



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

July 31, 2012 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2012-87

v.

City of Bayonne (Hudson)
Custodian of Record

At the July 31, 2012 public meeting, the Government Records Council (“Council”) considered the July 24, 2012 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. Although the Custodian herein disclosed to the Complainant all records ordered for disclosure pursuant to the Council’s May 29, 2012 Order by making copies of the records available in the City Clerk’s office on May 28, 2012, the Custodian failed to fully comply with the Order because the Custodian failed to convert the records in order to provide them electronically via e-mail pursuant to N.J.S.A. 47:1A-5.d., Paff v. County of Camden, GRC Complaint No. 2009-25 (March 2011), and Wolosky v. Township of Frankford (Sussex), GRC Complaint No. 2008-254 (November 2009). However, the Council declines to order the Custodian to provide the requested records electronically because the Custodian certified to the GRC on July 20, 2012 that he disclosed to the Complainant the requested records by making the records available in hard-copy format on May 28, 2012 at the City Clerk’s office.
2. Although the Custodian failed to comply in a timely manner with the Council’s May 29, 2012 Interim Order by failing to submit a certified confirmation of compliance until the eleventh (11th) business day after the extended due date granted by the GRC for compliance with said Order, and although the Custodian failed to provide the requested records to the Complainant in the medium requested by the Complainant, the Custodian did certify that he made the requested records available to the Complainant. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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



Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 31st Day of July, 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: August 6, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
July 31, 2012 Council Meeting**

**Richard Rivera¹
Complainant**

GRC Complaint No. 2012-87

v.

**City of Bayonne (Hudson)²
Custodian of Records**

Records Relevant to Complaint: Copies of unredacted Bayonne Police Department use of force incident reports from January 1, 2011 to February 27, 2012.

Request Made: February 27, 2012

Response Made: March 6, 2012

Custodian: Robert F. Sloan

GRC Complaint Filed: March 23, 2012³

Background

May 29, 2012

At the May 29, 2012 public meeting, the Government Records Council (“Council”) considered the May 22, 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:

1. Because the Superior Court in O’Shea v. Township of West Milford, 410 N.J. Super. 371 (App. Div. 2009) found that use of force reports cannot be exempt from disclosure under OPRA as criminal investigatory records because they are required to be made, and because the Custodian failed to otherwise cite a valid legal basis for exempting the requested records from access, the Custodian failed to meet his burden of proving that denial of access to the requested records is authorized by law pursuant to N.J.S.A. 47:1A-6., and the Custodian shall therefore disclose to the Complainant copies of Bayonne Police Department use of force reports from January 1, 2011 to February 27, 2012 in unredacted form, except for the names of subjects not arrested on those cases where there was an arrest made or where charges were made.

¹ No legal representation listed on record.

² Represented by Edward Florio, Esq. (Hoboken, NJ); however, there are no submissions from the Custodian’s Counsel to the GRC on file.

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

2. **The Custodian shall comply with the terms of paragraph #2 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, to the Executive Director.**
3. 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.

May 30, 2012

Council's Interim Order ("Order") distributed to the parties.⁴

June 4, 2012

Custodian's certification. The Custodian certifies that he disclosed to the Complainant the Bayonne Police Department use of force reports from January 1, 2011 to November 18, 2011, by making the records available in hard-copy format on May 28, 2012 at the City Clerk's office.

June 29, 2012

E-mail from the GRC to the Custodian. The GRC informs the Custodian that he failed to certify that he disclosed the records that the Council ordered disclosed in its May 29, 2012 Interim Order. Specifically, the GRC informs the Custodian that the Council ordered disclosure of the Bayonne Police Department use of force reports from January 1, 2011 to February 27, 2012, but the Custodian certified that he disclosed to the Complainant the Bayonne Police Department use of force reports from January 1, 2011 to November 18, 2011. The GRC asks the Custodian to submit a certification responsive to the Council's Order. The GRC also requests the Custodian to respond back to the GRC within three (3) business days.

June 29, 2012

E-mail from the Custodian to the GRC. The Custodian informs the GRC that he will be traveling out of state for two (2) weeks and states that he is delegating the task of preparing and submitting the requested supplemental certification to Deputy Custodian Charles D'Amico.

June 29, 2012

E-mail from the GRC to the Custodian's Counsel. The GRC forwards the Custodian's e-mail dated June 29, 2012 to Counsel for review and asks Counsel to have the Deputy Custodian prepare and submit a certification of compliance for the records relevant to this complaint.

⁴ UPS Next Day Air® Proof of Delivery revealed that the Order was delivered to the Custodian on May 31, 2012 at 10:14 a.m.
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July 3, 2012

E-mail from Assistant Corporation Counsel Peter Cecinini, Esq. to the GRC. Mr. Cecinini informs the GRC that the Deputy Custodian is on vacation this week and therefore cannot prepare a supplemental certification within three (3) business days. Mr. Cecinini further states that it is his understanding that the Bayonne Police Department use of force reports from January 1, 2011 to February 27, 2012 were disclosed to the Complainant and he asks the GRC if the Complainant has denied receiving the records.

July 5, 2012

E-mail from the GRC to Mr. Cecinini. The GRC informs Mr. Cecinini that the GRC e-mailed the Complainant on May 25, 2012, and asked him to confirm whether all of the records responsive to his request had been disclosed to him, and if not, which records were still pending disclosure. The GRC also informs Mr. Cecinini that the Complainant stated in reply to the GRC that he had not received any records as of May 25, 2012 and that the Complainant further stated that he will notify the GRC when he does receive the requested records.

July 6, 2012

E-mail from Mr. Cecinini to the GRC. Mr. Cecinini states that the Complainant visited the City Clerk's office on May 29, 2012 at which time office staff disclosed to the Complainant the requested records and the Complainant paid \$13.55 for copying charges. Mr. Cecinini attaches a copy of a receipt which indicates that the Complainant paid \$13.55 cash on May 29, 2012 for "records." Mr. Cecinini states that the requested records which were disclosed to the Complainant were arranged chronologically from January 2, 2011 to March 27, 2012 and as such, encompassed the dates of the Complainant's request. Mr. Cecinini states that he can obtain a certification from the Custodian's secretary averring to the statements made by him in the e-mail if the GRC requests such a certification.

July 6, 2012

E-mail from the GRC to Mr. Cecinini. The GRC informs Mr. Cecinini that it is the Custodian's duty to comply with the Council's Orders and in the instant case, because the Custodian delegated his authority to the Deputy Custodian, the GRC will await the Deputy Custodian's return the week of July 9, 2012.⁵ The GRC further informs Mr. Cecinini that if the GRC does not hear anything from the Deputy Custodian within the next few days, the GRC will submit the compliance issue to the Council without the Deputy Custodian's certification.

July 9, 2012

E-mail from Mr. Cecinini to the GRC. Mr. Cecinini states that he informed the Custodian's Counsel of the urgent need for readying the certification of compliance in this matter. Mr. Cecinini further states that the Custodian's Counsel is in the process of drafting the certification for the Deputy Custodian's signature and that when the draft is

⁵ The GRC was aware that the Deputy Custodian would return the week of July 9, 2012 because Mr. Cecinini in his July 3, 2012 e-mail to the GRC did not indicate that the Deputy Custodian would continue on vacation beyond the week of July 2 through 6, 2012.

complete he will have the Deputy Custodian sign it and then he will forward it to the GRC.

July 20, 2012

E-mail from Mr. Cecinini to the GRC. Mr. Cecinini forwards a copy of the Custodian's corrected certification to the GRC. The Custodian certifies that he disclosed to the Complainant the Bayonne Police Department use of force reports from January 1, 2011 to February 27, 2012, by making the records available in hard-copy format on May 28, 2012 at the City Clerk's office.

Analysis

Whether the Custodian complied with the Council's May 29, 2012 Interim Order?

At its May 29, 2012 public meeting, the Council determined that the Custodian shall disclose to the Complainant copies of Bayonne Police Department use of force reports from January 1, 2011 to February 27, 2012 in unredacted form, except for the names of subjects not arrested on those cases where there was an arrest made or where charges were made within five (5) business days from receipt of the Council's Interim Order with appropriate redactions as necessary, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.

On June 4, 2012, which was the second (2nd) business day after the Custodian's receipt of the Order, the Custodian provided a certification which purported to address the Council's May 29, 2012 Interim Orders for Rivera v. City of Bayonne, GRC Complaint Number 2012-49 as well as the instant complaint; however, although the Custodian certified that he disclosed the records for the former complaint, which were Bayonne Police Department use of force reports from January 1, 2011 to November 18, 2011, he did not certify that he disclosed the records for the instant complaint.

The GRC by e-mail dated June 29, 2012, informed the Custodian that he failed to certify that he disclosed the records that the Council ordered disclosed in its May 29, 2012 Interim Order for the instant complaint. The GRC also informed the Custodian to provide the GRC with a certification of compliance which addresses the records requested in the instant complaint within three (3) business days.

The Custodian by reply e-mail dated June 29, 2012, informed the GRC that he would be out of state for two (2) weeks and he said that he delegated the task of preparing and submitting the requested certification to the Deputy Custodian. Upon receipt of the Custodian's reply e-mail, the GRC forwarded it to the Custodian's Counsel and asked Counsel to have the Deputy Custodian prepare said certification and submit it to the GRC as per the directions in the GRC's e-mail to the Custodian dated June 29, 2012.⁶

⁶ Neither the Custodian's Counsel nor the Deputy Custodian responded to the GRC's correspondence. Richard Rivera v. City of Bayonne (Hudson), 2012-87 – Supplemental Findings and Recommendations of the Executive Director 4

On July 3, 2012, Mr. Cecinini informed the GRC that the Deputy Custodian was on vacation the week of July 2 through 6, 2012, and therefore was not available to prepare the certification responsive to the Council's Order within the three (3) business day period required by the GRC. Mr. Cecinini further stated that it was his understanding that the records ordered for disclosure were disclosed to the Complainant and he asked the GRC if the Complainant denied receiving the records. The GRC informed Mr. Cecinini by e-mail dated July 5, 2012, that the Complainant had informed the GRC that he had not received any of the requested records. Mr. Cecinini subsequently informed the GRC that he believed the records had been purchased by the Complainant and that he could obtain a certification from the Custodian's secretary to that effect. By e-mail dated July 6, 2012, the GRC informed Mr. Cecinini that it is the Custodian's duty to comply with the Council's Orders and the GRC acknowledged that because the Custodian delegated his authority to the Deputy Custodian, the GRC would await a certification from the Deputy Custodian. Although Mr. Cecinini stated that the Custodian's Counsel was in the process of drafting the certification for the Deputy Custodian, a certification averring that Bayonne Police Department use of force reports from January 1, 2011 to February 27, 2012 were disclosed to the Complainant in hard-copy format was not forwarded to the GRC until July 20, 2012, which is eleven (11) business days *beyond the extended due date* granted by the GRC for compliance with the Council's Order.

Moreover, the Custodian had an affirmative duty to provide the requested records to the Complainant in the medium requested by the Complainant, unless the agency did not maintain the record in such a medium, in which case the Custodian was required to either convert the record to the requested medium or provide a copy in another meaningful medium. Specifically, OPRA provides that:

“[a] custodian shall permit access to a government record and provide a copy thereof in the medium requested if the public agency maintains the record in that medium. If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium.”
N.J.S.A. 47:1A-5.d.

The GRC interprets the last sentence to mean a medium which is meaningful to the requestor since all limitations on access shall be construed in favor of the public pursuant to N.J.S.A. 47:1A-1. See Paff v. County of Camden, GRC Complaint No. 2009-25 (March 2011). In this instance, making a copy of the requested records available to the Complainant is not meaningful to the Complainant because the Complainant specifically requested the records be forwarded to him via e-mail, which contemplates an electronic copy of the records.

In Wolosky v. Township of Frankford (Sussex), GRC Complaint No. 2008-254 (November 2009), where the complainant requested delivery of certain records via fax or e-mail and the custodian stated that she did not maintain the records in a format that was conducive to such delivery, the Council decided:

“...in this complaint, if the Custodian does not maintain any of the records responsive in an electronic medium, she is required to convert the records in order to provide them electronically via e-mail.”

Accordingly, although the Custodian herein disclosed to the Complainant all records ordered for disclosure pursuant to the Council’s May 29, 2012 Order by making copies of the records available in the City Clerk’s office on May 28, 2012, the Custodian failed to fully comply with the Order because the Custodian failed to convert the records in order to provide them electronically via e-mail pursuant to N.J.S.A. 47:1A-5.d., Paff, supra, and Wolosky, supra. However, the Council declines to order the Custodian to provide the requested records electronically because the Custodian certified to the GRC on July 20, 2012 that he disclosed to the Complainant the requested records by making the records available in hard-copy format on May 28, 2012 at the City Clerk’s office.

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

OPRA states that:

“[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ...” N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

“... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86, 107 (App. Div. 1996).

Here, although the Custodian failed to comply in a timely manner with the Council's May 29, 2012 Interim Order by failing to submit a certified confirmation of compliance until the eleventh (11th) business day after the extended due date granted by the GRC for compliance with said Order, and although the Custodian failed to provide the requested records to the Complainant in the medium requested by the Complainant, the Custodian did certify that he made the requested records available to the Complainant. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian herein disclosed to the Complainant all records ordered for disclosure pursuant to the Council's May 29, 2012 Order by making copies of the records available in the City Clerk's office on May 28, 2012, the Custodian failed to fully comply with the Order because the Custodian failed to convert the records in order to provide them electronically via e-mail pursuant to N.J.S.A. 47:1A-5.d., Paff v. County of Camden, GRC Complaint No. 2009-25 (March 2011), and Wolosky v. Township of Frankford (Sussex), GRC Complaint No. 2008-254 (November 2009). However, the Council declines to order the Custodian to provide the requested records electronically because the Custodian certified to the GRC on July 20, 2012 that he disclosed to the Complainant the requested records by making the records available in hard-copy format on May 28, 2012 at the City Clerk's office.
2. Although the Custodian failed to comply in a timely manner with the Council's May 29, 2012 Interim Order by failing to submit a certified confirmation of compliance until the eleventh (11th) business day after the extended due date granted by the GRC for compliance with said Order, and although the Custodian failed to provide the requested records to the Complainant in the medium requested by the Complainant, the Custodian did certify that he made the requested records available to the Complainant. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: John E. Stewart, Esq.

Approved By: Karyn Gordon, Esq.
Acting Executive Director

July 24, 2012



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
Acting Commissioner

INTERIM ORDER

May 29, 2012 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2012-87

v.

City of Bayonne (Hudson)
Custodian of Record

At the May 29, 2012 public meeting, the Government Records Council ("Council") considered the May 22, 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:

1. Because the Superior Court in O'Shea v. Township of West Milford, 410 N.J. Super. 371 (App. Div. 2009) found that use of force reports cannot be exempt from disclosure under OPRA as criminal investigatory records because they are required to be made, and because the Custodian failed to otherwise cite a valid legal basis for exempting the requested records from access, the Custodian failed to meet his burden of proving that denial of access to the requested records is authorized by law pursuant to N.J.S.A. 47:1A-6., and the Custodian shall therefore disclose to the Complainant copies of Bayonne Police Department use of force reports from January 1, 2011 to February 27, 2012 in unredacted form, except for the names of subjects not arrested on those cases where there was an arrest made or where charges were made.
2. **The Custodian shall comply with the terms of paragraph #2 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. 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.

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 May, 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: May 30, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 29, 2012 Council Meeting**

**Richard Rivera¹
Complainant**

GRC Complaint No. 2012-87

v.

**City of Bayonne (Hudson)²
Custodian of Records**

Records Relevant to Complaint: Copies of unredacted Bayonne Police Department use of force incident reports from January 1, 2011 to February 27, 2012.

Request Made: February 27, 2012

Response Made: March 6, 2012

Custodian: Robert F. Sloan

GRC Complaint Filed: March 23, 2012³

Background

February 27, 2012

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in a letter referencing OPRA. The Complainant indicates that the preferred method of delivery is e-mail.

March 6, 2012

Custodian's response to the OPRA request. Assistant Bayonne Corporation Counsel, Peter Cecinini, Esq., responds in writing via letter to the Complainant's OPRA request on the sixth (6th) business day following receipt of such request. Mr. Cecinini informs the Complainant that the requested records are police investigatory records which are not government records for purposes of OPRA pursuant to N.J.S.A. 47:1A-1.1. Mr. Cecinini also informs the Complainant that the requested records contain confidential information and are not subject to disclosure in unredacted form.

Mr. Cecinini further states that he understands that the Complainant has spoken with Bayonne Corporation Counsel regarding his request. Mr. Cecinini informs the Complainant that approximately one (1) year ago the Custodian inadvertently disclosed similar records to the Complainant and that counsel representing the City of Bayonne notified the Complainant that the disclosure of those records was illegal and filed a motion for return of the records.

¹ No legal representation listed on record.

² Represented by Edward Florio, Esq. (Hoboken, NJ).

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

March 23, 2012

Denial of Access Complaint filed with the Government Records Council (“GRC”) attaching Complainant’s OPRA request dated February 27, 2012.

The Complainant states that he submitted his OPRA request letter to the Custodian via facsimile on February 27, 2012. The Complainant also states that he received a letter dated March 5, 2012 from Mr. Cecinini denying him access to the requested records.⁴

The Complainant does not agree to mediate this complaint.

April 10, 2012

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

April 10, 2012

E-mail from Mr. Cecinini to the GRC. Mr. Cecinini informs the GRC that the City has retained the law firm of Florio and Kenny to represent the Custodian. Mr. Cecinini provides an e-mail address for the law firm and informs the GRC to forward all GRC correspondence to the Custodian’s Counsel.

April 10, 2012

E-mail from the GRC to the Custodian’s Counsel. The GRC forwards a copy of the request for the SOI to Counsel. The GRC also requests that Counsel forward to the GRC a representation letter.

April 11, 2012

E-mail from the Custodian’s Counsel to the GRC. The Custodian’s Counsel sends a representation letter to the GRC.

April 26, 2012

Letter from the GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for an SOI on April 10, 2012 and to date has not received a response. Further, the GRC states that if the SOI is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

May 2, 2012

E-mail from the Custodian’s Counsel to the GRC. Counsel asks for an extension of time for the Custodian to complete and submit the SOI to the GRC.

May 2, 2012

E-mail from the GRC to the Custodian’s Counsel. The GRC grants the Custodian a five (5) business day extension of time to prepare and submit the SOI.

⁴ The Complainant states that this letter is attached to his complaint; however, the only attachment to the complaint was the Complainant’s OPRA request dated February 27, 2012.
Richard Rivera v. City of Bayonne (Hudson), 2012-87 – Findings and Recommendations of the Executive Director

May 11, 2012⁵

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated February 27, 2012
- Custodian's response to the OPRA request dated March 6, 2012

The Custodian certifies that the records that may have been responsive to the request have no records retention requirement in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management.

The Custodian certifies that he received the Complainant's OPRA request on February 27, 2012 and responded to said request on March 6, 2012. The Custodian certifies that he located approximately two hundred (200) pages of records responsive to the Complainant's request. The Custodian further certifies that the records responsive to the request are unredacted use of force reports that are retained in the Bayonne Police Department Internal Affairs file where they have been held since 2001.

The Custodian certifies that the Complainant's OPRA request duplicated an OPRA request submitted to the Custodian on November 18, 2011 which formed the basis for Rivera v. City of Bayonne (Hudson), GRC Complaint No. 2012-49. The Custodian also certifies that he denied the Complainant access to the requested records because they are criminal investigatory records which contain confidential information pursuant to N.J.S.A. 47:1A-1.1. The Custodian further certifies that he denied the Complainant access to the requested records because the Complainant's request is overly broad and burdensome. The Custodian certifies that OPRA is not intended as a research tool litigants may use to force government officials to identify and siphon information that may be useful in collateral litigation. The Custodian cites to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) in support of his position.

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

⁵ The Custodian did not certify to the search undertaken to locate the records responsive to the Complainant's OPRA request.

in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA further provides that:

“A government record shall not include ... *criminal investigatory records...*” (Emphasis added) N.J.S.A. 47:1A-1.1.

OPRA 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.

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.

There is no dispute between the parties that the Complainant’s OPRA request was provided to the Custodian on February 27, 2012. There is, however, disagreement between the parties as to the date the request was denied. The Complainant stated that the Custodian responded to his OPRA request by denying him access to the requested records on March 5, 2012 but the Custodian certified that he responded to the Complainant’s request on March 6, 2012. The evidence of record reveals that the Custodian denied the Complainant’s request in a timely manner via a written response dated March 6, 2012.

The Custodian certified in the SOI that the Complainant’s request which formed the basis for the instant complaint duplicated an OPRA request submitted to the Custodian on November 18, 2011 which formed the basis for Rivera v. City of Bayonne (Hudson), GRC Complaint No. 2012-49. The Custodian is not correct. In GRC Complaint No. 2012-49, the Complainant requested the identical records but he requested those records from January 1, 2011 to November 18, 2011. In the instant complaint, the Complainant requested the records from January 1, 2011 to February 27, 2012.

In the matter before the Council, the Custodian denied the Complainant access to copies of unredacted Bayonne Police Department use of force incident reports from

January 1, 2011 to February 27, 2012 for two (2) reasons. First, the Custodian asserted that the Complainant's request is overly broad and burdensome and that OPRA is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. The Custodian cited MAG, supra, as legal authority for denying an overly broad and burdensome request. Second, the Custodian denied access to the requested records because he certified that they are criminal investigatory records which contain confidential information and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

With respect to the Custodian's first reason for denying the Complainant access to the requested records; to wit, because the request is overly broad, the New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.'* N.J.S.A. 47:1A-1." (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). As the court noted in invalidating MAG's request under OPRA:

"Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past. Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted." *Id.* at 549.

The Court further held that "[u]nder OPRA, *agencies are required to disclose only 'identifiable' government records* not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files." (Emphasis added.) *Id.*

In addition, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),⁶ the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."⁷

⁶ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁷ As stated in Bent, supra.

Moreover, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), the court enumerated the responsibilities of a custodian and a requestor as follows:

“OPRA identifies the responsibilities of the requestor and the agency relevant to the prompt access the law is designed to provide. The custodian, who is the person designated by the director of the agency, N.J.S.A. 47:1A-1.1, must adopt forms for requests, locate and redact documents, isolate exempt documents, assess fees and means of production, identify requests that require "extraordinary expenditure of time and effort" and warrant assessment of a "service charge," and, when unable to comply with a request, "indicate the specific basis." N.J.S.A. 47:1A-5(a)-(j). The requestor must pay the costs of reproduction and submit the request with information that is essential to permit the custodian to comply with its obligations. N.J.S.A. 47:1A-5(f), (g), (i). *Research is not among the custodian's responsibilities.*” (Emphasis added), NJ Builders, 390 N.J. Super. at 177.

Moreover, the court cited MAG by stating that “...when a request is ‘complex’ because it fails to specifically identify the documents sought, then that request is not ‘encompassed’ by OPRA...” The court also quoted N.J.S.A. 47:1A-5.g in that “[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.” The court further stated that “...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency’s need to...generate new records...” Accordingly, the test under MAG then, is whether a requested record is a *specifically identifiable* government record.

Under such rationale, the GRC has repeatedly found that blanket requests are not valid OPRA requests. In the matter of Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009), the relevant part of the Complainant’s request sought:

2. Item No. 2: “From the Borough Engineer’s files: all engineering documents for all developments or modifications to Block 25, Lot 28; Block 25, Lot 18; Block 23, Lot 1; Block 23, Lot 1.02.
3. Item No. 3: From the Borough Engineer’s files: all engineering documents for all developments or modifications to North St., to the south and east of Wilson St.
4. Item No. 4: From the Borough Attorney’s files: all documents related to the development or modification to Block 25, Lot 28; Block 25, Lot 18; Block 23, Lot 1; Block 23, Lot 1.02.
5. Item No. 5: From the Borough Attorney’s files: all documents related to the development or modification to North Street, to the south and east of Wilson St.”

In reviewing the complainant's request, the Council found that "[b]ecause the Complainant's OPRA requests # 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005)."

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

In the instant case, as in Burnett, *supra*, the Complainant sought a specific type of document. The Complainant specifically identified the records he requested as "Bayonne Police Department use of force incident reports." Use of force incident reports are specific records that cannot be confused with other types of police reports. Pursuant to the *New Jersey Attorney General's Guidelines on Use of Force* ("AG Guidelines") revised June 2000, a use of force report must be prepared in all instances when physical, mechanical or deadly force is used by a law enforcement officer. Such a report may be in the form of either the AG Guidelines "Model Use of Force Report" or an agency-designed report. Therefore, by requesting "use of force incident reports" the Complainant specifically identified the records sought. Moreover, the Complainant specified a finite time period during which the requested records would have been prepared: January 1, 2011 to February 27, 2012. As such, the Complainant's request was not overly broad or burdensome and the Custodian's argument that the records must be denied for that reason is not persuasive.

The Custodian's second reason for denying the requested records was that they constitute criminal investigatory records which contain confidential information and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

In O'Shea v. Township of West Milford, 410 N.J. Super. 371 (App. Div. 2009), the requestor sought a municipality's use of force reports for a multi-year period. The custodian denied the request by asserting that such reports are criminal investigatory records and as such are exempt from disclosure under OPRA. The trial court disagreed and held that use of force reports are not exempt from the disclosure requirements of OPRA as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1, and ordered the municipality to grant the requestor access to the requested use of force reports in unredacted form, except for the names of subjects not arrested on those cases where there was an arrest made or where charges were made.

In upholding the trial judge's decision regarding access to the records, the Appellate Division analyzed the OPRA definition of a criminal investigatory record and

determined that a use of force report, in order to constitute a criminal investigatory record and thus be exempt from disclosure, must satisfy both prongs of a dual-prong test. First, the report must not be required to be made; second, it must pertain to a criminal investigation or related civil enforcement proceeding. With respect to the first prong, the court determined that:

“...there are no specific ‘statutes’ or ‘administrative rules’ that require [use of force reports] to be completed or maintained by a Township’s police department. We hold, however, that [the AG Guidelines], that requires the completion of [use of force reports] and their maintenance in the files of police departments, has the force of law for police entities.” *Id.* at 382.

Therefore, because the court found that use of force reports were required to be made, the first prong of the test could not be met. Thus the court found:

“ The [use of force reports]...are nominally subject to OPRA, and there is no governing policy or statement containing specific provisions for exempting them from OPRA’s general rule of disclosure...” *Id.* at 385.

Therefore, because the Superior Court in O’Shea, *supra*, found that use of force reports cannot be exempt from disclosure under OPRA as criminal investigatory records, the Custodian’s second reason for denial of access, that the requested records are criminal investigatory records exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1., is also without merit.

Accordingly, because the Superior Court in O’Shea found that use of force reports cannot be exempt from disclosure under OPRA as criminal investigatory records because they are required to be made, and because the Custodian failed to otherwise cite a valid legal basis for exempting the requested records from access, the Custodian failed to meet his burden of proving that denial of access to the requested records is authorized by law pursuant to N.J.S.A. 47:1A-6., and the Custodian shall therefore disclose to the Complainant copies of Bayonne Police Department use of force reports from January 1, 2011 to February 27, 2012 in unredacted form, except for the names of subjects not arrested on those cases where there was an arrest made or where charges were made.

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

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Superior Court in O'Shea v. Township of West Milford, 410 N.J. Super. 371 (App. Div. 2009) found that use of force reports cannot be exempt from disclosure under OPRA as criminal investigatory records because they are required to be made, and because the Custodian failed to otherwise cite a valid legal basis for exempting the requested records from access, the Custodian failed to meet his burden of proving that denial of access to the requested records is authorized by law pursuant to N.J.S.A. 47:1A-6., and the Custodian shall therefore disclose to the Complainant copies of Bayonne Police Department use of force reports from January 1, 2011 to February 27, 2012 in unredacted form, except for the names of subjects not arrested on those cases where there was an arrest made or where charges were made.
2. **The Custodian shall comply with the terms of paragraph #2 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 1:4-4,⁸ to the Executive Director.⁹**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: John E. Stewart, Esq.

Approved By: Catherine Starghill, Esq.
Executive Director

May 22, 2012

⁸ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁹ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.