



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

February 26, 2013 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2010-208

v.

Town of West New York (Hudson)
Custodian of Record

At the February 26, 2013 public meeting, the Government Records Council (“Council”) considered the February 19, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that this complaint be dismissed because the Complainant withdrew his complaint with prejudice via e-mail to the GRC on January 30, 2013 (via legal counsel). 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 26th Day of February, 2013

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

Robin Berg Tabakin, Esq., Chair
Government Records Council

Decision Distribution Date: February 27, 2013



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
February 26, 2013 Council Meeting**

**Richard Rivera¹
Complainant**

GRC Complaint No. 2010-208

v.

**Town of West New York (Hudson)²
Custodian of Records**

Records Relevant to Complaint:

June 22, 2010 OPRA request: Copies of computer-aided dispatching (“CAD”) reports for 517 51st Street for 2009 to the present.

July 2, 2010 OPRA request: Copies of police reports for all calls made from 517 51st Street for 2009 and 2010 on the attached location call history.

Request Made: June 22, 2010 and July 2, 2010

Response Made: July 1, 2010 and July 13, 2010

Custodian: Carmela Riccio

GRC Complaint Filed: August 11, 2010³

Background

January 29, 2013

Government Records Council’s (“Council”) Interim Order. At its January 29, 2013 public meeting, the Council considered the January 22, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian provided the GRC with a legal certification, the unredacted records requested for the *in camera* inspection, a redaction index and a completed balancing test within the extended time frame to comply with the Council’s Interim Order. Therefore, the Custodian timely complied with the Council’s December 20, 2011 Interim Order.

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

² Represented by Joseph DeMarco, Esq. (West New York, NJ). Previous Counsel was Jorge R. DeArmas, Esq., who advised the GRC by letter on June 7, 2011 that he no longer represents the Town of West New York.

³ The GRC received the Denial of Access Complaint on said date.

2. The Custodian unlawfully denied access to the location call history's description column. N.J.S.A. 47:1A-6. **Thus, the Custodian must disclose the location call history without redactions to the Complainant for the reasons set forth above.**
3. The Custodian initially unlawfully denied access to Operations Report Complaint No. 2009-021310 as a criminal investigatory record because the report does not meet the two-prong test set forth in N.J.S.A. 47:1A-1.1. N.J.S.A. 47:1A-6. However, portions of the record are exempt from disclosure pursuant to N.J.S.A. 47:1A-1. **Thus, the Custodian may redact field 6 through 15 and disclose the report with field 1 through 4 and field 16 unredacted.**
4. **The Custodian shall comply with Item Nos. 2 and 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if applicable, 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 1:4-4,⁴ to the Executive Director.⁵**
5. The Custodian lawfully denied access to Operations report Complaint No. 2010-006794 pursuant to Executive Order No. 26 (Gov. McGreevey 2002) because the report contains a description of a medical emergency. N.J.S.A. 47:1A-6. The GRC declines to address whether the record is exempt based on a citizen's reasonable expectation of privacy; because same is exempt pursuant to EO 26. *See* Bart v. City of Passaic (Passaic), GRC Complaint No. 2007-162 (April 2008).
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

January 30, 2013

Council's Interim Order ("Order") distributed to the parties.

⁴ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁵ Satisfactory compliance requires that the Custodian deliver the records 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.

January 30, 2013

E-mail from the Complainant's Counsel to the GRC. Counsel states that the Complainant is withdrawing this complaint with prejudice.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint be dismissed because the Complainant withdrew his complaint with prejudice via e-mail to the GRC on January 30, 2013 (via legal counsel). Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

February 19, 2013



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

January 29, 2013 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2010-208

v.

Town of West New York (Hudson)
Custodian of Record

At the January 29, 2013 public meeting, the Government Records Council ("Council") considered the January 22, 2013 *In Camera* 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 provided the GRC with a legal certification, the unredacted records requested for the *in camera* inspection, a redaction index and a completed balancing test within the extended time frame to comply with the Council's Interim Order. Therefore, the Custodian timely complied with the Council's December 20, 2011 Interim Order.
2. The Custodian unlawfully denied access to the location call history's description column. N.J.S.A. 47:1A-6. **Thus, the Custodian must disclose the location call history without redactions to the Complainant for the reasons set forth above.**
3. The Custodian initially unlawfully denied access to Operations Report Complaint No. 2009-021310 as a criminal investigatory record because the report does not meet the two-prong test set forth in N.J.S.A. 47:1A-1.1. N.J.S.A. 47:1A-6. However, portions of the record are exempt from disclosure pursuant to N.J.S.A. 47:1A-1. **Thus, the Custodian may redact field 6 through 15 and disclose the report with field 1 through 4 and field 16 unredacted.**
4. **The Custodian shall comply with Item Nos. 2 and 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if applicable, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**

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

² Satisfactory compliance requires that the Custodian deliver the records 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

5. The Custodian lawfully denied access to Operations report Complaint No. 2010-006794 pursuant to Executive Order No. 26 (Gov. McGreevey 2002) because the report contains a description of a medical emergency. N.J.S.A. 47:1A-6. The GRC declines to address whether the record is exempt based on a citizen's reasonable expectation of privacy; because same is exempt pursuant to EO 26. See Bart v. City of Passaic (Passaic), GRC Complaint No. 2007-162 (April 2008).
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 29th Day of January, 2013

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: January 30, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
January 29, 2013 Council Meeting**

**Richard Rivera¹
Complainant**

GRC Complaint No. 2010-208

v.

**Town of West New York (Hudson)²
Custodian of Records**

Records Relevant to Complaint:

June 22, 2010 OPRA request: Copies of computer-aided dispatching (“CAD”) reports for 517 51st Street for 2009 to the present.

July 2, 2010 OPRA request: Copies of police reports for all calls made from 517 51st Street for 2009 and 2010 on the attached location call history.

Request Made: June 22, 2010 and July 2, 2010

Response Made: July 1, 2010 and July 13, 2010

Custodian: Carmela Riccio

GRC Complaint Filed: August 11, 2010³

Records Submitted for *In Camera* Examination:

- Location call history for 517 51st Street.
- Operations report – Complaint No. 2009-021310⁴
- Operations report – Complaint No. 2010-006794

Background

December 20, 2011

Government Records Council’s Interim Order. At its December 20, 2011 public meeting, the Government Records Council (“Council”) considered the December 13, 2011 Executive Director’s Findings and Recommendations 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 Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, Esq., LLC (Clinton, NJ).

² Represented by Joseph DeMarco, Esq. (West New York, NJ). Previous Counsel was Jorge R. DeArmas, Esq., who advised the GRC by letter on June 7, 2011 that he no longer represents the Town of West New York.

³ The GRC received the Denial of Access Complaint on said date.

⁴ The GRC notes that the Custodian referred to this record as “2010-021310.” A review of the CAD report shows that the correct Complaint No. is in fact “2009-021310.”

1. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of location call history and two (2) operations reports to determine the validity of the Custodian's assertion that the records are exempt from disclosure due to privacy issues pursuant to N.J.S.A. 47:1A-1.1., are criminal investigatory in nature pursuant to N.J.S.A. 47:1A-1.1. and contain medical information that is exempt pursuant to N.J.S.A. 47:1A-9(a) and Executive Order No. 26 (McGreevey 2002).
2. **The Custodian must deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 1 above), a document or redaction index⁶, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4⁷, that the records provided is the document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. Because the Custodian has raised the issue that disclosure of the redacted portions of the location call history and two (2) operations reports implicates privacy concerns under OPRA, the Complainant and the Custodian must complete a balancing test chart. The GRC is therefore sending these charts to the parties contemporaneously with the Council's Interim Order in this matter. **The parties must complete this questionnaire and return it to the GRC within five (5) business days of receipt thereof.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

December 21, 2011

Council's Interim Order ("Order") distributed to the parties.

December 23, 2011

E-mail from Mr. Gil Garcia ("Mr. Garcia"), Town Attorney, to the GRC. Mr. Garcia states that he is the new Town Attorney. Mr. Garcia requests an extension of time until January 31, 2012 to comply with the Council's Interim Order. Mr. Garcia states that he will need to familiarize himself with the instant complaint. Additionally, Mr. Garcia states that the Custodian is on vacation until the first week of January.

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

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

⁷ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

December 27, 2011

E-mail from Mr. Garcia to the GRC. Mr. Garcia requests an extension of time to comply with the Council's Interim Order.

December 28, 2011

E-mail from the GRC to Mr. Garcia. The GRC states that it is in receipt of Mr. Garcia's request for a one-month extension of time to comply with the Council's Interim Order. The GRC states that compliance is currently due by close of business on December 29, 2011.

The GRC states that it will, as a courtesy, generally grant an extension of five (5) business days to comply with an order. The GRC states that only three (3) records are at issue; however, the GRC notes that the Custodian will not return from vacation until after January 1, 2012. The GRC thus grants Mr. Garcia an extension of time until January 11, 2012 to provide compliance to the GRC. The GRC states that this extension should provide ample time to comply with the Council's Order.

January 4, 2012

Telephone call from the Custodian's Counsel to the GRC. Counsel states that the Town did not receive a copy of the balancing test questionnaire required pursuant to the Council's Order. Counsel requests that the GRC forward copies of the balancing test questionnaire to all parties and extend the deadline to comply with the Council's Order.⁸

January 10, 2012

E-mail from the GRC to the Custodian's Counsel and Complainant with the following attachments:

- Balancing test questionnaire for custodians.
- Balancing test questionnaire for complainant.

The GRC states that attached are balancing test questionnaires for both the Custodian and Complainant. The GRC further states that it will extend the deadline for both parties to comply with the Council's Interim Order until January 18, 2012.

January 18, 2011

Certification of the Custodian in response to the Council's Order with the following attachments:

- Location call history for 517 51st Street.
- Operations Report - Complaint No. 2009-021310
- Operations Report - Complaint No. 2010-006794
- General document index.
- Custodian's balancing test questionnaire responses.⁹

⁸ The Custodian's Counsel confirmed his conversation with the GRC in an e-mail to same dated January 5, 2012.

⁹ The Complainant did not submit a completed balancing test questionnaire.

The Custodian certifies that the enclosed records are the records requested by the GRC for an *in camera* inspection. The Custodian certifies that she provided the Complainant access to the call history log with redactions of the description columns pursuant to N.J.S.A. 47:1A-1, Doe v. Poritz, 142 N.J. 1, 82 (1995), Serrano v. South Brunswick Twp., 358 N.J. Super. 352 (App. Div. 2003) and Perino v. Borough of Haddon Heights, GRC Complaint No. 2004-128 (November 2004). The Custodian certifies that access to Complaint No. 2009-021310 was denied pursuant to N.J.S.A. 47:1A-1.1., Blue v. Wall Township Police Department, GRC Complaint No. 2002-47 (August 2003), Janeczko v. N.J. Dep't. of Public Safety, GRC Complaint No. 2002-79 and 2002-80 (June 2004) and Bart v. City of Passaic (Passaic), GRC Complaint No. 2007-162 (April 2008) on the basis that said report relates to possible criminal activity. The Custodian further certifies that access to Complaint No. 2010-006794, which contains a description of a response to a medical emergency, was denied pursuant to N.J.S.A. 47:1A-1, Executive Order No. 26 (Gov. McGreevey, 2002) (“EO 26”), Doe, supra, Serrano, supra, and Perino, supra.

Additionally, the Custodian certifies that her responses to the balancing test questionnaire are as follows:

1. The type of records requested.

The Custodian states that the three (3) records at issue are a location call history (with reactions of the description column) and Operations Reports relevant to Complaint No. 2009-021310 and Complaint No. 2010-006794.

2. The information the requested records do or might contain.

The Custodian states that the CAD report contains dates and descriptions of calls received for incidents at 517 51st Street.

The Custodian states that Complaint No. 2009-021310, an operations report, contains information regarding the accused in a verbal dispute including address, date of birth and telephone number. The Custodian states that the report also contains the identity of the victim and personal information including the victim’s address and telephone number.

The Custodian states that Complaint No. 2010-006794, also an operations report, contains the address and birth date of a caller reporting a medical emergency. The Custodian states that the report contains the description of the medical emergency and that the caller was transported to a local medical center.

3. The potential harm in any subsequent non-consensual disclosure of the records.

The Custodian states that 517 51st Street is a three (3) family dwelling with limited occupants. The Custodian asserts that disclosure of the description column of the CAD report may result in disclosing the identity of the callers and promote unsolicited contact or harassment from neighbors and other tenants in the building.

The Custodian states that Complaint No. 2009-021310 involves a domestic dispute the disclosure of which could have a detrimental impact on the involved parties and their relationship. The Custodian asserts that disclosure may also cause harassment or unsolicited contact and may hamper the parties' desire to contact the police in future incidents.

The Custodian states that Complaint No. 2010-006794 contains medical information the disclosure of which could negatively affect the caller's relationship with others and may subject her to unsolicited contact.

4. The injury from disclosure to the relationship in which the records were generated.

The Custodian asserts that disclosure of personal information in all matters involving calls to the Town Police Department for aid and assistance could have a chilling effect on the public's willingness to report incidents. The Custodian asserts that disclosure of the description column on the CAD report and operations reports may deter people from contacting the police in fear that they may be identified through disclosure and thus subject to unsolicited contact or harassment.

5. The adequacy of safeguards to prevent unauthorized disclosure.

The Custodian states that the Town reviews all responsive records prior to disclosure to ensure that the Town is not disclosing personal or otherwise exempt information. The Custodian asserts that the Complainant has not and cannot provide assurance as to safeguards against unauthorized disclosure of the information.

6. Whether there is an express statutory mandate, articulated public policy or other recognized public interest militating toward access.

The Custodian asserts that previous Counsel directed her to redact the CAD report based on privacy concerns. N.J.S.A. 47:1A-1, Doe, supra, Serrano, supra, and Perino, supra. The Custodian asserts that privacy interests outweigh the Complainant's need for access because 517 51st Street is a three (3) family dwelling with limited occupants. The Custodian asserts that disclosure of the description column could promote unsolicited contact and harassment.

The Custodian further asserts that Complaint No. 2009-021310 is a criminal investigatory report to which access was lawfully denied pursuant to N.J.S.A. 47:1A-1.1., Blue, supra, Janeczko, supra and Bart, supra. The Custodian states that by definition, criminal investigatory records are "not required to by law to be made, maintained or kept on file that [are] held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding." N.J.S.A. 47:1A-1.1.

The Custodian also asserts that access to Complaint No. 2010-006794, which contains a description of a response to a medical emergency, was denied pursuant to N.J.S.A. 47:1A-1, EO 26, Doe, supra, Serrano, supra, and Perino, supra. The Custodian

asserts that disclosure of personal information is also limited under the Health Insurance Portability and Accountability Act of 1996 (“HIPPA”). 42 U.S.C.A. Section 1301, et seq.

March 5, 2012

Letter from the GRC to the Custodian. The GRC states that its regulations provide that “[t]he Council, acting through its Executive Director, may require custodians to submit, within prescribed time limits, additional information deemed necessary for the Council to adjudicate the complaint.” *N.J.A.C.* 5:105-2.4(l). The GRC states that it has reviewed the parties’ submissions and has determined that additional information is required.

The GRC states that the Custodian contended that Operations Report Complaint No. 2009-021310, which was provided for an *in camera* review as part of her compliance with the Council’s December 20, 2011 Interim Order, is a criminal investigatory record. N.J.S.A. 47:1A-1.1.

The GRC thus requests a legal certification, pursuant to N.J. Court Rule 1:4-4, in response to the following questions:

1. Whether Complaint No. 2009-021310 was part of or is currently part of a criminal investigation?
2. Whether there are any statutes, regulations or Attorney General Guidelines requiring that Complaint No. 2009-021310 be made, maintained or kept on file?

The GRC requests that the Custodian provide the requested legal certification and any supporting documentation by close of business on March 8, 2012. The GRC further advises that submissions received after this deadline date may not be considered by the Council for adjudication.

March 7, 2012

Letter from the Custodian’s Counsel attaching a legal certification of Michael Indri (“Director Indri”), Director of the Town of West New York Police Department. Counsel states that because as the Custodian did not have direct knowledge of the circumstances regarding Complaint No. 2009-021310, Director Indri is the appropriate party to make this legal certification.

Director Indri certifies that he reviewed Complaint No. 2009-021310 and determined that it is not currently part of a criminal investigation. Director Indri certifies that on June 18, 2009, police officers responded to a call for a possible dispute. Director Indri certifies that the officers conducted an investigation as to the nature of the dispute between the parties and whether any criminal activity occurred.

Director Indri further certifies that he is not aware of any statutes, regulations or Attorney General Guidelines requiring that an incident such as the one contained in Complaint No. 2009-021310 be made, maintained or kept on file.

Analysis

Whether the Custodian complied with the Council's December 20, 2011 Interim Order?

At its December 20, 2011 public meeting, the Council determined that because the Custodian asserted that the description column of the CAD report and two (2) operations reports were lawfully denied due to privacy issues pursuant to N.J.S.A. 47:1A-1.1., are criminal investigatory in nature pursuant to N.J.S.A. 47:1A-1.1. and contain medical information that is exempt pursuant to N.J.S.A. 47:1A-9(a) and EO 26, the Council must determine whether the legal conclusions asserted by the Custodian are properly applied to the records at issue pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005). Therefore, the GRC must conduct an *in camera* review of the requested records to determine the validity of the Custodian's assertion that the requested record was properly denied.

The Council therefore ordered the Custodian to deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted records, a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery was to be received by the GRC within five (5) business days from receipt of the Council's Interim Order, or on December 29, 2011.

Within the prescribed time frame to comply, Mr. Garcia sought an extension of time until January 31, 2012 to comply with said Order. On December 28, 2011, the GRC granted an extension of time until January 11, 2012, which it determined should provide ample time for compliance with the Council's Order. On January 4, 2012, the Custodian's Counsel advised the GRC that the Town did not receive a copy of the balancing test it was required to complete as part of the Custodian's compliance. Counsel thus requested that the GRC send the balancing test questionnaire to all parties and that the GRC extend the deadline to comply with the Council's Order. On January 10, 2012, the GRC e-mailed balancing test questionnaires to all parties and extended the deadline to comply with the Council's Order to January 18, 2012. Thereafter, the GRC received nine (9) copies of the *in camera* records, certified confirmation of compliance and the Custodian's completed balancing test on January 18, 2012.

The Custodian provided the GRC with a legal certification, the unredacted records requested for the *in camera* inspection, a redaction index and a completed balancing test within the extended time frame to comply with the Council's Interim Order. Therefore, the Custodian timely complied with the Council's December 20, 2011 Interim Order.

Whether the Custodian unlawfully denied the Complainant 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*... a

public agency has a *responsibility and an obligation to safeguard from public access* a citizen's *personal information* with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy..." (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 ... A government record shall not include the following ... *criminal investigatory records ...*" (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA defines "criminal investigatory records as:

"... a record which is not required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding." N.J.S.A. 47:1A-1.1.

OPRA further provides that:

"[t]he provisions of [OPRA], *shall not abrogate any exemption of a public record or government record from public access* heretofore made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; *Executive Order of the Governor*; Rules of Court; any federal law; federal regulation; or federal order." (Emphasis added.) N.J.S.A. 47:1A-9.a.

EO 26 provides that:

"The following *records shall not be considered to be government records* subject to public access pursuant to [OPRA]: *Information ... relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation ...*" (Emphasis added.) *Id.* at 4(b).

The Custodian asserts that she lawfully denied the Complainant access to the requested records because such records are exempt from disclosure due to privacy issues pursuant to N.J.S.A. 47:1A-1.1, are criminal investigatory in nature pursuant to N.J.S.A. 47:1A-1.1 and contain medical information that is exempt pursuant to N.J.S.A. 47:1A-9.a and EO 26.

The GRC conducted an *in camera* examination on the submitted record. The results of this examination are as follows:

Location call history for property located at 517 51st St. for 2009 to present

The Custodian provided this record to the Complainant with redactions of the column containing a description of the incidents for which the calls were made. The Custodian argued that the redactions were lawful due to privacy concerns pursuant to N.J.S.A. 47:1A-1, Doe v. Poritz, 142 N.J. 1, 82 (1995), Serrano v. South Brunswick Twp., 358 N.J. Super. 352 (App. Div. 2003) and Perino v. Borough of Haddon Heights, GRC Complaint No. 2004-128 (November 2004).

The GRC's *in camera* review of this record shows that the description column contains brief, nonspecific categories of types of incidents reported to be occurring at 517 51st St. The redacted column contains no personal information or information that could feasibly be used to identify each caller.

Therefore, the Custodian unlawfully denied access to the location call history's description column. N.J.S.A. 47:1A-6. **Thus, the Custodian must disclose the location call history without redactions to the Complainant for the reasons set forth above.**

Operations Report Complaint No. 2009-021310 dated June 18, 2009

The Custodian denied access to this report, asserting that it related to possible criminal activity and was therefore exempt from disclosure pursuant to N.J.S.A. 47:1A-1; Blue v. Wall Twp. Police Dep't, GRC Complaint No. 2002-47 (August 2003) and Janeczko v. N.J. Dep't of Public Safety, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004). In addition, the Custodian asserted that the record is not required by law to be made. In the SOI, the Custodian's Counsel argued that aside from the criminal investigatory exemption, this record is exempt from disclosure under OPRA based on privacy issues pursuant to N.J.S.A. 47:1A-1 and Perino, *supra*.

Regarding the criminal investigatory exemption, the Complainant's Counsel asserted in the Denial of Access Complaint that the Custodian's denial was unlawful because the records sought by the Complainant are "required by law to be made, maintained or kept on file" and, therefore, are subject to access pursuant to the Records Management Services ("RMS")¹⁰ retention schedule for municipal police agencies. *See* Record Series No. 0036-0003 *and* 0036-0007. Subsequent to the submission of the SOI, Counsel submitted a letter on November 23, 2010 in which he argued that the Custodian could not categorize the report as criminal investigatory based solely on its description of the report as a "potential criminal investigatory record." Counsel also contended that the responsive records would certainly contain some of the information identified as disclosable pursuant to N.J.S.A. 47:1A-3(b).

Director Indri subsequently certified to the GRC that the record did not currently relate to a criminal investigation; however, police officers responded to a call for a possible dispute and conducted an investigation as to the nature of the incident. The

¹⁰ Formerly the Department of Records and Archives Management, or DARM.

Custodian noted in her response to the balancing test questionnaire that the record contains details of a verbal dispute.¹¹

For a record to be considered exempt from disclosure under OPRA as a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1., that record must meet both prongs of a two-prong test: that is, “‘not be required by law to be made,’ and the record must ‘pertain[] to any criminal investigation or related civil enforcement proceeding.’” O’Shea v. Township of West Milford, 410 N.J. Super. 371 (App. Div. 2009)

Notwithstanding Complainant Counsel’s argument about the impact of RMS schedules on records that may be criminal investigatory in nature, the GRC’s *in camera* review of the record shows that this report does not indicate that any criminal charges or actions resulted from the verbal dispute. As the Complainant’s Counsel noted, because a report is described as a “potential criminal investigatory record,” then it cannot fall under the criminal investigatory exemption. In fact, the Appellate Division used this same reasoning in O’Shea, *supra*. There the Court held that it did not accept defendant’s argument that Use of Force forms should be considered criminal investigatory records because they could be used in a future investigation:

“In the absence of a factual showing that any of the reports sought in this matter pertained to an actual criminal investigation or to an existing related civil enforcement proceeding, we decline to adopt the position urged by defendant that UFRs should, generically, be regarded to be shielded from public access as records of that type.” *Id.* at 386.

The report does not indicate that any charges were filed or that an arrest was made. The Custodian does not assert that any charges were filed or that an arrest was made. Thus, the record cannot meet the two-prong test of a criminal investigatory record because no criminal investigation took place. N.J.S.A. 47:1A-1.1.

Regarding the Custodian Counsel’s argument that this report should be exempt from disclosure for privacy reasons, the GRC’s *in camera* review shows that the report is composed of a series of fields containing names, addresses, telephone numbers, a date of birth, witness names and a disposition of action taken by the officers. The report also includes more benign information such as the time and date of the incident, type of incident, responding officer and badge number. In her balancing test responses, the Custodian argued that disclosure of this report could cause individual personal harm to the persons contained therein and may deter people from contacting the police in the future for fear that they may be identified through the disclosure of records. The Custodian further argued that the Complainant could not ensure that unauthorized disclosure would not occur.

The Complainant did not return his balancing test questionnaire. Additionally, the GRC has reviewed the Complainant’s November 23, 2010 legal certification in which he argues why the factors of Doe, *supra*, weigh in favor of disclosure. However, the Complainant’s response refers only to the location call history and not to the two (2)

¹¹ The GRC notes that the Complainant did not provide a response to the balancing test questionnaire. Richard Rivera v. Town of West New York (Hudson), 2010-208 – *In Camera* Findings and Recommendations of the Executive Director 10

reports. Thus, in the absence of any response from the Complainant, the report should be disclosed with redactions of all personal information and the description of the action taken by the responding officer. The remainder of the report should be disclosed.

Therefore, the Custodian initially unlawfully denied access to Operations Report Complaint No. 2009-021310 as a criminal investigatory record because the report does not meet the two-prong test set forth in N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-6. However, portions of the record are exempt from disclosure pursuant to N.J.S.A. 47:1A-1. **Thus, the Custodian may redact fields 6 through 15 and disclose the report with field 1 through 4 and field 16 unredacted.**¹²

Operations report Complaint No. 2010-006794 dated March 6, 2010

The Custodian denied access to this report pursuant to N.J.S.A. 47:1A-1; Doe, supra; Perino, supra, and EO 26 asserting that it contains a description of a response to a medical emergency at the location in question. The Custodian's Counsel reiterated these arguments in the SOI and added that the GRC previously upheld a denial of access to Emergency Medical Services ("EMS") incident reports in Bart v. City of Passaic (Passaic), GRC Complaint No. 2007-162 (April 2008).

The Complainant's Counsel asserted in the Denial of Access Complaint that this report should be disclosed without redactions. After the submission of the SOI, Counsel submitted a letter to the GRC on November 23, 2010 in which he argued that the Custodian's description of this report as an "emergency medical incident" is not "[i]nformation relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation." EO 26. Counsel argued that the request is for the report as it relates to criminal activity, thus the report should be disclosed with redactions of the exempted information.

The GRC's *in camera* review of this record shows that the report is solely related to a medical issue. Specifically, the police responded to a medical call and the action taken is composed of "... medical ... diagnosis, treatment or evaluation." EO 26. Nothing in the report even remotely references any type of criminal activity or investigation. This GRC agrees with Custodian Counsel that this particular report is akin to the EMS report determined to be exempt from disclosure under OPRA pursuant to EO 26 in Bart, supra.

¹² **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

Therefore, the Custodian lawfully denied access to Operations report Complaint No. 2010-006794 pursuant to EO 26 because the report contains a description of a medical emergency. N.J.S.A. 47:1A-6. The GRC declines to address whether the record is exempt based on a citizen's reasonable expectation of privacy; because same is exempt pursuant to EO 26. See Bart, *supra*.

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.

Whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees?

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian provided the GRC with a legal certification, the unredacted records requested for the *in camera* inspection, a redaction index and a completed balancing test within the extended time frame to comply with the Council's Interim Order. Therefore, the Custodian timely complied with the Council's December 20, 2011 Interim Order.
2. The Custodian unlawfully denied access to the location call history's description column. N.J.S.A. 47:1A-6. **Thus, the Custodian must disclose the location call history without redactions to the Complainant for the reasons set forth above.**
3. The Custodian initially unlawfully denied access to Operations Report Complaint No. 2009-021310 as a criminal investigatory record because the report does not meet the two-prong test set forth in N.J.S.A. 47:1A-1.1. N.J.S.A. 47:1A-6. However, portions of the record are exempt from disclosure pursuant to N.J.S.A. 47:1A-1. **Thus, the Custodian may redact field 6 through 15 and disclose the report with field 1 through 4 and field 16 unredacted.**
4. **The Custodian shall comply with Item Nos. 2 and 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if applicable, including a detailed document index explaining the lawful basis for each redaction, and simultaneously**

provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹³ to the Executive Director.¹⁴

5. The Custodian lawfully denied access to Operations report Complaint No. 2010-006794 pursuant to Executive Order No. 26 (Gov. McGreevey 2002) because the report contains a description of a medical emergency. N.J.S.A. 47:1A-6. The GRC declines to address whether the record is exempt based on a citizen's reasonable expectation of privacy; because same is exempt pursuant to EO 26. *See* Bart v. City of Passaic (Passaic), GRC Complaint No. 2007-162 (April 2008).
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

January 22, 2013

¹³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

¹⁴ Satisfactory compliance requires that the Custodian deliver the records 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
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

INTERIM ORDER

December 20, 2011 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2010-208

v.

Town of West New York (Hudson)
Custodian of Record

At the December 20, 2011 public meeting, the Government Records Council ("Council") considered the December 13, 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. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of location call history and two (2) operations reports to determine the validity of the Custodian's assertion that the records are exempt from disclosure due to privacy issues pursuant to N.J.S.A. 47:1A-1.1., are criminal investigatory in nature pursuant to N.J.S.A. 47:1A-1.1. and contain medical information that is exempt pursuant to N.J.S.A. 47:1A-9.a. and Executive Order No. 26 (McGreevey 2002).
2. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 1 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4³, that the records provided is the document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. Because the Custodian has raised the issue that disclosure of the redacted portions of the location call history and two (2) operations reports implicates privacy concerns under OPRA, the Complainant and the Custodian must complete a balancing test chart. The GRC is therefore sending these charts to the parties contemporaneously with the Council's Interim Order in this matter. **The parties must complete this**

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

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

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."



questionnaire and return it to the GRC within five (5) business days of receipt thereof.

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 20th Day of December, 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: December 21, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 20, 2011 Council Meeting**

**Richard Rivera¹
Complainant**

GRC Complaint No. 2010-208

v.

**Town of West New York (Hudson)²
Custodian of Records**

Records Relevant to Complaint:

June 22, 2010 OPRA request: Copies of computer-aided dispatching (“CAD”) reports for 517 51st Street for 2009 to the present.

July 2, 2010 OPRA request: Copies of police reports for all calls made from 517 51st Street for 2009 and 2010 on the attached location call history.

Request Made: June 22, 2010 and July 2, 2010

Response Made: July 1, 2010 and July 13, 2010

Custodian: Carmela Riccio

GRC Complaint Filed: August 11, 2010³

Background

June 22, 2010

Complainant’s first (1st) Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint listed above in a letter referencing OPRA.

July 1, 2010

E-mail from the Custodian’s Counsel to Ms. Luisa Gomez (“Ms. Gomez”), Deputy Clerk, attaching a Town of West New York Police Department (“WNYPD”) location call history (with redactions).

Counsel states that he has been asked to review the record responsive to the Complainant’s first (1st) OPRA request. Counsel notes that location call histories may contain information that invokes OPRA’s privacy interest exemption. Counsel states that the Supreme Court has concluded that a privacy interest claim must be balanced against

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

² Represented by Julio C. Morejon, Esq. (West New York, NJ). Previous Counsel was Jorge R. DeArmas, Esq., who advised the GRC by letter on June 7, 2011 that he no longer represents the Town of West New York.

³ The GRC received the Denial of Access Complaint on said date.

the interest in disclosure. Counsel states that the Supreme Court developed a seven (7) point framework to assess government disclosure of information which implicates a privacy interest. Doe v. Poritz, 142 N.J. 1, 82 (1995). Counsel states that these factors are:

- (1) the type of record requested;
- (2) the information it does or might contain;
- (3) the potential for harm in any subsequent nonconsensual disclosure;
- (4) the injury from disclosure to the relationship in which the record was generated;
- (5) the adequacy of safeguards to prevent unauthorized disclosure;
- (6) the degree of need for access; and
- (7) whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access. *Id.*

Counsel states that in relation to location call histories, in Perino v. Borough of Haddon Heights, GRC Complaint No. 2004-128 (November 2004), the GRC employed a balancing test and held that disclosure of personal information of an individual making a complaint raised “the potential harm of unsolicited contact and confrontation between the citizen and the OPRA complainant and/or its agents or representatives...” *Id.*

Counsel states that because the responsive call history included details of the type of incident for which a call was made or about a residential location, the privacy interest of the individuals who sought assistance from the WNYPD outweighs the interest of the public in the disclosure of the record. Counsel states that as such, a redacted copy of the responsive call history should be provided to the Complainant.

July 1, 2010

Custodian’s response to the first (1st) OPRA request with the following attachments:

- WNYPD location call history for 517 51st Street dated September 4, 2006 to March 21, 2010 (with redactions).
- Letter from the Custodian’s Counsel to Ms. Gomez dated July 1, 2010.

On behalf of the Custodian, Mr. Cosmo A. Cirillo (“Mr. Cirillo”), Clerk’s Assistant, responds in writing to the Complainant’s OPRA request on the fifth (5th) business day following receipt of such request.⁴ Mr. Cirillo states that attached is Counsel’s response to the Complainant’s first (1st) OPRA request. Mr. Cirillo states that there is no charge for the attached record.

July 2, 2010

Complainant’s second (2nd) OPRA request attaching a WNYPD location call history (with redactions). The Complainant requests the records relevant to this complaint listed above in an e-mail referencing OPRA.

⁴ The Custodian certified in the Statement of Information that she received the Complainant’s OPRA request on June 24, 2010.

July 13, 2010

E-mail from the Custodian's Counsel to Ms. Gomez. Counsel states that he has reviewed the four (4) records deemed to be responsive to the Complainant's second (2nd) OPRA request. Counsel states that three (3) records appear to be operations reports and other reports not required by law to be maintained and are related to potential criminal activity. Counsel states that as such, the reports are not public records subject to disclosure pursuant to Blue v. Wall Township Police Department, GRC Complaint No. 2002-47 (August 2003).

Counsel states that the fourth (4th) record contains medical information which is not subject to disclosure because it is information relating to a medical, psychiatric or psychological history, diagnosis, treatment or evaluation pursuant to Executive Order No. 26 (McGreevey 2002)("EO 26").

July 13, 2010

Custodian's response to the second (2nd) OPRA request attaching an e-mail from the Custodian's Counsel to Ms. Gomez dated July 13, 2010.

On behalf of the Custodian, Mr. Cirillo responds in writing to the Complainant's OPRA request on the sixth (6th) business day following receipt of such request. Mr. Cirillo states that attached is Counsel's response to the Complainant's second (2nd) OPRA request.

July 14, 2010

E-mail from the Complainant to the Custodian's Counsel. The Complainant requests that Counsel reconsider whether CAD reports, which replaced paper event cards and incident reports or "operation" reports, are required to be maintained by law and are thus government records subject to disclosure. The Complainant states that the New Jersey Department of State, Division of Archives and Records Management ("DARM") retention schedule for these types of reports are five (5) and two (2) years respectively. The Complainant states that Blue, supra, does not apply to his OPRA request.

The Complainant states that four (4) reports were generated, totaling eight (8) calls for service. The Complainant states that if he files a complaint with the GRC he will also challenge the redactions made to the call history responsive to the first (1st) OPRA request, because the nature of incidents from the initial call officially changes following an actual police response. The Complainant states that if he does not hear back from the WNYPD by August 16, 2010, he will assume that Counsel has not reconsidered the Town of West New York's ("Town") denial of access and will file a complaint with the GRC.

July 16, 2010

E-mail from the Custodian's Counsel to Ms. Gomez. Counsel states that he has received a request from the Complainant to reconsider the denial of access to records responsive to the Complainant's second (2nd) OPRA request. Counsel states that the WNYPD has confirmed that two (2) pages are CAD reports. Counsel states that the other two (2) records are operations reports, one of which deals with potential criminal activity and the other contains medical information regarding a particular resident.

Counsel reiterates his initial opinion that operations reports pertaining to potentially criminal activities are not public records subject to disclosure pursuant to Blue, *supra*. Counsel further states that records containing information relating to a medical, psychiatric or psychological history, diagnosis, treatment or evaluation are exempt from disclosure under OPRA pursuant to EO 26. Counsel states that as such, these records are not subject to disclosure. Counsel states that the two (2) CAD reports may be produced with the nature of the incident redacted.

Counsel states that location call histories may contain information that implicates a person's privacy interest. Doe, *supra*.⁵ Counsel states that in Perino v. Borough of Haddon Heights, GRC Complaint No. 2004-128 (November 2004), the GRC employed a balancing test and held that disclosure of personal information of an individual making a complaint raised "the potential harm of unsolicited contact and confrontation between the citizen and the OPRA complainant and/or its agents or representatives..." *Id.*

Counsel states that because the call history includes details of the type of incident for which a call is made or about a residential location, the privacy interests of the individuals who sought assistance from the WNYPD outweighs the public's need for access. Counsel states that a redacted copy of the requested call history was correctly provided.

July 19, 2010

E-mail from Mr. Cirillo to the Complainant attaching the following:

- E-mail from the Custodian's Counsel to Ms. Gomez dated July 16, 2010.
- Report No. 2010-008278 dated September 8, 2009.
- Report No. 2009-030833 dated March 21, 2010.

Mr. Cirillo states that attached is Counsel's response to the Complainant's July 14, 2010 e-mail. Mr. Cirillo states that two (2) reports (without redactions) are attached and that there is no charge for same.

August 11, 2010

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

- E-mail from the Custodian's Counsel to Ms. Gomez dated July 1, 2010 attaching a WNYPD location call history (with redactions).
- E-mail from Mr. Cirillo to the Complainant dated July 1, 2010 attaching a WNYPD location call history (with redactions).
- Complainant's second (2nd) OPRA request dated July 2, 2010 attaching a WNYPD location call history (with redactions).
- E-mail from the Custodian's Counsel to Ms. Gomez dated July 13, 2010.
- E-mail from Mr. Cirillo to the Complainant dated July 13, 2010.
- E-mail from the Complainant to the Custodian's Counsel dated July 14, 2010.
- E-mail from the Custodian's Counsel to Ms. Gomez dated July 16, 2010.

⁵ Counsel relists the Doe factors in his e-mail to Ms. Gomez.

- E-mail from Mr. Cirillo to the Complainant dated July 19, 2010.
- CAD Report No. 2010-008278 dated September 8, 2009.
- CAD Report No. 2009-030833 dated March 21, 2010.
- Records Destruction Schedule established and approved by DARM for State of New Jersey Municipal Police Departments.

The Complainant's Counsel states that this complaint is being filed because the Custodian unlawfully redacted police records and call reports. Counsel states that at issue are redactions made to a location call history responsive to the Complainant's June 22, 2010 OPRA request and the 2009 and 2010 CAD reports and other reports that were responsive to the Complainant's July 2, 2010 OPRA request.⁶

Counsel states that the Complainant submitted his second (2nd) OPRA request via e-mail to the Town on July 2, 2010 seeking the police reports associated with four (4) calls listed on the location call history for 517 51st Street. Counsel states that the Custodian denied access to four (4) records on July 13, 2010 pursuant to Blue v. Wall Township Police Department, GRC Complaint No. 2002-47 (August 2003). Counsel states that the Complainant contacted the Custodian's Counsel via e-mail on July 14, 2010 requesting that the Town reconsider its denial based on the fact that CAD reports and incident reports have DARM retention schedules. Counsel states that the Town subsequently disclosed two (2) records with redactions and withheld the remaining two (2) records.

Counsel states that OPRA mandates that "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded [under OPRA] ... shall be construed in favor of the public's right of access." Libertarian Party of Cent. New Jersey v. Murphy, 384 N.J. Super. 136, 139 (App. Div. 2006)(citing N.J.S.A. 47:1A-1). Further, Counsel states that "[t]he purpose of OPRA 'is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.'" Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005)(quoting Asbury Park Press v. Ocean County Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004). Counsel states that in any action under OPRA, the burden of proof rests with the public agency. N.J.S.A. 47:1A-6.

Counsel states that the custodian of record must bear the burden of proof in any proceeding under OPRA. N.J.S.A. 47:1A-6; Paff v. Township of Lawnside (Camden), GRC Complaint No. 2009-155 (October 2010). Counsel contends that there is no doubt that the records requested by the Complainant are government records as defined under OPRA. N.J.S.A. 47:1A-1.1.

Counsel argues that the issue in this complaint is whether the redacted call history, CAD reports and other reports for which access was denied are exempt from disclosure under OPRA as criminal investigatory records. Counsel states that OPRA

⁶ Counsel states that the Complainant did not possess a copy of his June 22, 2010 OPRA request seeking the call history at issue at the time of the filing of this complaint. Thus, the Denial of Access Complaint does not address the facts of the first (1st) OPRA request.

defines a criminal investigatory record as a record “which is not required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding.” N.J.S.A. 47:1A-1.1.

Counsel argues that the records sought by the Complainant are “required by law to be made, maintained or kept on file” and, therefore, are subject to access. Counsel states that according to DARM’s retention schedule for municipal police agencies, incident reports are to be retained for two (2) years or one (1) year depending on the nature of the incident. *See* Record Series No. 0036-0003 *and* 0036-0007. Counsel states that event logs/Dispatcher’s log books must be retained for five (5) years. *See* Record Series No. 0027-0000. Counsel states that incident reports and log books would include CAD reports, which are computer-generated reports that have largely replaced traditional paper reports. Counsel states that to this end, the Council previously held in Morgano v. Essex County Prosecutor’s Office, GRC Complaint No. 2007-156 (October 2008) that a record required to be maintained pursuant to an agency’s DARM records retention schedule cannot be considered exempt from disclosure under OPRA as a “criminal investigatory record” because it is required by law to be made, maintained and kept on file. Counsel argues that the records sought in this complaint are similarly required to be maintained pursuant to the Town’s DARM schedule; thus, the records are not exempt from disclosure under OPRA as criminal investigatory records.

Counsel further states that according to the Custodian, the responsive records appear to relate to an investigation. Counsel states that OPRA provides that certain information on those records must be disclosed:

“... the following information concerning a criminal investigation shall be available to the public within 24 hours or as soon as practicable, of a request for such information:

- where a crime has been reported but no arrest yet made, information as to the type of crime, time, location and type of weapon, if any;
- if an arrest has been made, information as to the name, address and age of any victims unless there has not been sufficient opportunity for notification of next of kin of any victims of injury and/or death to any such victim or where the release of the names of any victim would be contrary to existing law or Court Rule. In deciding on the release of information as to the identity of a victim, the safety of the victim and the victim's family, and the integrity of any ongoing investigation, shall be considered;
- if an arrest has been made, information as to the defendant's name, age, residence, occupation, marital status and similar background information and, the identity of the complaining party unless the release of such information is contrary to existing law or Court Rule;

- information as to the text of any charges such as the complaint, accusation and indictment unless sealed by the court or unless the release of such information is contrary to existing law or court rule;
- information as to the identity of the investigating and arresting personnel and agency and the length of the investigation;
- information of the circumstances immediately surrounding the arrest, including but not limited to the time and place of the arrest, resistance, if any, pursuit, possession and nature and use of weapons and ammunition by the suspect and by the police; and
- information as to circumstances surrounding bail, whether it was posted and the amount thereof.” N.J.S.A. 47:1A-3.b.

Counsel contends that the CAD reports or other reports would certainly contain some of the information identified as disclosable pursuant to N.J.S.A. 47:1A-3.b.

Counsel contends that the call history should be disclosed without redactions. Counsel additionally contends that the two (2) other reports for which access was denied should be provided without redactions to show the information that may be made available as prescribed above. Counsel requests the following:

1. A determination ordering the Custodian to provide the Complainant with the records that were withheld and provide unredacted copies of the records already provided.
2. A determination that the Complainant is a prevailing party entitled to a reasonable attorney’s fee pursuant to N.J.S.A. 47:1A-6.

The Complainant does not agree to mediate this complaint.

August 30, 2010

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

September 14, 2010

Custodian’s SOI with the following attachments:

- Complainant’s first (1st) OPRA request dated June 22, 2010.
- E-mail from the Custodian’s Counsel to Ms. Gomez dated July 1, 2010 attaching a WNYPD location call history (with redactions).
- E-mail from Mr. Cirillo to the Complainant dated July 1, 2010 attaching a WNYPD location call history (with redactions).
- Complainant’s second (2nd) OPRA request dated July 2, 2010 attaching a WNYPD location call history (with redactions).
- E-mail from the Custodian’s Counsel to Ms. Gomez dated July 13, 2010.
- E-mail from Mr. Cirillo to the Complainant dated July 13, 2010.
- E-mail from the Complainant to the Custodian’s Counsel dated July 14, 2010.
- E-mail from the Custodian’s Counsel to Ms. Gomez dated July 16, 2010.
- Report No. 2010-008278 dated September 8, 2009.

- Report No. 2009-030833 dated March 21, 2010.

The Custodian certifies that the Town’s search for the requested records included forwarding the subject OPRA requests to the Police Department, where responsive records were identified and forwarded to the Clerk’s Office for review.

The Custodian also certifies that no records responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by DARM.

The Custodian certifies that the Town received the Complainant’s first (1st) OPRA request on June 24, 2010. The Custodian certifies that on July 1, 2010, the Clerk’s Office forwarded a copy of the redacted call history with redactions to the Complainant on the same day along with Custodian Counsel’s explanation for the redactions.

The Custodian certifies that the Town received the Complainant’s second (2nd) OPRA request on July 2, 2010. The Custodian certifies that the Clerk’s Office responded in writing on July 13, 2010 denying access to four (4) records and providing Counsel’s explanation of the denial of access.

The Custodian certifies that the Complainant e-mailed Counsel on July 14, 2010 requesting that the Town reconsider its denial of access to the records responsive to the Complainant’s second (2nd) OPRA request and that he would file a complaint challenging both the redactions made to the call history and the Town’s denial of the other records. The Custodian certifies that Counsel advised on July 16, 2010 that the call history was redacted based on the privacy interest of the information contained therein. The Custodian certifies that Counsel further advised that two (2) of the four (4) records are operation reports containing information exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. and EO 26, but that the other two (2) records are CAD reports that are subject to disclosure with redactions. The Custodian certifies that the Clerk’s Office forwarded Counsel’s e-mail to the Complainant on July 19, 2010 attaching the CAD reports without redactions.

List of all records responsive to Complainant’s OPRA request (include the number of pages for each record).	List the Records Retention Requirement and Disposition Schedule for each records responsive to the Complainant’s OPRA request.	List of all records provided to Complainant, in their <u>entirety</u> or <u>with redactions</u> (include the <u>date</u> such records were provided).	If records were disclosed with redactions, give a general nature description of the redactions.	If records were denied in their entirety, give a general nature description of the record.	List the legal explanation and statutory citation for the denial of access to records in their <u>entirety</u> or <u>with redactions</u>.
Complainant’s first (1st) OPRA request: Location Call History for 517 51 st Street	5 years – DARM Record Series No. 0026-0000.	Provided on July 1, 2010 (with redactions of the description column for privacy concerns).	Redactions to the description column that denotes the description of the incidents for which a call to	N/A	Redactions supported due to privacy concerns outweighing the Complainant’s need for access pursuant to

			the WNYPD was made. Redacted for privacy concerns.		<u>N.J.S.A. 47:1A-1, Doe v. Poritz, 142 N.J. 1, 82 (1995), Serrano v. South Brunswick Twp., 358 N.J. Super. 352 (App. Div. 2003) and Perino v. Borough of Haddon Heights, GRC Complaint No. 2004-128 (November 2004) (Information prior to 2009 was redacted. This information cannot be challenged by the Complainant because this information falls outside of the time frame identified by the Complainant).</u>
Complainant's second (2nd) OPRA request: CAD Report No. 2009-030833 dated September 8, 2009.	5 years – DARM Record Series No. 0026-0000.	Provided July 19, 2010.	N/A	N/A	
CAD Report No. 2010-008278 dated March 21, 2010.	5 years – DARM Record Series No. 0026-0000.	Provided July 19, 2010.	N/A	N/A	
Complaint No. 2010-006794 – Operations Report – Description of Incident – Medical Problem	No retention period as record not required to be made or maintained. Both DARM Record Series No. 0036-0002 and 0003 require that records be maintained for 1 year (if related to a criminal activity) and 2 years (if related to non-criminal activity) for incidents	N/A	N/A	The report contains a description of a response to a medical emergency at the location identified by the respondent.	Denial of access supported by privacy concerns outweighing the Complainant's need for access pursuant to <u>N.J.S.A. 47:1A-1, Doe v. Poritz, 142 N.J. 1, 82 (1995), Serrano v. South Brunswick Twp., 358 N.J. Super. 352 (App. Div. 2003), Perino v. Borough of</u>

	requiring a further report than the initial event card/report. No law requires the creation of such an operations report.				<u>Haddon Heights, GRC Complaint No. 2004-128 (November 2004) and EO 26.</u>
Complaint No. 2010-021310 – Operation Report –Description of Incident – Verbal Dispute	No retention schedule (See above)	N/A	N/A	The report contains a description of a call related to a domestic verbal dispute.	Denial of access supported by the fact that this record relates to possible criminal activity and is therefore exempt pursuant to <u>N.J.S.A. 47:1A-1.1., Blue v. Wall Township Police Department, GRC Complaint No. 2002-47 (August 2003), Janeczko v. N.J. Dept of Public Safety, GRC Complaint No. 2002-79 and 2002-80 (June 2004) and Bart v. City of Passaic (Passaic), GRC Complaint No. 2007-162 (April 2008).</u> The record is also not required by law to be made.

The Custodian’s Counsel submits a letter brief in support of the Town’s position in the instant complaint. Counsel states that the instant complaint appears to hinge on two (2) OPRA requests dated June 22, 2010 and July 2, 2010 respectively.⁷

Counsel states that following receipt of the Complainant’s first (1st) OPRA request, the Town sought legal advice from Counsel regarding whether any information should be redacted from the responsive call history. Counsel states that because 517 51st Street is a three family residence, he advised that the “description” section should be redacted to protect the privacy interests of the inhabitants of the residence pursuant to Doe, supra, and Perino v. Borough of Haddon Heights, GRC Complaint No. 2004-128 (November 2004). Counsel states that the Clerk’s Office adopted this position, disclosing

⁷ Counsel notes that the Custodian was out of the office until July 19, 2010 on medical leave; thus, Ms. Gomez and Mr. Cirillo handled both of the Complainant’s OPRA requests.
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the call history with redactions on July 1, 2010 and advising the Complainant in writing of the reasons for redactions.

Counsel states that the Complainant submitted a second (2nd) OPRA request on July 2, 2010 seeking information from police reports generated from the call history (provided in response to the Complainant's first OPRA request) for 2009 and 2010. Counsel states that the Town again sought legal advice regarding the four (4) responsive records. Counsel states that he determined that all four (4) records were exempt from disclosure pursuant to possible criminal investigatory activity, privacy concerns and medical information not subject to disclosure. Counsel states that the Clerk's Office adopted this position and denied access to the four (4) records in writing on July 13, 2010, advising the Complainant of the reasons therefor.

Counsel states that the Complainant contacted the Town on July 14, 2010 requesting that the Town reconsider its denial of access to the four (4) records responsive to his second (2nd) OPRA request. Counsel notes that in said e-mail, the Complainant indicated for the first time that he was seeking incident reports or operations reports. Counsel states that upon review of the records provided by the WNYPD, Counsel determined that the two (2) CAD reports should be disclosed with redactions of the incident due to privacy concerns. Counsel states that he further determined that access to the two (2) operations reports should be denied, as the first is criminal investigatory in nature and the second contains medical information.

Counsel states that the Clerk's Office did not adopt his position of redacting the CAD reports and instead disclosed same without redactions.⁸ Counsel further states that the Clerk's Office did adopt the position that the two (2) operations reports were exempt from disclosure and thus advised the Complainant of same and the reasons therefor on July 19, 2010.

Counsel states that this complaint raises several important questions:

1. Is an operations report a criminal investigatory record subject to disclosure?
2. Is an operations report which contains details of a medical incident subject to disclosure?
3. Are CAD reports detailing calls made from a three-family residence subject to disclosure when a custodian determines that disclosure is not warranted pursuant to Doe, and is such determination an abuse of the tenets of Doe?

Counsel notes that the Council has, in the past, determined that:

1. An operations report about a possible criminal activity is not subject to disclosure as a criminal investigatory record.
2. EO 26 prohibits the disclosure of records pertaining to medical situations.
3. Information on reports of complaints as minor as noise complaints are protected from disclosure pursuant to Doe, *supra*, in certain situations. See Perino, *supra*.

⁸ Counsel notes that the descriptions redacted on the call history for CAD No. 2009-030833 and CAD report No. 2010-008278 were disclosed in the CAD reports.

Operations reports are criminal investigatory records:

Counsel states that OPRA builds on the State's policy of favoring the public's right of access to government records and any limitation on the right of access shall be construed in favor of the public's right of access. N.J.S.A. 47:1A-1. Counsel states that the Town must balance its obligation to provide access to government records with its obligation to enforce OPRA's exemptions in situations where a person's privacy, medical or other information or a criminal investigation is at issue.

Counsel states that to this end, OPRA allows for custodians to deny access to "criminal investigatory records," which by definition, is a record "not required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding." N.J.S.A. 47:1A-1.1. The Council states that in O'Shea v. Township of West Milford, 410 N.J. Super. 371 (App. Div. 2009), the Court determined that the test of whether a record is a criminal investigatory record was two-pronged: "that is, the records must 'not be required by law to be made' and it must 'pertain to any criminal investigation or related civil enforcement proceeding.'" *Id.* at 380-81. Counsel further states that as recognized in Janeczko, "[c]riminal investigatory records include records involving all manner of crimes, resolved or unresolved, and include information that is part and parcel of an investigation, confirmed and unconfirmed" even where such records are kept or maintained, but where no law requires them to be made.

Counsel states that the Council has previously held that operations reports maintained by police departments are not subject to disclosure as criminal investigatory records. Counsel states that in Blue, the Council determined that criminal investigatory records not subject to disclosure "include commonly made police records such as incident reports, supplemental reports and *operations reports*." (Emphasis added.) Counsel contends that this is inapposite to Complainant Counsel's argument that the records should be disclosed because same are required to be retained by DARM pursuant to Morgano. Counsel notes that in Morgano, the Council noted that the fact that a record may be required to be retained pursuant to an agency's DARM schedule was only one factor weighed against non-disclosure.

Counsel contends that, assuming the Complainant is correct that DARM requires retention of operations reports (and even if the Town retains them in practice, as they do) such reports are still not subject to disclosure. Counsel argues that employing the two-pronged test set forth in O'Shea, operations reports are not required to be made by law, regulation or Attorney General Guidelines. Counsel further argues that the fact that there was no criminal investigation opened in connection with an operation report is of no consequence. Counsel asserts it was not clear prior to the arrival of officers at 517 51st Street whether the activity reported (a verbal dispute) warranted the filing of any criminal charges: the police had to at least investigate the incident to determine whether charges were warranted.

Counsel notes that the Town maintains operations reports for two (2) to seven (7) years. Counsel contends that whether DARM requires retention of operations reports is unclear. Counsel asserts that the only retention schedule that might apply is DARM

Record Series No. 0036-0003 – “Non-Criminal, Excluding Drunk Driving (Record Copy)”, which provides a retention schedule for records:

“Contain[ing] account of reported incident and follow up investigation report for all incidents which *require a further report* than the initial event card or event report. File may also include: arrest reports, copies of lab reports, polygraph results, supplementary reports, statements, tapes of statements, and waivers. May include: animal bite, drunkenness, file, disorderly conduct, department service and assistance reports, and other related reports of this nature.” (Emphasis added.)

Counsel notes that it appears not even DARM Record Series No. 0036-0003 applies here because nothing in law or regulation “require[s] a further report.” Counsel further argues that even if DARM requires retention of operations reports, to order disclosure would overturn Blue, and in the future possibly render all criminal investigation reports as disclosable based on the fact that these records might fall within a prescribed DARM category. Counsel argues that this would require the Council to reverse its holding in Bart v. City of Passaic (Passaic), GRC Complaint No. 2007-162 (April 2008) that investigation and currency seizure reports were criminal investigatory records. Counsel further argues that if the Council determines that the operations reports should be disclosed, the GRC should not issue any sanctions on the Custodian because of her reliance on prior GRC case law. *See Morgano, supra* (holding that the custodian did not act improperly in relying on previous GRC case law.)

Counsel notes that the Complainant argues that he is entitled to information pursuant to N.J.S.A. 47:1A-3.b. Counsel states that because no arrest was made in connection with Complaint No. 2010-021310, the only information required to be made available is the type of crime, time, location and type of weapon. Counsel argues that the Complainant made no request for this information.

Operations reports related to emergency medical situations are exempt from disclosure pursuant to EO 26:

Counsel states that the Town denied access to Complaint No. 2010-006794 as it describes an emergency medical incident which ultimately resulted in Emergency Medical Services (“EMS”) transporting a patient. Counsel argues that the report is exempt from disclosure pursuant to EO 26 as “information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation.” Counsel notes that the Council has previously determined that EMS division incident reports were exempt from disclosure in Bart. Counsel contends that in the absence of any cogent argument against the report at issue being akin to a report created by municipal EMS officials, the GRC should uphold the Town’s denial of access to Complaint No. 2010-006794.

Privacy interests outweigh the right to public access:

Counsel contends that in the instance of all the responsive records, the Custodian's position is that privacy interests outweigh the Complainant's need for access. Counsel argues that the non-disclosed portions of the call history, as well as the two (2) operations reports, contain information that implicates the privacy interest afforded by in OPRA. Counsel states that, in Doe, the Court concluded that privacy interests must be balanced against the interest in disclosure. Counsel states that the Doe Court relied on the following factors:

- (1) the type of record requested;
- (2) the information it does or might contain;
- (3) the potential for harm in any subsequent nonconsensual disclosure;
- (4) the injury from disclosure to the relationship in which the record was generated;
- (5) the adequacy of safeguards to prevent unauthorized disclosure;
- (6) the degree of need for access; and
- (7) whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access. *Id.*

Counsel states that OPRA provides for a public agency's responsibility and obligation to "safeguard from the public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy..." N.J.S.A. 47:1A-1.1. Counsel states that in Serrano, the Court held that "[w]ith the enactment of OPRA, it is reasonable to anticipate that its declaration of the 'public policy' respecting the 'citizen's reasonable expectation of privacy; will be considered extensively by the GRC and the courts." *Id.* at 368.

Counsel argues that in relation to the redacted call history, the GRC previously employed a balancing test to determine that disclosure of personal information of an individual making a complaint could result in unsolicited contact or confrontation. Perino v. Borough of Haddon Heights, GRC Complaint No. 2004-128 (November 2004). Counsel states that in Perino, the Council declined to disclose the identity of a person making a noise complaint on the basis of privacy. Counsel argues that here, the information pertains to domestic disputes and medical histories at a three family residence. Counsel contends that under Doe, access should not be provided without the Complainant proving that his need to access to the information outweighs the Town's right of confidentiality. *See* Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004).

Counsel finally states that the Custodian is willing to provide all records to the GRC for an *in camera* review to determine the validity of the Town's denial of access.

November 23, 2010

Complainant Counsel's response to the Custodian's SOI attaching the Complainant's legal certification.

Counsel states that he carefully reviewed the Custodian's SOI and believes that it has limited reliability. Counsel states that the burden of proving a lawful denial of access

rests on a custodian. N.J.S.A. 47:1A-6. Counsel further states that the GRC's regulations provide that a custodian "include with the SOI any attachments, affidavits, certifications or documentation deemed appropriate or supportive of the defenses set forth in the SOI." N.J.A.C. 5:105-2.4(e). Counsel argues that although the Town responded to all parts of the SOI, the Custodian could not have certified to the events therein because she was out of the office on medical leave. Counsel thus contends that the SOI is of no evidentiary value and should be rejected.

Counsel argues that the location call history for 517 51st Street is a listing of all calls and describes the type of call. Counsel contends that there is no evidence to support the Town's conclusion that disclosure of the descriptions would be an unwarranted invasion of privacy. Counsel contends that when measured against the Doe factors, the balance militates towards the Complainant's need for access.

Counsel states that regarding factor No. 1 and No. 2, the record at issue is a list of calls featuring the address of the call, number of associated report, type of call and date of call. Counsel states that no personal identifiers exist anywhere on the call history.

Counsel contends that regarding factor No. 3, the Custodian failed to identify any potential for harm. Counsel states that the Complainant is a former police officer who currently works for a private investigation firm that investigates police corruption and abuses. Counsel asserts that disclosure of the description of calls would not correlate to any particular crime or report with any individual, nor would disclosure pose a risk for unsolicited contact. Counsel contends that regarding factor No. 4, there is no evidence that any relationship between the police and the caller would be injured. Counsel asserts that there is no evidence that the callers were confidential informants who were promised confidentiality or immunity in exchange for information. Counsel further asserts that there is no evidence that disclosure of the description column would discourage the public from contacting the police in the future.

Counsel states that regarding factor No. 5, the Complainant cannot provide any information regarding the adequacy of safeguards to prevent unauthorized disclosure.

Counsel contends that regarding factor No. 6, the Complainant's need for access is set forth in the attached certification. The Complainant certifies that he sought the information in regard to a possible criminal investigation of members of the West New York Building Department. The Complainant certifies that as of the date of the Complainant's OPRA requests, Building Department records failed to indicate whether the basement of 517 51st Street was a registered residential unit or had recently been inspected. The Complainant certifies that on several occasions, he observed up to four (4) adults exiting the basement entrance. The Complainant certifies that the WNYPD's records do not indicate from which apartment the calls were made and he is attempting to ascertain who lives in the structure and whether the basement is a safe and legal unit.

Counsel contends that regarding factor No. 7, OPRA militates towards public access. Counsel argues that specifically, N.J.S.A. 47:1A-3.b. allows for certain information relating to a crime to be available "within 24 hours or as soon as

practicable.” *Id.* Counsel contends that a description of a call to the police would certainly fall within the information authorized for disclosure.

Counsel contends that in the absence of any substantive evidence from the Custodian regarding the actual harm that may result from disclosure of the redacted portions of the location call history, said record should be disclosed without redactions.

Counsel further contends that the two (2) operations reports for which access was denied should be disclosed pursuant to N.J.S.A. 47:1A-3. Counsel argues that because the Town has a policy of retaining these records for two (2) to (7) years, the reports are required by law to be maintained by the Town.

Counsel further argues that the Custodian has not identified any factual basis for withholding the operations reports. Counsel argues that the Town cannot describe Complaint No. 2010-021310 as criminal investigatory in nature. Counsel notes that the Town described the report as a “potential criminal investigatory record.” Counsel argues that if the record is only a “potential criminal investigatory” record, then it does not fall under the exemption to disclosure afforded by OPRA. N.J.S.A. 47:1A-3.

Counsel argues that the Town has represented that Complaint No. 2010-006794 described an “emergency medical incident,” which could mean anything. Counsel contends that a “emergency medical incident” is not “[i]nformation relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation.” EO 26. Counsel argues that even if this was the case, the Town has made no claim regarding the type of medical information contained in the report. Counsel contends that the request is for information as it relates to criminal activity; thus, the report should be disclosed with any medical information contained therein redacted.

December 3, 2010

Letter from the Custodian’s Counsel to the GRC. Counsel disputes Complainant Counsel’s contention that the SOI is of no evidentiary value based on the Custodian’s absence during the events pertaining to this complaint. Counsel argues that the Custodian properly executed the SOI certification. Counsel further argues that nothing in the certification requires a custodian to be present at the relevant time that the events took place. Counsel notes that all requests, responses and records at issue are in the possession of the Custodian. Counsel argues that the Complainant’s Counsel has further failed to identify any factual inconsistencies in the SOI. Counsel additionally notes that no custodian can certify to the legal analysis and conclusions contained in Item No. 12.

Counsel contends that the Complainant’s Counsel continues to ignore the privacy exemption in N.J.S.A. 47:1A-1, and instead cites to the N.J.S.A. 47:1A-1.1., exemptions for a “social security number, credit card number, unlisted telephone number or driver license number...”⁹ with the presumption that these exemptions limit the express privacy exemption holding that:

“a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been

⁹ The Complainant’s Counsel does not make this point in his letter to the GRC dated November 23, 2010. Richard Rivera v. Town of West New York (Hudson), 2010-208 – Findings and Recommendations of the Executive Director

entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy..." N.J.S.A. 47:1A-1.

Counsel asserts that the Complainant's Counsel contends that the Complainant's need for access outweighs the privacy interest; however, said need is not sufficient or relevant to caller's privacy interest as implicated in Perino. Counsel argues that a custodian may not deny access to records based on a requestor's intended use for the records and cannot likewise grant access based on same. Counsel argues that this type of determination is reserved for common law requests which fall outside the purview of OPRA. Counsel asserts that if the Council chooses to overturn or distinguish its holding in Perino, it may do so; however, a custodian must adhere to legal precedent. Counsel contends that nondisclosure of the redacted information on the location call history and the Town's denial of access to the operations reports were therefore lawful.

Counsel disputes Complainant Counsel's argument that the operations reports are not criminal investigatory records because they are maintained by the Town. Counsel argues that whether the Town maintains the record is of no consequence. Counsel argues that the issue is whether the operations reports were required by law to be maintained and contends that they are not. Counsel asserts that the Complainant's Counsel never disputes that operations reports are required by a law to be maintained. Counsel asserts that the Council has previously determined that any records produced as the result of a criminal investigation that are not required to be made, maintained or kept on file (regardless of whether they are maintained in practice) are not subject to disclosure. Counsel notes that the Council has specifically identified operations reports as exempt under the criminal investigatory records exemption; thus, the Custodian followed current GRC precedent in denying access to operations reports.

Counsel again notes that if the GRC wishes to change its position regarding criminal investigatory records, the GRC may have to order the release of all criminal investigatory reports in the future simply because they happen to be kept on file even when no law requires this practice.

Counsel disputes Complainant Counsel's assertion that Complaint No. 2010-023210 is not a criminal investigatory record because no investigation is underway. Counsel argues that an investigation into whether any charges should be filed was underway. Counsel argues that because no charges were eventually filed does not modify the character of the record after the fact. *See* Janeczko.

Counsel further disputes Complainant Counsel's claim that operation reports related to medical emergencies are subject to disclosure. Counsel asserts that he continues to rely on EO 26 and the Council's determination in Bart. Counsel contends that the Complainant's Counsel has not provided a cogent argument that differentiates an emergency response report from an EMS report, which was the record determined to be exempt from disclosure in Bart. Counsel argues that as such, the Town's denial of access should be upheld.

Counsel again reiterates from the SOI that the Town is willing to submit all records for an *in camera* review if necessary.

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*... a public agency has a *responsibility and an obligation to safeguard from public access* a citizen's *personal information* with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy...” (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 ... A government record shall not include the following ... *criminal investigatory records* ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA defines “criminal investigatory records as:

“a record which is not required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding.” N.J.S.A. 47:1A-1.1.

OPRA further provides that:

“[t]he provisions of [OPRA], *shall not abrogate any exemption of a public record or government record from public access* heretofore made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; *Executive Order of the Governor*; Rules of Court; any federal law; federal regulation; or federal order.” (Emphasis added.) N.J.S.A. 47:1A-9.a.

EO 26 provides that:

“The following *records shall not be considered to be government records* subject to public access pursuant to [OPRA]: *Information* ... relating to *medical, psychiatric or psychological history, diagnosis, treatment or evaluation* ...” (Emphasis added.) *Id.* at 4(b).

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.

In the instant complaint, the Custodian, on advice of Counsel, redacted the description section of the location call history responsive to the Complainant’s first (1st) OPRA request citing to privacy interests. Additionally, and again on advice of Counsel, the Custodian denied access to two (2) operations reports responsive to the Complainant’s second (2nd) OPRA request citing to privacy concerns, the criminal investigatory exemption and the medical information exemption provided for in EO 26.

In Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council¹⁰ in which the Council dismissed the complaint by accepting the custodian’s legal conclusion for the denial of access without further review. The Court stated that:

“OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records...When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.”

The Court also stated that:

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

Further, the Court stated that:

“[w]e hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the

¹⁰ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).
Richard Rivera v. Town of West New York (Hudson), 2010-208 – Findings and Recommendations of the Executive Director

appeal...There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC's obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7f, which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption."

Therefore, pursuant to Paff, *supra*, the GRC must conduct an *in camera* review of the location call history and two (2) operations reports to determine the validity of the Custodian's assertion that the records are exempt from disclosure due to privacy issues pursuant to N.J.S.A. 47:1A-1.1., are criminal investigatory in nature pursuant to N.J.S.A. 47:1A-1.1. and contain medical information that is exempt pursuant to N.J.S.A. 47:1A-9.a. and EO 26.

The GRC notes that although Counsel advised that the Custodian should redact the description in the two (2) CAD reports responsive to the Complainant's second (2nd) OPRA request, the Custodian certified in the SOI that these records were disclosed without redactions and are therefore no longer at issue.

Moreover, because the Custodian has raised the issue that disclosure of the redacted portions of the location call history and two (2) operations reports implicates privacy concerns under OPRA, the Complainant and the Custodian must complete a balancing test chart. The GRC is therefore sending these charts to the parties contemporaneously with the Council's Interim Order in this matter.

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.

Whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees?

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of location call history and two (2) operations reports to determine the validity of the Custodian's assertion that the records are exempt from disclosure due to privacy issues pursuant to N.J.S.A. 47:1A-1.1., are criminal investigatory in nature pursuant to N.J.S.A. 47:1A-1.1. and contain medical information that is

exempt pursuant to N.J.S.A. 47:1A-9.a. and Executive Order No. 26 (McGreevey 2002).

2. **The Custodian must deliver¹¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 1 above), a document or redaction index¹², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4¹³, that the records provided is the document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. Because the Custodian has raised the issue that disclosure of the redacted portions of the location call history and two (2) operations reports implicates privacy concerns under OPRA, the Complainant and the Custodian must complete a balancing test chart. The GRC is therefore sending these charts to the parties contemporaneously with the Council's Interim Order in this matter. **The parties must complete this questionnaire and return it to the GRC within five (5) business days of receipt thereof.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

December 13, 2011

¹¹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

¹² The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

¹³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."