, 2013. The Complainant challenges the Custodian's alternative basis for denial: that the records are exempt from disclosure because they pertain to an investigation in progress and disclosure would be inimical to the public interest pursuant to N.J.S.A. 47:1A-3. The Complainant states that "[the Custodian's] claim that this investigation is 'ongoing' is far from the truth."

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. *Id.* Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁹ Thus, a custodian's failure to respond in writing to a complainant's OPRA

⁸ The Custodian also argued in Item 9 of the SOI that responsive records numbered 10, 17 and 34 contained photographs of the body taken by or for the medical examiner and, as such, were also exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

⁹ It is the GRC's position that a custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Here, the Complainant alleged that he submitted his OPRA request to the Custodian on February 28, 2013, and in support of the allegation he included as an attachment to the complaint a transmittal letter dated February 28, 2013; however, no OPRA request accompanied the transmittal letter. However, the Custodian attached as Item 6 of the SOI a transmittal letter from the Complainant forwarding an official OPRA request form. Although the language is substantially the same in both transmittal letters submitted to the GRC, the transmittal letter that the Custodian attached to the SOI is dated April 2, 2013, and contains an appended OPRA request form seeking the records relevant to the complaint and marked as received on April 5, 2013. Moreover, the Complainant attached the Custodian’s April 30, 2013 response to the complaint, and in that response the Custodian states, “I am writing regarding your OPRA request of April 2, 2013.” Furthermore, the Custodian certified that he received the Complainant’s OPRA request on April 5, 2013, which corresponds to the date written on the request form. Accordingly, the preponderance of the evidence of record reveals that the OPRA request which formed the basis of this complaint was received by the Custodian on April 5, 2013, via a transmittal letter dated April 2, 2013.

However, notwithstanding the finding of a much shorter response time than the fifty-seven (57) day period alleged by the Complainant, the Custodian, by not responding in writing until April 30, 2013, failed to respond to the request until the seventeenth (17th) business day following receipt of same.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, supra.

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 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.

The Custodian’s failure to explain the lawful basis for redactions made to the accident report

OPRA provides that:

[i]f the custodian of a government record asserts that part of a particular record is exempt from public access... the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record.” N.J.S.A. 47:1A-5(g). The provision goes on to provide that “[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor.

Id.

In Paff v. Gloucester City (Camden), GRC Complaint No. 2009-102 (May 2011), the Custodian disclosed closed session minutes in redacted form but failed to explain the lawful basis for each redaction. The Council subsequently found that it was necessary to conduct an *in camera* review of the requested records to determine whether the custodian lawfully redacted them.

Here, the Custodian determined that thirty-four (34) records were responsive to the Complainant’s request; however, the Custodian disclosed one (1) record to the Complainant on May 10, 2013: a redacted three (3) page accident report. The Custodian failed to include a document index explaining the lawful basis for each redaction made to the report.

As such, the Custodian violated OPRA because he disclosed to the Complainant a redacted accident report on May 10, 2013, but failed to include a document index explaining the lawful basis for each redaction. N.J.S.A. 47:1A-5(g). *See also Paff, supra*.

It is unnecessary for the Council to order the Custodian to provide to the Complainant a document index explaining the lawful basis for each redaction made to the accident report, however, because on October 4, 2013, the Custodian disclosed to the Complainant an unredacted copy of said report.

The Custodian’s failure to disclose specific information pursuant to N.J.S.A. 47:1A-3(b)

OPRA provides that:

[i]f an arrest has been made [the following information shall be made available to the public] the defendant’s name, age, residence, occupation, marital status and similar background information and the identity of the complaining party...the text of any charges...the identity of the investigating and arresting personnel and agency...the time and place of arrest...and information as to circumstances surrounding bail, whether it was posted and the amount thereof.

N.J.S.A. 47:1A-3(b).

The Council has long held that police arrest reports are criminal investigatory records not subject to disclosure under OPRA. *See Vercammen v. City of Plainfield*, GRC Complaint No. 2002-109 (March 2004) and Lanosga v. Borough of Princeton, GRC Complaint No. 2004-37

(June 2004). However, in Morgano v. Essex County Prosecutor's Office, GRC Complaint No. 2007-156 (February 2009), the Council determined that a custodian should grant access to arrest reports tailored by redaction to allow for disclosure of the specific information required to be disclosed pursuant to N.J.S.A. 47:1A-3(b).

Therefore, by failing to disclose to the Complainant the information required to be disclosed for an arrest made in connection with the hit and run fatality on August 13, 2012, the Custodian violated N.J.S.A. 47:1A-3(b).

It is unnecessary, however, for the Council to order the Custodian to provide to the Complainant the specific information required to be disclosed pursuant to N.J.S.A. 47:1A-3(b) because on October 4, 2013, the Custodian disclosed to the Complainant an unredacted copy of an arrest report made in connection with the hit and run fatality on August 13, 2012.

The Custodian's failure to disclose all other records responsive to the request

The Custodian determined that the balance of the requested records responsive to the request were exempt from disclosure as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1 and records which pertain to an investigation in progress by the Police Department, the disclosure thereof would be inimical to the public interest pursuant to N.J.S.A. 47:1A-3. The Custodian also determined that three (3) of the records, above-listed items 10, 17 and 34, were also exempt from access as photographs of the body taken by or for the medical examiner at the scene of death or in the course of a post mortem examination or autopsy made by or caused to be made by the medical examiner pursuant to N.J.S.A. 47:1A-1.1.

Criminal investigatory records are exempt from disclosure. N.J.S.A. 47:1A-1.1. A criminal investigatory record is defined as "...a record which is not required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding..." Id.

The status of records purported to fall under the criminal investigatory records exemption pursuant to N.J.S.A. 47:1A-1.1 was examined by the GRC in Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004).¹⁰ In Janeczko, the Council found that under OPRA, "criminal investigatory records include records involving all manner of crimes, resolved or unresolved, and includes information that is part and parcel of an investigation, confirmed and unconfirmed."

More specifically, in Nance v. Scotch Plains Township Police Department, GRC Complaint No. 2003-125 (January 2005), the Council determined that police incident reports, continuation reports, and property and evidence reports are criminal investigatory records as defined by N.J.S.A. 47:1-1.1, and are therefore exempt from disclosure.

Here, the Complainant requested "all *investigative reports* regarding the hit and run fatality of Anthony Devito on August 13, 2012." (Emphasis added.) The requested investigative reports clearly pertain to a criminal investigation because the copy of the accident report dated

¹⁰ Affirmed in an unpublished opinion of the Appellate Division in May 2004.

August 13, 2012, which the Custodian attached to the SOI states that pedestrian Anthony Devito was killed in the accident and one of the drivers "...was charged with Leaving Scene of Fatal MVA (2C:11-5.1) on Warrant #0909 2012 000479..."

The requested investigative reports are exempt from access because they constitute police incident reports, continuation reports, and property and evidence reports, which are records previously found by the Council to be exempt from access as criminal investigatory records. Nance, supra. Furthermore, it is well settled that police supplementary investigation reports are criminal investigatory records, exempt from access under N.J.S.A. 47:1A-1.1. See Janeczko, supra.

Therefore, with the exception of certain segments of the arrest report, the Custodian did not unlawfully deny access to the records responsive to the request that were withheld from disclosure because those records are criminal investigatory records, not government records subject to public access under OPRA. N.J.S.A. 47:1A-1.1. See also Nance, supra, and Janeczko, supra.

Since the withheld records are exempt from disclosure as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1, it is unnecessary for the Council to determine whether said records are also exempt from disclosure as records which pertain to an investigation in progress pursuant to N.J.S.A. 47:1A-3, and/or photographs of the body taken by or for the medical examiner at the scene of death or in the course of a post mortem examination or autopsy made by or caused to be made by the medical examiner pursuant to N.J.S.A. 47:1A-1.1.

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 "... [i]f 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 (Id.; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); 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 violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), failed to provide the Complainant with a redaction index explaining the lawful basis for each redaction made to the accident report disclosed on May 10, 2013, and failed to disclose information regarding an arrestee which must be disclosed pursuant to N.J.S.A. 47:1A-3(b), the Custodian did provide the Complainant with all unredacted records responsive to the request not otherwise exempt from disclosure. 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 do not rise to the level of a knowing and willful violation of OPRA and an 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 did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian violated OPRA because although he disclosed to the Complainant a redacted New Jersey Police Crash Investigation Report on May 10, 2013, he failed to include a document index explaining the lawful basis for each redaction. N.J.S.A. 47:1A-5(g). *See also* Paff v. Gloucester City (Camden), GRC Complaint No. 2009-102 (May 2011).
3. By failing to disclose to the Complainant the information required to be disclosed for an arrest made in connection with the hit and run fatality on August 13, 2012, the Custodian violated N.J.S.A. 47:1A-3(b).
4. With the exception of certain segments of the arrest report, the Custodian did not unlawfully deny access to the records responsive to the request that were withheld from disclosure because those records are criminal investigatory records, not government records subject to public access under OPRA. N.J.S.A. 47:1A-1.1. *See also* Nance v. Scotch Plains Township Police Department, GRC Complaint No. 2003-125 (January 2005), and Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004).

5. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), failed to provide the Complainant with a redaction index explaining the lawful basis for each redaction made to the accident report disclosed on May 10, 2013, and failed to disclose information regarding an arrestee which must be disclosed pursuant to N.J.S.A. 47:1A-3(b), the Custodian did provide the Complainant with all unredacted records responsive to the request not otherwise exempt from disclosure. 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 do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

Prepared By: John E. Stewart, Esq.

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

December 10, 2013