



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

December 16, 2014 Government Records Council Meeting

Christopher T. Tasiopoulos
Complainant

Complaint No. 2011-231

v.

Warren County Prosecutor's Office
Custodian of Record

At the December 16, 2014 public meeting, the Government Records Council ("Council") considered the December 9, 2014 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that this complaint be dismissed because the Complainant (via Counsel) withdrew his complaint in an e-mail to the GRC on November 14, 2014. Therefore, no further adjudication is required.

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

Final Decision Rendered by the
Government Records Council
On The 16th Day of December, 2014

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: December 17, 2014



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Executive Director
December 16, 2014 Council Meeting**

**Christopher T. Tasiopoulos¹
Complainant**

GRC Complaint No. 2011-231

v.

**Warren County Prosecutor's Office²
Custodian of Records**

Records Relevant to Complaint: Copies of:

1. Any complaints received by the Warren County Prosecutor's Office ("WCPO") regarding Mr. Alan Hill's ("Mr. Hill") motor vehicle accident/driving under the influence arrest ("DUI") on January 14, 2006 (Greenwich Township Police Department ("GTPD") case No. 2006-0222).
2. Any complaints forwarded to the WCPO by the GTPD or Chief Richard Guzzo ("Chief Guzzo") regarding Mr. Hill's DUI.
3. All statements, subpoenas, lab reports, Miranda cards and charges forwarded to the WCPO by the GTPD or Chief Guzzo regarding Mr. Hill's DUI.
4. Any and all statements taken by the WCPO regarding Mr. Hill's DUI.
5. All subpoenas for blood that were made to any hospital regarding Mr. Hill's blood.
6. Any lab reports relating to Mr. Hill's blood.
7. Miranda card signed by Mr. Hill in regards to his DUI.
8. Any statements made by Mr. Hill regarding his DUI.
9. All memoranda and/or correspondence between the WCPO, Chief Guzzo and/or Chief Paul Hager ("Chief Hager"), Pohatcong Police Department, concerning Mr. Hill's DUI.
10. Any e-mails between the WCPO, Chief Guzzo and/or Chief Hager concerning Mr. Hill's DUI.³

Custodian of Record: Michael J. McDonald, Esq.⁴
Request Received by Custodian: June 27, 2011
Response Made by Custodian: July 1, 2011
GRC Complaint Received: July 6, 2011

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

² Represented by Joseph J. Bell, Esq., of The Bell Law Group, P.C. (Rockaway, NJ).

³ The Complainant requested additional records that are not at issue in the instant complaint.

⁴ The original Custodian of Record was Tara J. Kirkendall.

Background

September 30, 2014 Council Meeting:

At its September 30, 2014 public meeting, the Council considered the September 23, 2014 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The current Custodian complied with the Council's July 30, 2014 Interim Order because he responded in the prescribed time frame providing to the Complainant (via Counsel) those records ordered to be disclosed by the Honorable Tahesha L. Way, Administrative Law Judge, and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Pursuant to the Honorable Tahesha L. Way's, Administrative Law Judge, June 13, 2014 Initial Decision and the Council's July 29, 2014 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, in response to the June 13, 2014 Initial Decision and subsequent Interim Order, the Warren County Prosecutor's Office disclosed two (2) records to the Complainant. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).**

Procedural History:

On October 1, 2014, the Council distributed its Interim Order to all parties.

On October 30, 2014, the Complainant's Counsel sought an extension until November 3, 2014, to file a fee application, which the GRC granted. On November 3, 2014, the Complainant's Counsel submitted his fee application.

On November 7, 2014, the Custodian's Counsel requested a ten (10) day extension to file objections. On November 13, 2014, the GRC granted the extension and advised that because the final date of submission was a Saturday, Custodian's Counsel had the option of November 28, 2014 or December 1, 2014 as the final deadline. The Custodian's Counsel responded accepting December 1, 2014 as the last day to submit objections. Further, Custodian's Counsel noted that a

tentative settlement had been reached pending approval by the Complainant. On November 14, 2014, the Complainant's Counsel confirmed via e-mail that, in accordance with the settlement, the Complainant authorized him to withdraw this complaint.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint be dismissed because the Complainant (via Counsel) withdrew his complaint in an e-mail to the GRC on November 14, 2014. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

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

December 9, 2014



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

September 30, 2014 Government Records Council Meeting

Christopher T. Tasiopoulos
Complainant

Complaint No. 2011-231

v.

Warren County Prosecutor's Office
Custodian of Record

At the September 30, 2014 public meeting, the Government Records Council ("Council") considered the September 23, 2014 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The current Custodian complied with the Council's July 30, 2014 Interim Order because he responded in the prescribed time frame providing to the Complainant (via Counsel) those records ordered to be disclosed by the Honorable Tahesha L. Way, Administrative Law Judge, and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Pursuant to the Honorable Tahesha L. Way's, Administrative Law Judge, June 13, 2014 Initial Decision and the Council's July 29, 2014 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, in response to the June 13, 2014 Initial Decision and subsequent Interim Order, the Warren County Prosecutor's Office disclosed two (2) records to the Complainant. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).**



Interim Order Rendered by the
Government Records Council
On The 30th Day of September, 2014

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: October 1, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Christopher T. Tasiopoulos¹
Complainant**

GRC Complaint No. 2011-231

v.

**Warren County Prosecutor's Office²
Custodian of Records**

Records Relevant to Complaint: Copies of:

1. Any complaints received by the Warren County Prosecutor's Office ("WCPO") regarding Mr. Alan Hill's ("Mr. Hill") motor vehicle accident/driving under the influence arrest ("DUI") on January 14, 2006 (Greenwich Township Police Department ("GTPD") case No. 2006-0222).
2. Any complaints forwarded to the WCPO by the GTPD or Chief Richard Guzzo ("Chief Guzzo") regarding Mr. Hill's DUI.
3. All statements, subpoenas, lab reports, Miranda cards and charges forwarded to the WCPO by the GTPD or Chief Guzzo regarding Mr. Hill's DUI.
4. Any and all statements taken by the WCPO regarding Mr. Hill's DUI.
5. All subpoenas for blood that were made to any hospital regarding Mr. Hill's blood.
6. Any lab reports relating to Mr. Hill's blood.
7. Miranda card signed by Mr. Hill in regards to his DUI.
8. Any statements made by Mr. Hill regarding his DUI.
9. All memoranda and/or correspondence between the WCPO, Chief Guzzo and/or Chief Paul Hager ("Chief Hager"), Pohatcong Police Department, concerning Mr. Hill's DUI.
10. Any e-mails between the WCPO, Chief Guzzo and/or Chief Hager concerning Mr. Hill's DUI.³

Custodian of Record: Michael J. McDonald, Esq.⁴

Request Received by Custodian: June 27, 2011

Response Made by Custodian: July 1, 2011

GRC Complaint Received: July 6, 2011

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

² Represented by Joseph J. Bell, Esq., of The Bell Law Group, P.C. (Rockaway, NJ).

³ The Complainant requested additional records that are not at issue in the instant complaint.

⁴ The original Custodian of Record was Tara J. Kirkendall.

Background

July 29, 2014 Council Meeting:

At its July 29, 2014 public meeting, the Council considered the July 22, 2014 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Therefore, because the Custodian Counsel's argument set forth in his exceptions is outweighed by the credible evidence adduced during the hearing at the Office of Administrative Law and Custodian's July 17, 2014 certification, and because the Complainant has failed to otherwise provide any legal basis for the GRC to reject the Honorable Tahesha L. Way's, Administrative Law Judge, findings, the Council should accept said decision ordering ". . . that the [Custodian] forthwith provide access to . . ." the e-mail and annexed accident report to which access was unlawfully denied and concluding that ". . . the Custodian did not act knowingly and willfully in view of the totality of circumstances . . ."
2. **The Custodian shall comply with item No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁵ to the Executive Director.⁶**
3. Because the Complainant retained an attorney after this complaint was referred to Office of Administrative Law, the Council must address the issue of prevailing party 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.

Procedural History:

On July 30, 2014, the Council distributed its Interim Order to all parties. On August 5, 2014, the current Custodian responded to the Council's Interim Order certifying that he provided the e-mail and annexed accident report, with minor redactions, to the Complainant's Counsel via e-mail and regular mail.

⁵ "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."

⁶ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Analysis

Compliance

At its July 29, 2014 meeting, the Council ordered the Custodian to provide the Complainant the e-mail and annexed accident report ordered to be disclosed by the Administrative Law Judge (“ALJ”). On July 30, 2014, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian’s response was due by close of business on August 6, 2014.

On August 5, 2014, the fourth (4th) business day after receipt of the Council’s Order, the current Custodian disclosed the responsive e-mail and accident report, with minor redactions,⁷ to the Complainant’s Counsel via e-mail and regular mail. Further, the current Custodian simultaneously submitted certified confirmation of compliance to the Executive Director.

Therefore, the current Custodian complied with the Council’s July 30, 2014 Interim Order because he responded in the prescribed time frame providing to the Complainant (via Counsel) those records ordered to be disclosed by the ALJ and simultaneously provided certified confirmation of compliance to the Executive Director.

Prevailing Party Attorney’s Fees

OPRA provides that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court ...; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council ... A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

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

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Court held that a complainant is a “prevailing party” if he achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. Id. at 432. Additionally, the Court held that attorney’s fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Id.

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51

⁷ The GRC notes that although N.J.S.A. 39:4-131 provides that no information on an accident report “. . . shall be confidential . . .” the Complainant’s Counsel advised the GRC on August 18, 2014 that he had no objections with the redactions made to the annexed accident report. Thus, the GRC declines to address the redactions.

(2008), the Supreme Court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, 196 N.J. at 71, (quoting Buckhannon Bd. & Care Home v. West Virginia Dep’t of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties,” Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney’s fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

However, the Court noted in Mason, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, citing Teeters, 387 N.J. Super. at 429; see, e.g., Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), *certif. denied*, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

OPRA itself contains broader language on attorney’s fees than the former RTKL did. OPRA provides that “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney’s fee.” N.J.S.A. 47:1A-6. Under the prior RTKL, “[a] plaintiff in whose favor such an order [requiring access to public records] issues ... may be awarded a reasonable attorney’s fee not to exceed \$500.00.” N.J.S.A. 47:1A-4 (repealed 2002). The Legislature’s revisions therefore: (1) mandate, rather than permit, an award of attorney’s fees to a prevailing party; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

Mason at 73-76 (2008).

The Court in Mason, further held that:

[R]equestors are entitled to attorney’s fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) ‘a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved’; and (2) ‘that the relief ultimately secured by plaintiffs had a basis in law.’ Singer v. State, 95 N.J. 487, 495, *cert denied* (1984).

Id. at 76.

The GRC referred this matter to the OAL “. . . to fully develop the record with regard to the existence of a criminal and/or Internal Affairs investigation, the applicability of the advisory, consultative or deliberative materials exemption . . .” On June 13, 2014, the ALJ issued an Initial Decision ordering disclosure of an e-mail and an accident report annexed to one of the records reviewed *in camera*. The GRC notes that the ALJ determined that the Custodian lawfully denied access to the remainder of the records at issue.

Thereafter, the Council accepted the ALJ’s Initial Decision and ordered the Custodian to disclose those records as ordered in the Decision. The current Custodian complied with the Council’s Order on August 5, 2014. Based on the foregoing, the Complainant can be considered a prevailing party entitled to an award of reasonable attorney’s fees because the WCPO was compelled to disclose two (2) of the records.

Therefore, pursuant to the ALJ’s June 13, 2014 Initial Decision and the Council’s July 29, 2014 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, in response to the June 13, 2014 Initial Decision and subsequent Interim Order, the WCPO disclosed two (2) records to the Complainant. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney’s fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney’s fees to object to the attorney’s fees requested. N.J.A.C. 5:105-2.13(d).**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The current Custodian complied with the Council’s July 30, 2014 Interim Order because he responded in the prescribed time frame providing to the Complainant (via Counsel) those records ordered to be disclosed by the Honorable Tahesha L. Way, Administrative Law Judge, and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Pursuant to the Honorable Tahesha L. Way’s, Administrative Law Judge, June 13, 2014 Initial Decision and the Council’s July 29, 2014 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, in response to the June 13, 2014 Initial Decision and subsequent Interim Order, the Warren County Prosecutor’s Office disclosed two (2) records to the

Complainant. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).**

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

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

September 23, 2014



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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INTERIM ORDER

July 30, 2014 Government Records Council Meeting

Christopher T. Tasiopoulos
Complainant

Complaint No. 2011-231

v.

Warren County Prosecutor's Office
Custodian of Record

At the July 29, 2014 public meeting, the Government Records Council ("Council") considered the July 22, 2014 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Therefore, because the Custodian Counsel's argument set forth in his exceptions is outweighed by the credible evidence adduced during the hearing at the Office of Administrative Law and Custodian's July 17, 2014 certification, and because the Complainant has failed to otherwise provide any legal basis for the GRC to reject the Honorable Tahesha L. Way's, Administrative Law Judge, findings, the Council should accept said decision ordering ". . . that the [Custodian] forthwith provide access to . . ." the e-mail and annexed accident report to which access was unlawfully denied and concluding that ". . . the Custodian did not act knowingly and willfully in view of the totality of circumstances . . ."
2. **The Custodian shall comply with item No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**
3. Because the Complainant retained an attorney after this complaint was referred to Office of Administrative Law, the Council must address the issue of prevailing party 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.

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

Interim Order Rendered by the
Government Records Council
On The 29th Day of July, 2014

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: July 30, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
July 29, 2014 Council Meeting**

**Christopher T. Tasiopoulos¹
Complainant**

GRC Complaint No. 2011-231

v.

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Custodian of Records**

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10. Any e-mails between the WCPO, Chief Guzzo and/or Chief Hager concerning Mr. Hill's DUI.³

Custodian of Record: Tara J. Kirkendall
Request Received by Custodian: June 27, 2011
Response Made by Custodian: July 1, 2011
GRC Complaint Received: July 6, 2011

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

² Represented by Joseph J. Bell, Esq., of The Bell Law Group, P.C. (Rockaway, NJ).

³ The Complainant requested additional records that are not at issue in the instant complaint.

Background

December 18, 2012 Council Meeting:

At its December 18, 2012 public meeting, the Council considered the October 23, 2012, 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:

[I]n order to fully develop the record with regard to the existence of a criminal and/or Internal Affairs investigation, the applicability of the advisory, consultative or deliberative materials exemption and the existence of records responsive to the Complainant's OPRA request Item Nos. 5 through 8, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. Also, the Office of Administrative Law should determine whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, if necessary.

Procedural History:

On December 19, 2012, the Council distributed its Interim Order to all parties. On May 3, 2013, the complaint was transmitted to the Office of Administrative Law ("OAL"). On June 13, 2014, the Honorable Tahesha L. Way, Administrative Law Judge ("ALJ"), issued an Initial Decision in this matter.⁴

Exceptions

On June 26, 2014, the Custodian's Counsel filed exceptions to the ALJ's decision contending that the WCPO took exception with the ALJ's decision with respect to (1) the accident investigation report; and (2) the extent the findings exceeded or fell outside the scope of the inquiry and review directed.

Regarding the accident report, Counsel excepted the ALJ's decision ordering disclosure of the accident report. Counsel noted that the ALJ stated that the WCPO never claimed the record was exempt, the report was already provided to the Complainant and that the WCPO offered him a copy. *See* FN 7. Counsel contended that the ALJ's decision was clearly erroneous because the report was never at issue in this complaint. Further, Counsel contended that the fact that the report was attached to an exhibit in WCPO's filings belies any confidentiality claim the WCPO would have and that the report is even available online for review. Counsel also noted that the Complainant and Complainant's Counsel reference the report in their OAL filings.

Regarding the scope of review, Counsel excepted the ALJ's decision to the extent that it fell outside the scope of the GRC's order to review "Item Nos. 5 through 8." Counsel contended that the GRC should not consider any factual findings outside the parameters of the OAL's

⁴ On July, 10, 2014, the GRC requested a five (5) day extension of the 45-day statutory period, or until August 2, 2014, to accept, reject or modify the ALJ's Initial Decision. Same was granted on July 15, 2014.

authority in order to remain in compliance with N.J.S.A. 52:14B-9(f). Counsel asserted that the OAL incorrectly assumed all records contained in the WCPO's document index were at issue, to include the interoffice e-mail the ALJ ordered to be disclosed. Counsel argued that this e-mail might have been responsive to item No. 9 and/or No. 10 and thus was not included by the GRC when ordering a fact-finding hearing on ". . . Item Nos. 5 through 8 . . ." Additionally, Counsel argued that it is actually unlikely that the e-mail was even responsive to either request item, which sought correspondence between two (2) specific individuals.

Analysis

Administrative Law Judge's Initial Decision

The ALJ's findings of fact are entitled to deference from the GRC because they are based upon the ALJ's determination of the credibility of the parties. "The reason for the rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses and, consequently, is better qualified to judge their credibility." In the Matter of the Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div. 1989), *certif. denied* 121 N.J. 615 (1990). The Appellate Division affirmed this principle, underscoring that, "under existing law, the [reviewing agency] must recognize and give due weight to the ALJ's unique position and ability to make demeanor-based judgments." Whasun Lee v. Bd. of Educ. of the Twp. of Holmdel, Docket No. A-5978-98T2 (App. Div. 2000), slip op. at 14. "When such a record, involving lay witnesses, can support more than one factual finding, it is the ALJ's credibility findings that control, unless they are arbitrary or not based on sufficient credible evidence in the record as a whole." Cavalieri v. Bd. of Tr. of Pub. Emp. Ret. Sys., 368 N.J. Super. 527, 537 (App. Div. 2004).

The ultimate determination of the agency and the ALJ's recommendations must be accompanied by basic findings of fact sufficient to support them. State, Dep't of Health v. Tegnazian, 194 N.J. Super. 435, 442-43 (App. Div. 1984). The purpose of such findings "is to enable a reviewing court to conduct an intelligent review of the administrative decision and determine if the facts upon which the order is grounded afford a reasonable basis therefor." Id. at 443. Additionally, the sufficiency of evidence "must take into account whatever in the record fairly detracts from its weight"; the test is not for the courts to read only one side of the case and, if they find any evidence there, the action is to be sustained and the record to the contrary is to be ignored (citation omitted). St. Vincent's Hosp. v. Finley, 154 N.J. Super. 24, 31 (App. Div. 1977).

The ALJ's June 13, 2014 Initial Decision, set forth in full as "Exhibit A", concluded that:

I **CONCLUDE** that a civil penalty should not be assessed, because the Custodian did not act knowingly and willfully in view of the totality of circumstances . . . The record does not reflect a delay in response to [the Complainant], as [the Custodian] contacted the detectives to request access to the file within a reasonable amount of time. Even the denial of the accident report is not knowingly and willful because it is uncontroverted that it was provided to [the

Complainant] and offered by the [Warren County Prosecutor's Office]. Therefore, the refusals, albeit improper, were not deliberate.

...

It is hereby **ORDERED** that the [Custodian] improperly denied [the Complainant] access to the email between Borkowski and Barto, and the accident report. It is hereby **ORDERED** that the [Custodian] forthwith provide access to these records.

The Custodian's Counsel submitted exceptions arguing that (1) the accident report required to be disclosed was not at issue in this complaint; and (2) that the ALJ exceeded her scope of review as dictated by the GRC in its Interim Order.

The GRC rejects Counsel's first exception. Although it is true that the Complainant did not state that the report was at issue, it was an attachment to one of the records to which the Custodian initially denied access. The ALJ's footnote that the WCPO never "claimed it was exempt" and that they offered it serves to illustrate this conflict. The GRC has determined that attachments not otherwise exempt from disclosure must be provided pursuant to an OPRA request. *See Lewen v. Robbinsville Public Sch. Dist. (Mercer)*, GRC Complaint No. 2008-211 (Interim Order dated December 22, 2009) at 11. The ALJ's decision ordering disclosure of the attached report comports with this longstanding policy that attachments to a record sought must be provided if no exemptions apply.

The GRC further rejects that the ALJ exceeded the scope of review put in place by the Council. Specifically, while the Order refers to request item Nos. 5 through 8, this was not the only issue the GRC presented to the OAL for consideration. The evidence in the Order is clear that there were other issues to be resolved. All issues are explained definitively in the Order. *Id.* at 14-16. These issues include the question the intra-agency and inter-agency advisory, consultative or deliberative and criminal investigatory exemptions and their applicability to the records identified as responsive in the Statement of Information. *Id.* at 14. Further, the GRC asked the OAL to develop the record as to the existence of a criminal or Internal Affairs investigation. Thus, the ALJ did not exceed the scope of the GRC's Order.

Therefore, because the Custodian Counsel's argument set forth in his exceptions is outweighed by the credible evidence adduced during the hearing at OAL, and because the Complainant has failed to otherwise provide any legal basis for the GRC to reject the Honorable Tahesha L. Way's, ALJ, findings, the Council should accept said decision ordering ". . . that the [Custodian] forthwith provide access to . . ." the e-mail and annexed accident report to which access was unlawfully denied and concluding that ". . . the Custodian did not act knowingly and willfully in view of the totality of circumstances . . ."

Prevailing Party Attorney's Fees

Because the Complainant retained an attorney after this complaint was referred to OAL, the Council must address the issue of prevailing party 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. Therefore, because the Custodian Counsel's argument set forth in his exceptions is outweighed by the credible evidence adduced during the hearing at the Office of Administrative Law and Custodian's July 17, 2014 certification, and because the Complainant has failed to otherwise provide any legal basis for the GRC to reject the Honorable Tahesha L. Way's, Administrative Law Judge, findings, the Council should accept said decision ordering ". . . that the [Custodian] forthwith provide access to . . ." the e-mail and annexed accident report to which access was unlawfully denied and concluding that ". . . the Custodian did not act knowingly and willfully in view of the totality of circumstances . . ."
2. **The Custodian shall comply with item No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁵ to the Executive Director.⁶**
3. Because the Complainant retained an attorney after this complaint was referred to Office of Administrative Law, the Council must address the issue of prevailing party 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.

Prepared By: Frank F. Caruso
Senior Case Manager

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

July 22, 2014

⁵ "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."

⁶ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

December 18, 2012 Government Records Council Meeting

Christopher T. Tasiopoulos
Complainant

Complaint No. 2011-231

v.

Warren County Prosecutor's Office
Custodian of Record

At the December 18, 2012 public meeting, the Government Records Council ("Council") considered the October 23, 2012 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 in order to fully develop the record with regard to the existence of a criminal and/or Internal Affairs investigation, the applicability of the advisory, consultative or deliberative materials exemption and the existence of records responsive to the Complainant's OPRA request Item Nos. 5 through 8, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. Also, the Office of Administrative Law should determine whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, if necessary.

Interim Order Rendered by the
Government Records Council
On The 18th Day of December, 2012

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 19, 2012



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 18, 2012 Council Meeting**

**Christopher T. Tasiopoulos¹
Complainant**

GRC Complaint No. 2011-231

v.

**Warren County Prosecutor's Office²
Custodian of Records**

Records Relevant to Complaint: Copies of:

1. Any complaints received by the Warren County Prosecutor's Office ("WCPO") regarding Mr. Alan Hill's ("Mr. Hill") motor vehicle accident/driving under the influence arrest ("DUI") on January 14, 2006 (Greenwich Township Police Department ("GTPD") case No. 2006-0222).
2. Any complaints forwarded to the WCPO by the GTPD or Chief Richard Guzzo ("Chief Guzzo") regarding Mr. Hill's DUI.
3. All statements, subpoenas, lab reports, Miranda cards and charges forwarded to the WCPO by the GTPD or Chief Guzzo regarding Mr. Hill's DUI.
4. Any and all statements taken by the WCPO regarding Mr. Hill's DUI.
5. All subpoenas for blood that were made to any hospital regarding Mr. Hill's blood.
6. Any lab reports relating to Mr. Hill's blood.
7. Miranda card signed by Mr. Hill in regards to his DUI.
8. Any statements made by Mr. Hill regarding his DUI.
9. All memoranda and/or correspondence between the WCPO, Chief Guzzo and/or Chief Paul Hager ("Chief Hager"), Pohatcong Police Department, concerning Mr. Hill's DUI.
10. Any e-mails between the WCPO, Chief Guzzo and/or Chief Hager concerning Mr. Hill's DUI.³

Request Made: June 24, 2011

Response Made: July 1, 2011

Custodian: Tara J. Kirkendall

GRC Complaint Filed: July 6, 2011⁴

¹ No legal representation listed on record.

² Represented by Joseph J. Bell, Esq., of The Bell Law Group, P.C. (Rockaway, NJ).

³ The Complainant requested additional records that are not at issue in the instant complaint.

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

Background

June 24, 2011

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

July 1, 2011

Custodian's response to the OPRA request. The Custodian responds in writing via letter to the Complainant's OPRA request on the fourth (4th) business day following receipt of such request.⁵ The Custodian states that the WCPO received the Complainant's OPRA request on June 24, 2011. The Custodian states that same was forwarded to her for a response.

The Custodian states that pursuant to previous communications between the WCPO and the Complainant, most of the responsive records are exempt from disclosure as criminal investigatory records or intra-agency and inter-agency advisory, consultative or deliberative ("ACD") material pursuant to N.J.S.A. 47:1A-1.1.

The Custodian states that regarding OPRA request Item Nos. 1 and 2, she is providing access to a copy of a summons issued to Mr. Hill. The Custodian states that regarding OPRA request Item Nos. 3 through 8, if said records exist, they would be exempt from disclosure as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1. The Custodian states that regarding OPRA request Item Nos. 9 and 10, if said records exist, they would be exempt from disclosure as ACD material pursuant to N.J.S.A. 47:1A-1.1.

The Custodian states that the Complainant may wish to explore of avenues of requesting records, such as the common law right of access.

July 6, 2011

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

- OPRA request dated February 10, 2011.⁶
- Letter from the Custodian to the Complainant dated February 24, 2011.
- E-mail from the Complainant to the Custodian dated February 28, 2011.
- Letter from the Custodian to the Complainant dated February 28, 2011.
- Complainant's OPRA request dated June 24, 2011.
- Letter from the Custodian to the Complainant dated July 1, 2011.

The Complainant states that the impetus for this complaint began with an OPRA request he submitted to the WCPO on February 10, 2011. The Complainant states that the

⁵ The Custodian certifies in the SOI that she received the Complainant's OPRA request on June 27, 2011.

⁶ The GRC notes that the Complainant did not include this OPRA request in his complaint. Thus, it appears as though he attached the OPRA request and subsequent correspondence as background information leading up to the submission of his June 24, 2011 OPRA request, which is at issue herein.

Custodian responded on February 24, 2011 denying access to the records sought because the contents of the investigation of Mr. Hill's DUI arrest were criminal investigatory in nature pursuant to N.J.S.A. 47:1A-1.1. The Complainant states that the Custodian further stated that the Complainant's OPRA request was invalid pursuant to Bent v. Township of Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005). The Complainant states that on February 28, 2011, he sought clarification regarding whether Mr. Hill committed a criminal act. The Complainant states that he received a response from the Custodian dated February 28, 2011 on March 1, 2011 stating that while no criminal charges were filed, this fact does not preclude the records from being criminal investigatory in nature.

The Complainant states that after reviewing Bent, *supra*, he submitted the OPRA request at issue herein to the Custodian on June 24, 2011. The Complainant states that the Custodian responded in writing on July 1, 2011 again denying access to a majority of the OPRA request. The Complainant states that the Custodian cited to the criminal investigatory and ACD exemptions contained in N.J.S.A. 47:1A-1.1.

The Complainant asserts that in Bent, *supra*, the records sought were clearly criminal investigatory records; thus, that case is inapposite to the Complainant's OPRA request. The Complainant asserts that the Council's holding in Blue v. Wall Township Police Department, GRC Complaint No. 2002-47 (August 2003) is relevant to this complaint. The Complainant states that in Blue, the complainant sought police records, operations reports, supplemental reports, arrest reports, summons and a Blood Alcohol Concentration ("BAC") report regarding the arrest of Mr. Robert E. Sammon on February 20, 2002. The Complainant states that the Council held that:

"... police department records requested here, which relate solely to Title 39 Motor Vehicle violations neither punishable as crimes nor related to a pending criminal investigation, are not criminal investigatory records under OPRA. Thus, in this case, police reports related to the [DUI] incident at issue implicate none of the exceptions under OPRA, and therefore, subject to any appropriate OPRA based redactions such as social security number, driver's license number, etc., should be released."
Id.

The Complainant states that the Council further held that "... a Title 39 motor vehicle offense such as [a DUI] was not a 'crime' and that, therefore, [a] police investigation of such offenses was accessible under OPRA and not a 'criminal investigatory record' exempt from access pursuant to N.J.S.A. 47:1A-1.1." *Id.* The Complainant states that the Council thus ordered disclosure of all requested records related to any non-criminal arrest to be provided to the complainant with redactions where necessary.

The Complainant asserts that the OPRA request at issue in Blue, *supra*, is nearly identical to the OPRA request at issue herein. The Complainant asserts that he requested records relating to the investigation of a motor vehicle accident and DUI by the WCPO indicated by the accident report that Chief Guzzo provided to him pursuant to a previous OPRA request to the GTPD. The Complainant further asserts that Chief Guzzo advised the Complainant and testified during a departmental hearing that the WCPO conducted a

confidential investigation as to allegation of Mr. Hill's DUI but gave no indication that Mr. Hill committed any crime or was investigated for such.

The Complainant contends that none of the records sought fall within the criminal investigatory exemption; rather, his OPRA request was specific in nature and sought records relating to Mr. Hill's motor vehicle accident and DUI. The Complainant asserts that the Custodian has unlawfully denied him access to the responsive records. The Complainant requests that the GRC review this complaint and render a decision consistent with OPRA and past case law.

The Complainant does not agree to mediate this complaint.

July 29, 2011

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

August 4, 2011

Custodian's SOI with the following attachments:⁷

- Complainant's OPRA request dated February 10, 2011.
- Letter from the Custodian to the Complainant dated February 24, 2011.
- E-mail from the Complainant to the Custodian dated February 28, 2011.
- Letter from the Custodian to the Complainant dated February 28, 2011.
- Complainant's OPRA request dated June 24, 2011.
- Letter from the Custodian to the Complainant dated July 1, 2011.
 - Summons dated January 14, 2006.

The Custodian certifies that her search for the requested records included sending a request to the Internal Affairs ("IA") Division for the internal file created by the Major Crimes Unit. The Custodian certifies that the file was held by the Chief of Detectives, who is in charge of maintaining IA files. The Custodian certifies that access to these files are restricted and kept in a separate and secure location. The Custodian certifies that upon receipt of the file, she reviewed same.

The Custodian also certifies that she is not aware whether any records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services.

The Custodian certifies that she received the Complainant's OPRA request on June 27, 2011. The Custodian certifies that she responded in writing to the Complainant's OPRA request on July 1, 2011 denying access to a majority of the responsive records as follows:

⁷ The Custodian attached additional records that are not issue in the instant complaint.

List of Responsive Records	Records Retention Schedule	Records Provided	General Nature Description of Records	Legal Explanation
Summons dated January 14, 2006 (1 page)	5 years after case file closed if no indictment or prosecution	Provided July 1, 2011.	N/A	N/A
IA Summary report forms for 2004 through 2010 (6 pages).	See above.	Provided July 1, 2011.	N/A	N/A
Correspondence from the WCPO to GTPD (1 page).	See above.	No.	Inter-agency memo from the WCPO to GTPD regarding the investigation conducted by the WCPO	This record is exempt as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> . The record is further exempt because it pertains to a criminal investigation pursuant to <u>N.J.S.A. 47:1A-1</u> , is not required to be made, and is considered confidential under the IA Investigation Guidelines issued by the Attorney General (“AG”).
WCPO supplemental report from Major Crimes Unit (1 page).	See above.	No.	Inter-agency report detailing the status and particulars of a criminal investigation conducted by the WCPO.	This record is exempt as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> . The record is further exempt because it pertains to a criminal investigation pursuant to <u>N.J.S.A. 47:1A-1</u> . is not required to be made, and is considered confidential under the IA Investigation Guidelines issued by the AG.
New Jersey Police Crash		No.	Standardized accident	The WCPO believes that GTPD already provided

Investigation report (2 pages).			investigation report	this record to the Complainant as memorialized in a February 28, 2011 e-mail from the Complainant to the GTPD. Accordingly, the Custodian never claimed that access to this record was denied and offered same to the Complainant if he was not in possession of same. Because the Complainant has not claimed that he was, in fact seeking this report, the Custodian believes that the Complainant has not included this record as at issue in the instant complaint.
Warren County Serious Collision Analysis and Response Team report (1 page).	See above.	No.	Standardized accident investigation diagram.	The Custodian believes that this record was already provided to the Complainant and is thus not at issue herein.
WCPO Major Crimes Unit Investigation report (5 pages).	See above.	No.	Inter-agency investigatory report.	This record is exempt as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> . The record is further exempt because it pertains to a criminal investigation pursuant to <u>N.J.S.A. 47:1A-1.</u> , is not required to be made, and is considered confidential under the IA Investigation Guidelines issued by the AG.
WCPO Major Crime Unit Statement of Mr. Liaqat Chaudhary (“Mr. Chaudhary”) (14	See above.	No.	Transcript of taped statement of Mr. Chaudhary.	The record is exempt because it pertains to a criminal investigation pursuant to <u>N.J.S.A. 47:1A-1</u> . The record is further exempt from

pages).				disclosure under the AG's Guidelines pertaining to internal investigations.
GTPD confidential supplementary report (2 pages).	See above.	No.	Inter-agency confidential supplementary report draft by Chief Guzzo pertaining to the investigation.	The record is exempt because it pertains to a criminal investigation pursuant to <u>N.J.S.A. 47:1A-1</u> . The record is further exempt from disclosure under the AG's Guidelines pertaining to internal investigations.
GTPD complaint report (4 pages).	See above.	No.	Inter-agency criminal investigatory report drafted by the GTPD.	The record is exempt because it pertains to a criminal investigation pursuant to <u>N.J.S.A. 47:1A-1</u> . The record is further exempt from disclosure under the AG's Guidelines pertaining to internal investigations.
E-mail between First Assistant Prosecutor Angela Borkowski and Assistant Prosecutor Craig Barto (1 page).	See above.	No.	Inter-agency memo pertaining to investigation.	The record discusses aspects of the criminal investigation and is thus confidential under the IA Investigation Guidelines issued by the AG pursuant to <u>N.J.S.A. 47:1A-1</u> . The record also contains ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
Anonymous correspondence pertaining to investigation (8 pages).	See above.	No.	Anonymous correspondence submitted pertaining to the criminal investigation.	The record is exempt because it pertains to a criminal investigation pursuant to <u>N.J.S.A. 47:1A-1</u> . The record is further exempt from disclosure under the AG's Guidelines pertaining to internal investigations.

WCPO material (3 pages).	ACD (3)	See above.	No.	Inter-agency memos that include attorney-work product, impressions, thought, criminal investigation related research, thoughts, notes, investigation updates and statuses.	These records are exempt as attorney-work product created by the WCPO discussing specific investigatory methods, legal impressions and thoughts of a pending criminal investigation. The records are also exempt because they pertain to a criminal investigation pursuant to <u>N.J.S.A. 47:1A-1</u> . The records are further exempt from disclosure under the AG's Guidelines pertaining to internal investigations.
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The Custodian's Counsel submits a letter brief recapitulating the facts leading up to the date of receipt of the Complainant's OPRA request at issue herein. Counsel states that at that time, the Custodian advised the Complainant that a majority of the records sought are criminal investigatory and ACD in nature and that other portions of the Complainant's earlier OPRA request were overly broad. Counsel states that in subsequent correspondence with the Complainant, the Custodian advised that regardless of whether charges were brought against Mr. Hill does not preclude the records from being considered criminal-investigatory in nature.

Counsel states that in response to the Complainant's OPRA request at issue herein, the Custodian restated that the responsive records were exempt as criminal-investigatory and ACD in nature. Counsel states that the Custodian did provide access to a copy of the summons issued to Mr. Chaudary and IA summary forms for the years 2004 through 2010.

Counsel states that OPRA defines a government record as "any ... document ... made, maintained or kept on file ... or that has been received in the course of ... official business ... these terms shall not include [ACD] material." N.J.S.A. 47:1A-1.1. Counsel further states that OPRA exempts from disclosure "criminal investigatory records ... 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." *Id.* Counsel contends that the records identified in the document index are exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1. because they were created and maintained in accordance with the AG's Guidelines governing IA investigations. Counsel further contends that some of the records are also ACD material.

Counsel states that the Complainant contends that he is seeking records in connection with Mr. Hill's motor vehicle accident and DUI in violation of N.J.S.A. 39:4-

50. Counsel states that the Complainant further claims that there was no indication that a crime was committed or investigated in the matter. Counsel asserts that the Complainant's claims are misleading and disingenuous. Counsel asserts that the WCPO is not required to immediately announce that it is conducting a criminal investigation: the law clearly recognizes the confidentiality of an investigation. Counsel thus asserts that this is why the Complainant had no indication of a criminal investigation.

Counsel contends that the Complainant also omitted the fact that Mr. Hill is a police officer and that the matter involved allegations of a DUI and his involvement in a serious motor vehicle accident, which would explain why the investigation was handled by the WCPO. Counsel contends that whether an investigation conducted into a potential DUI can be characterized as a criminal investigation for purposes of N.J.S.A. 47:1A-1.1 is not relevant. Counsel argues that the nature and circumstances of the accident justify a criminal investigation into the potential suspicious causes of same. Counsel further argues that when a police officer is involved in a crash wherein there are allegations of a DUI, there are numerous justifications for conducting a criminal and IA investigation.⁸ Counsel further notes that the AG's Guidelines require an IA investigation whenever a police officer is involved in a motor vehicle accident and there is suspicion of DUI involvement.

Counsel argues that it is further clear that the AG's Guidelines required the WCPO to conduct a confidential IA investigation. Counsel states that the AG's policy on IA investigations is set forth in the AG's IA Policy and Procedures, which are binding pursuant to N.J.S.A. 40A:14-181. See O'Shea v. Township of West Milford, 410 N.J. Super. 371, 384 (App. Div. 2009). Counsel states that the guidelines require that "... all serious complaints shall be forwarded to the [IA] unit. This includes complaints of criminal activity, excessive force, improper or unjust arrest, improper entry, improper or unjustified search, differential treatment, serious rule infractions, and repeated minor rule infractions." *Id.* at 11-22. Counsel states that the guidelines further require that:

"The nature and source of internal allegations, the progress of internal affairs investigations, and the resulting materials are confidential information. The contents of the internal investigation case files shall be retained in the internal affairs unit and clearly marked as confidential. The information and records of an internal investigation shall only be released under the following limited circumstances:

- In the event that administrative charges have been brought against an officer, and a hearing will be held, a copy of those internal investigation reports to be used as evidence in the administrative hearing shall be provided to the officer.
- In the event that the subject officer, agency or governing jurisdiction has been named as a defendant in a lawsuit arising out of the specific incident covered by an internal investigation, a copy of the internal

⁸ Counsel notes that any allegations of favoritism, destruction of covering up of evidence or witness intimidation by the responding officers can elicit serious criminal charges.

investigation reports may be released to the attorney representing the subject officer, agency or jurisdiction.

- Upon the request or at the direction of the county prosecutor or Attorney General.
- Upon a court order.” *Id.* at 11-46.

Counsel states that in O’Shea, *supra*, the Appellate Division determined that use of force (“UFR”) report requirements set forth in the AG’s Guidelines had the force of law. *Id.* at 384. Counsel states that the Court reasoned that:

“[a]lthough we have held that AG guidelines might not impose mandatory requirements in particular circumstances, see McElwee v. Borough of Fieldsboro, 400 N.J. Super. 388, 947 A.2d 681 (App. Div. 2008), the quality, character and underlying policies of those bearing upon UFRs lead us to reach a conclusion that they are mandatory for all law enforcement agencies subject to the AG’s supervision. There can be no question that they have the force of law in respect of the duties of law enforcement agencies to conform to the requirements regarding the use of force and accountability for it.” *Id.* at 466-467.

Counsel states that although the Court determined that UFR reports are subject to disclosure under OPRA, these records were distinguished from IA investigation reports that the AG has declared are not subject to disclosure under OPRA. Counsel states that the Court reasoned that UFR reports do not share the same qualities as other IA reports considered confidential by the New Jersey State Police. Counsel states that the Court ordered disclosure of UFR reports because there was no express provision exempting same from access under OPRA:

“[w]ithout a particularized inclusionary provision in the AG’s IA Guidelines, we decline to regard UFRs as internal affairs documents. The section of the AG’s IA Guidelines titled ‘Confidentiality’ declares that ‘[t]he nature and source of internal allegations, the progress of internal affairs investigations, and the resulting materials are confidential information’ and ‘shall only be released under ... limited circumstances.’ IA Guidelines, at 11-46.” *Id.* at 385.

Counsel contends that the records at issue herein are expressly exempt and not subject to disclosure. Counsel further contends that it is also evident that the records were created in furtherance of a criminal investigation and are considered ACD material.

Counsel contends that it is important to keep confidential investigations similar to the one conducted by the WCPO for several reasons. Counsel asserts that investigations require some secrecy to facilitate and preserve the integrity of the investigation itself. Counsel asserts that confidentiality also protects the reputation of potentially innocent targets and/or informants or witnesses who provided information in good faith.

Counsel argues that the Complainant’s reliance on Blue, *supra*, is misplaced because the GRC there pointed out that the records related solely to a Title 39 vehicle

violation neither punishable as a crime nor relating to a pending criminal investigation; thus they were not “criminal investigatory records” exempt from access under OPRA. *See Paff v. Borough of Garwood*, Docket No. UNN-L-1089-10 (Law Div. 2010). Counsel states that in determining that the records at issue in *Blue*, *supra*, were disclosable, the GRC stated that:

“[i]t must be noted that in the few cases where the Legislature has stated that a Title 39 violation is punishable as a crime, records related to such charge would fall within the criminal investigatory records exemption. A similar result would apply where the Title 39 charge is connected with a criminal investigation or prosecution, such as a fatal motor vehicle accident. However, neither of these situations is presented here.” *Id.*

Counsel contends that here, the records sought clearly are not related solely to a Title 39 motor vehicle offense. Counsel contends that the records at issue are part of a criminal and IA investigation; thus, the Council’s holding in *Blue*, *supra*, actually supports the Custodian’s denial of access.

August 5, 2011

E-mail from the Complainant to the GRC. The Complainant states that he is in receipt of the SOI and wants to know if he needs to respond to same.

August 5, 2011

E-mail from the GRC to the Complainant. The GRC states that its regulations at *N.J.A.C. 5:105-2* set forth the complaint process, including which submissions a party must provide. The GRC states that although *N.J.A.C. 5:105-2* does not expressly afford for additional submissions and is silent as to whether any additional submissions are prohibited, as a matter of practice the GRC will, in its sole discretion, consider additional submissions which provide new information or evidence that was not available at the time of the Complainant’s Denial of Access Complaint.

The GRC thus states that if the Complainant wishes to submit additional correspondence that provides new information or proof such as evidence or a certification, he may do so at this time.

August 29, 2011

E-mail from the Complainant to the GRC. The Complainant states that he received the Custodian’s SOI on August 4, 2011 and contends that the Custodian Counsel’s arguments regarding the responsive records are misleading. The Complainant states that Counsel correctly asserted that the WCPO is not required to announce that it is conducting a criminal investigation under most circumstances. The Complainant asserts that Mr. Hill’s situation differs in that no criminal act was ever committed or even alleged. The Complainant further argues that although the confidentiality of a criminal investigation is essential to not alerting the subject of said investigation, motor vehicle accidents that include a suspicion of DUI cannot be clandestine because they are conducted after the event. The Complainant further notes that the Custodian’s Counsel omitted the fact that investigations of DUIs do not fall under the WCPO, as well as most motor vehicle accidents unless death or serious injury has occurred.

The Complainant further argues that the Custodian's Counsel implied that the WCPO was conducting an IA investigation against Mr. Hill. The Complainant asserts that Counsel failed to state that IA functions are the responsibility of the subject officer's agency pursuant to the AG's Guidelines and N.J.S.A. 40A:14-181. The Complainant asserts that the WCPO would only become involved if an agency discovered that a crime was committed during the course of an investigation and referred same to the WCPO. The Complainant asserts that no crime was committed or alleged and Mr. Hill was never charged with any violations of law; thus, the WCPO's involvement in the matter was improper. The Complainant further argues that Counsel's implication that the investigation was properly handled by the WCPO because Mr. Hill's superior officers might show favoritism is erroneous. The Complainant contends that by this standard, all IA investigations would be handled by the WCPO.

The Complainant states that he has reviewed the document index in the SOI and determined that it failed to address his OPRA request Item Nos. 5, 6 and 7. The Complainant further notes that his OPRA request Item No. 8 is only noted as "Transcript of taped statement of [Mr. Chaudhary]" is not responsive because he sought Mr. Hill's statement.

The Complainant further contends that the SOI was apparently prepared in an attempt to mask the true nature of the complaint. The Complainant states that his OPRA request sought records in connection with Mr. Hill's motor vehicle accident and DUI while off duty. The Complainant states that his request does not seek records pertaining to a possible IA investigation as represented by the Custodian and Counsel. The Complainant states that in the SOI, Counsel argues that Paff, supra, is applicable to the instant complaint. The Complainant notes that in Paff, supra, the record at issue pertained to an officer breaking into a municipal employee's office and desk, which would clearly initiate a criminal investigation. The Complainant further asserts that Counsel's comparison of that case to this one is erroneous because the Court ordered disclosure of that record.

The Complainant further states that Counsel noted that in Blue, supra, the GRC distinguished records relating solely to a DUI and those that may be accompanied by a criminal investigation. The Complainant argues that the former applies here because Mr. Hill was not involved in a fatal accident and no crime was committed. The Complainant states that pursuant to Blue, supra, a DUI is not a criminal offense and thus the records at issue herein should be disclosed.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ... A government record *shall not include* the following information which is deemed to be confidential ... *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 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 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.

Moreover, N.J.S.A. 40A:14-181 provides that:

“[e]very law enforcement agency shall adopt and implement guidelines which shall be consistent with the guidelines governing the "Internal Affairs Policy and Procedures" of the Police Management Manual promulgated by the Police Bureau of the Division of Criminal Justice in the Department of Law and Public Safety, and shall be consistent with any tenure or civil service laws, and shall not supersede any existing contractual agreements.” *Id.*

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.

The Complainant herein sought records relating to an accident and DUI of an off-duty police officer on January 14, 2006. The Custodian responded in a timely manner denying access to the responsive records as ACD, criminal investigatory records and IA investigations pursuant to OPRA and the AG's Guidelines. The Complainant subsequently filed the instant denial of access complaint arguing that the records at issue should be disclosed pursuant to the Council's decision in Blue, *supra*.

In the SOI, the Custodian argued that ten (10) records were exempt from disclosure as criminal-investigatory records, ACD material and or exempt under the AG's Guidelines pertaining to IA investigations. The Custodian's Counsel submitted a letter brief in which he argued that the fact that Mr. Hill is a police officer: a criminal and IA investigation is justified when police officers are involved in accidents and there is an allegation of a DUI. Counsel argued that the AG's guidelines required the WCPO to conduct an investigation and that the Guidelines further protect these records from disclosure except in limited circumstances, none of which exist in this complaint. Counsel further argued that the Appellate Division distinguished IA investigation reports from UFR reports in O'Shea, *supra*, in that records similar to those at issue herein are expressly exempt from access.

Counsel also disputed the Complainant's claim that the Council's holding in Blue applied to the instant complaint. Counsel asserted that the records at issue in Blue dealt only with a DUI. Counsel stated that the Council noted that there may be instances where DUI records could be connected with a criminal investigation and could be exempt for the same reasons. Counsel contended that here, the records were not solely related to a DUI and fall within the excepted view presented by the Council in Blue, *supra*.

The Complainant submitted an e-mail to the GRC on August 29, 2011 refuting the SOI. Specifically, the Complainant argued that no criminal act was ever committed or alleged in connection with Mr. Hill's DUI. The Complainant further contended that DUI investigations are not referred to the WCPO unless death or serious injury has occurred. The Complainant further argued that Counsel erred by not stating that IA investigations are the responsibility of the subject officer's agency pursuant to the AG's Guidelines and N.J.S.A. 40A:14-181. The Complainant contended that the Custodian failed to address his OPRA request Item Nos. 5, 6 and 7 and further provided the wrong record responsive to request Item No. 8. The Complainant finally argued that the Council's holding in Blue, *supra*, does apply because Mr. Hill was not involved in a fatal accident and no crime was committed.

At issue in this complaint is whether the records requested by the Complainant are part of a DUI or whether the records at issue were created in the course of a criminal and IA investigation. Further, there is an issue as to whether certain records are exempt from disclosure as ACD material and whether certain records responsive to the Complainant's OPRA request Item Nos. 5 through 8 exist. The GRC notes that N.J.S.A. 47:1A-6 places the burden of proving a lawful denial of access on the Custodian.

Regarding the criminal-investigatory exemption, the Council's holding in Blue, *supra*, clearly supports that records related solely to a DUI violation "... neither punishable as crimes nor related to a pending criminal investigation, are not criminal investigatory records under OPRA." *Id.* However, the Council therein reasoned that it could be possible that a criminal-investigatory exemption "... would apply where the Title 39 charge is connected with a criminal investigation or prosecution, such as a fatal motor vehicle accident." *Id.* The Custodian's Counsel took this stance in first asserting that the records are exempt from disclosure in this matter because they related to a criminal investigation. The Complainant refuted this allegation in his August 29, 2011 letter to the Council.

Ultimately, the Custodian bears the burden of proving that the responsive records meet the statutory two-prong test: that the records were not required to be made, maintained or kept on file *and* that the records pertained to a criminal investigation or related civil enforcement proceeding. *See O'Shea*, *supra*, at 380. Further, the GRC cannot accept an assertion that a record is criminal investigatory in nature in "the absence of a factual showing that [the records] pertained to an actual criminal investigation or to an existing related civil enforcement proceeding..." *Id.* at 385. This is especially true in this complaint because there is a question as to whether or not the records pertain to more than just a DUI violation. Here, the Custodian and Counsel simply asserted that the records were part of an investigation but provided no further factual detail to support this argument. Thus, the GRC is unable to determine whether the records at issue meet the criterion for exemption from disclosure.

Regarding the possibility of an IA investigation, the Custodian's Counsel noted that the O'Shea Court distinguished UFR reports from other IA investigation records.⁹ In his August 29, 2011 e-mail, the Complainant did not disagree that IA investigations are afforded a certain level of confidentiality; however, the Complainant argued that he did not request records regarding an IA investigation. The Complainant further argued that the WCPO's involvement in Mr. Hill's matter was improper because no criminal act was ever alleged and Mr. Hill was never charged.

As was the case above, the Custodian and Counsel in the matter herein provided to the GRC a blanket assertion that the records were part of an IA investigation with no further detail. The document index provided as part of the SOI notes generally that some of the records pertain to an IA investigation. Although the GRC acknowledges that the IA Guidelines allow for an exemption of IA investigation records except in limited circumstances not present herein, the GRC cannot make a determination as to whether an actual IA investigation took place in the absent of a more detailed explanation from the WCPO.

Regarding the ACD exemption, the Custodian and Counsel have also failed to provide the GRC with enough information to make a valid determination regarding the

⁹ The Custodian's Counsel also cited to Paff v. Borough of Garwood, Docket No. UNN-L-1089-10 (Law Div. 2010); however, that complaint did not deal with records that were part of a DUI. The record at issue in Paff was a surveillance video that captured a police officer in uniform trespassing in the Borough offices. Thus, the GRC declines to apply that case herein.

applicability of the exemption asserted to the records. As recently noted in Hyman v. City of Jersey City, Docket No. A-0789-10T4 (App. Div., August 27, 2012):

“... the GRC must require that the custodian do more than submit a conclusory recitation of the particular exception raised (*citing Paff v. NJ. Dep’t of Labor*, 379 N.J. Super. 346, 353 (App. Div. 2005)). In other words, it is not enough for the custodian to merely state that the record is exempt because of an asserted privilege or exception. Rather, accompanying the privilege or exception category must be an explanation, which is sufficient, without revealing information itself privileged or protected, to ‘enable other parties to assess the applicability of the privilege or protection.’ *Id.* at 354 (quoting [New Jersey Court Rule] 4:10-2(e))” *Id.* at pg. 9-10.

The Custodian’s document index contains brief descriptions of the records that the Custodian asserts to be exempt from disclosure as ACD material; however, the GRC is unable to determine whether the exemption applies to such records due to the brevity of the Custodian’s explanation. The GRC’s normal practice is to order the records for an *in camera* review to make a determination as to the validity of the asserted ACD exemption. However, given the significant questions of whether a criminal or IA investigation actually took place, there is insufficient information in the record for the GRC to make an appropriate determination as to the application of those exemptions, as well as the applicability of the asserted ACD exemption.

The Complainant further asserts that the Custodian failed to address in the SOI the Complainant’s request Item Nos. 5, 6 and 7 and further identified a nonresponsive record for his OPRA request Item No. 8. A review of the SOI and the document index supports this assertion. The document index does not identify any lab reports or blood tests as responsive and further the Custodian did not certify that records responsive to these items exist. Additionally, the Custodian did not identify any statements from Mr. Hill as responsive: the Custodian did identify a statement from Mr. Chaudhary.¹⁰ Thus, it is unclear whether the Custodian identified all records responsive in the SOI.

In short, the GRC has encountered significant questions of fact in the instant complaint that warrant further development before the Office of Administrative Law (“OAL”). The GRC is not convinced that there is sufficient information in the record to properly adjudicate this complaint.

Therefore, in order to fully develop the record with regard to the existence of a criminal and/or IA investigation, the applicability of the ACD exemption and the existence of records responsive to the Complainant’s OPRA request Item Nos. 5 through 8, this complaint should be referred to the OAL for a hearing to resolve the facts. Also, the OAL should determine whether the Custodian knowingly and willfully violated

¹⁰ The GRC notes that although the Complainant argued that this record was not responsive to his OPRA request Item No. 8, it is possible that the record is responsive to his OPRA request Item No. 4 seeking all statements taken by the WCPO in regard to Mr. Hill’s DUI.

OPRA and unreasonably denied access under the totality of the circumstances, if necessary.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that in order to fully develop the record with regard to the existence of a criminal and/or Internal Affairs investigation, the applicability of the advisory, consultative or deliberative materials exemption and the existence of records responsive to the Complainant's OPRA request Item Nos. 5 through 8, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. Also, the Office of Administrative Law should determine whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, if necessary.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

October 23, 2012¹¹

¹¹ This complaint was prepared and scheduled for adjudication at the Council's October 30, 2012 meeting; however, said meeting was cancelled due to Hurricane Sandy. Additionally, the Council's November 27, 2012 meeting was cancelled due to lack of quorum.