



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

May 31, 2022 Government Records Council Meeting

Jonathan L. Leitman, Esq.
Complainant

Complaint No. 2019-127

v.

Borough of Paramus (Bergen)
Custodian of Record

At the May 31, 2022 public meeting, the Government Records Council (“Council”) considered the May 24, 2022 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 Council dismiss the complaint because the Complainant withdrew the matter via e-mail to the Office of Administrative Law on April 27, 2022. 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 31st Day of May 2022

Robin Berg Tabakin, Esq., Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: June 2, 2022



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
May 31, 2022 Council Meeting**

**Jonathan L. Leitman, Esq.¹
Complainant**

GRC Complaint No. 2019-127

v.

**Borough of Paramus (Bergen)²
Custodial Agency**

Records Relevant to Complaint: Hard copies via U.S. mail of:

1. “[A]ny and all Paramus Police Department [(“PPD”)] records concerning a series of accidents that occurred on Route 4 West on April 5, 2018 between approximately 11:24 p.m. and 11:25 p.m. These accidents bear [PPD] Case Number I-2018-016533 and [PPD] Case Number I-2018-016537 [(“the Accidents”).”
2. “[R]ecords and recordings of all radio communications by police regarding [the Accidents].”
3. “[A]ny and all dashcam video recordings from of all police responding to [the Accidents].”³

Custodian of Record: Deanna Brenniser
Request Received by Custodian: April 10, 2018
Response Made by Custodian: April 12, 2018
GRC Complaint Received: July 5, 2019

Background

April 27, 2021 Council Meeting:

At its April 27, 2021 public meeting, the Council considered the February 16, 2021⁴ Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian’s April 12, 2018 response was legally insufficient because she failed to

¹ No legal representation listed on record.

² Represented by Bradley D. Tishman, Esq., of Cleary Giacobbe Alfieri Jacobs, LLC (Oakland, NJ). Previously represented by Justin D. Santagata, Esq., of Kaufman Semeraro & Leibman, LLP (Fort Lee, N.J.).

³ The Complainant requested other records that are not at issue in this complaint.

⁴ The matter was originally scheduled for adjudication at the Council’s February 23, 2021 meeting, but was tabled to seek additional information.

adequately respond to each item contained in the Complainant's OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008). See also Lenchitz v. Pittsgrove Twp. (Salem), GRC Complaint No. 2012-265 (Interim Order dated August 27, 2013). However, the GRC declines to order disclosure of responsive police radio calls since same was disclosed on June 13, 2019.

2. Notwithstanding the Custodian's insufficient response, she has borne her burden of proof that she lawfully denied access to a dashcam recording from Officer Mordaga's patrol car pertaining to the Accidents. N.J.S.A. 47:1A-6. Specifically, based upon the evidence of record and the certifications from the Custodian, Officer Mordaga, and Mr. Fahrney, no responsive record exists. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
3. Based on contradictory facts in the Custodian's and Complainant's submissions, there is conflicting evidence regarding whether the Custodian disclosed all eight (8) dashcam videos in response to the Complainant's April 10, 2018 OPRA request. The Administrative Procedures Act provides that the Office of Administrative Law "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). Therefore, it is necessary to refer this matter to the OAL for a hearing to resolve the facts and determine whether the Custodian disclosed the requested dashcam recordings in full or in part. See Rivera v. City of Bayonne (Hudson), GRC Complaint No. 2012-86 (Interim Order dated January 29, 2013). Further, and if necessary, the OAL should determine whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.

Procedural History:

On April 28, 2021, the Council distributed its Interim Order to all parties. On May 18, 2021, the Custodian filed a Motion for Leave to Appeal of the Council's Order. On June 14, 2021, the Complainant filed an answer to the Custodian's motion. On June 15, 2021, the Government Records Council ("GRC") filed a response to the Custodian's motion. On June 24, 2021, the Appellate Division denied the Custodian's Motion for Leave to Appeal.

On November 4, 2021, the GRC transmitted this complaint to the Office of Administrative Law ("OAL"). On April 27, 2022, the Complainant submitted a letter via e-mail to the OAL stating his desire to withdraw the matter. On April 29, 2022, the OAL returned the complaint back to the GRC marked "Withdrawal."

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends that the Council dismiss the complaint because the Complainant withdrew the matter via e-mail to the Office of Administrative Law on April 27, 2022. Therefore, no further adjudication is required.

Prepared By: Samuel A. Rosado
Staff Attorney

May 24, 2022



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

INTERIM ORDER

April 27, 2021 Government Records Council Meeting

Jonathan L. Leitman, Esq.
Complainant

Complaint No. 2019-127

v.

Borough of Paramus (Bergen)
Custodian of Record

At the April 27, 2021 public meeting, the Government Records Council (“Council”) considered the February 16, 2021 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’s April 12, 2018 response was legally insufficient because she failed to adequately respond to each item contained in the Complainant’s OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008). See also Lenchitz v. Pittsgrove Twp. (Salem), GRC Complaint No. 2012-265 (Interim Order dated August 27, 2013). However, the GRC declines to order disclosure of responsive police radio calls since same was disclosed on June 13, 2019.
2. Notwithstanding the Custodian’s insufficient response, she has borne her burden of proof that she lawfully denied access to a dashcam recording from Officer Mordaga’s patrol car pertaining to the Accidents. N.J.S.A. 47:1A-6. Specifically, based upon the evidence of record and the certifications from the Custodian, Officer Mordaga, and Mr. Fahrney, no responsive record exists. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. Based on contradictory facts in the Custodian’s and Complainant’s submissions, there is conflicting evidence regarding whether the Custodian disclosed all eight (8) dashcam videos in response to the Complainant’s April 10, 2018 OPRA request. The Administrative Procedures Act provides that the Office of Administrative Law “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). Therefore, it is necessary to refer this matter to the OAL for a hearing to resolve the facts and determine whether the Custodian disclosed the requested dashcam recordings in full or in part. See Rivera v. City of Bayonne (Hudson), GRC Complaint No. 2012-86 (Interim Order dated January 29, 2013). Further, and if necessary, the OAL should determine whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.



Interim Order Rendered by the
Government Records Council
On The 27th Day of April 2021

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: April 28, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 27, 2021 Council Meeting**

**Jonathan L. Leitman, Esq.¹
Complainant**

GRC Complaint No. 2019-127

v.

**Borough of Paramus (Bergen)²
Custodial Agency**

Records Relevant to Complaint: Hard copies via U.S. mail of:

1. “[A]ny and all Paramus Police Department [(“PPD”)] records concerning a series of accidents that occurred on Route 4 West on April 5, 2018 between approximately 11:24 p.m. and 11:25 p.m. These accidents bear [PPD] Case Number I-2018-016533 and [PPD] Case Number I-2018-016537 [(“the Accidents”).”
2. “[R]ecords and recordings of all radio communications by police regarding [the Accidents].”
3. “[A]ny and all dashcam video recordings from of all police responding to [the Accidents].”³

Custodian of Record: Deanna Brenniser

Request Received by Custodian: April 10, 2018

Response Made by Custodian: April 12, 2018

GRC Complaint Received: July 5, 2019

Background⁴

Initially, a summary of the Accidents is necessary for context and cohesion. On April 5, 2018, a motor vehicle accident occurred which was responded to by PPD Patrol Officer Anthony Mordaga, which encompassed accident No. I-2018-016533. Subsequently after Officer Mordaga’s response to the initial accident, a vehicle struck a pedestrian as well as other vehicles involved in the initial accident, encompassing accident No. I-2018-016537. The pedestrian was a driver involved in the first accident, No. I-2018-016533.

¹ No legal representation listed on record.

² Represented by Justin D. Santagata, Esq., of Kaufman Semeraro & Leibman, LLP (Fort Lee, N.J.).

³ The Complainant requested other records that are not at issue in this complaint.

⁴ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Request and Response:

On April 10, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 12, 2018, the Custodian responded in writing, providing copies of two (2) police reports, 911 recordings, and “one video from responding patrol vehicle” that responded to accident No. I-2018-016537.

Denial of Access Complaint:

On July 5, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that at the time of the OPRA request, he filed an action (“Litigation”)⁵ against the Borough of Paramus (“Borough”) on behalf of the pedestrian involved in the Accidents.

The Complainant argued that on or about June 13, 2019, in response to discovery demands during the Litigation, PPD provided police radio calls and eight (8) dashcam recordings from officers responding to accident No. I-2018-016537. The Complainant asserted that these records should have been provided in response to his OPRA request.

The Complainant also asserted that no dashcam recording was provided from Officer Mordaga’s vehicle. The Complainant argued that in response to a Request for Admissions, Officer Mordaga admitted that his vehicle’s light bar was activated, and that PPD policy stated that at all times that a light bar is activated, the vehicle’s dashcam is also activated. The Complainant asserted that footage from Officer Mordaga’s vehicle would have shown how he responded to the initial accident and depicted the second accident.

The Complainant next asserted that on June 26, 2019, he asked Scott Fahrney, Esq.⁶, representing the Borough in the Litigation, to confirm whether any dashcam recording from Officer Mordaga’s vehicle was available. The Complainant asserted that the next day, Mr. Fahrney responded stating that a video was kept for the requisite period and subsequently overwritten in accordance with Attorney General Guidelines.

The Complainant argued that the dashcam footage from Officer Mordaga’s vehicle was clearly responsive to his April 10, 2018 OPRA request, but was wrongfully withheld and ultimately destroyed. The Complainant argued that based upon the inadequate response to his request, and that probative evidence was withheld, the GRC should find that there was a knowing and willful violation.

As part of the complaint, the Complainant included a CD containing two (2) main folders marked as Exhibit C and Exhibit G. The Complainant asserted that Exhibit C consisted of what was provided by the Custodian in response to his OPRA request. The Complainant also asserted that Exhibit G consisted of what was provided by the Custodian in response to discovery.

⁵ Giron v. Borough of Paramus, Dkt. No. BER-L-2901-18.

⁶ Mr. Fahrney is a member of the same firm as Custodian’s Counsel.

Statement of Information:

On July 25, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on April 10, 2018. The Custodian certified that she responded in writing on April 12, 2018, providing responsive records to the Complainant.

The Custodian, through Counsel, asserted that the Complainant received all available records at the time of the request and could not be denied access to records already in his possession. Counsel argued that although the April 12, 2018 response referred to “one video”, the Custodian certified that the provided CD contained eight (8) separate dashcam recordings.

Counsel asserted that the Complainant received all responsive records in response to the OPRA request and received them again during discovery. Counsel argued that the matter should be dismissed as the Complainant possessed the responsive records at the time he filed in the instant complaint. See Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609, 618 (App. Div. 2008).

Counsel also argued that regarding the additional dashcam recording from the responding officer, he provided a certification from Officer Mordaga dated July 3, 2019. Officer Mordaga certified that when he arrived on the scene of the first accident, he turned on his rear lights. Officer Mordaga also certified that in his experience, activating the rear patrol lights did not automatically activate the dashcam system. Officer Mordaga certified that based on his experience, the dashcam system only activated when all lights of the patrol vehicle’s light bar were activated, and he did not have time to activate them when the second accident occurred.

Additional Submissions:

On July 30, 2019, the Complainant submitted a letter brief in response to the Custodian’s SOI. The Complainant disputed the claim that all responsive records were provided at the time of the request, arguing that the provided CD segregated what was produced in response to his OPRA request versus discovery via Litigation. The Complainant asserted that the OPRA response, Exhibit C, did not contain the requested police radio calls and contained only one (1) dashcam recording, whereas Exhibit G, the discovery production, contained eight (8) dashcam recordings and the police radio calls.

The Complainant next asserted that the request for Officer Mordaga’s dashcam recording was not baseless, contending that he asked Mr. Fahrney whether such video existed, and was told by same that a recording did exist, but was deleted. The Complainant noted that in contrast, the eight (8) dashcam recordings he received were not deleted and were produced over a year after the Accidents took place.

The Complainant asserted that the only substantive argument made by the Custodian is that the no further action should be taken since the Complainant allegedly received all responsive records at the time of the complaint. The Complainant argued that it was implausible for the Custodian to be unaware of the police radio calls at the time she responded to the OPRA request, and therefore the failure to provide them was intentional. The Complainant therefore argued that

sanctions should be appropriate for a knowing and willful violation, regardless of whether any further records were required to be produced in the instant complaint.

On August 7, 2019, Counsel submitted a response to the Complainant, providing a certification from the Custodian. Therein, the Custodian certified that the CD she received as part of the complaint did not contain the eight (8) recordings purportedly provided in response to the Litigation discovery. The Custodian also certified that she checked and confirmed that what was provided in response to the OPRA request contained eight (8) recordings, and that the cover letter asserting that one (1) video was contained in the CD was an error.

On March 2, 2021, the GRC submitted a request for additional information to the Custodian. Therein, the GRC inquired the Custodian:

1. Specifically, what records were provided to the Complainant in response to his OPRA request. Please provide physical evidence demonstrating same, if any.
2. Did the records provided in response to the Complainant's April 10, 2018 OPRA request comprise all the records provided on or about June 13, 2019 in response to the Complainant's discovery request?
3. Please describe in detail the search performed to locate all responsive records provided to the Complainant. If the search was performed by another party or parties, please provide a separate certification from same.
4. What records were provided to the Custodian as a result of the search(es) detailed in response to question No. 3 above?
5. Does/did a dashcam video from Officer Mordaga's patrol car stemming from accident Nos. I-2018-016537 or No. I-2018-016533 exist? If such a video did exist but was subsequently destroyed or overwritten, provide the date on which this occurred. Also, please provide a certification from Officer Mordaga responding to this question.

On March 3, 2021, Counsel requested an extension until March 16, 2021 to provide a response. The GRC granted the request on March 4, 2021. On March 15, 2021, Counsel requested an additional extension until March 19, 2021, to which the GRC granted that same day.

On March 19, 2021, Counsel submitted a response to the GRC's request for additional information, providing certifications from the Custodian, Mr. Fahrney, and Officer Mordaga. Regarding the first inquiry, the Custodian certified that she could not produce physical evidence that eight (8) videos were provided to the Complainant in response to his April 10, 2018 OPRA request, but certified that a "media chain of custody report" indicated that she exported eight (8) video files to a CD for production to the Complainant on April 12, 2018. The Custodian also included a photocopy of the CD and certified that the affixed label identifying seven (7) patrol officers and one (1) "ESU Hayo". The Custodian further certified that the April 12, 2018 letter should have said "one disc" rather than "one video."

Regarding the second inquiry, the Custodian certified that the records provided in response to the Complainant's OPRA request did comprise all the records provided in response to the Complainant's discovery request. The Custodian certified that the Complainant therefore possessed everything requested at the time he filed the instant complaint.

Regarding the third inquiry, the Custodian certified that she canvassed the relevant officers and PPD's files for police reports and dashcam videos. The Custodian certified that the dashcam videos were exported as described in the chain of custody report. Regarding the fourth inquiry, the Custodian certified that what was provided to the Complainant was everything detailed in the April 12, 2018 letter.

Regarding the fifth inquiry, Officer Mordaga certified that he was not aware of any dashcam recording existing from his patrol vehicle pertaining to the Accidents, repeating what he certified to on July 3, 2019, and when deposed by the Complainant during Litigation proceedings. Officer Mordaga certified that only his rear lights were activated when he arrived on scene. Officer Mordaga also certified that he did not have time to activate his dashcam or his full lights in the time between when he arrived on scene and subsequent accident. Additionally, the Custodian certified that Officer Mordaga's activity report corroborates his testimony that there was no dashcam recordings pertaining to the Accidents.

Furthermore, Mr. Fahrney certified that his statement to the Complainant on June 27, 2019 that the dashcam video from Officer Mordaga's patrol vehicle had been "overwritten" was made in error. Mr. Fahrney certified that he corrected the error when he sent Officer Mordaga's July 3, 2019 certification to the Complainant on July 19, 2019, where Officer Mordaga certified that no dashcam video exists.

Analysis

Sufficiency of Response

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. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008), the Council 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)." See also Lenchitz v. Pittsgrove Twp. (Salem), GRC Complaint No. 2012-265 (Interim Order dated August 27, 2013).

In the instant matter, the Custodian asserted that she provided a CD containing in part (8) dashcam recordings in response to the Complainant's April 10, 2018 OPRA request. The Complainant contended that the CD contained only one (1) dashcam recording. Thereafter, in response to the Complainant's discovery request during the Litigation, the Borough provided eight (8) dashcam recordings and police radio calls. The police radio calls were also responsive to the Complainant's OPRA request item No. 2, but were not provided until June 13, 2019, over a year after the Custodian's initial response.

The dispute of whether the Custodian's response to the OPRA request contained all responsive dashcam recordings will be discussed below. Notwithstanding, it is not in dispute that the Custodian's response failed to contain the responsive police radio calls that were subsequently provided via discovery. Thus, the evidence of record supports that the Custodian's initial response to this OPRA request was insufficient in accordance with Paff, GRC 2007-272.

As such, the Custodian's April 12, 2018 response was legally insufficient because she failed to adequately respond to each item contained in the Complainant's OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Paff, GRC 2007-272. See also Lenchitz, GRC 2012-265. However, the GRC declines to order disclosure of the police radio calls since same was provided to the Complainant on June 13, 2019.

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.

Officer Mordaga's Dashcam Video

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). In the instant matter, the Complainant argued that a dashcam recording existed based upon Mr. Farhney's statement to the Complainant on June 27, 2019 that a dashcam recording from Officer Mordaga's patrol car was kept for the requisite period then overwritten. The Complainant also argued that because Officer Mordaga activated his light bar at the time he arrived at the scene of the Accidents, the dashcam in his patrol car should have activated automatically.

Within the SOI and in response to the GRC's request for additional information, Officer Mordaga certified that no dashcam recording existed from his patrol car pertaining to the Accident. Officer Mordaga certified that at the time he arrived at the scene of the Accidents, he had activated his rear light bar, but did not have time to activate the full light bar by the time the second accident occurred. Officer Mordaga certified that it was his understanding that the dashcam recording system did not activate unless the full light bar was turned on.

Additionally, the Custodian provided copies of Officer Mordaga's activity report for the day of the Accidents, which indicates that there was no dashcam recording stemming from the Accidents. Furthermore, the Custodian provided excerpts from the Complainant's deposition of Officer Mordaga, who maintained that the dashcam recording system did not automatically record when the patrol vehicle was turned on. Lastly, Mr. Farhney certified that his June 27, 2019 statement to the Complainant was made in error and was ultimately corrected by Officer Mordaga's July 3, 2019 certification. Thus, based on the totality of the evidence, the GRC is satisfied that a dashcam recording from Officer Mordaga's patrol car did not exist.

Accordingly, notwithstanding the Custodian's insufficient response, she has borne her burden of proof that she lawfully denied access to a dashcam recording from Officer Mordaga's patrol car pertaining to the Accidents. N.J.S.A. 47:1A-6. Specifically, based upon the evidence of record and the certifications from the Custodian, Officer Mordaga, and Mr. Fahrney, no responsive record exists. See Pusterhofer, GRC 2005-49.

Contested Facts

The Administrative Procedures Act (“APA”) 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). In the past, when the issue of contested facts has arisen from a custodian’s compliance with an order, the Council has opted to send said complaint to the OAL for a fact-finding hearing. See Hyman v. City of Jersey City (Hudson), GRC Complaint No. 2007-118 (Interim Order dated September 25, 2012); Mayer v. Borough of Tinton Falls (Monmouth), GRC Complaint No. 2008-245 (Interim Order dated July 27, 2010); Latz v. Twp. of Barnegat (Ocean), GRC Complaint No. 2012-241 *et seq.* (Interim Order dated January 28, 2014).

In Rivera v. City of Bayonne (Hudson), GRC Complaint No. 2012-86 (Interim Order dated January 29, 2013), the custodian stated that he disclosed to the complainant all requested records. The complainant, however, asserted that only some of the requested records were disclosed to him. Due to the conflicting evidence of record, the Council referred the complaint to the OAL for a hearing to resolve the facts and determine whether the custodian disclosed the requested records to the complainant.

Seven (7) Dashcam Videos

In the instant matter, the Custodian asserted that on April 12, 2018, she provided in part a CD containing (8) dashcam recordings in response to the Complainant’s OPRA request. Thereafter, on June 13, 2019, the Borough provided in part eight (8) dashcam recordings via CD in response to the Complainant’s discovery request. The Complainant asserted that he filed the instant complaint contending that he received only one (1) dashcam recording in response to his OPRA request and should have received the seven (7) additional recordings provided via discovery.

In response to the GRC’s request for additional information, the Custodian maintained that all eight (8) dashcam recordings were provided on April 12, 2018. Although the Custodian certified that she could not produce a physical copy of the CD provided to the Complainant, she submitted a photocopy of same that has a label listing seven (7) patrol officers and another party affixed on the CD cover. However, there is no indication on the CD itself, such as a date stamp or OPRA request log, that same was a copy provided in response to the Complainant’s OPRA request.

Additionally, the Custodian provided a “media chain of custody report” to show that she exported eight (8) dashcam recording files to the CD provided to the Complainant on April 12, 2018. A review of the report indicates that eight (8) videos were uploaded from “DVR” to PPD’s system on the morning of April 6, 2018, as indicated in each video’s “Access Log”. However, the access log of the first video, “PATROL 15”, is the only one indicating that the Custodian requested a certified copy. The log states that the Custodian completed an export request on April 11, 2018, the day before providing the response to the Complainant’s OPRA request. None of the other videos in the report include an export request from the Custodian.

The Custodian also contended that the April 12, 2018 letter’s reference to “one video from [a] responding patrol vehicle” was made in error. In response to the GRC’s request for additional

information, the Custodian certified that “one video” should have instead been “one disc.” The GRC does not find this persuasive, as the videos all came separate patrol cars, and not just one that responded to the Accidents. Thus, the revised statement of “one disc from [a] responding patrol vehicle” is inconsistent with what the Custodian previously certified.

The totality of the above evidence casts doubts upon the Custodian’s certifications that all eight (8) dashcam recordings were provided in response to the Complainant’s OPRA request. A fact-finding hearing will provide the most effective method for developing the record and making determinations of fact.

Therefore, based on contradictory facts in the Custodian’s and Complainant’s submissions, there is conflicting evidence regarding whether the Custodian disclosed all eight (8) dashcam videos in response to the Complainant’s April 10, 2018 OPRA request. The APA provides that the 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). Therefore, it is necessary to refer this matter to the OAL for a hearing to resolve the facts and determine whether the Custodian disclosed the requested dashcam recordings in full or in part. See Rivera, GRC 2012-86. Further, and if necessary, the OAL should determine whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian’s April 12, 2018 response was legally insufficient because she failed to adequately respond to each item contained in the Complainant’s OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008). See also Lenchitz v. Pittsgrove Twp. (Salem), GRC Complaint No. 2012-265 (Interim Order dated August 27, 2013). However, the GRC declines to order disclosure of responsive police radio calls since same was disclosed on June 13, 2019.
2. Notwithstanding the Custodian’s insufficient response, she has borne her burden of proof that she lawfully denied access to a dashcam recording from Officer Mordaga’s patrol car pertaining to the Accidents. N.J.S.A. 47:1A-6. Specifically, based upon the evidence of record and the certifications from the Custodian, Officer Mordaga, and Mr. Fahrney, no responsive record exists. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. Based on contradictory facts in the Custodian’s and Complainant’s submissions, there is conflicting evidence regarding whether the Custodian disclosed all eight (8) dashcam videos in response to the Complainant’s April 10, 2018 OPRA request. The Administrative Procedures Act provides that the Office of Administrative Law “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). Therefore, it is necessary to refer this matter to the OAL for a hearing to resolve the

facts and determine whether the Custodian disclosed the requested dashcam recordings in full or in part. See Rivera v. City of Bayonne (Hudson), GRC Complaint No. 2012-86 (Interim Order dated January 29, 2013). Further, and if necessary, the OAL should determine whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.

Prepared By: Samuel A. Rosado
Staff Attorney

February 16, 2021⁷

⁷ The matter was originally scheduled for adjudication at the Council's February 23, 2021 meeting, but was tabled to seek additional information.