



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

LORI GRIFA
Commissioner

FINAL DECISION

July 26, 2011 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2009-266

v.

Borough of Fort Lee Police Department (Bergen)
Custodian of Record

At the July 26, 2011 public meeting, the Government Records Council (“Council”) considered the July 19, 2011 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 March 29, 2011 Interim Order by certifying to the Executive Director within the time provided within said Order, as extended, that (a) the List of Eligibles is not maintained or kept on file by the Custodian, (b) no special service charges will be billed to the Complainant for disclosure of any of the requested records, (c) all attorney bills that the agency incurred as a result of responding to the Complainant’s OPRA requests have been made available to the Complainant, (d) a CD containing a copy of the Computer Aided Dispatch log for calls and events on June 29, 2009 from 4:00 p.m. until 8:00 p.m. and August 27, 2009 from 4:00 p.m. until 11:59 p.m. has been made available for the Complainant to examine and/or retain, and (e) a CD containing a copy of the police use of force annual summary reports for the years 2007 and 2008 has been made available for the Complainant to examine and/or retain.
2. Although the Custodian failed to respond in writing to the Complainant’s April 15, 2009 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days resulting in a deemed denial, the Custodian did respond in writing to said request on the ninth (9th) business day following his receipt of the request and the Custodian responded in writing in a timely manner to the Complainant’s September 15, 2009 OPRA request. As such, the Custodian’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 26th Day of July, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: July 27, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
July 26, 2011 Council Meeting**

**Richard Rivera¹
Complainant**

GRC Complaint No. 2009-266

v.

**Borough of Fort Lee Police Department (Bergen)²
Custodian of Records**

Records Relevant to Complaint:

The Complainant requests an on-site examination of the following records:

1. List of candidates on the Department of Personnel, Division of Human Resource Information Services Certification of Eligibles for Appointment forms for the title of police officer for the years 2008 and 2009.
2. All forfeited assets received, Municipal Forfeiture Program Report forms filed on behalf of the Fort Lee Police Department for 2001 through 2008.
3. All reallocation of property, Municipal Forfeiture Program Report forms filed on behalf of the Fort Lee Police Department for 2001 through 2008.
4. All request for forfeiture fund disbursement to a non-law enforcement agency, Municipal Forfeiture Program Report forms filed on behalf of the Fort Lee Police Department for 2001 through 2008.
5. Municipal Law Enforcement Trust Account statements for 2001 through 2008.
6. Seized Asset Trust Account statements for 2001 through 2008.
7. Bergen County Prosecutor escrow account statements for funds held on behalf of the Fort Lee Police Department for the years 2001 through 2008.
8. Inventory record of direct purchases made using forfeited assets for 2001 through 2008.
9. All Computer Aided Dispatch (“CAD”) event abstracts for funeral home and funeral escorts from 2006 to September 15, 2009.
10. Police and Borough records of any and all written communications to and from the Chief of Police regarding the Complainant and/or his OPRA requests and/or his employment or background.
11. Police and Borough records of legal/attorney bills relating to OPRA requests made by the Complainant.

The Complainant requests copies of the following records:

12. CAD log for calls and events on June 29, 2009 from 4:00 p.m. until 8:00 p.m.
13. CAD log for calls and events on August 27, 2009 from 4:00 p.m. until 11:59 p.m.

¹ No legal representation listed on record.

² Represented by J. Sheldon Cohen, Esq., DeCotiis, Cole & Wisler (Teaneck, NJ).

14. Police use of force annual summary reports for 2005 through 2008.³
The Complainant requests a faxed or e-mailed copy of the following record:

15. Fort Lee Notice of Tort Claim form.

Requests Made: April 15, 2009 and September 15, 2009

Responses Made: April 28, 2009 and September 24, 2009

Custodian: Neil Grant, Clerk

GRC Complaint Filed: September 25, 2009⁴

Background

March 29, 2011

At the March 29, 2011 public meeting, the Government Records Council (“Council”) considered the March 22, 2011 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 failure to respond in writing to the Complainant’s April 15, 2009 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s April 15, 2009 OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (January 2010). Further, the Custodian’s response to the Complainant’s September 15, 2009 OPRA request, which informed the Complainant that the Custodian would respond back to the Complainant after the Custodian received advice from the Bergen County Prosecutor’s Office, constituted an open ended response by the Custodian and is therefore a “deemed” denial pursuant to N.J.S.A. 47:1A-5.i. and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008).
2. The Custodian must disclose to the Complainant Item No. 1 of the records relevant to the complaint, which is the list of candidates on the Department of Personnel, Division of Human Resource Information Services Certification of Eligibles for Appointment forms for the title of police officer for the years 2008 and 2009. If said record is not maintained or kept on file by the Custodian, the Custodian must provide a certification to that effect addressed to the Executive Director of the GRC.
3. **The Custodian shall within five (5) business days from receipt of the Council’s Interim Order comply with the provisions of paragraph 2 above by (a) disclosing the records to the Complainant with any appropriate redactions and a detailed document index explaining the**

³ The Complainant states that he does not want individual use of force incident reports.

⁴The GRC received the Denial of Access Complaint on said date.

lawful basis for any such redaction and simultaneously provide certified confirmation of compliance to the Executive Director, or (b) provide a certification to the Executive Director averring that said records are not maintained or kept on file by the Custodian.

4. Because the Custodian certified that there are no records responsive to the Complainant's request for Item Numbers 2, 3, 4, 6, 7, 9, 14 and 15, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny the Complainant access to said records pursuant to N.J.S.A. 47:1A-1.1. and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
5. Because the Custodian has failed to establish that the estimated special service charges for redacting and disclosing Item No. 5, Item No. 8 and all such other forfeiture records are reasonable and reflect the actual cost to the Borough to fulfill the Complainant's OPRA request, the estimated special service charges of \$5,345.65 proposed by the Custodian are unreasonable and unwarranted under N.J.S.A. 47:1A-5.d.
6. **The Custodian shall comply with the provisions of paragraph 5 above by preparing a detailed estimate of actual costs to be incurred by the Borough for the materials and effort necessary to fulfill the Complainant's OPRA request, and provide this estimate to the Complainant within five (5) business days from receipt of the Council's Interim Order, simultaneously providing certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
7. Because the Complainant's request for Item No. 10 of the records relevant to the complaint fails to seek specific identifiable government records, the Complainant's request is overly broad and is therefore invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and the Council's decision in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Accordingly, the Custodian has not unlawfully denied the Complainant access to said records.
8. The Custodian must disclose to the Complainant Item No. 11 which are all attorney bills or invoices, with any appropriate redactions, that the agency incurred as a result of responding to the Complainant's OPRA requests pursuant to N.J.S.A. 47:1A-1.1.
9. Because Item Number 12, Item No. 13 and Item No. 14 (for the years 2007 and 2008) of the records request are specifically identified government records, and because the Custodian failed to bear his burden of proving a

lawful denial of access to the requested records pursuant to N.J.S.A. 47:1A-6, the Custodian must disclose said records to the Complainant.

10. **The Custodian shall comply with the provisions of paragraphs 8 and 9 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions if any, 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.**
11. 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.

March 30, 2011

Council's Interim Order distributed to the parties.

March 30, 2011

E-mail from the GRC to the Custodian. The GRC confirms a telephone conversation this date between the Custodian and the GRC, wherein the Custodian requested and the GRC granted an extension of time until April 15, 2011 for the Custodian to complete and submit a certification of compliance with the terms of the Council's March 29, 2011 Interim Order.

April 13, 2011

Custodian's response to the Council's Interim Order. The Custodian certifies to the Executive Director within eleven (11) business days of receipt of the Council's March 29, 2011 Interim Order, as extended, that in compliance with paragraph 3 of said Order the list of candidates on the Department of Personnel, Division of Human Resource Information Services Certification of Eligibles for Appointment forms for the title of police officer for the years 2008 and 2009 ("List of Eligibles") is not maintained or kept on file by the Custodian. The Custodian further certifies that in compliance with paragraph 6 of said Order no special service charges will be billed to the Complainant for disclosure of any of the requested records. The Custodian also certifies that in compliance with paragraph 10 of said Order all attorney bills that the agency incurred as a result of responding to the Complainant's OPRA requests have been made available for the Complainant to examine, a CD containing a copy of the CAD log for calls and events on June 29, 2009 from 4:00 p.m. until 8:00 p.m. and August 27, 2009 from 4:00 p.m. until 11:59 p.m. has been made available for the Complainant to examine and/or retain and a CD containing a copy of the police use of force annual summary reports for the years 2007 and 2008 has been made available for the Complainant to examine and/or retain.

April 13, 2011

E-mail from the Custodian to the Complainant. The Custodian asks the Complainant to call him to schedule a date and time for the Complainant to report to the Fort Lee Clerk's Office to review the records the Council directed be disclosed by the Custodian to the Complainant in the Council's Interim Order dated March 29, 2011.

Analysis**Whether the Custodian complied with the Council's March 29, 2011 Interim Order?**

On March 30, 2011, the Council's Interim Order was distributed to the Custodian and the evidence of record reveals that the Order was received by the Custodian on that same date because on March 30, 2011 the Custodian requested an extension of time until April 15, 2011 to complete and submit a certification of compliance in accordance with the terms of the Council's March 29, 2011 Interim Order.

The Custodian responded with certified confirmation of compliance to the Executive Director on April 13, 2011 which was within the time period for providing confirmation of compliance with the Council's Order, as extended. The Custodian in compliance with paragraph 3 of the Council's Interim Order certified that the List of Eligibles is not maintained or kept on file by the Custodian, that in compliance with paragraph 6 of said Order no special service charges will be billed to the Complainant for disclosure of any of the requested records and that in compliance with paragraph 10 of said Order all attorney bills that the agency incurred as a result of responding to the Complainant's OPRA requests have been made available to the Complainant. Further, the Custodian certified that a CD containing a copy of the CAD log for calls and events on June 29, 2009 from 4:00 p.m. until 8:00 p.m. and August 27, 2009 from 4:00 p.m. until 11:59 p.m. has been made available for the Complainant to examine and/or retain and a CD containing a copy of the police use of force annual summary reports for the years 2007 and 2008 has been made available for the Complainant to examine and/or retain.

Accordingly, the Custodian complied with the Council's March 29, 2011 Interim Order by certifying to the Executive Director within the time provided within said Order, as extended, that (a) the List of Eligibles is not maintained or kept on file by the Custodian, (b) no special service charges will be billed to the Complainant for disclosure of any of the requested records, (c) all attorney bills that the agency incurred as a result of responding to the Complainant's OPRA requests have been made available to the Complainant, (d) a CD containing a copy of the CAD log for calls and events on June 29, 2009 from 4:00 p.m. until 8:00 p.m. and August 27, 2009 from 4:00 p.m. until 11:59 p.m. has been made available for the Complainant to examine and/or retain and (e) a CD containing a copy of the police use of force annual summary reports for the years 2007 and 2008 has been made available for the Complainant to examine and/or retain.

Whether the Custodian’s actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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:

“... If 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.

In the instant complaint, the Custodian failed to respond in writing to the Complainant’s OPRA April 15, 2009 request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days. The Custodian, however, did respond in writing to the Complainant’s April 15, 2009 OPRA request on the ninth (9th) business day following his receipt of the request. Further, the Custodian responded in writing in a timely manner to the Complainant’s September 15, 2009 OPRA request.

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 (Berg); 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).

Accordingly, although the Custodian failed to respond in writing to the Complainant’s April 15, 2009 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days resulting in a deemed denial, the Custodian did respond in writing to said request on the ninth (9th) business day following his receipt of the request and the Custodian responded in writing in a timely manner to the Complainant’s

September 15, 2009 OPRA request. As such, the Custodian'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 Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's March 29, 2011 Interim Order by certifying to the Executive Director within the time provided within said Order, as extended, that (a) the List of Eligibles is not maintained or kept on file by the Custodian, (b) no special service charges will be billed to the Complainant for disclosure of any of the requested records, (c) all attorney bills that the agency incurred as a result of responding to the Complainant's OPRA requests have been made available to the Complainant, (d) a CD containing a copy of the Computer Aided Dispatch log for calls and events on June 29, 2009 from 4:00 p.m. until 8:00 p.m. and August 27, 2009 from 4:00 p.m. until 11:59 p.m. has been made available for the Complainant to examine and/or retain, and (e) a CD containing a copy of the police use of force annual summary reports for the years 2007 and 2008 has been made available for the Complainant to examine and/or retain.
2. Although the Custodian failed to respond in writing to the Complainant's April 15, 2009 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days resulting in a deemed denial, the Custodian did respond in writing to said request on the ninth (9th) business day following his receipt of the request and the Custodian responded in writing in a timely manner to the Complainant's September 15, 2009 OPRA request. As such, the Custodian'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: John E. Stewart, Esq.

Approved By: Catherine Starghill, Esq.
Executive Director

July 19, 2011



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

LORI GRIFA
Commissioner

INTERIM ORDER

March 29, 2011 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2009-266

v.

Borough of Fort Lee Police Department (Bergen)
Custodian of Record

At the March 29, 2011 public meeting, the Government Records Council (“Council”) considered the March 22, 2011 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 failure to respond in writing to the Complainant’s April 15, 2009 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s April 15, 2009 OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (January 2010). Further, the Custodian’s response to the Complainant’s September 15, 2009 OPRA request, which informed the Complainant that the Custodian would respond back to the Complainant after the Custodian received advice from the Bergen County Prosecutor’s Office, constituted an open ended response by the Custodian and is therefore a “deemed” denial pursuant to N.J.S.A. 47:1A-5.i. and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008).
2. The Custodian must disclose to the Complainant Item No. 1 of the records relevant to the complaint, which is the list of candidates on the Department of Personnel, Division of Human Resource Information Services Certification of Eligibles for Appointment forms for the title of police officer for the years 2008 and 2009. If said record is not maintained or kept on file by the Custodian, the Custodian must provide a certification to that effect addressed to the Executive Director of the GRC.
3. **The Custodian shall within five (5) business days from receipt of the Council’s Interim Order comply with the provisions of paragraph 3 above by (a) disclosing the records to the Complainant with any appropriate redactions and a detailed document index explaining the lawful basis for any such redaction and simultaneously provide certified confirmation of compliance to the Executive**



Director, or (b) provide a certification to the Executive Director averring that said records are not maintained or kept on file by the Custodian.¹

4. Because the Custodian certified that there are no records responsive to the Complainant's request for Item Numbers 2, 3, 4, 6, 7, 9, 14 and 15, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny the Complainant access to said records pursuant to N.J.S.A. 47:1A-1.1. and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
5. Because the Custodian has failed to establish that the estimated special service charges for redacting and disclosing Item No. 5, Item No. 8 and all such other forfeiture records are reasonable and reflect the actual cost to the Borough to fulfill the Complainant's OPRA request, the estimated special service charges of \$5,345.65 proposed by the Custodian are unreasonable and unwarranted under N.J.S.A. 47:1A-5.d.
6. **The Custodian shall comply with the provisions of paragraph 5 above by preparing a detailed estimate of actual costs to be incurred by the Borough for the materials and effort necessary to fulfill the Complainant's OPRA request, and provide this estimate to the Complainant within five (5) business days from receipt of the Council's Interim Order, simultaneously providing certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
7. Because the Complainant's request for Item No. 10 of the records relevant to the complaint fails to seek specific identifiable government records, the Complainant's request is overly broad and is therefore invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and the Council's decision in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Accordingly, the Custodian has not unlawfully denied the Complainant access to said records.
8. The Custodian must disclose to the Complainant Item No. 11 which are all attorney bills or invoices, with any appropriate redactions, that the agency incurred as a result of responding to the Complainant's OPRA requests pursuant to N.J.S.A. 47:1A-1.1.
9. Because Item Number 12, Item No. 13 and Item No. 14 (for the years 2007 and 2008) of the records request are specifically identified government records, and because the Custodian failed to bear his burden of proving a lawful denial of access to the requested records pursuant to N.J.S.A. 47:1A-6, the Custodian must disclose said records to the Complainant.

¹ In accordance with N.J. Court Rule 1:4-4, the following language must immediately precede the Custodian's signature on the certification: "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."

10. **The Custodian shall comply with the provisions of paragraphs 8 and 9 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions if any, 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.²**
11. 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 March, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: March 30, 2011

² 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
Findings and Recommendations of the Executive Director
March 29, 2011 Council Meeting

Richard Rivera¹
Complainant

GRC Complaint No. 2009-266

v.

Borough of Fort Lee Police Department (Bergen)²
Custodian of Records

Records Relevant to Complaint:

The Complainant requests an on-site examination of the following records:

1. List of candidates on the Department of Personnel, Division of Human Resource Information Services Certification of Eligibles for Appointment forms for the title of police officer for the years 2008 and 2009.
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3. All reallocation of property, Municipal Forfeiture Program Report forms filed on behalf of the Fort Lee Police Department for 2001 through 2008.
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7. Bergen County Prosecutor escrow account statements for funds held on behalf of the Fort Lee Police Department for the years 2001 through 2008.
8. Inventory record of direct purchases made using forfeited assets for 2001 through 2008.
9. All Computer Aided Dispatch (“CAD”) event abstracts for funeral home and funeral escorts from 2006 to September 15, 2009.
10. Police and Borough records of any and all written communications to and from the Chief of Police regarding the Complainant and/or his OPRA requests and/or his employment or background.
11. Police and Borough records of legal/attorney bills relating to OPRA requests made by the Complainant.

The Complainant requests copies of the following records:

12. CAD log for calls and events on June 29, 2009 from 4:00 p.m. until 8:00 p.m.
13. CAD log for calls and events on August 27, 2009 from 4:00 p.m. until 11:59 p.m.
14. Police use of force annual summary reports for 2005 through 2008.³

¹ No legal representation listed on record.

² Represented by J. Sheldon Cohen, Esq., DeCotiis, Cole & Wisler (Teaneck, NJ).

Richard Rivera v. Borough of Fort Lee Police Department (Bergen), 2009-266 – Findings and Recommendations of the Executive Director

The Complainant requests a faxed or e-mailed copy of the following record:

15. Fort Lee Notice of Tort Claim form.

Requests Made: April 15, 2009 and September 15, 2009

Responses Made: April 28, 2009 and September 24, 2009

Custodian: Neil Grant, Clerk

GRC Complaint Filed: September 25, 2009⁴

Background

April 15, 2009

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above as Items No. 1 through No. 8 on an official OPRA request form.

April 28, 2009

Custodian's response to the OPRA request. The Custodian's Counsel responds in writing to the Complainant's OPRA request on the ninth (9th) business day following receipt of such request. Counsel states that access to the requested records is denied because the Complainant's request is overly broad; to wit, the request seeks records over a period of years. Counsel states that the Complainant's request for Item No. 1 is also denied because, although the agency maintains some of the same information that is contained in the requested record, the record as requested does not exist. Finally, Counsel states that the Complainant's request for Items No. 2 through No. 8 relate to receipt and disbursement of forfeiture funds and that disclosure thereof would be inimical to the public interest. Counsel further states that if those records were disclosable pursuant to a valid request, sections of the records would have to be redacted and the Complainant would be assessed a special service charge in excess of ten thousand dollars (\$10,000.00).

May 4, 2009

Letter from the Complainant to the Custodian's Counsel. The Complainant states that he will accept the information that Counsel stated is included in certain agency records in substitution for Item No. 1 of the records relevant to the complaint. The Complainant also asserts that although he did not request the identity of equipment purchased with forfeited funds, such equipment can be viewable in police magazines and catalogues. The Complainant also contends that his request is not overly broad and that if it is necessary for the Custodian to redact certain portions of the requested records and charge him a special service charge, then he wants the Custodian to provide him with an accurate amount so that he can decide if he will pay the amount for the records.

June 9, 2009

Letter from the Custodian to the Complainant. The Custodian informs the Complainant that compiling and redacting the confidential forfeiture records will require

³ The Complainant states that he does not want individual use of force incident reports.

⁴The GRC received the Denial of Access Complaint on said date.

file retrieval work by clerical and senior clerical personnel followed by command review and redaction where necessary. The Custodian further informs the Complainant that final review and approval by the Chief of Police will be necessary. The Custodian advises the Complainant that the special service charges, together with copying charges for 6363 pages, has been estimated to total \$25,952.00.

September 15, 2009

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above as Items No. 9 through No. 15 on an official OPRA request form.⁵

September 22, 2009

Letter from the Complainant to the Custodian. The Complainant states that Items No. 9 through No. 14 of the records relevant to the complaint should be disclosed to him within seven (7) business days of his request because they do not need to be reviewed by the Bergen County Prosecutor's Office ("BCPO"). The Complainant also states that he believes the Custodian unlawfully denied him access to the records he requested on April 15, 2009 and that the Custodian is now also unlawfully denying him access to the records he requested on September 15, 2009. The Complainant states that he will file a Denial of Access Complaint.

September 24, 2009

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the seventh (7th) business day following receipt of such request. The Custodian states he is seeking the advice of the BCPO concerning the Complainant's request and will respond to the Complainant after he receives the advice from the BCPO. The Custodian also makes reference to an earlier undated conversation between the Complainant and the Custodian regarding the Complainant's September 15, 2009 request, wherein the Custodian states that the Complainant already has in his possession Denial of Access Complaint forms.

September 25, 2009

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- Complainant's OPRA request dated April 15, 2009
- Custodian's response to the OPRA request dated April 28, 2009
- Letter from the Complainant to the Custodian's Counsel dated May 4, 2009
- Letter from the Custodian to the Complainant dated June 9, 2009
- Complainant's OPRA request dated September 15, 2009
- Letter from the Complainant to the Custodian dated September 22, 2009
- Custodian's response to the OPRA request dated September 24, 2009

The Complainant contends that the Custodian is intentionally denying the Complainant access to the records he requested by OPRA requests dated April 15, 2009

⁵ The Complainant repeated his request for Items No. 2 through No. 8, however in this request they were less inclusive.

and September 15, 2009. The Complainant contends there was no need for the Custodian to consult the BCPO for the September 15, 2009 request because the Custodian had already consulted with the BCPO for the Complainant's April 15, 2009 request, which sought the same records. The Complainant states that he based his requests upon the following authority:

- Attorney General Law Enforcement Directive 2004-4
- N.J.S.A. 2C:35-1 et seq.
- N.J.S.A. 2C:36-1 et seq.
- Memos from the Department of Law & Public Safety to the Assembly Appropriations Committee regarding forfeiture reports, including a February 10, 2004 memo

The Complainant does not agree to mediate this complaint.

October 7, 2009

E-mail from the Complainant to the Custodian. The Complainant asks the Custodian to inform him when the records the Complainant requested on September 25, 2009 [sic] will be ready.

October 7, 2009

E-mail from the Custodian to the Complainant. The Custodian informs the Complainant that he will have to check with the Police Department to determine when the Complainant's records will be ready.

October 16, 2009

Request for the Statement of Information ("SOI") sent to the Custodian.

October 20, 2009

Telephone call from the Custodian to the GRC. The Custodian requests an extension of time until October 30, 2009 to complete and return the SOI.

October 20, 2009

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension of time until October 30, 2009 to complete and return the SOI.

October 28, 2009⁶

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated September 15, 2009
- Letter from the Complainant to the Custodian dated September 22, 2009
- Custodian's response to the OPRA request dated September 24, 2009
- E-mail from the Complainant to the Custodian dated October 7, 2009
- E-mail from the Custodian to the Complainant dated October 7, 2009

⁶ Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.
Richard Rivera v. Borough of Fort Lee Police Department (Bergen), 2009-266 – Findings and Recommendations of the Executive Director

The Custodian certifies that his search for the requested records involved faxing a copy of the Complainant's OPRA request to the Borough Police Chief who maintains actual physical custody of the requested records. The Custodian certifies he also provided copies to the Borough Administrator and Borough Attorney. The Custodian also certifies that no records which may have been responsive to the request were destroyed in accordance with Record Destruction Schedules 0026-0000 and 0319-0001 established and approved by New Jersey Department of State, Division of Archives and Records Management.

The Custodian certifies that the following records relevant to the complaint do not exist:

- Item No. 2: all forfeited assets received, Municipal Forfeiture Program Report forms filed on behalf of the Fort Lee Police Department for 2001 through 2008
- Item No. 3: all reallocation of property, Municipal Forfeiture Program Report forms filed on behalf of the Fort Lee Police Department for 2001 through 2008
- Item No. 4: all request for forfeiture fund disbursement to a non-law enforcement agency, Municipal Forfeiture Program Report forms filed on behalf of the Fort Lee Police Department for 2001 through 2008
- Item No. 6: seized Asset Trust Account statements for 2001 through 2008
- Item No. 7: Bergen County Prosecutor escrow account statements for funds held on behalf of the Fort Lee Police Department for the years 2001 through 2008
- Item No. 9: all Computer Aided Dispatch ("CAD") event abstracts for funeral home and funeral escorts from 2006 to September 15, 2009
- Item No. 14: police use of force annual summary reports for the years 2005 and 2006
- Item No. 15: Fort Lee Notice of Tort Claim form

The Custodian certifies that Item No. 10 and Item No. 11 of the records relevant to the complaint cannot be disclosed because these records are relevant to pending litigation against the Borough of Fort Lee and contain privileged material. Item No. 10 constitutes Police and Borough records of any and all written communications to and from the Chief of Police regarding the Complainant and/or his OPRA requests and/or his employment or background and Item No. 11 contains Police and Borough records of attorney bills relating to OPRA requests made by the Complainant.

The Custodian certifies that, rather than the records listed in Item No. 2 through Item No. 4 of the records relevant to the complaint, the Borough uses BCPO Form A and Form N for local and state seizures of property and U.S. Treasury Department Form 92-22.46 for federal seizures ("forfeiture records"). The Custodian certifies that these forms, along with the other existing records not withheld from disclosure that are responsive to the Complainant's request, can be disclosed to the Complainant but will have to be reviewed for redaction of personal identifying information and social security numbers, juvenile information, criminal investigatory information, information relevant to an open

case and/or vendor information which could identify equipment used in confidential and undercover investigations. The Custodian further certifies that because all of the records responsive to the request will have to be reviewed and redacted before access can be granted, none of the records will be available for on site examination. The Custodian certifies that 263 records were located that are responsive to the Complainant’s request. The Custodian further certifies that the records total 411 pages. The Custodian certifies that copies of the records will have to be made and redacted before disclosure to the Complainant. The Custodian also certifies that the records will have to be retrieved from the files, copied and then redacted. The Custodian certifies that such operations will generate a special service charge as set forth in the following table:

TASK	HOURS	AMT/HOUR	SUBTOTAL
Clerical retrieval, copying and assembly	65.75	\$24.85	\$1,633.89
Command review/redaction	43.66	\$67.04	\$2,926.83 ⁷
Approval by Chief of Police	8.77	\$76.93	\$ 674.68
Copying charges for 411 pages ⁸			\$ 110.25 ⁹
TOTAL ESTIMATED AMOUNT			\$5,345.65

The Custodian certifies that payment must be received by the Borough before work commences and that the Complainant must allow a reasonable amount of time for the Borough to comply with the Complainant’s requests.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

⁷ This figure should be \$2,926.97; therefore the total should be \$5,345.79.

⁸ The Custodian certified that this calculation is based upon \$.75 for the first ten pages, \$.50 for the second ten pages and \$.25 for each page thereafter.

⁹ The Custodian certified that although the Complainant requested an on site inspection of the records, the records will have to be copied in order to be redacted prior to inspection because they contain sensitive information.

OPRA also provides that:

“A government record shall not include...any record within the attorney-client privilege. This paragraph shall not be construed as exempting from access attorney or consultant bills or invoices except that *such bills or invoices may be redacted* to remove any information protected by the attorney-client privilege...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA further provides that:

“A copy or copies of a government record may be purchased by any person upon payment of the actual cost of duplicating the record...[t]he actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy except as provided for in subsection c.” N.J.S.A. 47:1A-5.b.

OPRA states that:

“Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an *extraordinary expenditure of time and effort to accommodate the request*, the public agency may charge, in addition to the actual cost of duplicating the record, a *special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies ...*” (Emphasis added.) N.J.S.A. 47:1A-5.c.

OPRA further states that:

“[a] custodian shall permit access to a government record and provide a copy thereof in the medium requested if the public agency maintains the record in that medium. If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium. If a request is for a record . . . requiring a substantial amount of manipulation or programming of information technology, the agency may charge, in addition to the actual cost of duplication, a special service charge that shall be reasonable and shall be based on the cost for any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred by the agency or attributable to the agency for the programming, clerical, and supervisory assistance required, or both.” N.J.S.A. 47:1A-5.d.

OPRA also states that:

“[a] custodian shall promptly comply with a request to inspect, examine, copy or provide a copy of a government record. If 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...[i]f the custodian of a government record asserts that part of a particular record is exempt from public access...the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record.” N.J.S.A. 47:1A-5.g.

OPRA additionally provides that:

“Unless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... [i]n the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ... [t]he requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

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.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g. Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g.,

N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (January 2010).

The evidence of record reveals that the Complainant's OPRA request dated April 15, 2009 was sent to the Custodian via e-mail on that same date. The Custodian's Counsel responded to the OPRA request on April 28, 2009, which is the ninth (9th) business day following receipt of such request. Further, the Custodian responded to the Complainant's OPRA request dated September 15, 2009 on September 24, 2009, by informing the Complainant that the Custodian sought advice from the BCPO with respect to the Complainant's request and that the Custodian would respond back to the Complainant after the Custodian received advice from the BCPO. Although the Custodian responded to the Complainant's September 15, 2009 OPRA request in a timely manner on the seventh (7th) business day following receipt of the request, the Custodian failed to advise the Complainant when the records would be made available.

N.J.S.A. 47:1A-5.i. provides that a custodian shall advise the requestor when a record can be made available. In Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), the custodian provided the complainant with a written response to the complainant's OPRA request on the date the request was received stating that the requested records may not be readily available and that the custodian may have to reach out to several units within the agency to obtain the records. Subsequently, on the seventh (7th) business day following the custodian's receipt of the request, the custodian requested an extension of time to respond to the complainant's request; however, the custodian failed to notify the complainant when the requested records would be provided. The council determined that such an open ended communication by the custodian goes against the spirit of OPRA. Thus, the Custodian's response was found to be inadequate under OPRA and constituted a "deemed" denial pursuant to N.J.S.A. 47:1A-5.i.

Here, the Custodian's failure to respond in writing to the Complainant's April 15, 2009 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's April 15, 2009 OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007). Further, the Custodian's response to the Complainant's September 15, 2009 OPRA request, which informed the Complainant that the Custodian would respond back to the Complainant after the Custodian received advice from the BCPO, constituted an open ended response by the Custodian and is therefore a "deemed" denial pursuant to N.J.S.A. 47:1A-5.i. and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008).

Item No. 1 of the Records Request – List of candidates on the Department of Personnel, Division of Human Resource Information Services Certification of Eligibles for Appointment forms for the title of police officer for the years 2008 and 2009.

The Custodian did not address Item No. 1 of the records relevant to the complaint in his Statement of Information. For this reason, the GRC will look to the Custodian's response to the Complainant's April 15, 2009 OPRA request, wherein the Complainant

requested this item. The Custodian's Counsel responded to the Complainant's April 15, 2009 OPRA request on April 28, 2009. With respect to this item Counsel stated that the record is a State record and not a Borough record; therefore Counsel denied the Complainant access to the record. Counsel also stated, however, that the Borough does possess documents that contain the same information which is protected personal information. Counsel did not clarify whether the records in the Borough's possession are copies of the State records or records other than State records, or copies thereof, which contain the same information.

The Complainant was very specific in identifying the requested record as the list of candidates on the *Department of Personnel, Division of Human Resource Information Services Certification of Eligibles for Appointment forms for the title of police officer for the years 2008 and 2009*. OPRA provides that a government record is any record "...that has been made, maintained or kept on file...or that has been received in the course of..." the agency's business. Further, there is no exemption from disclosure within OPRA that allows for the denial of access to these records.

Accordingly, the Custodian must disclose to the Complainant Item No. 1 of the records relevant to the complaint, which is the list of candidates on the Department of Personnel, Division of Human Resource Information Services Certification of Eligibles for Appointment forms for the title of police officer for the years 2008 and 2009. If said record is not maintained or kept on file by the Custodian, the Custodian must provide a certification to that effect addressed to the Executive Director of the GRC.

Item No. 2 of the Records Request – All forfeited assets received, Municipal Forfeiture Program Report forms filed on behalf of the Fort Lee Police Department for 2001 through 2008.

Item No. 3 of the Records Request – All reallocation of property, Municipal Forfeiture Program Report forms filed on behalf of the Fort Lee Police Department for 2001 through 2008.

Item No. 4 of the Records Request – All requests for forfeiture fund disbursement to a non-law enforcement agency, Municipal Forfeiture Program Report forms filed on behalf of the Fort Lee Police Department for 2001 through 2008.

Item No. 6 of the Records Request – Seized Asset Trust Account statements for 2001 through 2008.

Item No. 7 of the Records Request – Bergen County Prosecutor escrow account statements for funds held on behalf of the Fort Lee Police Department for the years 2001 through 2008.

Item No. 9 of the Records Request – All CAD event abstracts for funeral home and funeral escorts from 2006 to September 15, 2009.

Item No. 14 of the Records Request – Police use of force annual summary reports for the years 2005 and 2006.

Item No. 15 of the Records Request – Fort Lee Notice of Tort Claim form.

The Custodian certified that that there are no records responsive to the Complainant's request for the above Item Numbers 2, 3, 4, 6, 7, 9, 14 and 15. The Complainant did not submit any evidence to refute the Custodian's certification in this regard. The Custodian did certify, however, that forfeiture records used by the Fort Lee Police Department could be substituted for Item Nos. 2 through 4 of the records relevant to the complaint. This will be analyzed in more detail, *infra*.

The Council has held that if a custodian has sufficiently borne his/her burden of proving that there is no record responsive to the complainant's request, the custodian could not have unlawfully denied access. In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought a copy of a telephone bill from the custodian in an effort to obtain proof that a phone call was made to him by an official from the Department of Education. The custodian provided a certification in his submission to the GRC that averred that the requested record was nonexistent. The complainant submitted no evidence to refute the custodian's certification. The Council subsequently determined that "[t]he Custodian has certified that the requested record does not exist. Therefore, the requested record can not (sic) be released and there was no unlawful denial of access."

Therefore, because the Custodian certified that there are no records responsive to the Complainant's request for Item Numbers 2, 3, 4, 6, 7, 9, 14 and 15, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny the Complainant access to said records pursuant to N.J.S.A. 47:1A-1.1. and Pusterhofer, supra.

Item No. 5 of the Records Request – Municipal Law Enforcement Trust Account statements for 2001 through 2008.

Item No. 8 of the Records Request – Inventory record of direct purchases made using forfeited assets for 2001 through 2008.

Again, the Custodian did not address Item No. 5 and Item No. 8 of the records relevant to the complaint in his Statement of Information. For this reason, the GRC will look to the Custodian's response to the Complainant's April 15, 2009 OPRA request, wherein the Complainant requested these items.

The Custodian's Counsel asserted in the response to the Complainant's April 15, 2009 OPRA request that these items relate to the receipt and disbursement of forfeiture funds. Counsel stated that disclosing details of these transactions could endanger police officers and compromise the integrity of investigations because the equipment obtained via forfeited funds is often used in such special operations. The Complainant contends, however, that although he did not request the identity of equipment purchased with forfeited funds, such equipment can be viewable in police magazines and catalogues.

The GRC is not convinced of the merit in the Complainant’s counter argument that various types of special police equipment can be readily viewed in police catalogues. Recognizing that such special equipment exists and realizing that a specific police department may possess such equipment are two different issues. It is, therefore, reasonable for the agency to have an interest in keeping special operations equipment away from prying eyes. The Custodian’s Counsel stated that the records contained in Item No. 5 and Item No. 8 of the records relevant to the complaint could be disclosed after the records have certain sensitive information redacted. And the Custodian certified in his Statement of Information that forfeiture records used by the Fort Lee Police Department could be substituted for Item Nos. 2 through 4 of the records relevant to the complaint; however, these forfeiture records would also have to be redacted to protect sensitive material. The Custodian certified in the SOI that the total estimated cost for retrieving and redacting the forfeiture records would be \$5,345.65.

Whenever a records custodian asserts that fulfilling an OPRA records request requires an “extraordinary” expenditure of time and effort, a special service charge may be warranted pursuant to N.J.S.A. 47:1A-5.c. The determination of what constitutes an “extraordinary expenditure of time and effort” under OPRA must be made on a case by case basis and requires an analysis of a variety of factors. These factors were discussed in The Courier Post v. Lenape Regional High School, 360 N.J.Super. 191, 199 (Law Div. 2002). There, the plaintiff publisher filed an OPRA request with the defendant school district, seeking to inspect invoices and itemized attorney bills submitted by four law firms over a period of six and a half years. *Id.* at 193. Lenape assessed a special service charge due to the “extraordinary burden” placed upon the school district in responding to the request. *Id.*

Based upon the volume of documents requested and the amount of time estimated to locate and assemble them, the court found the assessment of a special service charge for the custodian’s time was reasonable and consistent with N.J.S.A. 47:1A-5.c. *Id.* at 202. The court noted that it was necessary to examine the following factors in order to determine whether a records request involves an “extraordinary expenditure of time and effort to accommodate the request” pursuant to OPRA:

- The volume of government records involved;
- The period of time over which the records were received by the governmental unit;
- Whether some or all of the records sought are archived;
- The amount of time required for a government employee to locate, retrieve and assemble the documents for inspection or copying;
- The amount of time, if any, required to be expended by government employees to monitor the inspection or examination;¹⁰ and
- The amount of time required to return the documents to their original storage place. *Id.* at 199.

¹⁰ The court stated that the government agency should bear the burden of proving that monitoring is necessary. *Id.* at 199.

The court determined that in the context of OPRA, the term “extraordinary” will vary among agencies depending on the size of the agency, the number of employees available to accommodate document requests, the availability of information technology, copying capabilities, the nature, size and number of documents sought, as well as other relevant variables. *Id.* at 202.

Recognizing that many different variables may affect a determination of whether a special service charge is reasonable and warranted, the GRC established an analytical framework for situations which may warrant an assessment of a special service charge. This framework incorporates the factors identified in the Courier Post case, as well as additional relevant factors in order to comply with the provisions of N.J.S.A. 47:1A-5.c., which contemplates a two-pronged analysis: first, to determine whether the special service charged is warranted and second, if warranted, to analyze the reasonableness of the charge.

Using the GRC framework to analyze the feasibility of a special service charge in this complaint, however, is not necessary because the special service charge here is driven by the sensitive nature of the records that the Complainant has requested. As such, the first prong of the analysis has been satisfied because the special service charge is warranted. The “extraordinary” burden placed on the agency is in the form of examination of the requested forfeiture materials for sensitive information which must be redacted. Accordingly, the Custodian may charge, in addition to the actual cost of duplicating the record, a special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copies.

The Custodian certified that the overtime hourly rate for clerical personnel to retrieve, copy and assemble the records is \$24.85 per hour and that it will take 65.75 hours to complete the task, totaling \$1,633.89. The Custodian also certified that the Captain’s hourly rate for reviewing and redacting the records is \$67.04. The Custodian certified that it would take the Captain 43.66 hours to complete the redactions, totaling \$2,926.83. The Custodian further certified that the Police Chief must review and approve the redactions and authorize disclosure of the redacted records. The Custodian certified that the Chief gets paid \$76.93 per hour and it will take him 8.77 hours for a total of \$674.68. The Custodian also certified that copying charges based upon \$.75 for the first ten pages, \$.50 for the second ten pages and \$.25 for each page thereafter, for a total of 411 pages, would cost \$110.25. Accordingly, the Custodian estimated the total special service charge for redacting the forfeiture records to be \$5,345.65.

Upon review, the special service charge calculated by the Custodian is not reasonable and based upon the actual direct cost of providing the copies. The Custodian calculated the amount for clerical personnel services by factoring in time for making copies. This is contrary to the provisions of OPRA, which provides that *for records which can be reproduced by ordinary document copying equipment in ordinary business size* “[t]he actual cost of duplicating the record...shall not include the cost of labor...associated with making the copy...” N.J.S.A. 47:1A-5.b. Here, the clerical personnel are making regular copies so that the Captain can subsequently examine and redact sensitive information; therefore, the time for the clerical personnel to make the copies should not be factored into the total clerical time.

Further, OPRA makes no provision for hierarchical review and approval of records prior to disclosure. The employee making the redactions is a captain, which is a senior level superior officer in the Police Department. If the Borough believes it is necessary to have the Police Chief review and approve the Captain's work as a cautionary measure, then the Borough will have to bear the expense of such a measure. Accordingly, the Police Chief's approval time will have to be deducted from the special service charges.

Finally, there is the issue of the cost of copies. The Custodian certifies that he has calculated the copying charges "using [the] standard OPRA rate of \$.75 for the first ten pages, \$.50 for the second ten pages and \$.25 for each copy thereafter." The Custodian misunderstands OPRA; this is not a standard rate. OPRA provides that:

"...copies of a government record may be purchased by any person upon payment of the actual cost of duplicating the record [but]...**shall not exceed**...first page to tenth page, \$.75 per page; eleventh page to twentieth page, \$.50 per page; all pages over twenty, \$.25 per page." (Emphasis added.) N.J.S.A. 47:1A-5.b.

Based upon the state of the law when the Custodian calculated the copying charges, the Custodian did not violate OPRA, however the Legislature subsequently amended OPRA to provide that a public agency charge \$0.05 per copy for letter size paper and \$0.07 for legal size paper. This amendment took effect on November 9, 2010.

Because the Custodian has failed to establish that the estimated special service charges for redacting and disclosing Item No. 5, Item No. 8 and all such other forfeiture records are reasonable and reflect the actual cost to the Borough to fulfill the Complainant's OPRA request, the estimated special service charges of \$5,345.65 proposed by the Custodian are unreasonable and unwarranted under N.J.S.A. 47:1A-5.d. The Custodian must prepare a detailed estimate of actual costs to be incurred by the Borough for the materials and effort necessary to fulfill the Complainant's OPRA request.

Item No. 10 of the Records Request – Police and Borough records of any and all written communications to and from the Chief of Police regarding the Complainant and/or his OPRA requests and/or his employment or background.

The Custodian certified that this record will not be released because the information sought is potentially relevant to current litigation involving the Borough of Fort Lee. The Custodian further certified that such records, to the extent they exist, are subject to the attorney-client privilege and/or deliberative privilege.

Whether the information sought in Item No. 10 is exempt from disclosure due to it being attorney-client privileged, relevant to current litigation and/or advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1 need not be analyzed because the request is overly broad and unclear.

The New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.'* N.J.S.A. 47:1A-1." (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). The Court further held that "[u]nder OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files." (Emphasis added.) *Id.* at 549.

In determining that MAG Entertainment's request for "all documents or records" from the Division of Alcoholic Beverage Control pertaining to selective enforcement was invalid under OPRA, the Appellate Division noted that:

"[m]ost significantly, the request failed to identify with any specificity or particularity the governmental records sought. MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past. Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted." *Id.*

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),¹¹ the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."¹²

Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) the court cited MAG by stating that "...when a request is 'complex' because it fails to specifically identify the documents sought, then that request is not 'encompassed' by OPRA..." The court also quoted N.J.S.A. 47:1A-5.g in that "[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency." The court further stated that "...the Legislature would not expect or want courts to require more persuasive proof

¹¹ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹² As stated in Bent, *supra*.

of the substantiality of a disruption to agency operations than the agency's need to...generate new records..."

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009) the Council held that "[b]ecause the Complainant's OPRA requests # 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005)."

This matter is substantially different from the facts presented in Burnett v. County of Gloucester, 415 N.J.Super. 506 (App. Div. 2010). In Burnett, the plaintiff appealed from an order of summary judgment entered against him in his suit to compel production by the County of Gloucester of documents requested pursuant to OPRA, consisting of "[a]ny and all *settlements, releases or similar documents* entered into, approved or accepted from 1/1/2006 to present." *Id.* at 508. (Emphasis added). The Appellate Division determined that the request sought a specific type of document, although it did not specify a particular case to which such document pertained, and was therefore not overly broad. *Id.* at 515-16.

In the present complaint, the Complainant requested both Police Department and/or Borough records of any and all written communications to the Chief of Police and/or from the Chief of Police regarding the Complainant and/or his OPRA requests and/or his employment and/or his background. There are so many variations of records that could be gleaned from this request that it would be impossible to specifically identify a particular record or records with any certainty.

Therefore, because the Complainant's request for Item No. 10 of the records relevant to the complaint fails to seek specific identifiable government records, the Complainant's request is overly broad and is therefore invalid under OPRA pursuant to MAG, supra, Bent, supra, New Jersey Builders, supra, and the Council's decision in Schuler, supra. Accordingly, the Custodian has not unlawfully denied the Complainant access to said records.

Item No. 11 of the Records Request – Police and Borough records of legal/attorney bills relating to OPRA requests made by the Complainant.

Although this request is somewhat broad, it is not overly broad pursuant to Burnett, supra, because the Complainant is seeking a specific type of document, and although the Complainant's request did not specify a date range or a particular case to which such document or documents pertained, the Complainant narrowed the request to only those attorney bills relating to OPRA requests that he filed with the agency.

The Custodian denied the Complainant access to these records because the Custodian asserted that they are subject to the attorney-client privilege. OPRA provides that any record within the attorney-client privilege is not a government record subject to disclosure except for attorney bills. Moreover, OPRA specifically provides that such

records may be redacted to remove any information protected by the attorney-client privilege.

Accordingly, the Custodian must disclose to the Complainant Item No. 11, which are all attorney bills or invoices, with any appropriate redactions, which the agency incurred as a result of responding to the Complainant's OPRA requests pursuant to N.J.S.A. 47:1a-1.1.

Item No. 12 of the Records Request – CAD log for calls and events on June 29, 2009 from 4:00 p.m. until 8:00 p.m.

Item No. 13 of the Records Request – CAD log for calls and events on August 27, 2009 from 4:00 p.m. until 11:59 p.m.

Item No. 14 of the Records Request – Police use of force annual summary reports for the years 2005 and 2006.

The Custodian failed to address Item No. 12, Item No. 13 and Item No. 14 (for the years 2007 and 2008) in either the response to the Complainant's September 15, 2009 OPRA request or the SOI. These requests clearly specified not only the type of record sought but also the date and time the record was generated.

Therefore, because Item Number 12, Item No. 13 and Item No. 14 (for the years 2007 and 2008) of the records request are specifically identified government records, and because the Custodian failed to bear his burden of proving a lawful denial of access to the requested records pursuant to N.J.S.A. 47:1A-6, the Custodian must disclose said records to the Complainant.

Whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond in writing to the Complainant's April 15, 2009 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's April 15, 2009 OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (January 2010). Further, the Custodian's response to the Complainant's September 15, 2009 OPRA request, which informed the Complainant that the Custodian would respond back to the Complainant after the Custodian

received advice from the Bergen County Prosecutor's Office, constituted an open ended response by the Custodian and is therefore a "deemed" denial pursuant to N.J.S.A. 47:1A-5.i. and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008).

2. The Custodian must disclose to the Complainant Item No. 1 of the records relevant to the complaint, which is the list of candidates on the Department of Personnel, Division of Human Resource Information Services Certification of Eligibles for Appointment forms for the title of police officer for the years 2008 and 2009. If said record is not maintained or kept on file by the Custodian, the Custodian must provide a certification to that effect addressed to the Executive Director of the GRC.
3. **The Custodian shall within five (5) business days from receipt of the Council's Interim Order comply with the provisions of paragraph 2 above by (a) disclosing the records to the Complainant with any appropriate redactions and a detailed document index explaining the lawful basis for any such redaction and simultaneously provide certified confirmation of compliance to the Executive Director, or (b) provide a certification to the Executive Director averring that said records are not maintained or kept on file by the Custodian.**¹³
4. Because the Custodian certified that there are no records responsive to the Complainant's request for Item Numbers 2, 3, 4, 6, 7, 9, 14 and 15, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny the Complainant access to said records pursuant to N.J.S.A. 47:1A-1.1. and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
5. Because the Custodian has failed to establish that the estimated special service charges for redacting and disclosing Item No. 5, Item No. 8 and all such other forfeiture records are reasonable and reflect the actual cost to the Borough to fulfill the Complainant's OPRA request, the estimated special service charges of \$5,345.65 proposed by the Custodian are unreasonable and unwarranted under N.J.S.A. 47:1A-5.d.
6. **The Custodian shall comply with the provisions of paragraph 5 above by preparing a detailed estimate of actual costs to be incurred by the Borough for the materials and effort necessary to fulfill the Complainant's OPRA request, and provide this estimate to the Complainant within five (5) business days from receipt of the Council's Interim Order, simultaneously providing certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**

¹³ In accordance with N.J. Court Rule 1:4-4, the following language must immediately precede the Custodian's signature on the certification: "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." Richard Rivera v. Borough of Fort Lee Police Department (Bergen), 2009-266 – Findings and Recommendations of the Executive Director

7. Because the Complainant's request for Item No. 10 of the records relevant to the complaint fails to seek specific identifiable government records, the Complainant's request is overly broad and is therefore invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and the Council's decision in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Accordingly, the Custodian has not unlawfully denied the Complainant access to said records.
8. The Custodian must disclose to the Complainant Item No. 11 which are all attorney bills or invoices, with any appropriate redactions, that the agency incurred as a result of responding to the Complainant's OPRA requests pursuant to N.J.S.A. 47:1A-1.1.
9. Because Item Number 12, Item No. 13 and Item No. 14 (for the years 2007 and 2008) of the records request are specifically identified government records, and because the Custodian failed to bear his burden of proving a lawful denial of access to the requested records pursuant to N.J.S.A. 47:1A-6, the Custodian must disclose said records to the Complainant.
10. **The Custodian shall comply with the provisions of paragraphs 8 and 9 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions if any, 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.**¹⁴
11. 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.
Mediator

Approved By: Catherine Starghill, Esq.
Executive Director

March 22, 2011

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