



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

March 26, 2019 Government Records Council Meeting

Sean Vandy
Complainant

Complaint No. 2016-166

v.

Newfield Police Department (Gloucester)
Custodian of Record

At the March 26, 2019 public meeting, the Government Records Council (“Council”) considered the March 19, 2019 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 Complainant has failed to establish in his request for reconsideration of the Council’s December 18, 2018 Final Decision that 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. The Complainant failed to establish that the complaint should be reconsidered based on fraud. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the Complainant failed to show that the Custodian knowingly sent the responsive record to the Complainant’s previous address. Thus, the Complainant’s request for reconsideration should be denied. 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).

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 26th Day of March, 2019

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: March 29, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration
Supplemental Findings and Recommendations of the Council Staff
March 26, 2019 Council Meeting

Sean Patrick Vandy¹
Complainant

GRC Complaint No. 2016-166

v.

Newfield Police Department (Gloucester)²
Custodial Agency

Records Relevant to Complaint: A copy of a body camera footage from Ed Siebert on February 11, 2016, between 18:00-21:00 hours. A copy of a body camera footage from Kevin Wagshowski on February 24, 2016, between 18:00-21:00 hours.

Custodian of Record: Toni L. VanCamp
Requests Received by Custodian: May 6, 2016
Response Made by Custodian: May 25, 2016
GRC Complaint Received: June 13, 2016

Background

December 18, 2018 Council Meeting:

At its December 18, 2018 public meeting, the Council considered the December 11, 2018 Supplemental Findings and Recommendations of the Council Staff 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 complied with the Council's November 13, 2018 Interim Order because she responded in the prescribed time frame providing records and simultaneously provided certified confirmation of compliance to the Council Staff.
2. Officer Conway unlawfully denied access to the to the Complainant's request by claiming that release of the body camera footage would have been inimical to the public interest. N.J.S.A. 47:1A-3(a). However, the Custodian provided the Complainant with the body camera footage in accordance with the Council's Interim Order. Additionally, the evidence of record does not indicate that Officer Conway's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Officer Conway's actions do not rise to the level of a knowing and willful

¹ No legal representation listed on record.

² Represented by John C. Eastlack, Jr., Esq., of Weir & Partners, LLP (Turnersville, NJ).

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

Procedural History:

On December 20, 2018, the Council distributed its Final Decision to all parties. On January 3, 2019 the Complainant requested additional time to submit a request for reconsideration. That same day, the GRC granted the Complainant's, request for an extension until January 11, 2019.

On January 10, 2019 the Complainant filed a request for reconsideration of the Council's December 18, 2018 Final Decision based upon fraud. The Complainant asserted that as of January 4, 2019, he had not received the responsive record from the Custodian. The Complainant contended that he went to the Custodian's office on December 11, 2018 and was told to come back. The Complainant then asserted that he went back to the office on December 13, 2018 and was told by the Custodian that the record was mailed to him.

The Complainant asserted that he moved and that the Custodian never asked for the Complainant's new address. However, the Complainant also asserted that the Custodian knew that he had moved, claiming that he received a bill at his new address from the Borough of Newfield ("Borough") pertaining to his old home.

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 Complainant filed the request for reconsideration of the Council's Order dated December 18, 2018 on January 10, 2019, the second to last day of the extension of time from the issuance of the Council's Order.

Applicable case law holds that:

"A party should not seek reconsideration merely based upon dissatisfaction with a decision." D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, . . . 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).]

After reviewing the Complainant’s arguments, the GRC is not persuaded that the Council should reconsider its December 18, 2018 Final Decision.

Although the Complainant asserted that the Custodian knew that he had moved to a new location, he did not provide substantive evidence that the Custodian had this knowledge prior to sending the records in accordance with the Council’s November 13, 2018 Interim Order. The Complainant asserted that he received a bill from the Borough at his current address but did not provide the date on which he received the bill. In short, the Complainant did not provide sufficient evidence to contradict the Custodian’s certification that she mailed the responsive record to the Complainant’s last known address.

As the moving party, the Complainant, 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 Complainant failed to establish that the complaint should be reconsidered based on fraud. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. See D’Atria, 242 N.J. Super. at 401. Specifically, the Complainant failed to show that the Custodian knowingly sent the responsive record to the Complainant’s previous address. Thus, the Complainant’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 Council Staff respectfully recommends the Council find that the Complainant has failed to establish in his request for reconsideration of the Council’s December 18, 2018 Final Decision that 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. The Complainant failed to establish that the complaint should be reconsidered based on fraud. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the Complainant failed to show that the Custodian knowingly sent the responsive record to the Complainant’s previous address. Thus, the Complainant’s request for reconsideration should be denied. 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: Samuel A. Rosado
Staff Attorney

March 19, 2019



State of New Jersey
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PHILIP D. MURPHY
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LT. GOVERNOR SHEILA Y. OLIVER
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FINAL DECISION

December 18, 2018 Government Records Council Meeting

Sean Patrick Vandy
Complainant

Complaint No. 2016-166

v.

Newfield Police Department (Gloucester)
Custodian of Record

At the December 18, 2018 public meeting, the Government Records Council (“Council”) considered the December 11, 2018 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s November 13, 2018 Interim Order because she responded in the prescribed time frame providing records and simultaneously provided certified confirmation of compliance to the Council Staff.
2. Officer Conway unlawfully denied access to the to the Complainant’s request by claiming that release of the body camera footage would have been inimical to the public interest. N.J.S.A. 47:1A-3(a). However, the Custodian provided the Complainant with the body camera footage in accordance with the Council’s Interim Order. Additionally, the evidence of record does not indicate that Officer Conway’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Officer Conway’s 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.

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 December, 2018

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 20, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
December 18, 2018 Council Meeting**

**Sean Patrick Vandy¹
Complainant**

GRC Complaint No. 2016-166

v.

**Newfield Police Department (Gloucester)²
Custodial Agency**

Records Relevant to Complaint: A copy of a body camera footage from Ed Siebert on February 11, 2016, between 18:00-21:00 hours. A copy of a body camera footage from Kevin Wagshowski on February 24, 2016, between 18:00-21:00 hours.

Custodian of Record: Toni L. VanCamp
Requests Received by Custodian: May 6, 2016
Response Made by Custodian: May 25, 2016
GRC Complaint Received: June 13, 2016

Background

November 13, 2018 Council Meeting:

At its November 13, 2018 public meeting, the Council considered the November 7, 2018 *In Camera* Findings and Recommendations of the Council Staff 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 complied with the Council’s September 25, 2018 Interim Order because she responded in the prescribed time frame providing the withheld records for *in camera* review and simultaneously provided certified confirmation of compliance to the Council Staff.
2. Officer Conway did not satisfy his/her burden of proof that he/she lawfully denied access to the body camera footage. N.J.S.A. 47:1A-6. Officer Conway failed to show that releasing the body camera footage of Chief Ed Siebert would be “inimical to the public interest” under N.J.S.A. 47:1A-3(a). See North Jersey Media Group v. Twp. of Lyndhurst, 229 N.J. 541, 573-74 (2017). Thus, the Custodian shall release the record to the Complainant. The Council notes that this is the first time a determination has been made on the disclosure of body camera footage. However, the Council stresses that this

¹ No legal representation listed on record.

² Represented by John C. Eastlack, Jr., Esq., of Weir & Partners, LLP (Turnersville, NJ).

determination is specific to the applicability of N.J.S.A. 47:1A-3(a) to the facts of this matter, and notes that other exemptions may apply on a case-by-case basis. Accordingly, this determination should not be construed to provide for unmitigated access to body camera footage.

3. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in conclusion No. 2 above within five (5) business days from receipt of this Order. Further, the Custodian shall simultaneously deliver³ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁴ to the Council Staff.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.

Procedural History:

On November 14, 2018, the Council distributed its Interim Order to all parties. On November 19, 2018, the Custodian responded to the Council's Interim Order, certifying that the records were provided to the Complainant that same day.

Analysis

Compliance

At its November 13, 2018 meeting, the Council ordered the Custodian to provide the responsive records and to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Council Staff. On November 14, 2018, 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 21, 2018.

On November 19, 2018, the third (3rd) business day after receipt of the Council's Order, the Custodian responded to the Council's Interim Order, certifying that the records were provided to the Complainant via two (2) DVDs. The Custodian certified that the records were provided on November 19, 2018.

³ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁴ "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."

⁵ 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.

Therefore, the Custodian complied with the Council's November 13, 2018 Interim Order because she responded in the prescribed time frame providing records and simultaneously provided certified confirmation of compliance to the Council Staff.

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)).

Officer Conway unlawfully denied access to the to the Complainant's request by claiming that release of the body camera footage would have been inimical to the public interest. N.J.S.A. 47:1A-3(a). However, the Custodian provided the Complainant with the body camera footage in accordance with the Council's Interim Order. Additionally, the evidence of record does not indicate that Officer Conway's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Officer Conway's 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.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Custodian complied with the Council's November 13, 2018 Interim Order because she responded in the prescribed time frame providing records and simultaneously provided certified confirmation of compliance to the Council Staff.

2. Officer Conway unlawfully denied access to the to the Complainant's request by claiming that release of the body camera footage would have been inimical to the public interest. N.J.S.A. 47:1A-3(a). However, the Custodian provided the Complainant with the body camera footage in accordance with the Council's Interim Order. Additionally, the evidence of record does not indicate that Officer Conway's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Officer Conway's 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.

Prepared By: Samuel A. Rosado
Staff Attorney



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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

November 13, 2018 Government Records Council Meeting

Sean Patrick Vandy
Complainant

Complaint No. 2016-166

v.

Newfield Police Department (Gloucester)
Custodian of Record

At the November 13, 2018 public meeting, the Government Records Council (“Council”) considered the November 7, 2018 Findings and Recommendations of the Council Staff 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 complied with the Council’s September 25, 2018 Interim Order because she responded in the prescribed time frame providing the withheld records for *in camera* review and simultaneously provided certified confirmation of compliance to the Council Staff.
2. Officer Conway did not satisfy his/her burden of proof that he/she lawfully denied access to the body camera footage. N.J.S.A. 47:1A-6. Officer Conway failed to show that releasing the body camera footage of Chief Ed Siebert would be “inimical to the public interest” under N.J.S.A. 47:1A-3(a). See North Jersey Media Group v. Twp. of Lyndhurst, 229 N.J. 541, 573-74 (2017). Thus, the Custodian shall release the record to the Complainant. The Council notes that this is the first time a determination has been made on the disclosure of body camera footage. However, the Council stresses that this determination is specific to the applicability of N.J.S.A. 47:1A-3(a) to the facts of this matter, and notes that other exemptions may apply on a case-by-case basis. Accordingly, this determination should not be construed to provide for unmitigated access to body camera footage.
3. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in conclusion No. 2 above within five (5) business days from receipt of this Order. Further, the**



Custodian shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Council Staff.³

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 13th Day of November, 2018

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 14, 2018

¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

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."

³ 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.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Council Staff
November 13, 2018 Council Meeting**

**Sean Patrick Vandy¹
Complainant**

GRC Complaint No. 2016-166

v.

**Newfield Police Department²
Custodial Agency**

Records Relevant to Complaint: A copy of a body camera footage from Ed Siebert on February 11, 2016, between 18:00-21:00 hours. A copy of a body camera footage from Kevin Wagshowski on February 24, 2016, between 18:00-21:00 hours.

Custodian of Record: Toni L. VanCamp
Requests Received by Custodian: May 6, 2016
Response Made by Custodian: May 25, 2016
GRC Complaint Received: June 13, 2016

Records Submitted for *In Camera* Examination: Body camera footage from Chief Ed Siebert.

Background

September 25, 2018 Council Meeting:

At its September 25, 2018 public meeting, the Council considered the August 21, 2018³ Findings and Recommendations of the Council Staff 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. Officer Conway's May 25, 2016 response was insufficient because he or she failed to respond in writing to each request item contained in the request individually. Therefore, Officer Conway violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008). See also Graumann v. Newfield Police Dep't (Gloucester), GRC Complaint No. 2014-314 (May 2015).
2. The GRC must conduct an *in camera* review of the body camera footage to determine the validity of the Custodian's assertion that the record is exempt under OPRA because

¹ No representation listed on record.

² Represented by John C. Eastlack, Jr., Esq., of Weir & Partners, LLP (Turnersville, NJ).

³ The matter was originally scheduled for the August 28, 2018 meeting, but was tabled pending additional review. Sean Patrick Vandy v. Newfield Police Department (Gloucester), 2016-166 – *In Camera* Findings and Recommendations of the Council Staff

the record is part of an ongoing investigation. N.J.S.A. 47:1A-3(a); Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005). Furthermore, the Custodian shall provide a statement asserting why disclosure of the footage would be inimical to the public interest.

3. **The Custodian must deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see conclusion No. 2 above), a document or redaction index⁵, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁶ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. Notwithstanding the insufficient response, the Custodian has borne her burden of proof that she lawfully denied access to the portion of the Complainant's OPRA request seeking body camera footage from Keith Wagshowski of the Newfield Police Department. Specifically, the Custodian certified that no one with that name works at the Newfield Police Department and that a search of the Newfield Police Department's records did not locate any responsive records. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
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.

Procedural History:

On September 27, 2018, the Council distributed its Interim Order to all parties on. On October 2, 2018, the Custodian responded to the Council's Interim Order, providing nine (9) copies of the requested body camera footage, with an accompanying certification.

Analysis

Compliance

At its September 25, 2018 meeting, the Council ordered the Custodian to provide nine (9) copies of the body camera footage from Ed Siebert within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance to the Council Staff. On September 27, 2018, the Council distributed its Interim Order to all parties,

⁴ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁵ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁶ "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."

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 October 4, 2018.

On October 2, 2018, the third (3rd) business day after receipt of the Council's Order, the Custodian hand-delivered nine (9) copies of the body camera footage, along with an accompanying certification. The Custodian certified that Officer Conway denied the request because there was an ongoing investigation with the Newfield Police Department ("NPD"). The Custodian then certified that as of the date of the certification, the investigation was closed and disclosure is not inimical to the public interest.

Therefore, the Custodian complied with the Council's September 25, 2018 Interim Order because she responded in the prescribed time frame providing the withheld records for *in camera* review and simultaneously provided certified confirmation of compliance to the Council Staff.

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

OPRA provides that in order to withhold access to records under N.J.S.A. 47:1A-3(a), the agency must show that the records "pertain to an investigation in progress by any public agency," that disclosure will "be inimical to the public interest," and also show that the records were not available to the public prior to the beginning of the investigation. See North Jersey Media Group v. Twp. of Lyndhurst, 229 N.J. 541, 573 (2017).

In NJMG, the Court noted that section 3(a) has seen little analysis in published decisions, stating:

[i]n Serrano v. South Brunswick Township, 358 N.J. Super. 352, 367, 817 A.2d 1004 (App. Div. 2003), the Appellate Division rejected a claim that the release of a 9-1-1 tape could make it difficult to impanel a jury in a murder case and might call for a change of venue. Even if that were to happen, the panel observed, the "inconveniences to the prosecutor" did not make disclosure "inimical to the public interest." Ibid. The panel also initially noted that the tape "was created hours before the police investigation began" and was "open for public inspection" at that time. Id. at 366, 817 A.2d 1004 (quoting N.J.S.A. 47:1A-3(a)). Section 3(a) expressly carves that type of record out of the ongoing investigations exception.

...

[I]n [Paff v. Ocean Cnty. Prosecutor's Office, 446 N.J. Super. 163, 189-90 (App. Div. 2016)], the Appellate Division briefly addressed section 3(a). In light of the

facts of the case, which are discussed above, a majority of the panel found that the MVR recordings preceded any investigation and that their release would not be inimical to the public interest.

[229 N.J. at 573-74.]

In summary, the Court found that the custodian must demonstrate that disclosure of the record will “be inimical to the public interest” under N.J.S.A. 47:1A-3(a).

The GRC conducted an *in camera* examination on the submitted record. The first disc contained footage that is twenty-two (22) seconds long, and appeared to record a portion of a Newfield Borough (“Borough”) council meeting. An individual purporting to be the Complainant was speaking to the council. The second disc contains footage that is three (3) minutes and eighteen (18) seconds long, and recorded Chief Siebert escorting the Complainant from inside the building where the council meeting is taking place. The individuals spoke outside the entrance about the Complainant’s comments made during the council meeting, as well as previous interactions between the Complainant and Chief Siebert. Neither the Custodian nor Officer Conway provided a reason why disclosing the footage would be inimical to the public interest at the time of the request.

Therefore, Officer Conway did not satisfy his/her burden of proof that he/she lawfully denied access to the body camera footage. N.J.S.A. 47:1A-6. Officer Conway failed to show that releasing the body camera footage of Chief Ed Siebert would be “inimical to the public interest” under N.J.S.A. 47:1A-3(a). See NJMG, 229 N.J. at 573-74. Thus, the Custodian shall release the record to the Complainant. The Council notes that this is the first time a determination has been made on the disclosure of body camera footage. However, the Council stresses that this determination is specific to the applicability of N.J.S.A. 47:1A-3(a) to the facts of this matter, and notes that other exemptions may apply on a case-by-case basis. Accordingly, this determination should not be construed to provide for unmitigated access to body camera footage.

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 Council Staff respectfully recommends the Council find that:

1. The Custodian complied with the Council’s September 25, 2018 Interim Order because she responded in the prescribed time frame providing the withheld records for *in camera* review and simultaneously provided certified confirmation of compliance to the Council Staff.

2. Officer Conway did not satisfy his/her burden of proof that he/she lawfully denied access to the body camera footage. N.J.S.A. 47:1A-6. Officer Conway failed to show that releasing the body camera footage of Chief Ed Siebert would be “inimical to the public interest” under N.J.S.A. 47:1A-3(a). See North Jersey Media Group v. Twp. of Lyndhurst, 229 N.J. 541, 573-74 (2017). Thus, the Custodian shall release the record to the Complainant. The Council notes that this is the first time a determination has been made on the disclosure of body camera footage. However, the Council stresses that this determination is specific to the applicability of N.J.S.A. 47:1A-3(a) to the facts of this matter, and notes that other exemptions may apply on a case-by-case basis. Accordingly, this determination should not be construed to provide for unmitigated access to body camera footage.
3. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in conclusion No. 2 above within five (5) business days from receipt of this Order. Further, the Custodian shall simultaneously deliver⁷ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁸ to the Council Staff.⁹**
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: Samuel A. Rosado
Staff Attorney

November 7, 2018

⁷ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

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.



State of New Jersey
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

September 25, 2018 Government Records Council Meeting

Sean Patrick Vandy
Complainant

Complaint No. 2016-166

v.

Newfield Police Department (Gloucester)
Custodian of Record

At the September 25, 2018 public meeting, the Government Records Council ("Council") considered the September 18, 2018 Findings and Recommendations of the Council Staff 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. Officer Conway's May 25, 2016 response was insufficient because he or she failed to respond in writing to each request item contained in the request individually. Therefore, Officer Conway violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008). See also Graumann v. Newfield Police Dep't (Gloucester), GRC Complaint No. 2014-314 (May 2015).
2. The GRC must conduct an *in camera* review of the body camera footage to determine the validity of the Custodian's assertion that the record is exempt under OPRA because the record is part of an ongoing investigation. N.J.S.A. 47:1A-3(a); Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005). Furthermore, the Custodian shall provide a statement asserting why disclosure of the footage would be inimical to the public interest.
3. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see conclusion No. 2 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,³ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be**

¹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

² The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

³ "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."



received by the GRC within five (5) business days from receipt of the Council's Interim Order.

4. Notwithstanding the insufficient response, the Custodian has borne her burden of proof that she lawfully denied access to the portion of the Complainant's OPRA request seeking body camera footage from Keith Wagshowski of the Newfield Police Department. Specifically, the Custodian certified that no one with that name works at the Newfield Police Department and that a search of the Newfield Police Department's records did not locate any responsive records. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
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.

Interim Order Rendered by the
Government Records Council
On The 25th Day of September, 2018

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: September 27, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
September 25, 2018 Council Meeting**

**Sean Patrick Vandy¹
Complainant**

GRC Complaint No. 2016-166

v.

**Newfield Police Department²
Custodial Agency**

Records Relevant to Complaint: A copy of a body camera footage from Ed Siebert on February 11, 2016, between 18:00-21:00 hours. A copy of a body camera footage from Kevin Wagshowski on February 24, 2016, between 18:00-21:00 hours.

Custodian of Record: Toni L. VanCamp
Requests Received by Custodian: May 6, 2016
Response Made by Custodian: May 25, 2016
GRC Complaint Received: June 13, 2016

Background³

Request and Response:

On May 6, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On May 25, 2016, Officer J. Conway (“Officer Conway”) of the Newfield Police Department (“NPD”) responded in writing, stating that the body camera footage from Ed Siebert contains information that is “law enforcement sensitive (Internal Affairs), which is covered by one or more of the 25 exemptions under N.J.S.A. 47:1A and therefore will not be released to you.”

Denial of Access Complaint:

On June 13, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he was told by the Custodian that the incident pertaining to the records was still under review. The Complainant also asserted that the NPD were wasting time so that after ninety (90) days the records would be destroyed.

¹ No representation listed on record.

² Represented by John C. Eastlack, Jr., Esq., of Weir & Partners, LLP (Turnersville, NJ).

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

Sean Patrick Vandy v. Newfield Police Department (Gloucester), 2016-166 – Findings and Recommendations of the Council Staff

Statement of Information:

On July 15, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on May 6, 2016. The Custodian certified that a response was sent to the Complainant on May 25, 2016.

Regarding the body camera footage for Ed Siebert, the Custodian asserted that the footage was exempt under N.J.S.A. 47:1A-3(a). The Custodian asserted that the records were part of an ongoing investigation, and thus protected from disclosure. The Custodian certified that on February 11, 2016, at a council meeting, the Complainant made allegations against NPD officers. The Custodian certified that an investigation into those allegations began immediately thereafter. The Custodian then certified that the requested record was created after the initiation of the investigation, and thus protected under OPRA’s exemption.

As to the other body camera footage, the Custodian certified that responsive records did not exist. The Custodian certified that NPD does not employ an officer with the name “Kevin Wagshowski.” The Custodian also certified that notwithstanding the above, a search of NPD’s video records could not locate any responsive records. The Custodian also asserted that she was not required to conduct research to figure out what records may be responsive to an OPRA request that is unclear. Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506, 515 (App. Div. 2010).

Analysis

Insufficient Response

OPRA provides that a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g). Further, in Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008), the GRC held that “. . . [t]he Custodian’s response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5(g).” In Graumann v. Newfield Police Dep’t (Gloucester), GRC Complaint No. 2014-314 (May 2015), the subject OPRA request sought multiple items in a single paragraph, as opposed to an enumerated list. In her response, the custodian only addressed a portion of the OPRA request. The Council determined that the custodian’s response was insufficient because it failed to address each request item individually. In reaching this conclusion, the Council reasoned that the custodian “completely failed to acknowledge or address the balance of the request.”

Here, Officer Conway responded to the Complainant’s May 6, 2016 OPRA request on May 25, 2016, asserting that the body camera footage from Ed Siebert was exempt from disclosure as “law enforcement sensitive.” Officer Conway did not address the portion of the request seeking body camera footage from Kevin Wagshowski. The Custodian did not address that portion of the request until she submitted her SOI. The facts here are directly on point with Graumann, GRC 2014-314. Officer Conway only addressed part of the OPRA request but failed to address each item requested. Thus, the response was insufficient.

Accordingly, Officer Conway’s May 25, 2016 response was insufficient because he or she failed to respond in writing to each request item contained in the request individually. Therefore,

Officer Conway violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff, GRC 2007-272. See also Graumann, GRC 2014-314.

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 Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council⁴ that accepted the custodian’s legal conclusion for the denial of access without further review. The Appellate Division noted that “OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.” Id. The Court stated that:

[OPRA] also contemplates the GRC’s *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

[Id. at 355.]

Further, the Court found that:

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC’s obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

[Id.]

In the current matter, the Complainant sought body camera footage from Ed Siebert at a specific time and date. The Custodian stated that prior to the record’s creation, the Complainant had made allegations against the NPD at a local council meeting, initiating an investigation into

⁴ Paff v. N.J. Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

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the NPD. The Custodian argued that therefore the footage should be withheld until the investigation's conclusion pursuant to N.J.S.A. 47:1A-3(a). However, the Custodian did not provide any evidence to support that releasing the footage would be inimical to the public interest, which is required to qualify for protection under N.J.S.A. 47:1A-3(a). See North Jersey Media Group v. Twp. of Lyndhurst, 229 N.J. 541, 573 (2017).

Therefore, the GRC must conduct an *in camera* review of the body camera footage to determine the validity of the Custodian's assertion that the record is exempt under OPRA because the record is part of an ongoing investigation. N.J.S.A. 47:1A-3(a); See Paff, 379 N.J. Super. at 346. Furthermore, the Custodian shall provide a statement asserting why disclosure of the footage would be inimical to the public interest.

Body Camera Footage from Keith Wagshowski

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). Here, a portion of the Complainant's OPRA request sought body camera footage from Keith Wagshowski of the NPD from a specific date and time. In her SOI, the Custodian denied access to the record, certifying that no records existed. The Custodian certified that no officer with that name is employed at the NPD. Furthermore, the Custodian certified that a search of the NPD's hard drive returned no results. Additionally, there is no evidence in the record to refute the Custodian's certification. Thus, the GRC is satisfied that no unlawful denial of access occurred with respect to this request item.

Accordingly, notwithstanding the insufficient response, the Custodian has borne her burden of proof that she lawfully denied access to the portion of the Complainant's OPRA request seeking body camera footage from Keith Wagshowski of the NPD. Specifically, the Custodian certified that no one with that name works at the NPD and that a search of the NPD's records did not locate any responsive records. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

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 Council Staff respectfully recommends the Council find that:

1. Officer Conway's May 25, 2016 response was insufficient because he or she failed to respond in writing to each request item contained in the request individually. Therefore, Officer Conway violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008). See also Graumann v. Newfield Police Dep't (Gloucester), GRC Complaint No. 2014-314 (May 2015).

2. The GRC must conduct an *in camera* review of the body camera footage to determine the validity of the Custodian's assertion that the record is exempt under OPRA because the record is part of an ongoing investigation. N.J.S.A. 47:1A-3(a); Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005). Furthermore, the Custodian shall provide a statement asserting why disclosure of the footage would be inimical to the public interest.
3. **The Custodian must deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see conclusion No. 2 above), a document or redaction index⁶, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁷ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. Notwithstanding the insufficient response, the Custodian has borne her burden of proof that she lawfully denied access to the portion of the Complainant's OPRA request seeking body camera footage from Keith Wagshowski of the Newfield Police Department. Specifically, the Custodian certified that no one with that name works at the Newfield Police Department and that a search of the Newfield Police Department's records did not locate any responsive records. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
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.

Prepared By: Samuel A. Rosado
Staff Attorney

August 21, 2018⁸

⁵ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁶ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁷ "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."

⁸ The matter was originally scheduled for the August 28, 2018 meeting, but was tabled pending additional review. Sean Patrick Vandy v. Newfield Police Department (Gloucester), 2016-166 – Findings and Recommendations of the Council Staff