



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

November 18, 2014 Government Records Council Meeting

Darian Vitello
Complainant

Complaint Nos. 2012-268, 2012-321,
2013-72 and 2013-73

v.

Borough of Belmar Police Department
(Monmouth)
Custodian of Record

At the November 18, 2014 public meeting, the Government Records Council (“Council”) considered the November 10, 2014 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. Because Chief Palmisano responded within the prescribed time frame providing certified confirmation of compliance to the Executive Director that the July 17, 2008 transmission provided to the Complainant was complete, he complied with the Council’s October 28, 2014 Interim Order.
2. Chief Palmisano’s failure to bear his burden of proving a timely response to the Complainant’s OPRA requests resulted in a “deemed” denial. However, Chief Palmisano either bore his burden of proving a lawful denial of access to records or provided same to the Complainant. Finally, Chief Palmisano complied with the Council’s October 28, 2014 Interim Order. Additionally, the evidence of record does not indicate that the Chief Palmisano’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Chief Palmisano actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, there is no evidence in the record to support that the filing of these complaints led to the disclosure of the July 17, 2008



transmission. Additionally, the Council has held that Chief Palmisano lawfully denied access to all other records. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

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 18th Day of November, 2014

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: November 20, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
November 18, 2014 Council Meeting**

**Darian Vitello¹
Complainant**

**GRC Complaint Nos. 2012-268,
2012-321, 2013-72 and 2013-73²**

v.

**Borough of Belmar Police Department³
Custodial Agency**

Records Relevant to Complaint: Copies of:

May 21, 2012 OPRA request:⁴ The radio transmissions were [sic] [Complainant's] name was mentioned on the Belmar Police radio in regards to being involved in a theft . . . [T]he report were [sic] [Complainant's] name is involved in regards to a theft pertaining to the radio transmissions . . . from the beginning of May 2012 to the date of the request.

December 3, 2012 OPRA request:⁵ [T]he audio Belmar Police recordings in regards to Incident #2008-00010720 that took place on or about July 17, 2008 at approximately 16[:]26 hours . . . from the time [Complainant] called in the motor vehicle stop [un]till the time the subject was transported to Headquarters. The entire recording of the Incident, I understand some personal information may need to be removed.

January 25, 2013 OPRA requests:⁶ (The Complainant filed two (2) separate requests on this date.)

1. It has come to our attention that Paul Smikovecus was investigated for theft and threatening a person over dog training. I [Complainant] am requesting a complete copy of the IA Investigation in regards to Paul Smikovecus and this matter, I am requesting a copy of the IA complaint, the IA report and all statements. Including[,] if any[,] charges [which] were brought against Smikovecus.
2. [A] copy of the IA Investigation were [sic] Chris Lynch used my name over the Belmar Police radio in a harassing manner which served no legitimate purpose. Chief Tom Palmisano advised me he was conducting an IA Investigation. I would like all reports, statement[s] and[,] if any[,] charges [which] were brought against Chris Lynch.

¹ Represented by Walter M. Luers, Esq., of Walter M. Luers, LLC (Clinton, NJ).

² The GRC has consolidated these complaints for adjudication because of the commonality of the parties and issues.

³ Represented by James Plosia, Esq., of Apruzzese, McDermott, Mastro & Murphy, P.C. (Warren, NJ).

⁴ This OPRA request is the subject of GRC Complaint No. 2012-268.

⁵ This OPRA request is the subject of GRC Complaint No. 2012-321.

⁶ These OPRA requests are the subject of GRC Complaint Nos. 2013-72 and 2013-73 respectively.

Custodian of Record: April Claudio⁷

Requests Received by Custodian: May 21, 2012; December 14, 2012; and February 1, 2013

Response Made by Custodian: Unknown

GRC Complaints Received: September 18, 2012; December 14, 2012 and March 1, 2013.

Background

October 28, 2014 Council Meeting:

At its October 28, 2014 public meeting, the Council considered the October 21, 2014 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, found that:

1. Notwithstanding the arguments advanced by both parties, the GRC believes it is in the best interest of all involved to reconsider portions of this complaint. The procedural history of this complaint, in its totality, warrants reconsideration to correct the record, provide appropriate service to the parties and allow for proper compliance of the Council's Order, if necessary. Therefore, the Council should reconsider its October 29, 2013 Interim Order pursuant to N.J.A.C. 5:105- 2.10(a) to amend the record and correct procedural anomalies.
2. The Council should amend conclusion No. 3 as the Custodian could not have unlawfully denied access to a record that did not exist. Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). Further, because the requested record does not exist and thus no order of disclosure is necessary, the Council should rescind its order of compliance.
3. The Council should reissue conclusion No. 5 ordering disclosure of the July 17, 2008 recording to the Complainant. However, the Council should amend said conclusion to as follows: "If the recording provided to the Complainant represented a complete and accurate copy of the only record that existed at the time of the request, Chief Palmisano must legally certify to this fact."
4. **The Custodian shall comply with item No. 3 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 1:4-4,⁸ to the Executive Director.⁹**

⁷ Chief Thomas Palmisano was named as the custodian of record in the Denial of Access Complaint.

⁸ "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."

⁹ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Darian Vitello v. Borough of Belmar Police Department, 2012-268, 2012-321, 2013-72 and 2013-73 – Supplemental Findings and Recommendations of the Executive Director 2

5. 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.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On October 29, 2014, the Council distributed its Interim Order to all parties. On November 5, 2014, Custodian's Counsel stated that the Borough of Belmar ("Borough") may not have made their position sufficiently clear on whether any May 2012 Internal Affairs ("IA") report exist. Counsel stated that there are no records, IA-related or otherwise, in the Borough's possession. Counsel averred that, for this reason, the Borough did not produce any records because none existed.¹⁰

Further, Counsel asserted that, contrary to the Complainant's allegations, the recording ordered to be disclosed in conclusion No. 3 was complete. Counsel further noted that he provided a copy of the transmission for the Council's review. Counsel averred that the end of the transmission includes the suspect being brought through "the sally port" and into Police Headquarters. Counsel asserted that there would certainly be no more transmissions regarding the incident after this point.

On November 6, 2014, the Chief Thomas Palmisano responded to the Council's Interim Order. Chief Palmisano certified that the copy of the July 17, 2008 motor vehicle stop provided to the Complainant was a complete and accurate copy of the only recording the Borough possessed at the time of the Complainant's OPRA request. Also, Chief Palmisano certified that the CD provided to the GRC attached to Custodian Counsel's November 5, 2014 letter is an identical copy of the one provided to the Complainant.

Analysis

Compliance

At its October 28, 2014 meeting, the Council ordered the Custodian to disclose the July 17, 2008 transmissions or certify to the completeness of the transmission. Further, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On October 29, 2014, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on November 6, 2014.

On November 5, 2014, the fourth (4th) business day after receipt of the Council's Order, Custodian's Counsel stated that the transmission provided were complete and accurate. Counsel

¹⁰ The GRC notes that in the Council's October 28, 2014 Interim Order, it determined that conclusion No. 3 of the Council's October 29, 2013 Interim Order should be rescinded because no records existed.

also provided a copy of the transmission for the GRC's review. On November 6, 2014, the last day to comply with the Council's Order, Chief Palmisano submitted certified confirmation of compliance in which he affirmed that the transmission provided to the Complainant was a complete copy.¹¹

Therefore, because Chief Palmisano responded within the prescribed time frame providing certified confirmation of compliance to the Executive Director that the July 17, 2008 transmission provided to the Complainant was complete, he complied with the Council's October 28, 2014 Interim Order.

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)).

Chief Palmisano's failure to bear his burden of proving a timely response to the Complainant's OPRA requests resulted in a “deemed” denial. However, Chief Palmisano either bore his burden of proving a lawful denial of access to records or provided same to the Complainant. Finally, Chief Palmisano complied with the Council's October 28, 2014 Interim Order. Additionally, the evidence of record does not indicate that the Chief Palmisano's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate.

¹¹ The GRC should note that although the Order required the Custodian to comply, Chief Palmisano was in the best position to provide certified confirmation of compliance because he was the individual most familiar with the facts of the instant complaint.

Therefore, Chief Palmisano actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney's Fees

OPRA provides that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court ...; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council ... A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

N.J.S.A. 47:1A-6.

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Court held that a complainant is a "prevailing party" if he achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct. Id. at 432. Additionally, the Court held that attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Id.

Additionally, the New Jersey Supreme Court has ruled on the issue of "prevailing party" attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." Mason, 196 N.J. at 71, (quoting Buckhannon Bd. & Care Home v. West Virginia Dep't of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." (quoting Black's Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because "[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties," Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

However, the Court noted in Mason, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, *citing* Teeters, 387 N.J. Super. at 429; *see, e.g.*, Baer v. Klugholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), *certif. denied*, 174 N.J. 193 (2002). "But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes." 196 N.J. at 73 (citations omitted).

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6. Under the prior RTKL, “[a] plaintiff in whose favor such an order [requiring access to public records] issues ... may be awarded a reasonable attorney's fee not to exceed \$500.00.” N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

Mason at 73-76 (2008).

The Court in Mason, further held that:

[R]equestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) ‘a factual causal nexus between plaintiff's litigation and the relief ultimately achieved’; and (2) ‘that the relief ultimately secured by plaintiffs had a basis in law.’ Singer v. State, 95 N.J. 487, 495, *cert denied* (1984).

Id. at 76.

In this matter, the Complainant filed these four (4) complaints seeking relief from Chief Palmisano's failure to respond to his OPRA requests, including disclosure of the responsive records. Thereafter, the Council initially ordered disclosure of certain records and determined that he lawfully denied access to others. However, one of the Council's orders was rescinded in its October 28, 2014 Interim Order. Further, in response to conclusion No. 3 of the Order, Chief Palmisano certified that the July 17, 2008 transmission provided to the Complainant on an unknown date was a complete copy of same.

In determining whether this complaint brought about a change in Chief Palmisano's conduct, the GRC is satisfied that this is not the case. Specifically, the only record disclosed was the July 17, 2008 transmission; however, there is no evidence in the record of when the Borough provided same to the Complainant. In the absence of any evidence relating disclosure to this complaint, the GRC is not satisfied that the Complainant is a prevailing party entitled to an award of attorney's fees.

Therefore, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters, 387 N.J. Super. 432. Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, there is no evidence in the record to support that the filing of these complaints led to the disclosure of the July 17, 2008 transmission. Additionally, the Council has held that Chief

Palmisano lawfully denied access to all other records. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because Chief Palmisano responded within the prescribed time frame providing certified confirmation of compliance to the Executive Director that the July 17, 2008 transmission provided to the Complainant was complete, he complied with the Council's October 28, 2014 Interim Order.
2. Chief Palmisano's failure to bear his burden of proving a timely response to the Complainant's OPRA requests resulted in a "deemed" denial. However, Chief Palmisano either bore his burden of proving a lawful denial of access to records or provided same to the Complainant. Finally, Chief Palmisano complied with the Council's October 28, 2014 Interim Order. Additionally, the evidence of record does not indicate that the Chief Palmisano's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Chief Palmisano actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, there is no evidence in the record to support that the filing of these complaints led to the disclosure of the July 17, 2008 transmission. Additionally, the Council has held that Chief Palmisano lawfully denied access to all other records. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

November 10, 2014



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

October 28, 2014 Government Records Council Meeting

Darian Vitello
Complainant

Complaint Nos. 2012-268, 2012-321, 2013-72 and 2013-73

v.

Borough of Belmar Police Department
(Monmouth)
Custodian of Record

At the October 28, 2014 public meeting, the Government Records Council ("Council") considered the October 21, 2014 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:

Notwithstanding the arguments advanced by both parties, the GRC believes it is in the best interest of all involved to reconsider portions of this complaint. The procedural history of this complaint, in its totality, warrants reconsideration to correct the record, provide appropriate service to the parties and allow for proper compliance of the Council's Order, if necessary. Therefore, the Council should reconsider its October 29, 2013 Interim Order pursuant to N.J.A.C. 5:105- 2.10(a) to amend the record and correct procedural anomalies.

The Council should amend conclusion No. 3 as the Custodian could not have unlawfully denied access to a record that did not exist. Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). Further, because the requested record does not exist and thus no order of disclosure is necessary, the Council should rescind its order of compliance.

The Council should reissue conclusion No. 5 ordering disclosure of the July 17, 2008 recording to the Complainant. However, the Council should amend said conclusion to as follows: "If the recording provided to the Complainant represented a complete and accurate copy of the only record that existed at the time of the request, Chief Palmisano must legally certify to this fact."

The Custodian shall comply with item No. 3 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 1:4-4,¹ to the Executive Director.²

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

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.

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 28th Day of October, 2014

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: October 29, 2014

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**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
October 28, 2014 Council Meeting**

**Darian Vitello¹
Complainant**

**GRC Complaint Nos. 2012-268,
2012-321, 2013-72 and 2013-73²**

v.

**Borough of Belmar Police Department³
Custodial Agency**

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1. It has come to our attention that Paul Smikovecus was investigated for theft and threatening a person over dog training. I [Complainant] am requesting a complete copy of the IA Investigation in regards to Paul Smikovecus and this matter, I am requesting a copy of the IA complaint, the IA report and all statements. Including[,] if any[,] charges [which] were brought against Smikovecus.
2. [A] copy of the IA Investigation were [sic] Chris Lynch used my name over the Belmar Police radio in a harassing manner which served no legitimate purpose. Chief Tom Palmisano advised me he was conducting an IA Investigation. I would like all reports, statement[s] and[,] if any[,] charges [which] were brought against Chris Lynch.

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Darian Vitello v. Borough of Belmar Police Department, 2012-268, 2012-321, 2013-72 and 2013-73 – Findings and Recommendations of the Executive Director

Custodian of Record: April Claudio⁷

Requests Received by Custodian: May 21, 2012; December 14, 2012; and February 1, 2013

Response Made by Custodian: Unknown

GRC Complaints Received: September 18, 2012; December 14, 2012 and March 1, 2013.

Background⁸

October 29, 2013 Council Meeting:

At its October 29, 2013 public meeting, the Council considered the October 22, 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, found that:

1. The Custodian certified that he is unaware of when the Complainant's May 21, 2012 OPRA request was received or responded to. Although the Custodian acknowledges receipt of the Complainant's December 2, 2012 request on December 12, 2012, he certifies that the response was provided on an "unknown date." The Custodian further certifies that he responded to the Complainant's January 25, 2013 request for the Smikoevcus File on February 1, 2013; however, he does not provide if the response was in writing. Finally, the Custodian failed to provide whether any response was ever made to the Complainant's second January 25, 2013 request for the Lynch File. There is no evidence that that the Custodian responded within seven (7) days to any of the Complainant's requests as required by N.J.S.A. 47:1A-6. Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond, in writing, to the Complainant's OPRA requests 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian certifies that he provided a CD copy of the requested May 2012 Transmission to the Complainant. The Complainant does not challenge the Custodian's assertion that a copy of the May 2012 Transmission was provided. Therefore, although there was a "deemed denial," it is unnecessary for the Council to order disclosure of the radio transmission because the Complainant has received a copy.
3. The Complainant also sought the May 2012 Report, which he identified as a report "were [sic] [Complainant's] name is involved in regards to a theft pertaining to the

⁷ Chief Thomas Palmisano was named as the custodian of record in the Denial of Access Complaint.

⁸ 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.

Darian Vitello v. Borough of Belmar Police Department, 2012-268, 2012-321, 2013-72 and 2013-73 – Findings and Recommendations of the Executive Director

radio transmissions . . . from the beginning of May 2012 to the date of the request.” The Custodian denied access to the report stating only that the Complainant is “not entitled to internal affairs reports.” Although the Custodian’s SOI identified the report as an IA report, he failed to identify the report by the date of creation, to describe the nature of the May 2012 Report (e.g., as an incident report or an accident report) or in any other way which would support his denial of the May 2012 Report as an IA report. From the record before it, the Council cannot determine if the May 2012 Report was indeed an IA report. Thus, the Council cannot find that the confidentiality provisions of the IAPP governing IA Investigation reports would restrict access by the Complainant to the May 2012 Report. **Therefore, the Council directs that the Custodian, within five (5) business days of receipt of its Interim Order either: (1) produce a copy of the May 2012 Report to the Complainant⁹ with appropriate redactions, if any, including a detailed document index, explaining the lawful basis for each redaction and to simultaneously provide certification of compliance, in accordance with N.J. Court Rule 1:4-4 (and a copy of the document index, if any) to the Executive Director; or alternatively (2) deny access to the May 2012 Report and simultaneously provide a certification, with relevant authority, explaining the denial in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**

4. The Complainant’s January 25, 2013 OPRA requests sought the “IA Investigation[s]” for Paul Smikovecus and Chris Lynch. Here, the Complainant sought the entire IA Investigation files. In light of the Appellate Court’s holding in O’Shea v. Twp. W. Milford that the Attorney General guidelines, directives and policies are binding and enforceable on law enforcement agencies, 410 N.J. Super. 371, 380 (App. Div. 2009), and further because the guidelines are not abrogated by OPRA pursuant to N.J.S.A. 47:1A-9(a), the confidentiality provisions of the IAPP governing IA investigation reports restricts public access to the requested records. Accordingly, the Custodian lawfully denied the Complainant access to IA investigation files of Paul Smikovecus and Chris Lynch.
5. The Custodian certifies that the 2008 Transmission, which was the subject of the Complainant’s December 2, 2012 OPRA Request, was disclosed. However, the Complainant challenges the Custodian’s contention, arguing that the copy of the 2008 Transmission produced was incomplete and that he did not receive the entire recording of the motor vehicle stop. The Council, from the record before it, is unable to determine it if the Complainant received the entire 2008 Transmission or a portion of it. **Therefore, the Council directs that the Custodian, within five (5) business days of receipt of its Interim Order, produce a copy of the 2008 Transmission to the Complainant and simultaneously to provide a certification of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. If redactions to the transmission are necessary then the Custodian must also include a**

⁹ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

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detailed document index, explaining the lawful basis for each redaction, to the Complainant and the Executive Director.

6. 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 October 30, 2013, the Council distributed its Interim Order to all parties. On November 11, 2013, the Complainant's Counsel entered his appearance by letter of representation to the GRC.

On January 16, 2014, the Custodian's Counsel, via letter, first apologized for not responding to the Council's Interim Order. The Custodian's Counsel stated that the decisions were only copied to Chief Thomas Palmisano and not to April Claudio, Custodian for the Borough of Belmar ("Borough"). Further, the Custodian's Counsel stated that Chief Palmisano did not forward the Interim Order to anyone in the Borough; thus, he did not receive same until the end of December, 2013.

The Custodian's Counsel affirmed that although Chief Palmisano's Statement of Information ("SOI") identified only Apruzzese, McDermott, Mastro & Murphy, P.C., as representing the Borough (and failed to identify Counsel by name), his e-mail address was included. Thus, the Custodian's Counsel averred that the GRC was given sufficient notice that he represented the Borough in at least two (2) of the four (4) complaints for which SOIs were submitted.¹⁰ Additionally, the Custodian's Counsel stated that the Complainant, and at least four (4) attorneys representing the Complainant, were aware that he represented the Borough prior to the Council's Interim Order. The Custodian's Counsel asserted that for these reasons, it is fair to note that although the Custodian's failure to respond rested solely on the Borough, he should have been copied on all correspondence regarding these complaints.

Regarding conclusion No. 3 of the Interim Order, the Custodian's Counsel averred that no Internal Affairs ("IA") report responsive to the Complainant's May 21, 2012 OPRA request exists. Counsel asserted that although he was unable to locate a written statement from Chief Palmisano advising the Complainant that he was "not entitled to internal affairs reports," such a denial is of no moment here. The Custodian's Counsel asserted that no IA investigation took place and thus no records were created pertaining to such.

Regarding the remainder of the Complainant's May 21, 2012 OPRA request seeking "radio transmissions" and a "report" where he was implicated in a theft, the Custodian's Counsel contended that same was invalid because it failed to identify a specific record but speculated that records may have existed. Also, the Custodian's Counsel argued that the request did not include

¹⁰ Not fully aware of entire universe of complaints the Complainant filed with the GRC, Custodian's Counsel made a general appearance in all matters by expressing that he would be representing the Custodian in all complaints filed. Although his appearance was noted in other cases, the GRC did not record Counsel's notice of representation within all the files of these complaints.

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a time frame, did not make mention of the alleged statement and essentially sought information. The Custodian's Counsel asserted that, notwithstanding that the request was invalid, Chief Palmisano attempted to obtain clarification from the Complainant in a series of e-mails and telephone conversations. The Custodian's Counsel noted that Complainant was initially unable to provide details, and requested that Chief Palmisano review the transmissions to find the alleged statements. The Custodian's Counsel argued that although Chief Palmisano was not required to review the transmissions to locate alleged statements contained therein, he did so and was unable to locate same.

Further, the Custodian's Counsel contended that while there was a timeliness violation here, Chief Palmisano still endeavored to fulfill a request that was otherwise invalid. The Custodian's Counsel asserted that it seemed inappropriate for the Council to find a timeliness violation because the evidence of record indicated that Chief Palmisano attempted to obtain clarification from the Complainant on multiple occasions.

Finally, the Custodian's Counsel agreed that Chief Palmisano's failure to respond in writing to the Complainant's request for IA investigation records of Mr. Smikovecus resulted in a "deemed" denial. However, the Custodian's Counsel asserted that based on the Council's upholding of Chief Palmisano's denial of access to IA records and the fact that no files existed, Chief Palmisano's violation of OPRA is minor.

On January 22, 2014, the Complainant's Counsel submitted objections to the request for reconsideration. Initially, Counsel argued that the request for reconsideration should be denied because it was not submitted on the appropriate form. The Complainant's Counsel argued that the Council should require the Custodian to comply with conclusion No. 3.

Further, the Complainant's Counsel asserted that there is no reason why the Borough should not comply with conclusion No. 5. First, the Complainant's Counsel argued that the conclusion should not be reconsidered because their only argument is that the December 2, 2013 OPRA request was invalid. The Complainant's Counsel contended that this argument is erroneous because the Borough was able to search for and locate a responsive record. Burke v. Brandes, 429 N.J. Super. 169, 179 (App. Div. 2012).

On October 9, 2014, the GRC advised Custodian's Counsel that the Borough had not fully met compliance. Specifically, the GRC noted that because Chief Palmisano was identified as the Custodian of Record, he should have filed a certified confirmation of compliance and failed to do so. Accordingly, the GRC requested Chief Palmisano's certification be submitted by October 14, 2014.

On October 14, 2014, Chief Palmisano responded to the Council's October 29, 2013 Interim Order. Chief Palmisano first certified that he is not the Custodian of Record for the Borough and did not forward the Council's Order to anyone until he forwarded same to Custodian's Counsel in December 2013. Further, Chief Palmisano certified that he advised the GRC of Custodian Counsel's representation in the SOIs submitted in May 2013. However, Custodian's Counsel was never copied on these decisions.

Regarding conclusion No. 3, Chief Palmisano certified that he initially denied the request on the basis that no IA report concerning Office Chris Lynch existed. Chief Palmisano accordingly certified that his denial was appropriate because the Borough has no responsive records.¹¹

Analysis

Distribution and Response to the Council's October 29, 2013 Interim Order

Pursuant to N.J.A.C. 5:105-2.10(a), the Council, “at its own discretion, may reconsider any decision it renders.” Id. The GRC thus reconsiders this matter of its own volition in order to amend the Council’s January 28, 2014 Administrative Complaint Disposition.

As a threshold issue, all parties to this complaint, including the GRC, made missteps in the handling of same that caused confusion and led to significant complications.

Specifically, and based on the incomplete nature of the SOIs submitted in three (3) of the four (4) complaints,¹² the Council based its Order solely on the evidence of record, thereby requiring disclosure of records without fully being aware of the existence of same. Thereafter, the Order was disseminated to only Chief Palmisano and the Complainant. Based on Chief Palmisano’s October 14, 2014 legal certification, Custodian’s Counsel was not made aware of the Council’s Order until December 2013. On January 16, 2014, the Custodian’s Counsel advised that no records as ordered to be disclosed in conclusion No. 3 existed because no IA investigation was conducted. This statement was supported in Chief Palmisano’s October 14, 2014 legal certification. However, neither Counsel nor Chief Palmisano’s submissions addressed conclusion No. 5.

To this end, Complainant’s Counsel submitted objections to what he believed to be the Borough’s “request for reconsideration.” Therein, he argued that the Council should reject Custodian Counsel’s submission because it was not on the GRC’s official OPRA request form. Further, Complainant’s Counsel contended that the GRC should require the Borough to comply with both conclusion Nos. 3 and 5.

Notwithstanding the arguments advanced by both parties, the GRC believes it is in the best interest of all involved to reconsider portions of this complaint. The procedural history of this complaint, in its totality, warrants reconsideration to correct the record, provide appropriate service to the parties and allow for proper compliance of the Council’s Order, if necessary. Therefore, the Council should reconsider its October 29, 2013 Interim Order pursuant to N.J.A.C. 5:105- 2.10(a) to amend the record and correct procedural anomalies.

¹¹ Chief Palmisano also included additional certifications that did not address conclusion No. 5 of the Council’s Order.

¹² Chief Palmisano did not submit an SOI for GRC Complaint No. 2013-73.

Reconsideration

Conclusion No. 3

Regarding the Council's Order, in the SOI, Chief Palmisano noted that the Complainant "is not entitled to [IA] reports." Thus, the Council ordered Chief Palmisano to disclose to the Complainant "a copy of the May 2012 Report." The Council based this conclusion on the evidence of record at the time, which suggested that the requested report identified by the Complainant existed and did not meet the exemption set forth in the SOI by Chief Palmisano.

However, after being made aware of the Order, Custodian's Counsel stated that no such record existed because no IA investigation took. On October 14, 2014, Chief Palmisano certified to this fact. Further, no evidence in the record suggested that the "May 2012' Report" actually existed.

Therefore, the Council should amend conclusion No. 3 as the Custodian could not have unlawfully denied access to a record that did not exist. Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). Further, because the requested record does not exist and thus no order of disclosure is necessary, the Council should rescind its order of compliance.

Conclusion No. 5

Regarding the Council's Order, Chief Palmisano certified in the SOI that he provided a copy of the responsive 2008 transmission to the Complainant. However, as noted by the Council, the Complainant contended that the recording he received was incomplete. The Complainant contended that the video he received ended immediately after he "called out the motor vehicle stop." The GRC notes that neither the Custodian Counsel's January 16, 2014 submission or Chief Palmisano's October 14, 2014 legal certification addressed this conclusion.

Thus, the crux of this complaint is whether Chief Palmisano properly fulfilled the request by providing the complete July 17, 2008 recording "from the time [the Complainant] called out the motor vehicle stop [until] the time the subject was transported to headquarters." Historically, in situations where the content of a record is disputed, the Council has found that it has no authority over such an issue. *See DiCampli v. NJ State Police*, GRC Complaint No. 2013-338 (July 2014)(*citing Kwanzaa v. NJ Dep't of Corrections*, GRC Complaint No. 2004-167 (March 2005)). Of course, the precedential analysis is predicated on the custodian's certification that the incomplete record provided was the only record that existed and that no evidence refuted same.

However, a separate set of facts appears to exist here. Specifically, the Complainant seems to have intimate knowledge of the recording because he was the individual recording the motor vehicle stop. This is not to say that the recording exists in the manner requested by the Complainant, but it does provide a significant question as to the actual length of the recording.

Accordingly, the Council should reissue conclusion No. 5 ordering disclosure of the July 17, 2008 recording to the Complainant. However, the Council should amend said conclusion to as follows: "If the recording provided to the Complainant represented a complete and accurate

copy of the only record that existed at the time of the request, Chief Palmisano must legally certify to this fact.”

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.

Prevailing Party Attorney’s Fees

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Notwithstanding the arguments advanced by both parties, the GRC believes it is in the best interest of all involved to reconsider portions of this complaint. The procedural history of this complaint, in its totality, warrants reconsideration to correct the record, provide appropriate service to the parties and allow for proper compliance of the Council’s Order, if necessary. Therefore, the Council should reconsider its October 29, 2013 Interim Order pursuant to N.J.A.C. 5:105- 2.10(a) to amend the record and correct procedural anomalies.
2. The Council should amend conclusion No. 3 as the Custodian could not have unlawfully denied access to a record that did not exist. Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). Further, because the requested record does not exist and thus no order of disclosure is necessary, the Council should rescind its order of compliance.
3. The Council should reissue conclusion No. 5 ordering disclosure of the July 17, 2008 recording to the Complainant. However, the Council should amend said conclusion to as follows: “If the recording provided to the Complainant represented a complete and accurate copy of the only record that existed at the time of the request, Chief Palmisano must legally certify to this fact.”
4. **The Custodian shall comply with item No. 3 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 1:4-4,¹³ to the Executive Director.¹⁴**

¹³ "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."

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5. 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.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

October 21, 2014

¹⁴ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

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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

October 29, 2013 Government Records Council Meeting

Darian Vitello
Complainant

Complaint Nos. 2012-268, 2012-321, 2013-72 and
2013-73

v.

Borough of Belmar Police
Department
Custodian of Record

At the October 29, 2013 public meeting, the Government Records Council (“Council”) considered the October 22, 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 certified that he is unaware of when the Complainant’s May 21, 2012 OPRA request was received or responded to. Although the Custodian acknowledges receipt of the Complainant’s December 2, 2012 request on December 12, 2012, he certifies that the response was provided on an “unknown date.” The Custodian further certifies that he responded to the Complainant’s January 25, 2013 request for the Smikoevcus File on February 1, 2013; however, he does not provide if the response was in writing. Finally, the Custodian failed to provide whether any response was ever made to the Complainant’s second January 25, 2013 request for the Lynch File. There is no evidence that that the Custodian responded within seven (7) days to any of the Complainant’s requests as required by N.J.S.A. 47:1A-6. Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond, in writing, to the Complainant’s OPRA requests 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 certifies that he provided a CD copy of the requested May 2012 Transmission to the Complainant. The Complainant does not challenge the Custodian’s assertion that a copy of the May 2012 Transmission was provided. Therefore, although there was a “deemed denial,” it is unnecessary for the Council to order disclosure of the radio transmission because the Complainant has received a copy.



3. The Complainant also sought the May 2012 Report, which he identified as a report “were [sic] [Complainant’s] name is involved in regards to a theft pertaining to the radio transmissions . . . from the beginning of May 2012 to the date of the request.” The Custodian denied access to the report stating only that the Complainant is “not entitled to internal affairs reports.” Although the Custodian’s SOI identified the report as an IA report, he failed to identify the report by the date of creation, to describe the nature of the May 2012 Report (e.g., as an incident report or an accident report) or in any other way which would support his denial of the May 2012 Report as an IA report. From the record before it, the Council cannot determine if the May 2012 Report was indeed an IA report. Thus, the Council cannot find that the confidentiality provisions of the IAPP governing IA Investigation reports would restrict access by the Complainant to the May 2012 Report. **Therefore, the Council directs that the Custodian, within five (5) business days of receipt of its Interim Order either: (1) produce a copy of the May 2012 Report to the Complainant¹ with appropriate redactions, if any, including a detailed document index, explaining the lawful basis for each redaction and to simultaneously provide certification of compliance, in accordance with N.J. Court Rule 1:4-4² (and a copy of the document index, if any) to the Executive Director; or alternatively (2) deny access to the May 2012 Report and simultaneously provide a certification, with relevant authority, explaining the denial in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
4. The Complainant’s January 25, 2013 OPRA requests sought the “IA Investigation[s]” for Paul Smikovecus and Chris Lynch. Here, the Complainant sought the entire IA Investigation files. In light of the Appellate Court’s holding in O’Shea v. Twp. W. Milford that the Attorney General guidelines, directives and policies are binding and enforceable on law enforcement agencies, 410 N.J. Super. 371, 380 (App. Div. 2009), and further because the guidelines are not abrogated by OPRA pursuant to N.J.S.A. 47:1A-9(a), the confidentiality provisions of the IAPP governing IA investigation reports restricts public access to the requested records. Accordingly, the Custodian lawfully denied the Complainant access to IA investigation files of Paul Smikovecus and Chris Lynch.
5. The Custodian certifies that the 2008 Transmission, which was the subject of the Complainant’s December 2, 2012 OPRA Request, was disclosed. However, the Complainant challenges the Custodian’s contention, arguing that the copy of the 2008 Transmission produced was incomplete and that he did not receive the entire recording of the motor vehicle stop. The Council, from the record before it, is unable to determine it if the Complainant received the entire 2008 Transmission or a portion of it. **Therefore, the Council directs that the Custodian, within five (5) business days of receipt of its Interim Order, produce a copy of the 2008 Transmission to the Complainant and simultaneously to provide a certification of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. If redactions**

¹ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

² "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."

to the transmission are necessary then the Custodian must also include a detailed document index, explaining the lawful basis for each redaction, to the Complainant and the Executive Director.

6. 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 29th Day of October, 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: October 30, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 29, 2013 Council Meeting**

**Darian Vitello¹
Complainant**

**GRC Complaint Nos. 2012-268,
2012-321, 2013-72 and 2013-73²**

v.

**Borough of Belmar Police Department³
Custodial Agency**

Records Relevant to Complaint: Copies of:

May 21, 2012 OPRA Request:

The radio transmissions were [sic] [Complainant's] name was mentioned on the Belmar Police radio in regards to being involved in a theft. . . [T]he report were [sic] [Complainant's] name is involved in regards to a theft pertaining to the radio transmissions . . . from the beginning of May 2012 to the date of the request.

December 3, 2012 OPRA Request:

[T]he audio Belmar Police recordings in regards to Incident #2008-00010720 that took place on or about July 17, 2008 at approximately 16[:]26 hours. . . from the time [Complainant] called in the motor vehicle stop [un]till the time the subject was transported to Headquarters. The entire recording of the Incident, I understand some personal information may need to be removed.

January 25, 2013 OPRA Requests: (The Complainant filed two separate requests on this date.)

1. It has come to our attention that Paul Smikovecus was investigated for theft and threatening a person over dog training. I [Complainant] am requesting a complete copy of the IA Investigation in regards to Paul Smikovecus and this matter, I am requesting a copy of the IA complaint, the IA report and all statements. Including[,] if any[,] charges [which] were brought against Smikovecus.
2. [A] copy of the IA Investigation were [sic] Chris Lynch used my name over the Belmar Police radio in a harassing manner which served no legitimate purpose. Chief Tom Palmisano advised me he was conducting an IA Investigation. I would like all

¹ No legal representation listed on record.

² The GRC has consolidated these complaints for adjudication because of the commonality of the parties and issues.

³ Although the Custodian's Statement of Information ("SOI") indicates he is represented by Apruzzese, Nastro and Murphy, P.C. (Liberty Corner, NJ), he fails to list a specific contact at the firm and the firm did not make an appearance in any of these cases.

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reports, statement[s] and[,] if any[,] charges [which] were brought against Chris Lynch.

Custodian of Record: Chief Thomas Palmisano

Requests Received by Custodian:

May 21, 2012;
December 14, 2012; and
February 1, 2013

Response Made by Custodian: Unknown

GRC Complaints Received:

No. 2012-268: September 18, 2012;
No. 2012-321: December 14, 2012;
Nos. 2013-72 and 2013-73: March 1, 2013.

Background⁴

Requests and Responses:

May 21, 2012 OPRA Request:

On May 21, 2012, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian requesting copies of both a police report (the “May 2012 Report”) and a radio transmission (the “May 2012 Transmission”), in which the Complainant believed he was named in connection with an alleged theft. On a date unknown, the Custodian responded to the Complainant by providing him with a CD of the May 2012 Transmission. The Custodian, however, did not provide a copy of the May 2012 Report, claiming: “Mr. Vitello is not entitled to internal affairs reports.”

December 3, 2012 OPRA Request:

On December 2, 2012, the Complainant hand delivered an OPRA request to the Custodian seeking a radio transmission of a traffic stop which occurred on or about July 17, 2008 (the “2008 Transmission”). On a date unknown, Mr. Vitello was given a CD of the 2008 Transmission.

January 25, 2013 OPRA Requests:

On January 25, 2013, the Complainant filed two separate OPRA requests. The first sought a complete copy of all statements, reports, and any charges, if any, regarding the Internal Affairs (“IA”) investigation of Paul Smikovecus (the “Smikovecus File”) for theft and

⁴ 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.

Darian Vitello v. Borough of Belmar Police Department, 2012-268, 2012-321, 2013-72 and 2013-73 – Findings and Recommendations of the Executive Director

threatening a person over dog training. The Custodian did not provide the requested Smikovecus File because it could not be located.

The second January 25, 2012 OPRA request sought a copy of the IA investigation, including all reports, statements and charges, if any, which were brought against Chris Lynch (the "Lynch File") as a result of Lynch's use of the Complainant's name over the Belmar Police radio. No response was received.

Denial of Access Complaints:

May 21, 2012 OPRA Request:

On September 18, 2012, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserts that the requested May 2012 Transmission and May 2012 Report were not produced.

December 2, 2012 OPRA Request:

On December 14, 2012, the Complainant filed a Denial of Access Complaint with the GRC. The Complainant asserts that he did not receive any response to his request for the 2008 Transmission.

January 25, 2013 OPRA Requests:

On or about March 1, 2013, the Complainant filed two additional Denial of Access Complaints with the GRC in connection with his January 25, 2012 requests. In the first of those complainants (No. 2013-72), the Complainant asserts that he did not receive any response to his request for the Smikovecus File.

In the second complaint filed in connection with the January 25, 2012 OPRA requests (No. 2013-73), the Complainant alleges he did not receive a copy of the Lynch File. The Complainant further contends that the Custodian is withholding the Lynch file to prevent the Complaint from filing criminal charges against Officer Lynch.

Statements of Information:

On May 7, 2013, the Custodian filed Statements of Information ("SOP") in connection with the Complainant's May 21, 2012, December 2, 2012 and one of the January 25, 2013 OPRA Requests.

May 21, 2012 OPRA Request:

The Custodian states that he is unaware of the date Complainant's May 21, 2012 request was received. The Custodian certifies that on an unknown date, the Complainant was provided with a CD copy of the May 2012 Transmission. The Custodian, however, asserts that "Mr. Vitello is not entitled to internal affairs [police] reports." The Custodian does not state if he ever

responded, in writing or otherwise, to the Complainant denying his May 21, 2012 request for the May 2012 Report and/or if he provided any explanation for the denial. Nor does the Custodian cite to any OPRA provision, executive order, other law or case law in support of his refusal to produce the police report.

December 2, 2012 OPRA Request:

The Custodian acknowledges receipt of the Complainant's December 2, 2012 OPRA Request. The Custodian asserts that the Complainant, on an unknown date, was "given an audio CD of the [i]nformation he wanted." The Custodian claims that the I.T. technician for the police department burned a CD of the 2008 Transmission for the Complainant. Again the Custodian, without legal support or citation, asserts that the Complainant is "not entitled [to] any internal affairs files."

January 25, 2013 OPRA Requests:

The Custodian acknowledges that he received the Complainant's request seeking documents regarding the IA investigation of Paul Smikovecus on January 25, 2012. The Custodian provides that on February 1, 2013, "Mr. Vitello was advised [that] the personal file of Paul Smikovecus was missing." The Custodian, however, does not state how the Complainant was advised of the missing file and, particularly, if he was noticed in writing. Furthermore, the Custodian does not state what efforts were taken to locate the file or how it was determined that the file was missing.

The Custodian did not file an SOI regarding Complainant's second January 25, 2013 OPRA request for "all reports, statements and charges, if any, which were brought against Chris Lynch as a result of Lynch's use of the Complainant's name over the Belmar Police radio."

Additional Submissions:

On May 16, 2013, the Complainant, in response to a question posed by the GRC, stated that he received an audio tape of the 2008 Transmission from the Custodian. The tape, however, contained only the Complainant "calling out a motor vehicle stop" and allegedly not the entire audio of the motor vehicle stop, as requested.

Analysis⁵

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

⁵ 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.

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N.J.S.A. 47:1A-5(g).⁶ Thus, a custodian's failure to respond in writing to a 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

May 21, 2012 OPRA Request:

Although the Custodian represents that he responded to the Complainant's May 21, 2012 OPRA request by providing a CD of the May 2012 Transmission, the Custodian states that he does not know either when the original request was received or when he sent the Complainant the CD. The Custodian does not address if he provided the Complainant with a response denying access to the May 12, 2012 Report.

December 2, 2012 OPRA Request:

The Custodian states that he received a copy of the Complainant's December 2, 2012 OPRA request on December 12, 2013 [sic]. However, he certifies that on an unknown date, the Complainant was provided with an audio CD, burned by the Police Department I.T. Technician, of the information the Complainant wanted. The Custodian certifies that he advised the Complainant that the Custodian needed the assistance of the I.T. Technician to search the audio records and to burn the CD.

January 25, 2013 OPRA Requests:

The Custodian acknowledges that he received a request from the Complainant on January 25, 2013. The Custodian further provides that he responded to the Complainant on February 1, 2013. The Custodian only states that the Complainant "was advised" that the "personal file" of Mr. Smikovecus was missing. The Custodian does not state if the Complainant was, as required, advised in writing. N.J.S.A. 47:1A-5(g).

The Custodian did not provide an SOI regarding Complainant's second January 25, 2013 request, which sought the Lynch IA Investigation.

The Custodian certified that he is unaware of when the Complainant's May 21, 2012 OPRA request was received or responded to. Although the Custodian acknowledges receipt of the Complainant's December 2, 2012 request on December 12, 2012, he certifies that the response was provided on an "unknown date." The Custodian further certifies that he responded to the Complainant's January 25, 2013 request for the Smikovecus File on February 1, 2013; however, he does not provide if the response was in writing. Finally, the Custodian failed to provide whether any response was ever made to the Complainant's second January 25, 2013 request for the Lynch File. There is no evidence that that the Custodian responded within seven (7) days to any of the Complainant's requests as required by N.J.S.A. 47:1A-6. Therefore, the

⁶ 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.

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Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond, in writing, to the Complainant's OPRA requests 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, GRC 2007-11.

Unlawful Denial of Access

Internal Affairs Reports

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. Further, OPRA provides that:

all government records shall be subject to public access unless exempt from such access by . . . 47:1A-1 *et. seq.* . . any other statute, resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law, federal regulation or federal order[.]

N.J.S.A. 47:1A-1. In addition, 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; O'Shea v. Twp. W. Milford, 410 N.J. Super. 371, 380 (App. Div. 2009).

The Appellate Court in O'Shea held that the Attorney General guidelines, directives and policies are binding and enforceable on law enforcement agencies. 410 N.J. Super. at 383. The O'Shea court reasoned that "the Attorney General as the 'chief law enforcement officer of [this] State . . . is charged with adopting guidelines, directives and policies that bind local police departments in the day-to-day administration of the law enforcement process.'" Id. (internal citations omitted) (*citing In re Gen. Disciplinary Hearing of Carberry*, 114 N.J. 574, 577-78 (1989)). The Court in Jones v. Paulsboro Police Dep't further held that:

Under the Attorney General's Guidelines, the confidentiality of internal affairs is of the utmost importance and release of such records is permitted in specific "exceptional circumstances." The Attorney General's Internal Affairs Policy and Procedures Guidelines states "The nature and source of internal allegations, the progress of internal affairs investigations, and the resulting materials are confidential information." The Guidelines, revised in May 2011, state "The nature and source of internal allegations, the progress of internal affairs investigations, and the resulting materials are confidential information."

2012 N.J. Super Unpub. LEXIS 234 (Law Div. 2012) (citations omitted) (footnote added).

In Jones, the plaintiff made an OPRA request for a copy of a police surveillance video depicting an altercation between citizens and officers outside the Paulsboro Police Department. The incident spawned the filing of criminal charges between the citizens and the police officers, as well as an internal affairs investigation into the police officers' conduct. Id. at 2-3, 8. The Jones court concluded that the video fell within the AG guidelines for confidentiality because it was being used in an ongoing IA investigation. Id. at 9-10.

May 21, 2012 OPRA Request:

The Custodian certifies that he provided a CD copy of the requested May 2012 Transmission to the Complainant. The Complainant does not challenge the Custodian's assertion that a copy of the May 2012 Transmission was provided. Therefore, although there was a "deemed denial," it is unnecessary for the Council to order disclosure of the radio transmission because the Complainant has received a copy.

The Complainant also sought the May 2012 Report, which he identified as a report "were [sic] [Complainant's] name is involved in regards to a theft pertaining to the radio transmissions . . . from the beginning of May 2012 to the date of the request." The Custodian denied access to the report stating only that the Complainant is "not entitled to internal affairs reports." Although the Custodian's SOI identified the report as an IA report, he failed to identify the report by the date of creation, to describe the nature of the May 2012 Report (e.g., as an incident report or an accident report) or in any other way which would support his denial of the May 2012 Report as an IA report. From the record before it, the Council cannot determine if the May 2012 Report was indeed an IA report. Thus, the Council cannot find that the confidentiality provisions of the IAPP governing IA Investigation reports would restrict access by the Complainant to the May 2012 Report. Therefore, the Council directs that the Custodian, within five (5) business days of receipt of its Interim Order either: (1) produce a copy of the May 2012 Report to the Complainant⁷ with appropriate redactions, if any, including a detailed document index, explaining the lawful basis for each redaction and to simultaneously provide certification of compliance, in accordance with N.J. Court Rule 1:4-4⁸ (and a copy of the document index, if any) to the Executive Director; or alternatively (2) deny access to the May 2012 Report and simultaneously provide a certification, with relevant authority, explaining the denial in accordance with N.J. Court Rule 1:4-4, to the Executive Director.

January 25, 2013 OPRA Requests:

The Complainant's January 25, 2013 OPRA requests sought the "IA Investigation[s]" for Paul Smikovec and Chris Lynch. Here, the Complainant sought the entire IA Investigation files. In light of the Appellate Court's holding in O'Shea that the Attorney General guidelines, directives and policies are binding and enforceable on law enforcement agencies, 410 N.J. Super.

⁷ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

⁸ "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."

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at 383, and further because the guidelines are not abrogated by OPRA pursuant to N.J.S.A. 47:1A-9(a), the confidentiality provisions of the IAPP governing IA investigation reports restricts public access to the requested records. Accordingly, the Custodian lawfully denied the Complainant access to IA investigation files of Paul Smikovecus and Chris Lynch.

Audio Transmission:

December 2, 2012 OPRA Request:

The Custodian certifies that the 2008 Transmission, which was the subject of the Complainant's December 2, 2012 OPRA Request, was disclosed. However, the Complainant challenges the Custodian's contention, arguing that the copy of the 2008 Transmission produced was incomplete and that he did not receive the entire recording of the motor vehicle stop. The Council, from the record before it, is unable to determine if the Complainant received the entire 2008 Transmission or a portion of it. Therefore, the Council directs that the Custodian, within five (5) business days of receipt of its Interim Order, produce a copy of the 2008 Transmission to the Complainant and simultaneously to provide a certification of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. If redactions to the 2008 Transmission are necessary then the Custodian must also include a detailed document index, explaining the lawful basis for each redaction, to the Complainant and the Executive Director.

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 certified that he is unaware of when the Complainant's May 21, 2012 OPRA request was received or responded to. Although the Custodian acknowledges receipt of the Complainant's December 2, 2012 request on December 12, 2012, he certifies that the response was provided on an "unknown date." The Custodian further certifies that he responded to the Complainant's January 25, 2013 request for the Smikovecus File on February 1, 2013; however, he does not provide if the response was in writing. Finally, the Custodian failed to provide whether any response was ever made to the Complainant's second January 25, 2013 request for the Lynch File. There is no evidence that that the Custodian responded within seven (7) days to any of the Complainant's requests as required by N.J.S.A. 47:1A-6. Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond, in writing, to the Complainant's OPRA requests 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 certifies that he provided a CD copy of the requested May 2012 Transmission to the Complainant. The Complainant does not challenge the Custodian's assertion that a copy of the May 2012 Transmission was provided. Therefore, although there was a "deemed denial," it is unnecessary for the Council to order disclosure of the radio transmission because the Complainant has received a copy.
3. The Complainant also sought the May 2012 Report, which he identified as a report "were [sic] [Complainant's] name is involved in regards to a theft pertaining to the radio transmissions . . . from the beginning of May 2012 to the date of the request." The Custodian denied access to the report stating only that the Complainant is "not entitled to internal affairs reports." Although the Custodian's SOI identified the report as an IA report, he failed to identify the report by the date of creation, to describe the nature of the May 2012 Report (e.g., as an incident report or an accident report) or in any other way which would support his denial of the May 2012 Report as an IA report. From the record before it, the Council cannot determine if the May 2012 Report was indeed an IA report. Thus, the Council cannot find that the confidentiality provisions of the IAPP governing IA Investigation reports would restrict access by the Complainant to the May 2012 Report. **Therefore, the Council directs that the Custodian, within five (5) business days of receipt of its Interim Order either: (1) produce a copy of the May 2012 Report to the Complainant⁹ with appropriate redactions, if any, including a detailed document index, explaining the lawful basis for each redaction and to simultaneously provide certification of compliance, in accordance with N.J. Court Rule 1:4-4¹⁰ (and a copy of the document index, if any) to the Executive Director; or alternatively (2) deny access to the May 2012 Report and simultaneously provide a certification, with relevant authority, explaining the denial in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
4. The Complainant's January 25, 2013 OPRA requests sought the "IA Investigation[s]" for Paul Smikovecus and Chris Lynch. Here, the Complainant sought the entire IA Investigation files. In light of the Appellate Court's holding in O'Shea v. Twp. W. Milford that the Attorney General guidelines, directives and policies are binding and enforceable on law enforcement agencies, 410 N.J. Super. 371, 380 (App. Div. 2009), and further because the guidelines are not abrogated by OPRA pursuant to N.J.S.A. 47:1A-9(a), the confidentiality provisions of the IAPP governing IA investigation

⁹ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

¹⁰ "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."

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reports restricts public access to the requested records. Accordingly, the Custodian lawfully denied the Complainant access to IA investigation files of Paul Smikovecus and Chris Lynch.

5. The Custodian certifies that the 2008 Transmission, which was the subject of the Complainant's December 2, 2012 OPRA Request, was disclosed. However, the Complainant challenges the Custodian's contention, arguing that the copy of the 2008 Transmission produced was incomplete and that he did not receive the entire recording of the motor vehicle stop. The Council, from the record before it, is unable to determine it if the Complainant received the entire 2008 Transmission or a portion of it. **Therefore, the Council directs that the Custodian, within five (5) business days of receipt of its Interim Order, produce a copy of the 2008 Transmission to the Complainant and simultaneously to provide a certification of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. If redactions to the transmission are necessary then the Custodian must also include a detailed document index, explaining the lawful basis for each redaction, to the Complainant and the Executive Director.**

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

Prepared By: Dawn R. SanFilippo, Esq.
Senior Counsel

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

October 22, 2013