



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**

**September 30, 2014 Government Records Council Meeting**

Loren Cherensky  
Complainant

Complaint No. 2013-87

v.

Borough of Fanwood (Union)  
Custodian of Record

At the September 30, 2014 public meeting, the Government Records Council (“Council”) considered the September 23, 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 this complaint be dismissed because the Complainant withdrew the complaint via letter dated August 26, 2014. Therefore, no further adjudication is required.

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

Final Decision Rendered by the  
Government Records Council  
On The 30<sup>th</sup> Day of September, 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 3, 2014**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
September 30, 2014 Council Meeting**

**Loren Cherensky<sup>1</sup>  
Complainant**

**GRC Complaint No. 2013-87**

**v.**

**Borough of Fanwood (Union)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

1. All and any data, images, video, text, including place, time and GPS coordinates captured by a mobile data terminal (“MDT”) or automatic license plate reader used by Officer Ryan Gilmore or other Fanwood Police member on January 28, 2013 between the approximate times of 9:15 p.m. and 9:30 p.m., as related to traffic ticket C# 069252; 39 3-40 issued by Officer Gilmore the same date. The records are to be delivered via electronic transmission or CD-ROM.
2. A copy of any audio recording of communications conducted by Officer Gilmore associated with the above referenced stop and ticket on January 28, 2013 during the approximate times of 9:15 p.m. and 9:45 p.m. This includes but is not limited to any verbal communications with other police officers and staff such as dispatchers by police radio and/or cell phone, or other means; and any texts or images sent or received similarly by Officer Gilmore related to this stop. The records are to be delivered via CD-ROM.
3. A copy of all relevant pages of Fanwood Police Department manuals, policy and procedures, memos that address or describe policies and procedures regarding the random use of MDTs and/or random license plate checks by members of the Fanwood Police Department. The records are to be delivered electronically via e-mail attachment.

**Custodian of Records:** Eleanor McGovern  
**Request Received by Custodian:** February 6, 2013  
**Response Made by Custodian:** February 7, 2013  
**GRC Complaint Received:** March 13, 2013

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

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

## **Background**

### **January 28, 2014 Council Meeting:**

At its January 28, 2014 public meeting, the Government Records Council (“Council”) considered the January 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 the Custodian has failed to establish in her request for reconsideration of the Council’s December 20, 2013 Final Decision<sup>3</sup> that: 1) the Council’s decision is based upon a “palpably incorrect or irrational basis”; or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Thus, the Custodian failed to support her claim that reconsideration should be granted based on mistake and her request for reconsideration should be denied and this complaint should be referred to the Office of Administrative Law (“OAL”) for a determination of whether the Custodian complied or failed to comply with the terms of the Council’s December 20, 2013 Order. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

### **Procedural History:**

On January 29, 2014, the Council distributed its Order to all parties. On April 28, 2014, the Complaint was transmitted to OAL. On September 8, 2014, OAL transmitted this complaint back to the GRC because the Complainant withdrew the complaint in writing to the OAL on August 26, 2014.

## **Analysis**

No analysis required.

## **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that this complaint be dismissed because the Complainant withdrew the complaint via letter dated August 26, 2014. Therefore, no further adjudication is required.

Prepared By: John E. Stewart, Esq.

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

September 23, 2014

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<sup>3</sup> This should have been captioned as an Interim Order, not a Final Decision.



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**

**January 28, 2014 Government Records Council Meeting**

Loren Cherensky  
Complainant

Complaint No. 2013-87

v.

Borough of Fanwood (Union)  
Custodian of Record

At the January 28, 2014 public meeting, the Government Records Council (“Council”) considered the January 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 the Custodian has failed to establish in her request for reconsideration of the Council’s December 20, 2013 Final Decision<sup>1</sup> that: 1) the Council’s decision is based upon a “palpably incorrect or irrational basis”; or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Thus, the Custodian failed to support her claim that reconsideration should be granted based on mistake and her request for reconsideration should be denied and this complaint should be referred to the Office of Administrative Law (“OAL”) for a determination of whether the Custodian complied or failed to comply with the terms of the Council’s December 20, 2013 Order. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

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<sup>1</sup> This should have been captioned as an Interim Order, not a Final Decision.

Interim Order Rendered by the  
Government Records Council  
On The 28<sup>th</sup> Day of January, 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: January 29, 2014**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Loren Cherensky<sup>1</sup>  
Complainant**

**GRC Complaint No. 2013-87**

v.

**Borough of Fanwood (Union)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

1. All and any data, images, video, text, including place, time and GPS coordinates captured by a mobile data terminal (“MDT”) or automatic license plate reader used by Officer Ryan Gilmore or other Fanwood Police member on January 28, 2013 between the approximate times of 9:15 p.m. and 9:30 p.m., as related to traffic ticket C# 069252; 39 3-40 issued by Officer Gilmore the same date. The records are to be delivered via electronic transmission or CD-ROM.
2. A copy of any audio recording of communications conducted by Officer Gilmore associated with the above referenced stop and ticket on January 28, 2013 during the approximate times of 9:15 p.m. and 9:45 p.m. This includes but is not limited to any verbal communications with other police officers and staff such as dispatchers by police radio and/or cell phone, or other means; and any texts or images sent or received similarly by Officer Gilmore related to this stop. The records are to be delivered via CD-ROM.
3. A copy of all relevant pages of Fanwood Police Department manuals, policy and procedures, memos that address or describe policies and procedures regarding the random use of MDTs and/or random license plate checks by members of the Fanwood Police Department. The records are to be delivered electronically via e-mail attachment.

**Custodian of Records:** Eleanor McGovern  
**Request Received by Custodian:** February 6, 2013  
**Response Made by Custodian:** February 7, 2013  
**GRC Complaint Received:** March 13, 2013

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

<sup>2</sup> Represented by Dennis Estis, Esq., of Greenbaum, Rowe, Smith & Davis LLP (Woodbridge, NJ).  
Loren Cherensky v. Borough of Fanwood (Union), 2013-87 – Supplemental Findings and Recommendations of the Executive Director

## **Background**

### **December 20, 2013 Council Meeting:**

At its December 20, 2013 public meeting, the Government Records Council (“Council”) considered the December 17, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that since there are issues of contested facts, specifically whether the Custodian disclosed all of the records responsive to request items numbered 1, 2, and 3, as per the Council’s October 29, 2013 Interim Order, or failed to disclose the records in disobedience of the Order, this complaint should be referred to the Office of Administrative Law (“OAL”) for a determination of whether the Custodian complied or failed to comply with the terms of said Order. Additionally, if necessary, OAL should make a determination of whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access to the requested records under the totality of the circumstances.

### **Procedural History:**

On December 23, 2013, the Council distributed its Final Decision<sup>3</sup> to all parties. On January 7, 2014, the Custodian filed a request for reconsideration of the Council’s December 20, 2013 Final Decision<sup>4</sup> based on a mistake. The Complainant did not file an objection to the request for reconsideration.

## **Analysis**

### **Reconsideration**

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

In the matter before the Council, the Custodian filed the request for reconsideration of the Council’s December 20, 2013 Final Decision<sup>5</sup> on January 7, 2014, nine (9) business days from receipt of the Council’s Order.

Applicable case law holds that:

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<sup>3</sup> This should have been captioned as an Interim Order, not a Final Decision.

<sup>4</sup> This should have been captioned as an Interim Order, not a Final Decision.

<sup>5</sup> This should have been captioned as an Interim Order, not a Final Decision.

“A party should not seek reconsideration merely based upon dissatisfaction with a decision.” D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a “palpably incorrect or irrational basis;” or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, supra, 242 N.J. Super. at 401. “Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement. Ibid.”

In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

The Custodian’s Counsel filed the request for reconsideration based on mistake. The Custodian’s Counsel contends that the Council made a mistake in the adjudication of this complaint by referring the complaint to OAL for a determination of whether the Custodian complied or failed to comply with the Council’s October 29, 2013 Interim Order, and if necessary, whether the Custodian knowingly and willfully violated OPRA. Counsel asserts that the Borough did in fact produce all records responsive to the Complainant’s request. Counsel further asserts that the additional records sought by the Complainant do not exist. Accordingly, Counsel concludes that the Custodian complied with the Council’s October 29, 2013 Interim Order. The evidence of record relied upon by Counsel are the certifications of compliance submitted by the Custodian. The Custodian’s Counsel states that the Complainant submitted an e-mail dated December 16, 2013, stating that the Custodian failed to disclose numerous records that were required to be disclosed pursuant to said Order.

Counsel neglects to mention in his argument that after the GRC received the Complainant’s December 16, 2013 e-mail, it requested and received via e-mail on that same date a **certification** from the Complainant, wherein she stated that the Custodian failed to disclose to her numerous records which were required to be disclosed under the Council’s October 29, 2013 Interim Order. The GRC now had a certification from the Custodian asserting that the Borough had disclosed all records responsive to the Complainant’s request and a conflicting certification from the Complainant averring that the Custodian failed to disclose several records which were required to be disclosed under the terms of the Council’s October 29, 2013 Interim Order. As such, the Council found that since there were issues of contested facts the complaint should be referred to the Office of Administrative Law (“OAL”) for a hearing.

As the moving party, the Custodian was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not



consider the significance of probative, competent evidence. *See Cummings*, 295 N.J. Super. at 384. The Custodian failed to establish that the complaint should be reconsidered based on mistake. The Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. *See D'Atria*, 242 N.J. Super. at 401. Thus, the Custodian's request for reconsideration should be denied. *Cummings*, 295 N.J. Super. at 384; *D'Atria*, 242 N.J. Super. at 401; *Comcast*, 2003 N.J. PUC at 5-6.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the Custodian has failed to establish in her request for reconsideration of the Council's December 20, 2013 Final Decision<sup>6</sup> that: 1) the Council's decision is based upon a "palpably incorrect or irrational basis"; or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Thus, the Custodian failed to support her claim that reconsideration should be granted based on mistake and her request for reconsideration should be denied and this complaint should be referred to the Office of Administrative Law ("OAL") for a determination of whether the Custodian complied or failed to comply with the terms of the Council's December 20, 2013 Order. *Cummings v. Bahr*, 295 N.J. Super. 374 (App. Div. 1996); *D'Atria v. D'Atria*, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Prepared By: John E. Stewart, Esq.

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

January 21, 2014

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<sup>6</sup> This should have been captioned as an Interim Order, not a Final Decision.



**State of New Jersey**  
**GOVERNMENT RECORDS COUNCIL**

101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

**CHRIS CHRISTIE**  
*Governor*

**KIM GUADAGNO**  
*Lt. Governor*

**RICHARD E. CONSTABLE, III**  
*Commissioner*

**FINAL DECISION**

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

Loren Cherensky  
Complainant

Complaint No. 2013-87

v.

Borough of Fanwood (Union)  
Custodian of Record

At the December 20, 2013 public meeting, the Government Records Council (“Council”) considered the December 17, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds since there are issues of contested facts, specifically whether the Custodian disclosed all of the records responsive to request items numbered 1, 2, and 3, as per the Council’s October 29, 2013 Interim Order, or failed to disclose the records in disobedience of the Order, this complaint should be referred to OAL for a determination of whether the Custodian complied or failed to comply with the terms of said Order. Additionally, if necessary, OAL should make a determination of whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access to the requested records 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**

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

**Loren Cherensky<sup>1</sup>  
Complainant**

**GRC Complaint No. 2013-87**

**v.**

**Borough of Fanwood (Union)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

1. All and any data, images, video, text, including place, time and GPS coordinates captured by a mobile data terminal (“MDT”) or automatic license plate reader used by Officer Ryan Gilmore or other Fanwood Police member on January 28, 2013 between the approximate times of 9:15 p.m. and 9:30 p.m., as related to traffic ticket C# 069252; 39 3-40 issued by Officer Gilmore the same date. The records are to be delivered via electronic transmission or CD-ROM.
2. A copy of any audio recording of communications conducted by Officer Gilmore associated with the above referenced stop and ticket on January 28, 2013 during the approximate times of 9:15 p.m. and 9:45 p.m. This includes but is not limited to any verbal communications with other police officers and staff such as dispatchers by police radio and/or cell phone, or other means; and any texts or images sent or received similarly by Officer Gilmore related to this stop. The records are to be delivered via CD-ROM.
3. A copy of all relevant pages of Fanwood Police Department manuals, policy and procedures, memos that address or describe policies and procedures regarding the random use of MDTs and/or random license plate checks by members of the Fanwood Police Department. The records are to be delivered electronically via e-mail attachment.

**Custodian of Records:** Eleanor McGovern  
**Request Received by Custodian:** February 6, 2013  
**Response Made by Custodian:** February 7, 2013  
**GRC Complaint Received:** March 13, 2013

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

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

## Background

At its 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, found that:

1. Although the Custodian provided a written response to the Complainant’s request within the statutorily mandated period, said response is insufficient because it does not grant access, deny access, seek clarification, or request an extension of time. N.J.S.A. 47:1A-5(g). *See also* Bart v. City of Paterson Hous. Auth., GRC Complaint No. 2005-145 (May 2007).
2. The Custodian has failed to bear her burden of proving that the denial of access to the requested records was authorized by law. N.J.S.A. 47:1A-6. Therefore, the Custodian shall disclose to the Complainant the records responsive to request items numbered 1, 2 and 3 in the medium requested by the Complainant. For those items which must be remitted via CD-ROM, the Custodian may not charge more than the actual cost of reproducing the record. *See* Vessio v. Twp. of Manchester (Ocean), GRC Complaint No. 2006-130 (April 2008).
3. **The Custodian shall comply with paragraph #2 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, to the Executive Director.**
4. 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 October 29, 2013 Interim Order to all parties. On November 4, 2013, the third (3<sup>rd</sup>) business day following receipt of the Council’s Interim Order, the Custodian submitted a certification to the GRC wherein she stated that a disc identified as “Gilmore M.V. Stop/CO69252/2013-736” which contains the records responsive to request items numbered 1 and 2 had been prepared to be forwarded by mail to the Complainant on November 5, 2013. The Custodian further stated that the records responsive to request item number 3 are attached to the certification.<sup>3</sup>

On December 16, 2013, the GRC received an e-mail from the Complainant stating that the Custodian failed to disclose to her numerous records that were required to be disclosed pursuant to the Council’s October 29, 2013 Interim Order.

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<sup>3</sup> The evidence of record reveals that the Complainant was copied on the certification.

On December 16, 2013, the GRC e-mailed the Complainant to inform her that she must prepare a certification listing the records which were required to be disclosed under the Council's Order and that the Custodian failed to disclose. The GRC by copy of the e-mail provided the Custodian with a copy of the Complainant's correspondence to the GRC and informed the Custodian to check to make certain she did not mislabel the disc which contained the disclosed records or otherwise err when preparing the records for disclosure. The GRC further informed the Custodian to immediately cure any errors and provide the GRC with a certification of all corrective action taken, if any.

On December 16, 2013, the Complainant e-mailed a certification to the GRC in which she stated that the Custodian failed to disclose to her the following items which were required to be disclosed under the Council's October 29, 2013 Interim Order:

- A copy of any and all data, images, text, including place, time and GPS coordinates obtained by or through MDT or MDC, including but not limited to a license plate query, vehicle registration, driver's license information and demographics associated with traffic summons C# 069252; 39 3-40 issued on January 28, 2013, made by or through the MDT/MDC system to access data in systems such as the New Jersey Division of Motor Vehicles, NCIC, SCIC or AOC.
- An audible audiofile copy of any and all radio communications conducted by Officer Gilmore associated with the traffic stop and traffic summons C# 069252; 39 3-40. This includes but is not limited to any verbal communications with other police officers and staff such as dispatchers by police radio and/or cell phone or other means (there is limited but inaudible audio of verbal communication on the disclosed disc).
- Any texts sent or received similarly by Officer Gilmore or other police officers and staff such as dispatchers by cell phone or other means related to the traffic stop.
- Copies of all relevant pages of Fanwood Police Department manuals, policy and procedures, and memos that address or describe policies and procedures regarding random license plate checks by members of the Fanwood Police Department.
- Any memos that address or describe the use of MDTs and/or random license plate checks by members of the Fanwood Police Department.
- A detailed document index explaining the lawful basis for each redaction.

On December 17, 2013, the Custodian e-mailed a certification to the GRC in which she acknowledged receipt of the Complainant's December 16, 2013 e-mail to the GRC. The Custodian stated that she again reviewed the original request with the Police Chief and that as a result of the review the Chief sent her a memo confirming that all requested existing documents were disclosed to the Complainant; therefore the Complainant's request has been satisfied.

## Analysis

### Compliance

On October 29, 2013, the Council ordered the above-referenced compliance.<sup>4</sup> On October 30, 2013, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. On November 4, 2013, three (3) business days after receipt of the Interim Order, the Custodian certified that she disclosed all of the requested records to the Complainant.

On December 16, 2013, the Complainant filed a certification with the GRC stating that she did receive the Custodian's November 4, 2013 certification of compliance, but that the Custodian failed to disclose to her numerous records that were required to be disclosed pursuant to the Council's Order.

On December 17, 2013, the Custodian filed a certification with the GRC in which she stated that, after receiving a copy of the Complainant's December 16, 2013 e-mail to the GRC, she again reviewed the original request with the Police Chief. The Custodian stated that as a result of the review the Chief sent her a memo confirming that all requested existing documents were disclosed to the Complainant. The Custodian stated that, as such, the Complainant's OPRA request was satisfied.

Here, the Custodian certified that she disclosed all of the requested records to the Complainant in accordance with the Council's October 29, 2013 Interim Order. Conversely, the Complainant certified that the Custodian failed to disclose to her all of the records which should have been disclosed pursuant to the Council's Order. The Administrative Procedures Act provides that the Office of Administrative Law ("OAL") "shall acquire jurisdiction over a matter only after it has been [determined] to be a contested case by an agency head and has been filed with the [OAL]..." *N.J.A.C. 1:1-3.2(a)*.

Accordingly, since there are issues of contested facts, specifically whether the Custodian disclosed all of the records responsive to request items numbered 1, 2, and 3, as per the Council's October 29, 2013 Interim Order, or failed to disclose the records in disobedience of the Council's Order, this complaint should be referred to OAL for a determination of whether the Custodian complied or failed to comply with the terms of said Order. Additionally, if necessary, OAL should make a determination of whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access to the requested records under the totality of the circumstances.

### Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that since there are issues of contested facts, specifically whether the Custodian disclosed all of the records responsive to request items numbered 1, 2, and 3, as per the Council's October 29, 2013 Interim Order, or failed to disclose the records in disobedience of the Order, this complaint should be

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<sup>4</sup> Although the Custodian requested and was granted an additional five (5) business day extension of time to comply with the Council's Order, the Custodian did not need the additional time.

referred to OAL for a determination of whether the Custodian complied or failed to comply with the terms of said Order. Additionally, if necessary, OAL should make a determination of whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access to the requested records under the totality of the circumstances.

Prepared By: John E. Stewart, Esq.

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

December 17, 2013





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

Loren Cherensky  
Complainant

Complaint No. 2013-87

v.

Borough of Fanwood (Union)  
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. Although the Custodian provided a written response to the Complainant's request within the statutorily mandated period, said response is insufficient because it does not grant access, deny access, seek clarification, or request an extension of time. N.J.S.A. 47:1A-5(g). See also Bart v. City of Paterson Hous. Auth., GRC Complaint No. 2005-145 (May 2007).
2. The Custodian has failed to bear her burden of proving that the denial of access to the requested records was authorized by law. N.J.S.A. 47:1A-6. Therefore, the Custodian shall disclose to the Complainant the records responsive to request items numbered 1, 2 and 3 in the medium requested by the Complainant. For those items which must be remitted via CD-ROM, the Custodian may not charge more than the actual cost of reproducing the record. See Vessio v. Twp. of Manchester (Ocean), GRC Complaint No. 2006-130 (April 2008).
3. **The Custodian shall comply with paragraph #2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>1</sup> to the Executive Director.<sup>2</sup>**

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

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

4. 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**

**Loren Cherensky<sup>1</sup>  
Complainant**

**GRC Complaint No. 2013-87**

v.

**Borough of Fanwood (Union)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

1. All and any data, images, video, text, including place, time and GPS coordinates captured by a mobile data terminal (“MDT”) or automatic license plate reader used by Officer Ryan Gilmore or other Fanwood Police member on January 28, 2013 between the approximate times of 9:15 p.m. and 9:30 p.m., as related to traffic ticket C# 069252; 39 3-40 issued by Officer Gilmore the same date. The records are to be delivered via electronic transmission or CD-ROM.
2. A copy of any audio recording of communications conducted by Officer Gilmore associated with the above referenced stop and ticket on January 28, 2013 during the approximate times of 9:15 p.m. and 9:45 p.m. This includes but is not limited to any verbal communications with other police officers and staff such as dispatchers by police radio and/or cell phone, or other means; and any texts or images sent or received similarly by Officer Gilmore related to this stop. The records are to be delivered via CD-ROM.
3. A copy of all relevant pages of Fanwood Police Department manuals, policy and procedures, memos that address or describe policies and procedures regarding the random use of MDTs and/or random license plate checks by members of the Fanwood Police Department. The records are to be delivered electronically via e-mail attachment.

**Custodian of Records:** Eleanor McGovern  
**Request Received by Custodian:** February 6, 2013  
**Response Made by Custodian:** February 7, 2013  
**GRC Complaint Received:** March 13, 2013

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

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

## **Background**<sup>3</sup>

### **Request and Response:**

On February 6, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request seeking the above-listed records. On February 7, 2013, the first (1<sup>st</sup>) business day following receipt of said request, the Custodian responded in writing informing the Complainant to submit her request for discovery to Fanwood Police Chief Richard Trigo (“Chief”).

### **Denial of Access Complaint:**

On March 13, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant states that she submitted her OPRA request to the Custodian on February 6, 2013. The Complainant states that on February 7, 2013 she received a telephone call from the Chief informing her that she had to make a discovery request for the requested records. The Complainant further states that the Chief informed her that she could not make an OPRA request for the records, and therefore he intended to deny the request. The Complainant states that she made her request to the Municipal Clerk and that the Chief has no standing to deny her request. The Complainant further states that the Chief deliberately misinformed her about her right to make an OPRA request. The Complainant states that, despite numerous follow-up written communications to the Custodian, the Custodian failed to comply with the records request.

### **Statement of Information:**

On March 25, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian did not complete and return page 3 of the SOI; therefore, the Custodian failed to certify either the date she received the Complainant’s OPRA request or the date she responded to the request.

The Custodian certifies that upon receipt of the OPRA request she visited the Chief because the Police Department maintains the records requested by the Complainant. The Custodian further certifies that the Chief telephoned the Complainant and told the Complainant to submit a request for discovery. The Custodian certifies that she e-mailed the Complainant on February 7, 2013, and informed her to send a request for discovery to the Chief. The Custodian certifies that the legal reason for denying the Complainant access to the requested records is that she was advised by the Chief that the proper way to obtain the records was via discovery. The Custodian further certifies that she thought the Complainant agreed to obtain the records in that manner.

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<sup>3</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

## Analysis

### Sufficiency of Response

OPRA provides 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. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A- 5(g).

Further, in Bart v. City of Paterson Hous. Auth., GRC Complaint No. 2005-145 (May 2007), the custodian provided a written response to the complainant’s request; however, the response did not explicitly grant or deny access to the requested record. The Council held that the custodian’s response represented a “deemed” denial of access because, “[a]lthough the Custodian responded in writing within the statutory time period under OPRA the Custodian’s response to the request...was so vague that it could not be determined if the requested [record] did not exist or if the request was being denied.”

Here, the Custodian responded to the Complainant’s OPRA request on the first (1<sup>st</sup>) business day following receipt of the request informing the Complainant to submit her request for discovery to the Fanwood Police Chief.

Therefore, although the Custodian provided a written response to the Complainant’s request within the statutorily mandated period, said response is insufficient because it does not grant access, deny access, seek clarification, or request an extension of time. N.J.S.A. 47:1A-5(g). See also Bart, *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.

In Vessio v. Twp. of Manchester (Ocean), GRC Complaint No. 2006-130 (April 2008), the custodian denied access to records that the complainant requested in order to prepare his defense for an alleged traffic violation. In denying the request, the custodian informed the complainant that the records were available through discovery. The Council determined that the custodian unlawfully denied access to the records because OPRA contains no exemption from disclosure for records which are available through discovery. The Council further determined that “...the availability of records pursuant to discovery or other court rule does not preclude the availability of the same records pursuant to OPRA.”

Similarly here, the Custodian denied the OPRA request by informing the Complainant that she should request the records via discovery. Although the Custodian certified that she had legal counsel, she stated that the legal reason for denying the Complainant access to the

requested records was that she was advised by the Chief that the proper way to obtain the records was through discovery. This is not one of the proper exemptions permitted by OPRA.

As such, the Custodian has failed to bear her burden of proving that the denial of access to the requested records was authorized by law. N.J.S.A. 47:1A-6. Therefore, the Custodian shall disclose to the Complainant the records responsive to request items numbered 1, 2 and 3 in the medium requested by the Complainant. For those items which must be remitted via CD-ROM, the Custodian may not charge more than the actual cost of reproducing the record.<sup>4</sup> *See Vessio, supra.*

### **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. Although the Custodian provided a written response to the Complainant's request within the statutorily mandated period, said response is insufficient because it does not grant access, deny access, seek clarification, or request an extension of time. N.J.S.A. 47:1A-5(g). *See also* Bart v. City of Paterson Hous. Auth., GRC Complaint No. 2005-145 (May 2007).
2. The Custodian has failed to bear her burden of proving that the denial of access to the requested records was authorized by law. N.J.S.A. 47:1A-6. Therefore, the Custodian shall disclose to the Complainant the records responsive to request items numbered 1, 2 and 3 in the medium requested by the Complainant. For those items which must be remitted via CD-ROM, the Custodian may not charge more than the actual cost of reproducing the record. *See* Vessio v. Twp. of Manchester (Ocean), GRC Complaint No. 2006-130 (April 2008).
3. **The Custodian shall comply with paragraph #2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>5</sup> to the Executive Director.<sup>6</sup>**

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<sup>4</sup> For an explanation of the actual cost for copying a record onto a diskette see Wolosky v. City of Paterson (Passaic), GRC Complaint No. 2011-134 (September 2012).

<sup>5</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>6</sup> 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.

4. 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: John E. Stewart, Esq.

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

October 22, 2013