



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

May 23, 2017 Government Records Council Meeting

Susan Barker
Complainant

Complaint No. 2015-26

v.

Borough of Lakehurst (Ocean)
Custodian of Record

At the May 23, 2017 public meeting, the Government Records Council (“Council”) considered the May 16, 2017 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s March 28, 2017 Interim Order because she responded in the extended time frame by providing all responsive time sheets (with redactions) to the Complainant with a redaction index and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian unlawfully denied access to certain portions of the requested handwritten time sheets. N.J.S.A. 47:1A-6. However, the Custodian did not unlawfully deny access to records responsive to the Complainant’s December 12, 2014 OPRA request No. 1 and January 8, 2015 OPRA request item Nos. 2, 3, and 4 because she provided all records that existed. The Custodian also lawfully denied access to certain portions of the responsive handwritten time sheets. Further, the Custodian lawfully denied access to the work schedules responsive to the Complainant’s January 8, 2015 OPRA request item No. 1. In addition, the Custodian timely complied with the Council’s March 28, 2017 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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 23rd Day of May, 2017

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: May 30, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
May 23, 2017 Council Meeting**

**Susan Barker¹
Complainant**

GRC Complaint No. 2015-26

v.

**Borough of Lakehurst (Ocean)²
Custodial Agency**

Records Relevant to Complaint:

December 12, 2014 OPRA request:

1. Time and attendance/time management policy and procedures for the Lakehurst Police Department (“LPD”).
2. Individual handwritten time sheet (if no time cards are available) from January 1, 2013, to the most recent pay period.³

January 8, 2015 OPRA request:

1. Work schedules for LPD personnel from January 1, 2013, through December 31, 2014.
2. Names of all LPD shift scheduling officers from January 1, 2013, through December 31, 2014.
3. Dates that each scheduling officer was responsible for scheduling from January 1, 2013, through December 31, 2014.
4. Names of LPD payroll officers from January 31, 2013, through December 31, 2014.
5. Regular and overtime hourly pay rates for police officers from January 1, 2013, through December 31, 2014.⁴

Custodian of Record: Bernadette Dugan

Request Received by Custodian: December 12, 2014; January 8, 2015

Response Made by Custodian: December 23, 2014; January 16, 2015

GRC Complaint Received: February 4, 2015

¹ No legal representation listed on record.

² Represented by Sean D. Gertner, Esq. (Lakewood, NJ).

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

⁴ The Complainant requested additional records that are not at issue in this complaint.

Background

March 28, 2017 Council Meeting:

At its March 28, 2017 public meeting, the Council considered the February 14, 2017 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian complied with the Council's December 13, 2016 Interim Order. Specifically, the Custodian responded in the extended time frame by providing nine (9) copies of a cross section of handwritten time sheets (redacted and unredacted) along with a cross section of work schedules for an *in camera* examination. Further, the Custodian included a certification from Chief Higgins that adequately addresses conclusion No. 4 of the Order. The Custodian also simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian lawfully denied access to the first two (2) sets of columns indicating the "Regular Time" and "Extra Time" worked. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-1.1; Rivera v. Rutgers, The State Univ. of NJ, GRC Complaint No. 2009-311 (Interim Order dated January 31, 2012). However, the Custodian has unlawfully denied access to all remaining columns, with the exception of information in the "Case#" and "Explanation" columns that the Custodian believes is exempt. For the "Case#" and "Explanation" columns, the Custodian is required to provide a lawful basis and detailed explanation for any redactions she intends to perform prior to disclosure.
3. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination regarding the responsive hand written time sheets set forth in Item No. 2 within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.⁵**
4. **The *In Camera* Examination set forth above reveals the Custodian has lawfully denied access to the work schedules responsive to the Complainant's January 8, 2015 OPRA request item No. 1 pursuant to N.J.S.A. 47:1A-6.**
5. The Custodian bore her burden of proving she did not unlawfully deny access to any additional records responsive to the Complainant's January 8, 2015 OPRA request item Nos. 2, 3 and 4. N.J.S.A. 47:1A-6. Specifically, the Custodian certified in the SOI that she provided all responsive records to the Complainant. Furthermore, in compliance with the Council's Order, Chief Higgins certified that no additional

⁵ 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.

records existed that identify the payroll officer and shift supervisor prior to November 10, 2014. Finally, there is no evidence in the record to refute the Custodian's SOI and Chief Higgins' certification. *See Burns v. Borough of Collingswood*, GRC Complaint No. 2005-68 (September 2005). *See also Ehmman v. Borough of Belmar (Monmouth)*, GRC Complaint No. 2014-281 (March 2015).

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

Procedural History:

On March 30, 2017, the Council distributed its Interim Order to all parties. On the same day, the Custodian's Counsel sought an extension of time until April 20, 2017, which the GRC granted. On April 19, 2017, the Custodian's Counsel sought a second (2nd) extension until April 24, 2017, asserting that review and redaction of the timesheets took longer than expected. On April 20, 2017, the GRC granted the second (2nd) extension of time.

On April 21, 2017, the Custodian responded to the Council's Interim Order. The Custodian provided the responsive handwritten time sheets (with redactions) to all parties along with a redaction index, a legal certification from Chief Eric S. Higgins, and certified confirmation of compliance to the Executive Director.

In his certification, Chief Higgins affirmed that he redacted only that information in the "Case#" and "Explanation" columns believed to be exempt as grand jury information, domestic violence information, juvenile information, privacy interest, and other criminal investigatory information. Chief Higgins further certified that, although he believed overtime information was exempt in accordance with N.J.A.C. 13:1E-3.2(a)(7), those notations were provided as part of the Custodian's compliance. Chief Higgins averred that he worked in good faith to disclose responsive records while keeping in mind that OPRA favors disclosure and that the totality of the circumstances does not support a knowing and willful violation.

Analysis

Compliance

At its March 28, 2017 meeting, the Council ordered the Custodian to disclose to the Complainant all responsive time sheets without redactions of "Case#" and "Explanation" columns, unless she believed individual entries were exempt. For these prospective redactions, the Council required the Custodian to provide a detailed explanation of the redaction and a specific lawful basis. Further, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On March 30, 2017, 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 April 6, 2017.

On March 30, 2017, the Custodian's Counsel sought an extension of time until April 20, 2017, which the GRC granted. Thereafter, on April 19, 2017, the Custodian's Counsel sought a second (2nd) extension of time until April 24, 2017, which the Council also granted. On April 21, 2017, the first (1st) business day of the second (2nd) extended time frame, the Custodian disclosed all responsive handwritten time sheets (with redactions) to the Complainant with a redaction index and simultaneously submitted certified confirmation of compliance to the Executive Director.

Therefore, the Custodian complied with the Council's March 28, 2017 Interim Order because she responded in the extended time frame by providing all responsive time sheets (with redactions) to the Complainant with a redaction index and simultaneously providing certified confirmation of compliance to the Executive Director.

Knowing & Willful

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 “. . . [i]f 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 (id.; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); 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)).

In the matter currently before the Council, the Custodian unlawfully denied access to certain portions of the requested handwritten time sheets. N.J.S.A. 47:1A-6. However, the Custodian did not unlawfully deny access to records responsive to the Complainant's December 12, 2014 OPRA request No. 1 and January 8, 2015 OPRA request item Nos. 2, 3, and 4 because she provided all records that existed. The Custodian also lawfully denied access to certain portions of the responsive handwritten time sheets. Further, the Custodian lawfully denied access to the work schedules responsive to the Complainant's January 8, 2015 OPRA request item No.

1. In addition, the Custodian timely complied with the Council's March 28, 2017 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's March 28, 2017 Interim Order because she responded in the extended time frame by providing all responsive time sheets (with redactions) to the Complainant with a redaction index and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian unlawfully denied access to certain portions of the requested handwritten time sheets. N.J.S.A. 47:1A-6. However, the Custodian did not unlawfully deny access to records responsive to the Complainant's December 12, 2014 OPRA request No. 1 and January 8, 2015 OPRA request item Nos. 2, 3, and 4 because she provided all records that existed. The Custodian also lawfully denied access to certain portions of the responsive handwritten time sheets. Further, the Custodian lawfully denied access to the work schedules responsive to the Complainant's January 8, 2015 OPRA request item No. 1. In addition, the Custodian timely complied with the Council's March 28, 2017 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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: Frank F. Caruso
Communications Specialist/Resource Manager

May 16, 2017



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
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Commissioner

INTERIM ORDER

March 28, 2017 Government Records Council Meeting

Susan Barker
Complainant

Complaint No. 2014-26

v.

Borough of Lakehurst (Ocean)
Custodian of Record

At the March 28, 2017 public meeting, the Government Records Council (“Council”) considered the February 14, 2017 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s December 13, 2016 Interim Order. Specifically, the Custodian responded in the extended time frame by providing nine (9) copies of a cross section of handwritten time sheets (redacted and unredacted) along with a cross section of work schedules for an *in camera* examination. Further, the Custodian included a certification from Chief Higgins that adequately addresses conclusion No. 4 of the Order. The Custodian also simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian lawfully denied access to the first two (2) sets of columns indicating the “Regular Time” and “Extra Time” worked. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-1.1; Rivera v. Rutgers, The State Univ. of NJ, GRC Complaint No. 2009-311 (Interim Order dated January 31, 2012). However, the Custodian has unlawfully denied access to all remaining columns, with the exception of information in the “Case#” and “Explanation” columns that the Custodian believes is exempt. For the “Case#” and “Explanation” columns, the Custodian is required to provide a lawful basis and detailed explanation for any redactions she intends to perform prior to disclosure.
3. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination regarding the responsive hand written time sheets set forth in Item No. 2 within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.¹**

¹ 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
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4. **The *In Camera* Examination set forth above reveals the Custodian has lawfully denied access to the work schedules responsive to the Complainant's January 8, 2015 OPRA request item No. 1 pursuant to N.J.S.A. 47:1A-6.**
5. The Custodian bore her burden of proving she did not unlawfully deny access to any additional records responsive to the Complainant's January 8, 2015 OPRA request item Nos. 2, 3 and 4. N.J.S.A. 47:1A-6. Specifically, the Custodian certified in the SOI that she provided all responsive records to the Complainant. Furthermore, in compliance with the Council's Order, Chief Higgins certified that no additional records existed that identify the payroll officer and shift supervisor prior to November 10, 2014. Finally, there is no evidence in the record to refute the Custodian's SOI and Chief Higgins' certification. *See Burns v. Borough of Collingswood*, GRC Complaint No. 2005-68 (September 2005). *See also Ehmann v. Borough of Belmar (Monmouth)*, GRC Complaint No. 2014-281 (March 2015).
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 28th Day of March, 2017

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: March 30, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
March 28, 2017 Council Meeting**

**Susan Barker¹
Complainant**

GRC Complaint No. 2015-26

v.

**Borough of Lakehurst (Ocean)²
Custodial Agency**

Records Relevant to Complaint:

December 12, 2014 OPRA request:

1. Time and attendance/time management policy and procedures for the Lakehurst Police Department (“LPD”).
2. Individual handwritten time sheet (if no time cards are available) from January 1, 2013, to the most recent pay period.³

January 8, 2015 OPRA request:

1. Work schedules for LPD personnel from January 1, 2013, through December 31, 2014.
2. Names of all LPD shift scheduling officers from January 1, 2013, through December 31, 2014.
3. Dates that each scheduling officer was responsible for scheduling from January 1, 2013, through December 31, 2014.
4. Names of LPD payroll officers from January 31, 2013, through December 31, 2014.
5. Regular and overtime hourly pay rates for police officers from January 1, 2013, through December 31, 2014.⁴

Custodian of Record: Bernadette Dugan

Request Received by Custodian: December 12, 2014; January 8, 2015

Response Made by Custodian: December 23, 2014; January 16, 2015

GRC Complaint Received: February 4, 2015

Records Submitted for *In Camera* Examination: Handwritten time sheets and work/shift schedules for the LPD.

¹ No legal representation listed on record.

² Represented by Sean D. Gertner, Esq. (Lakewood, NJ).

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

⁴ The Complainant requested additional records that are not at issue in this complaint.

Background

December 13, 2016 Council Meeting:

At its December 13, 2016 public meeting, the Council considered the December 6, 2016 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 Custodian certified in the SOI that she provided the Complainant two (2) records that the GRC has determined adequately addressed the Complainant's December 12, 2014 OPRA request item No. 1, she did not unlawfully deny access to any requested records. N.J.S.A. 47:1A-6. Moreover, there is no competent, credible evidence in the record to refute the Custodian's certification. *See* Demitroff v. Buena Vista Twp. (Atlantic), GRC Complaint No. 2014-184 (January 2015)(*citing* Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005)).
2. The GRC must conduct an *in camera* review of the handwritten time sheets responsive to the Complainant's December 12, 2014 OPRA request item No. 2. To effectuate the review, and similar to how it addressed the *in camera* review in Taylor v. NJ Dep't of Corr., GRC Complaint No. 2010-319 (Interim Order dated March 27, 2012), the GRC is only requesting that the Custodian provide redacted and unredacted copies of all handwritten time sheets for the time period January 1, 2013, through March 1, 2013. The GRC must also conduct an *in camera* review of the work schedule record responsive to the Complainant's January 8, 2015 OPRA request item No. 1. Specifically the Council must validate the Custodian's assertion that the redactions are lawful under OPRA because disclosure would jeopardize public safety and substantially interfere with the State's ability to protect its citizens against sabotage and acts of terrorism. *See* Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-9(a), Executive Order No. 21 (Gov. McGreevey, 2002). Further, the Council must determine whether the records at issue are comparable to either those in Taylor v. NJ Dep't of Corr., GRC Complaint No. 2010-319 (Interim Order dated March 27, 2012) or those in Rivera v. Rutgers, The State Univ. of New Jersey, GRC Complaint No. 2009-311 (Interim Order dated January 31, 2012).
3. **The Custodian must deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), nine (9) copies of the redacted handwritten time sheets, a document or redaction index⁶, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-**

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

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

4,⁷ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.

4. The Custodian may have unlawfully denied access to additional records responsive to the Complainant's January 8, 2015 OPRA request item Nos. 2, 3, and 4. The Custodian must provide all responsive records identifying the shift supervisor and payroll officer for the entirety of 2013 and through November 10, 2014. Alternatively, if applicable, the Custodian must either certify whether Sgt. Heinzman and Sgt. Kline held those duties throughout the applicable time frame and/or that no additional responsive records exist. The GRC notes that it might be prudent for the Chief of Lakehurst Police Department or other appropriate officers to include supplemental certifications as part of the Custodian's compliance.
5. **The Custodian shall comply with item No. 4 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**
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On December 14, 2016, The Council distributed its Interim Order to all parties on. On December 14, 2016, the Custodian's Counsel e-mailed the GRC, seeking an extension of time until January 5, 2017, to comply with the Council's Order. On December 19, 2016, the GRC responded, granting the extension of time.

On January 5, 2017, the Custodian responded to the Council's Interim Order. Therein, the Custodian provided to the GRC nine (9) copies of a cross section of handwritten time sheets (redacted and unredacted) along with (9) copies of a cross section of work schedules. The Custodian reasserted her arguments that the records in question could be used to determine policing patterns. The Custodian affirmed that the Borough has a long-established schedule for shifts with little to no deviation. The Custodian argued that releasing older schedules would be detrimental to the officers, the public at large, and the Borough's infrastructure. The Custodian

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

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.

argued that recent events have proven that police are being targeted in violent crimes.¹⁰ The Custodian thus stated that she supported Chief Eric Higgins' concerns (stated below) and believed that she lawfully denied access to the redacted portions of the handwritten time sheets and work schedules in their entirety under Executive Order No. 21 (Gov. McGreevey, 2002)(“EO 21”) and N.J.A.C. 13:1E-3.2.

Chief Higgins also included a certification, whereby he expressed his concerns over disclosure of unredacted handwritten time sheets and the monthly work schedules. Chief Higgins argued that each time sheet showed the exact start and end times for officer shifts, which essentially acted as a schedule. Chief Higgins asserted that a criminal could utilize these records to facilitate illegal activity and thwart law enforcement detection. Chief Higgins stressed that the Complainant only received this exact information in bi-weekly payroll sheets, with the exception of the exact times worked. Chief Higgins argued that he firmly believed EO 21 applied to these records given that the Borough houses many facilities on Joint Base McGuire-Dix-Lakehurst (“JBMDL”) that are deemed “critical infrastructure.”

Chief Higgins also certified that, in response to conclusion No. 4 of the Order, no records exist in relation to the payroll/scheduling officers prior to November 10, 2014. Chief Higgins affirmed that, to the best of his recollection, Sergeant Ronald Heinzman was shift supervisor, and Sergeant Matthew Kline was payroll officer prior to that date.

Analysis

Compliance

At its December 13, 2016 meeting, the Council ordered the Custodian to provide to the GRC nine (9) copies of a cross section of the handwritten timesheets at issue here along with a cross section of unredacted work schedules. The Custodian was also required either to disclose records identifying the payroll/scheduling officer prior to November 10, 2014, or certify that no records existed. The Council noted that the Custodian might choose to include a supplemental certification from Chief Higgins (or other appropriate officer or official) regarding the payroll/scheduling officer issue. Finally, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On December 14, 2016, 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 December 21, 2016.

On December 14, 2016, the same business day of receipt of the Council's Order, the Custodian's Counsel sought an extension until January 5, 2017, to comply with the Order. On December 19, 2016, the GRC granted the requested extension. On January 5, 2017, the last day of the extended deadline, the Custodian submitted to the GRC in a sealed envelope nine (9) copies of a cross section of handwritten time sheets (redacted and unredacted) as well as a cross section of work schedules for an *in camera* review. The Custodian also submitted a certification from Chief Higgins, who certified that no additional records responsive to the Complainant's

¹⁰ The Custodian noted the murder of Pennsylvania State Trooper Bryon Dickson and wounding of Trooper Alex Douglas, allegedly by Eric Matthew Frein in an ambush style attack during a shift change.

January 8, 2015 OPRA request item Nos. 2, 3, and 4 existed. The Custodian also provided certified confirmation of compliance to the Executive Director.

Therefore, the Custodian complied with the Council's December 13, 2016 Interim Order. Specifically, the Custodian responded in the extended time frame by providing nine (9) copies of a cross section of handwritten time sheets (redacted and unredacted) along with a cross section of work schedules for an *in camera* examination. Further, the Custodian included a certification from Chief Higgins that adequately addressed conclusion No. 4 of the Order. The Custodian also simultaneously provided certified confirmation of compliance to the Executive Director.

Unlawful Denial of Access

In Camera Review

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

Further, OPRA provides that its provisions "shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to any other . . . regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor . . ." N.J.S.A. 47:1A-9(a). To this end, EO 21 provides that government records are not subject to access:

[W]here the inspection, examination or copying of that record would substantially interfere with the State's ability to protect and defend the State and its citizens against acts of sabotage or terrorism, or which, if disclosed, would materially increase the risk or consequences of potential acts of sabotage or terrorism.

Id.

The GRC's regulations at N.J.A.C. 5:105-2.1(h) allow the GRC to raise issues or defenses *sua sponte*. See Paff v. Twp. of Plainsboro, 2007 N.J. Super. Unpub LEXIS 2135 (App. Div. 2007)(*certif. denied Paff v. Twp. of Plainsboro*, 193 N.J. 292 (2007)).¹¹ In Paff, the Council affirmed the custodian's denial of portions of responsive executive session minutes, but for reasons other than those cited by the custodian. The complainant appealed the Council's Final Decision, challenging the Council's authority to uphold a denial of access for reasons never raised by the custodian. The Court initially noted "the authority of a reviewing agency to affirm on reasons not advanced by the reviewed agency is well established." Id. (*citations omitted*). The Court thus held that:

The GRC has an independent obligation to "render a decision as to whether the record which is the subject of the complaint is a government record which must

¹¹ On appeal from Paff v. Twp. of Plainsboro, GRC Complaint No. 2005-29 (March 2006).

be made available for public access pursuant to” OPRA . . . The GRC is not limited to assessing the correctness of the reasons given for the custodian’s initial determination; it is charged with determining if the initial decision was correct.

Id. See also Chiappini v. Twp. of Fairfield (Cumberland), GRC Complaint No. 2013-139 (Interim Order dated July 29, 2014).

To this end, OPRA provides that “[a] government record shall not include . . . *security measures and surveillance techniques which, if disclosed, would create a risk to the safety of person [or] property . . .*” N.J.S.A. 47:1A-1.1 (emphasis added). See also Rivera v. Rutgers, The State Univ. of NJ, GRC Complaint No. 2009-311 (Interim Order dated January 31, 2012)(upholding the denial of access to police daily duty logs under N.J.S.A. 47:1A-1.1).

The Custodian initially denied access to a majority of the handwritten time sheets and the work schedules in their entirety pursuant to, in part, EO 21.¹² The GRC conducted an *in camera* examination on the submitted handwritten time sheets and work schedules. The results of this examination are set forth below.

Handwritten Time Sheets

The Custodian relied on, among other exemptions, EO 21 exempts access to records the disclosure of which “would substantially interfere with the State's ability to protect and defend the State and its citizens against acts of sabotage or terrorism, or which, if disclosed, would materially increase the risk or consequences of potential acts of sabotage or terrorism.” However, the GRC notes that it has typically found that public employee time sheets are subject to disclosure as a payroll record. N.J.S.A. 47:1A-10; Jackson v. Kean Univ., GRC Complaint No. 2002-98 (February 2004)(defining “payroll records” for OPRA’s purposes). Nonetheless, in at least one instance, the GRC departed from such a ruling where the applicable facts supported such a determination. See Gaines v. NJ Office of the Pub. Defender, GRC Complaint No. 2012-261 (August 2013)(holding that the responsive time sheets were not disclosable under N.J.S.A. 47:1A-5(k)). Here, the GRC is tasked with determining whether the time sheets fall within a limited set of circumstances requiring the GRC to depart from its typical finding.

The redacted portions of the handwritten time sheets contain two (2) columns each for “Regular Shift,” “Extra Duty,” and “Court Time,” where the officers input their actual time in and time out. Additionally, the sheets include the columns for the total number of hours, overtime/holiday hours, a case and explanation column, and four (4) columns dedicated to compensation time. All time sheets are uniform and each officer submitted them monthly.

¹² The Custodian also cited to N.J.A.C. 13:1E-3.2, a NJ Dep’t of Law & Pub. Safety (“LPS”) regulation that exempts access to any records that may reveal an agency’s “duty assignment of an individual law enforcement officer . . . that may reveal or lead to . . . such duty assignment . . .” However, this regulation is specific to records maintained by LPS and does not apply to municipal agencies unless said records were meant to be sent to LPS. See Cattonar v. Twp. of Jackson Police Dep’t (Ocean), 2014 N.J. Super. Unpub. LEXIS 2130 (App. Div. 2014)(affirming the Council’s decision that Executive Order No. 26 (Gov. McGreevey 2002) allowed for LPS’s regulations to apply to municipal uniform crime monthly reports).

Upon review of the time sheets, the GRC is satisfied that the Custodian properly redacted the first two (2) sets of columns that identify the actual time worked. As indicated by Chief Higgins and supported by the Custodian, disclosure of the actual shift times and extra duty assignments would reveal scheduling and staffing patterns. This is because a majority of the shift times within the cross section of time sheets did not change from month to month. The GRC therefore agrees that anyone could reasonably develop a schedule from the “Regular Time” columns of the time sheets to use for nefarious purposes. *See* EO 21. The “Extra Duty” column similarly could be used to glean an overall schedule, as most times aligned with the end of the officer’s regular shift. Id.

Unlike the first two (2) sets of columns, the “Court Time” column does not correlate to any definitive schedule. A review of the sheets does not indicate any pattern of officer attendance at court. Further, the limited number of “Court Time” entries present in the sheets did not always coincide with shift work. The remainder of the columns, with the exception of the “Case#” and “Explanation” columns, contain information that is statutorily subject to disclosure under OPRA. N.J.S.A. 47:1A-10. Further, as noted by Chief Higgins in his certification, the Custodian previously disclosed this information to the Complainant in the form of bi-weekly reports. Such an acknowledgement supports that the Custodian should not have redacted these sections of the time sheets.

Regarding the “Case#” and “Explanation” columns, those generically identified reasons for either extra shift time or reasons for using compensatory time that would not likely garner a lawful basis for redaction. However, it is plausible that certain entries on an officer’s handwritten time sheet might contain sensitive or otherwise exempt information. Should the Custodian believe that certain explanations are exempt under OPRA, she must include the specific lawful basis and a detailed explanation of how the redacted information falls under that exemption.

Accordingly, the Custodian lawfully denied access to the first two (2) sets of columns indicating the “Regular Time” and “Extra Time” worked. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-1.1; Rivera, GRC 2009-311. However, the Custodian has unlawfully denied access to all remaining columns, with the exception of information in the “Case#” and “Explanation” columns that the Custodian believes is exempt. For the “Case#” and “Explanation” columns, the Custodian is required to provide a lawful basis and detailed explanation for any redactions she intends to perform prior to disclosure.

Work Schedules

Each responsive work schedule comprises one (1) month of schedules in a chart form. Each row identifies an officer and corresponds with columns representing each day of the month. There is a key identifying each shift by a particular number; that number is reflected in the officer’s row by column, depending on their work days. The schedule also includes a second key that identifies special dates such as trainings, exercises, special notices, *etc.* The chart also memorializes scheduled compensation time.

Upon review of the time sheets, the GRC is satisfied that the Custodian lawfully denied access to those records in their entirety. As certified by both the Custodian and Chief Higgins,

the schedules contain little to no deviation from month to month. Further, it took the GRC a miniscule amount of time to identify a clear scheduling and staffing pattern, the disclosure of which could be detrimental to both the citizens of the Borough and the LPD. For that reason, the GRC views those records as similar to those at issue in Rivera, GRC 2009-311, because disclosure would “necessarily include details regarding surveillance techniques and staffing levels which, if disclosed, could pose a risk to the safety of police personnel.” Id. at 18-19.

Thus, the Custodian lawfully denied access to the requested work schedules. N.J.S.A. 47:1A-6. Notwithstanding the Custodian’s assertion that the schedules were exempt under EO 21, an *in camera* review revealed that disclosure of these records would reveal information about surveillance techniques, sensitive trainings, and staffing levels. Such records are exempt from access under N.J.S.A. 47:1A-1.1. *See* Rivera, GRC 2009-311.

Remaining Issues

In Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), the custodian produced one (1) responsive record to the complainant’s March 2, 2005 OPRA request and stated that no other responsive records existed. The complainant argued that more responsive records existed. Subsequent to the GRC’s request for additional information, the custodian certified that the provided document was the only responsive record. The GRC held that:

The Custodian certified that the Complainant was in receipt of all contracts and agreements responsive to the request. The Custodian has met the burden of proving that all records in existence responsive to the request were provided to the Complainant. Therefore there was no unlawful denial of access.

Id.

Regarding the existence of additional responsive to the Complainant’s January 8, 2015 OPRA request item Nos. 2, 3 and 4, the Council found that the Custodian may have unlawfully denied access to additional records. To that end, the Council noted that the Chief of LPD or other appropriate officers might want to include a supplemental certification regarding the existence of additional records responsive to these items. As part of the Custodian’s compliance, Chief Higgins certified that no additional records existed that identify the payroll/scheduling officers prior to November 10, 2014. Based on the certification, the GRC is satisfied that the Custodian properly provided those records containing the personnel information sought and that no other records existed.

Therefore, the Custodian bore her burden of proving she did not unlawfully deny access to any additional records responsive to the Complainant’s January 8, 2015 OPRA request item Nos. 2, 3 and 4. N.J.S.A. 47:1A-6. Specifically, the Custodian certified in the SOI that she provided all responsive records to the Complainant. Furthermore, in compliance with the Council’s Order, Chief Higgins certified that no additional records identifying the payroll officer and shift supervisor prior to November 10, 2014 existed. Finally, there is no evidence in the record to refute the Custodian’s SOI and Chief Higgins’ certification. *See* Burns, GRC 2005-68.

See also Ehmann v. Borough of Belmar (Monmouth), GRC Complaint No. 2014-281 (March 2015).

Knowing & Willful

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's December 13, 2016 Interim Order. Specifically, the Custodian responded in the extended time frame by providing nine (9) copies of a cross section of handwritten time sheets (redacted and unredacted) along with a cross section of work schedules for an *in camera* examination. Further, the Custodian included a certification from Chief Higgins that adequately addresses conclusion No. 4 of the Order. The Custodian also simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian lawfully denied access to the first two (2) sets of columns indicating the "Regular Time" and "Extra Time" worked. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-1.1; Rivera v. Rutgers, The State Univ. of NJ, GRC Complaint No. 2009-311 (Interim Order dated January 31, 2012). However, the Custodian has unlawfully denied access to all remaining columns, with the exception of information in the "Case#" and "Explanation" columns that the Custodian believes is exempt. For the "Case#" and "Explanation" columns, the Custodian is required to provide a lawful basis and detailed explanation for any redactions she intends to perform prior to disclosure.
3. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination regarding the responsive hand written time sheets set forth in Item No. 2 within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.¹³**
4. **The *In Camera* Examination set forth above reveals the Custodian has lawfully denied access to the work schedules responsive to the Complainant's January 8, 2015 OPRA request item No. 1 pursuant to N.J.S.A. 47:1A-6.**

¹³ 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.

5. The Custodian bore her burden of proving she did not unlawfully deny access to any additional records responsive to the Complainant's January 8, 2015 OPRA request item Nos. 2, 3 and 4. N.J.S.A. 47:1A-6. Specifically, the Custodian certified in the SOI that she provided all responsive records to the Complainant. Furthermore, in compliance with the Council's Order, Chief Higgins certified that no additional records existed that identify the payroll officer and shift supervisor prior to November 10, 2014. Finally, there is no evidence in the record to refute the Custodian's SOI and Chief Higgins' certification. *See Burns v. Borough of Collingswood*, GRC Complaint No. 2005-68 (September 2005). *See also Ehmann v. Borough of Belmar (Monmouth)*, GRC Complaint No. 2014-281 (March 2015).
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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

February 14, 2017¹⁴

¹⁴ This consolidated complaint was prepared for adjudication at the Council's February 21, 2017 meetings but could not be adjudicated because legal counsel has requested more time to review the matter.



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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

December 13, 2016 Government Records Council Meeting

Susan Barker
Complainant

Complaint No. 2015-26

v.

Borough of Lakehurst (Ocean)
Custodian of Record

At the December 13, 2016 public meeting, the Government Records Council (“Council”) considered the December 6, 2016 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 Custodian certified in the SOI that she provided the Complainant two (2) records that the GRC has determined adequately addressed the Complainant’s December 12, 2014 OPRA request item No. 1, she did not unlawfully deny access to any requested records. N.J.S.A. 47:1A-6. Moreover, there is no competent, credible evidence in the record to refute the Custodian’s certification. *See Demitroff v. Buena Vista Twp. (Atlantic)*, GRC Complaint No. 2014-184 (January 2015)(*citing Burns v. Borough of Collingswood*, GRC Complaint No. 2005-68 (September 2005)).
2. The GRC must conduct an *in camera* review of the handwritten time sheets responsive to the Complainant’s December 12, 2014 OPRA request item No. 2. To effectuate the review, and similar to how it addressed the *in camera* review in Taylor v. NJ Dep’t of Corr., GRC Complaint No. 2010-319 (Interim Order dated March 27, 2012), the GRC is only requesting that the Custodian provide redacted and unredacted copies of all handwritten time sheets for the time period January 1, 2013, through March 1, 2013. The GRC must also conduct an *in camera* review of the work schedule record responsive to the Complainant’s January 8, 2015 OPRA request item No. 1. Specifically the Council must validate the Custodian’s assertion that the redactions are lawful under OPRA because disclosure would jeopardize public safety and substantially interfere with the State’s ability to protect its citizens against sabotage and acts of terrorism. *See Paff v. NJ Dep’t of Labor, Bd. of Review*, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-9(a), Executive Order No. 21 (Gov. McGreevey, 2002). Further, the Council must determine whether the records at issue are comparable to either those in Taylor v. NJ Dep’t of Corr., GRC Complaint No. 2010-319 (Interim Order dated March 27, 2012) or those in Rivera v. Rutgers, The State Univ. of New Jersey, GRC Complaint No. 2009-311 (Interim Order dated January 31, 2012).



3. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), nine (9) copies of the redacted handwritten time sheets, a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,³ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. The Custodian may have unlawfully denied access to additional records responsive to the Complainant's January 8, 2015 OPRA request item Nos. 2, 3, and 4. The Custodian must provide all responsive records identifying the shift supervisor and payroll officer for the entirety of 2013 and through November 10, 2014. Alternatively, if applicable, the Custodian must either certify whether Sgt. Heinzman and Sgt. Kline held those duties throughout the applicable time frame and/or that no additional responsive records exist. The GRC notes that it might be prudent for the Chief of Lakehurst Police Department or other appropriate officers to include supplemental certifications as part of the Custodian's compliance.
5. **The Custodian shall comply with item No. 4 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 1:4-4,⁴ to the Executive Director.⁵**
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 13th Day of December, 2016

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

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

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

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

⁵ Satisfactory compliance requires that the Custodian deliver the 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.

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 14, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 13, 2016 Council Meeting**

**Susan Barker¹
Complainant**

GRC Complaint No. 2015-26

v.

**Borough of Lakehurst (Ocean)²
Custodial Agency**

Records Relevant to Complaint:

December 12, 2014 OPRA request:

1. Time and attendance/time management policy and procedures for the Lakehurst Police Department (“LPD”).
2. Individual handwritten time sheet (if no time cards are available) from January 1, 2013, to the most recent pay period.³

January 8, 2015 OPRA request:

1. Work schedules for LPD personnel from January 1, 2013, through December 31, 2014.
2. Names of all LPD shift scheduling officers from January 1, 2013, through December 31, 2014.
3. Dates that each scheduling officer was responsible for scheduling from January 1, 2013, through December 31, 2014.
4. Names of LPD payroll officers from January 31, 2013, through December 31, 2014.
5. Regular and overtime hourly pay rates for police officers from January 1, 2013, through December 31, 2014.⁴

Custodian of Record: Bernadette Dugan

Request Received by Custodian: December 12, 2014; January 8, 2015

Response Made by Custodian: December 23, 2014; January 16, 2015

GRC Complaint Received: February 4, 2015

¹ No legal representation listed on record.

² Represented by Sean D. Gertner, Esq. (Lakewood, NJ).

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

⁴ The Complainant requested additional records that are not at issue in this complaint.

Background⁵

Request and Response:

On December 12, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 23, 2014, the Custodian responded in writing as follows:

- Item No. 1: The Custodian provided the most recent LPD police contract (“Contract”) and a copy of the “Policies and Procedures Manual” (“Policies”).
- Item No. 2: The Custodian provided the responsive time sheets with redactions of all time entries pursuant to Executive Order No. 21 (Gov. McGreevey, 2002)(“EO-21”) on advice of Custodian’s Counsel. Further, the Custodian noted that time sheets for December 2013 were not located and thus not provided.

On January 8, 2015, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On January 16, 2015, the Custodian responded in writing as follows:

- Item No. 1: The Custodian denied access to work/shift schedules from January 1, 2013, through December 31, 2014, under EO-21 on advice of Custodian’s Counsel.
- Item No. 2: The Custodian provided a November 10, 2014 memorandum (“Memo”) that identified a shift-scheduling officer.
- Item No. 3: The Custodian directed the Complainant to the Memo, which evidences the dates for which the shift-scheduling officer was responsible.
- Item No. 4: The Custodian noted that the identity of the payroll officer was also in the Memo.

Denial of Access Complaint:

On February 4, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that she recently noticed that a third of the municipal tax levy was spent on LPD. The Complainant stated that, based on her interest in how tax dollars are spent, she utilized OPRA to conduct her own financial analysis of LPD spending.

December 12, 2014 OPRA request

Regarding item No. 1, the Complainant argued that the disclosed Contract and Policies did not provide the sought information. The Complainant asserted that, although the Contract covers basic time policy, it did not explain how time and attendance is collected, managed, and paid. The Complainant asserted that the Policies similarly do not address time keeping. The

⁵ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Complainant contended that the Custodian provided 102 pages of records in an attempt to inundate her with paperwork to hide that the records were not responsive to her request item.

Regarding item No. 2, the Complainant argued that the Custodian improperly redacted 375 pages of time sheets. The Complainant argued that she did not believe that EO-21 applied to time sheets. The Complainant noted that she did not intend to jeopardize the safety of LPD officers and certainly would not want to increase the risk of potential acts of sabotage or terrorism. However, the Complainant contended that EO-21 does not apply here because she sought past time sheets to compare to computerized payroll timesheets she had also received. The Complainant asserted that disclosing time in/time out, vacation, sick, personal, and comp usage would in no way jeopardize the safety of any officers within LPD.

January 8, 2015 OPRA request

Regarding item No. 1, the Complainant reiterated her position that the responsive work/shift schedules are not exempt under EO-21. The Complainant noted that she was interested in the number of hours scheduled, whether eight (8) hour shifts, ten (10) hour shifts, weekly work schedules, overtime, *etc.*, from past work weeks. The Complainant further noted that she was not seeking specifics about the officers' tasks during those hours.

Regarding item Nos. 2 through 4, the Complainant asserted that the Custodian response to these request items did not appropriately identify the sought information. The Complainant contended that the Memo, from November 10, 2014, only identified the current scheduling and payroll officers but did not identify any past officers charged with these duties.

Statement of Information:

On February 20, 2015, the Custodian filed a Statement of Information ("SOI").

December 12, 2014 OPRA request

The Custodian certified that she received the Complainant's OPRA request on December 12, 2014. The Custodian certified that her search included locating all responsive records and contacting Custodian's Counsel with concerns that certain information would be exempt from disclosure under OPRA. The Custodian affirmed that she and the Custodian's Counsel agreed that certain records should be redacted. The Custodian certified that she responded in writing on December 23, 2014, disclosing a copy of the LPD contract and Policies responsive to item No. 1 and redacted time sheets responsive to item No. 2. The Custodian noted that she provided the lawful basis for her redactions at the time of her response.

The Custodian did not make any arguments in connection with her disclosure for item No. 1. However, the Custodian contended that she properly redacted the entirety of the grids in the handwritten time sheets responsive to item No. 2. The Custodian contended that, if taken together, the handwritten time sheets could reveal staffing and reporting patterns, the knowledge of which could jeopardize the safety and security of LPD. N.J.S.A. 47:1A-9(a); EO-21. Additionally, the Custodian argued that the redacted portions of the time sheets were exempt

under N.J.S.A. 47:1A-3(a), N.J.S.A. 47:1A-9(a), N.J.A.C. 13:1E-3.2, and prevailing GRC case law. *See* Taylor v. NJ Dep't of Corr., GRC Complaint No. 2010-319 (Interim Order dated March 27, 2012); Durham v. NJ Dep't of Corr., GRC Complaint No. 2012-35 (March 2013); Edwards v. NJ Dep't of Corr., GRC Complaint No. 2014-8 (September 2014).⁶

January 8, 2015 OPRA request

The Custodian certified that she received the Complainant's OPRA request on January 8, 2015. The Custodian certified that her search included locating all responsive records and contacting Custodian's Counsel with concerns that certain information would be exempt from disclosure under OPRA. The Custodian affirmed that she and the Custodian's Counsel agreed that certain records were not disclosable under OPRA. The Custodian certified that she responded in writing on January 16, 2015, denying access to the officer work schedules responsive to item No. 1 and disclosing a memorandum dated November 10, 2014, in response to item Nos. 2, 3, and 4. The Custodian noted that she provided the lawful basis for the denial of access to item No. 1 at the time of her response.

The Custodian addressed her denial of access to the work schedules by reiterating her basis for denial in relation to the Complainant's December 12, 2014 OPRA request item No. 2.

Analysis

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

December 12, 2014 OPRA Request, Item No. 1

In the Denial of Access Complaint, the Complainant contended that the Contract and Policies provided in response to this request item were not responsive because they did not include policies and procedures on how attendance was collected, managed, and paid. In the SOI, the Custodian certified that she provided both records in response to this request item but did not provide any arguments as to how the two (2) records satisfied this item.

Notwithstanding the lack of argument from the Custodian, upon review of the Contract and Policies, it is clear that both were responsive to the request item. Specifically, the Contract provides procedures for requesting time, changing time, and using compensatory time. Additionally, the Policies address time submission on time sheets and the process for appropriate approval. *See* Policies at 30 (under the heading "Timesheet"). Thus, the GRC is satisfied that the Custodian properly responded and that no unlawful denial of access occurred.

⁶ The Custodian included two (2) other cases which, upon review, did not address time sheets or work schedules.

Therefore, because the Custodian certified in the SOI that she provided the Complainant two (2) records that the GRC has determined adequately addressed the Complainant's December 12, 2014 OPRA request item No. 1, she did not unlawfully deny access to any requested records. N.J.S.A. 47:1A-6. Moreover, there is no competent, credible evidence in the record to refute the Custodian's certification. *See* Demitroff v. Buena Vista Twp. (Atlantic), GRC Complaint No. 2014-184 (January 2015)(*citing* Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005)).

December 12, 2014 OPRA request item No. 2 and
January 8, 2015 OPRA request item No. 1

EO-21 provides that government records are not subject to access:

where the inspection, examination or copying of that record would substantially interfere with the State's ability to protect and defend the State and its citizens against acts of sabotage or terrorism, or which, if disclosed, would materially increase the risk or consequences of potential acts of sabotage or terrorism.

Id.

In Taylor v. NJ Dep't of Corr., GRC Complaint No. 2010-319 (Interim Order dated March 27, 2012), the Council was tasked with determining whether a "Custody Staff Daily Shift Roster" was exempt from disclosure under the building security exemption. N.J.S.A. 47:1A-1.1. Ultimately, the Council required *in camera* review to make the determination. However, following the custodian's production of a cross section of the total records responsive, the Council dismissed the complaint due to the inability to locate the complainant. Id. (May 2015). Thus, the Council was unable to make a determination there. Subsequently, the Council has determined on multiple occasions that correctional facility shift schedules were exempt from disclosure in accordance with N.J.S.A. 47:1A-1.1; Durham v. NJ Dep't of Corr., GRC Complaint No. 2012-35 (March 2013); Edwards v. NJ Dep't of Corr., GRC Complaint No. 2014-8 (September 2014).

During the same time as the Council was adjudicating Taylor, it addressed the disclosability of law enforcement agency "duty logs." *See* Rivera v. Rutgers, The State Univ. of New Jersey, GRC Complaint No. 2009-311 (Interim Order dated January 31, 2012); Rivera v. City of Plainfield Police Dep't (Union), GRC Complaint No. 2009-317 (March 2012); Rivera v. City of Passaic (Passaic), GRC Complaint No. 2011-214 (Interim Order dated July 31, 2012). In each case, the Council determined that "duty logs" were exempt from disclosure under N.J.S.A. 47:1A-1.1 as records that "necessarily include details regarding surveillance techniques and staffing levels which, if disclosed, could pose a risk to the safety of police personnel." *See* Rivera, GRC 2009-311 at 18-19.

In Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council⁷ that accepted the custodian's legal conclusion for the denial of access without further review. The Appellate Division noted that

⁷ Paff v. NJ Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

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

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

Id. at 355.

Further, the Court found that:

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal . . . There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC’s obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

Id.

At issue currently before the Council are redacted hand written time sheets from January 31, 2013, to December 12, 2014, and work schedules for 2013 and 2014. In response to this request, the Custodian denied access, citing to EO-21. In the SOI, the Custodian also added that the records were exempt pursuant to a New Jersey Department of Law & Public Safety regulation (N.J.A.C. 13:1E-3.2) and N.J.S.A. 47:1A-3. Notwithstanding the forgoing and based on the evidence of record, it is impossible to determine whether disclosure of the records would, in fact, fall within the EO-21 exemption. Further, it is currently impossible to determine whether the records at issue are more akin to those at issue in Taylor, GRC 2010-319, or the “duty logs” at issue in Rivera, GRC 2009-311. For this reason, the GRC believes that it has an obligation to review *in camera* a cross section of the redacted sheet and of the 2013 and 2014 work schedule to make a determination on disclosure.

Therefore, the GRC must conduct an *in camera* review of the handwritten time sheets responsive to the Complainant’s December 12, 2014 OPRA request item No. 2. To effectuate the review, and similar to how it addressed the *in camera* review in Taylor, GRC 2010-319, the GRC is only requesting that the Custodian provide redacted and unredacted copies of all handwritten time sheets for the time period January 1, 2013, through March 1, 2013. The GRC must also conduct an *in camera* review of the work schedule record responsive to the

Complainant's January 8, 2015 OPRA request item No. 1. Specifically the Council must validate the Custodian's assertion that the redactions are lawful under OPRA because disclosure would jeopardize public safety and substantially interfere with the State's ability to protect its citizens against sabotage and acts of terrorism. *See Paff*, 379 N.J. Super. at 346; N.J.S.A. 47:1A-9(a), EO-21. Further, the Council must determine whether the records at issue are comparable to either those in Taylor, GRC 2010-319 or those in Rivera, GRC 2009-311.

January 8, 2015 OPRA request item Nos. 2, 3, and 4

The Complainant contended in the Denial of Access Complaint that the November 10, 2014 memorandum did not sufficiently answer her OPRA request items No. 2, 3, and 4, which sought the names and dates of both the shift-scheduling and payroll officers from January 1, 2013, through December 31, 2014. The Custodian simply asserted in the SOI that she provided the memorandum as responsive but provided no additional arguments.

A review of the memorandum does identify Sergeant Ronald Heinzman as shift supervisor and Sergeant Matthew Kline as payroll officer. However, the opening paragraph of the memorandum states that "[e]ffective immediately, the following duties are assigned to the below listed officers." Thus, it stands to reason that the memorandum only addressed a small portion of the Complainant's identified time frame based on the assumed effective date of November 10, 2014. Further, the memorandum provides no indication as to whether Sgt. Heinzman and/or Sgt. Kline were merely being reappointed to those duties from an earlier time. Based on this, the GRC is persuaded that the Custodian may have failed to respond fully to the instant OPRA request. Specifically, the memorandum addresses a roughly two (2) month portion of the Complainant's identified time frame. However, the Custodian provided no indication as to whether these officers were serving in that capacity throughout 2013 and 2014, whether another record exists identifying other officers during that time frame, or whether no other records exist.

Accordingly, the Custodian may have unlawfully denied access to additional records responsive to the Complainant's January 8, 2015 OPRA request item Nos. 2, 3, and 4. The Custodian must provide all responsive records identifying the shift supervisor and payroll officer for the entirety of 2013 and through November 10, 2014. Alternatively, if applicable, the Custodian must either certify whether Sgt. Heinzman and Sgt. Kline held those duties throughout the applicable time frame and/or that no additional responsive records exist. The GRC notes that it might be prudent for the Chief of LPD or other appropriate officers to include supplemental certifications as part of the Custodian's compliance.

To briefly address the Complainant's January 8, 2015 OPRA request item Nos. 2 and 4, requests for employee names are valid OPRA requests because said information is expressly identified as a "government record" under OPRA. N.J.S.A. 47:1A-10; Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated June 29, 2010); Scheeler, Jr. v. Motor Vehicle Comm'n, GRC Complaint No. 2014-75 (Interim Order dated October 28, 2014). Further, the Complainant's OPRA request item No. 3 appears to seek information rather than an identifiable government record. However, in situations where a request appeared overly broad on its face but the custodian nonetheless was able to locate records, the Council has followed Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012), in

determining that the request contained sufficient information for record identification. *See also* Bond v. Borough of Washington (Warren), GRC Complaint No. 2009-324 (Interim Order dated March 29, 2011); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2010-302 (Interim Order dated January 31, 2012). Here, while the request might arguably be invalid as written, the Custodian nevertheless identified the November 10, 2014 memorandum as responsive to the aforementioned request item. For this reason, the GRC declines to address the validity question.

Knowing & Willful

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 Custodian certified in the SOI that she provided the Complainant two (2) records that the GRC has determined adequately addressed the Complainant's December 12, 2014 OPRA request item No. 1, she did not unlawfully deny access to any requested records. N.J.S.A. 47:1A-6. Moreover, there is no competent, credible evidence in the record to refute the Custodian's certification. *See* Demitroff v. Buena Vista Twp. (Atlantic), GRC Complaint No. 2014-184 (January 2015)(*citing* Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005)).
2. The GRC must conduct an *in camera* review of the handwritten time sheets responsive to the Complainant's December 12, 2014 OPRA request item No. 2. To effectuate the review, and similar to how it addressed the *in camera* review in Taylor v. NJ Dep't of Corr., GRC Complaint No. 2010-319 (Interim Order dated March 27, 2012), the GRC is only requesting that the Custodian provide redacted and unredacted copies of all handwritten time sheets for the time period January 1, 2013, through March 1, 2013. The GRC must also conduct an *in camera* review of the work schedule record responsive to the Complainant's January 8, 2015 OPRA request item No. 1. Specifically the Council must validate the Custodian's assertion that the redactions are lawful under OPRA because disclosure would jeopardize public safety and substantially interfere with the State's ability to protect its citizens against sabotage and acts of terrorism. *See* Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-9(a), Executive Order No. 21 (Gov. McGreevey, 2002). Further, the Council must determine whether the records at issue are comparable to either those in Taylor v. NJ Dep't of Corr., GRC Complaint No. 2010-319 (Interim Order dated March 27, 2012) or those in Rivera v. Rutgers, The State Univ. of New Jersey, GRC Complaint No. 2009-311 (Interim Order dated January 31, 2012).

3. **The Custodian must deliver⁸ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), nine (9) copies of the redacted handwritten time sheets, a document or redaction index⁹, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,¹⁰ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. The Custodian may have unlawfully denied access to additional records responsive to the Complainant's January 8, 2015 OPRA request item Nos. 2, 3, and 4. The Custodian must provide all responsive records identifying the shift supervisor and payroll officer for the entirety of 2013 and through November 10, 2014. Alternatively, if applicable, the Custodian must either certify whether Sgt. Heinzman and Sgt. Kline held those duties throughout the applicable time frame and/or that no additional responsive records exist. The GRC notes that it might be prudent for the Chief of Lakehurst Police Department or other appropriate officers to include supplemental certifications as part of the Custodian's compliance.
5. **The Custodian shall comply with item No. 4 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 1:4-4,¹¹ to the Executive Director.¹²**
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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December 6, 2016

⁸ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁹ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

¹⁰ "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."

¹¹ "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."

¹² 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.