



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

**December 14, 2021 Government Records Council Meeting**

Edwin Sheppard  
Complainant

Complaint No. 2017-181

v.

NJ Division of Law and Public Safety,  
Division of Law  
Custodian of Record

At the December 14, 2021 public meeting, the Government Records Council (“Council”) considered the December 8, 2021 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 has borne her burden of proof that she timely responded to the Complainant’s OPRA request based on a warranted and substantiated extension. N.J.S.A. 47:1A-6; Ciccarone v. N.J. Dep’t of Treasury, GRC Complaint No. 2013-280 (Interim Order dated July 29, 2014). See Libertarians for Transparent Gov’t v. Summit Pub. Sch. (Union), GRC Complaint No. 2016-193 (March 2018). Therefore, no “deemed” denial occurred in the instant matter. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).
2. The requested “disciplinary actions,” to the extent they exist, are exempt from disclosure under OPRA. N.J.S.A. 47:1A-9(a); N.J.S.A. 47:1A-10; N.J.A.C. 13:1E-3.2(a)(4); North Jersey Media Grp. v. Bergen Cnty. Prosecutor’s Office, 405 N.J. Super. 386, 390 (App. Div. 2009); Rodriguez v. Kean Univ., GRC Complaint No. 2013-296 (June 2014). For this reason, the Custodian lawfully denied access to the Complainant’s OPRA request. N.J.S.A. 47:1A-6.

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 14<sup>th</sup> Day of December 2021

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: December 16, 2021**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
December 14, 2021 Council Meeting**

**Edwin Sheppard<sup>1</sup>  
Complainant**

**GRC Complaint No. 2017-181**

v.

**N.J. Department of law and Public Safety,  
Division of Law<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of any and all “disciplinary action(s) the Division of Law [“(DOL”)”] has taken against” Deputy Attorney General (“DAG”) Labinot Berlaolli between April 1, 2016 and July 26, 2017.

**Custodian of Record:** Octavia Frias  
**Request Received by Custodian:** July 26, 2017  
**Response Made by Custodian:** August 4, 2017  
**GRC Complaint Received:** September 11, 2017

**Background<sup>3</sup>**

**Request and Response:**

On July 26, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 4, 2017, the seventh (7<sup>th</sup>) business day after receipt of the OPRA request, the Custodian responded in writing stating that an extension of five (5) business days was necessary to respond to the Complainant’s OPRA request. The Complainant responded stating that the Custodian failed to provide an explanation for the extension and objected to same.

On August 10, 2017, the Custodian responded in writing stating that the subject OPRA request was denied under the personnel records exemption. N.J.S.A. 47:1A-10; Kovalcik v. Somerset Co. Prosecutor’s Office, 206 N.J. Super. 581 (2011).

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Deputy Attorney General (“DAG”) James A, McGhee. Previously represented by DAG Angela Juneau Bezer.

<sup>3</sup> 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.

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### Denial of Access Complaint:

On September 11, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant noted that the subject OPRA request was the result of a telephone interaction he had with DAG Berljolli in connection with a “Provisional Order of Revocation and Discipline” (“PORD”) delivered to his employer, who was contracted with the County of Cape May (“County”). The Complainant alleged that during that call, DAG Berljolli “abus[ed] his position in order to compel, intimidate, or bully people into actions that he wants them to do, even if he knows those actions are illegal.”

The Complainant first contended that the Custodian violated OPRA by extending the time frame without a proper explanation. The Complainant further contended that the extension was unnecessary given that the Custodian’s response amounted to two (2) paragraphs denying the subject OPRA request. The Complainant further argued that if the denial was lawful, which he contends it is not, then the Custodian should not have needed eleven (11) business days to proffer her boilerplate response.

The Complainant next argued that the Custodian refused to identify whether any responsive records exist, but that her response to a separate OPRA request confirmed their existence. The Complainant stated that the subject OPRA request was one of two requests submitted on the same day for DOL employee disciplinary records. The Complainant stated that while the Custodian denied access here, she responded to the other OPRA request stating that no records existed. The Complainant also argued that Custodian’s extension proved that records existed, but that DOL needed to “scramble to find any excuse” to deny access.

The Complainant further argued that the Custodian unlawfully denied access to the responsive disciplinary records. The Complainant asserted that his OPRA request did not seek personnel files or personal information; he sought access to disciplinary actions that are required to be disclosed by law under the “Brady disclosure rules.” The Complainant further argued that numerous court cases have reaffirmed this position, while noting that the Brady rule applies to disciplinary records of “law enforcement officers and investigators” but also “extend to . . . prosecutors.” Paff v. Cape May Cty. Prosecutor's Office, 2016 N.J. Super. Unpub. LEXIS 2485 (App. Div. 2016). The Complainant thus contended that the responsive records should be disclosed to him, as such disclosure would serve the public interest and relevant case law supports their disclosure.

The Complainant noted that he would withdraw this complaint if the Custodian disclosed the responsive disciplinary records without redactions; however, he demanded that several certifications addressing various issues be submitted should this not occur. The Complainant also requested that: 1) the GRC find that the Custodian be found to have knowingly and willfully violated OPRA; 2) the GRC award “renumeration to [the Complainant] for the time” expended on this complaint;<sup>4</sup> and 3) DOL provide him a “written apology . . . for the conduct of its employees” handling the subject OPRA request and “condemn[ing] the same conduct.”

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<sup>4</sup> The GRC notes that OPRA only supports prevailing party attorney’s fees where a complainant who is represented prevails in OPRA litigation. N.J.S.A. 47:1A-6. OPRA does not provide for general renumeration to a *pro se* party, Edwin Sheppard v. N.J. Department of Law and Public Safety, Division of Law, 2017-181 – Findings and Recommendations of the Executive Director

### Statement of Information:<sup>5</sup>

On June 6, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on July 26, 2017 in tandem with a second request for similar records of another employee. The Custodian certified that following a five (5) business day extension of time, she responded in writing on August 10, 2017 denying the subject OPRA request under the personnel records exemption. N.J.S.A. 47:1A-10.

The Custodian argued that her denial of access was lawful because personnel records are presumptively exempt from disclosure. N.J.S.A. 47:1A-10; Kovalcik, 206 N.J. Super. 581; McGee v. Twp. of East Amwell, 416 N.J. Super. 602, 615 (App. Div. 2010). The Custodian also argued that none of the exceptions to the personnel records exemption apply to employee disciplinary records. The Custodian also argued that regulations promulgated by the New Jersey Department of Law & Public Safety (“LPS”), of which DOL is a division therein, exempt access to employee disciplinary records. N.J.A.C. 13:1E-3.2(a)(4). The Custodian thus argued that it is clear that the requested disciplinary history for DAG Berlajolli is exempt from disclosure and that the GRC should find accordingly.

### Analysis

#### Timeliness

OPRA provides that a custodian may request an extension of time to respond to the complainant’s OPRA request, but the custodian must provide a specific date by which he/she will respond. Should the custodian fail to respond by that specific date, “access shall be deemed denied.” N.J.S.A. 47:1A-5(i).

In Rivera v. City of Plainfield Police Dep’t (Union), GRC Complaint No. 2009-317 (May 2011), the custodian responded in writing to the complainant’s request on the fourth (4<sup>th</sup>) business day by seeking an extension of time to respond and providing an anticipated date by which the requested records would be made available. The complainant did not consent to the custodian’s request for an extension of time. The Council stated that:

The Council has further described the requirements for a proper request for an extension of time. Specifically, in Starkey v. N.J. Dep’t of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009), the Custodian provided the Complainant with a written response to his OPRA request on the second (2<sup>nd</sup>) business day following receipt of said request in which the Custodian requested an extension of time to respond to said request and provided the Complainant with an anticipated deadline date upon which the Custodian would respond to the request. The Council held that “because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days

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even if they are a licensed attorney. See Feld v. City of Orange Twp., 2019 N.J. Super. Unpub. LEXIS 903 (App. Div. 2019); Pitts v. N.J. Dep’t of Corr., GRC Complaint No. 2005-71 (April 2006).

<sup>5</sup> On October 6, 2017, this complaint was referred to mediation. On November 20, 2017, this complaint was referred back to the GRC for adjudication.

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and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5(g) [and] N.J.S.A. 47:1A-5(i).

Further, in Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010), the Council held that the custodian did not unlawfully deny access to the requested records, stating in pertinent part that:

[B]ecause the Custodian provided a written response requesting an extension on the sixth (6<sup>th</sup>) business day following receipt of the Complainant's OPRA request and providing a date certain on which to expect production of the records requested, and, notwithstanding the fact that the Complainant did not agree to the extension of time requested by the Custodian, the Custodian's request for an extension of time [to a specific date] to respond to the Complainant's OPRA request was made in writing within the statutorily mandated seven (7) business day response time.

Moreover, in Werner v. N.J. Civil Serv. Comm'n, GRC Complaint No. 2011-151 (December 2012), the Council again addressed whether the custodian lawfully sought an extension of time to respond to the complainant's OPRA request. The Council concluded that because the custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated date by which the requested records would be made available, the custodian properly requested the extension pursuant to OPRA. See also Rivera, GRC 2009-317; Criscione, GRC 2010-68; and Starkey, GRC 2007-315, *et seq.*

Although extensions are rooted in well-settled case law, the Council need not find valid every request for an extension containing a clear deadline. In Ciccarone v. N.J. Dep't of Treasury, GRC Complaint No. 2013-280 (Interim Order dated July 29, 2014), the Council found that the custodian could not lawfully exploit the process by repeatedly rolling over an extension once obtained. In reaching the conclusion that the continuous extensions resulted in a "deemed" denial of access, the Council looked to what is "reasonably necessary."

In the instant matter, the Custodian sought an extension of time until January 15, 2020 for the Complainant's OPRA request. The Custodian extended the response time on one (1) occasion for a total of five (5) business days. As noted above, a requestor's approval is not required for a valid extension. However, it should be noted that the Complainant objected to the extension prior to the filing of this complaint.

To determine if the extended time for a response is reasonable, the GRC must first consider the complexity of the request as measured by the number of items requested, the ease in identifying and retrieving requested records, and the nature and extent of any necessary redactions. Ciccarone, GRC 2013-280. The GRC must next consider the amount of time the custodian already had to respond to the request. Id. Finally, the GRC must consider any extenuating circumstances that could hinder the custodian's ability to respond effectively to the request.<sup>6</sup> Id.

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<sup>6</sup> "Extenuating circumstances" could include, but not necessarily be limited to, retrieval of records that are in storage or archived (especially if located at a remote storage facility), conversion of records to another medium to Edwin Sheppard v. N.J. Department of Law and Public Safety, Division of Law, 2017-181 – Findings and Recommendations of the Executive Director

Regarding the subject OPRA request, the Complainant sought “any and all disciplinary actions the [DOL] has taken against” DAG BerlaJolli between April 1, 2016 and July 26, 2017. In the SOI, the Custodian explained that she received and responded to two (2) OPRA requests at the same time that sought similar records. The Custodian ultimately responded on the fourth (4) business day of the extension denying the subject OPRA request.

From the Custodian’s receipt of the Complainant’s OPRA request, she sought an additional five (5) business days to respond. Thus, the Custodian sought five (5) business days in addition to the original seven (7) business days but responded on the fourth (4<sup>th</sup>) business day of the extended time frame. Thus, the total time expended to respond to the subject OPRA request totaled eleven (11) business days. In determining whether the extension was ultimately unreasonable, the GRC looks to its prior decision in Libertarians for Transparent Gov’t v. Summit Pub. Sch. (Union), GRC Complaint No. 2016-193 (March 2018). There, the custodian sought one (1) extension comprising of twelve (12) business days to respond to the subject OPRA request. The Council ultimately found that the extension was warranted and substantiated. In reaching this conclusion, the Council noted that although the request itself was not complex, the underlying circumstances pertaining to the review of the responsive settlement agreement substantiated the extension.

The GRC sees the facts here as more permissive of an extension than in Libertarians, GRC 2016-193. Specifically, the Custodian sought significantly less time than the custodian in Libertarians. Further, the OPRA request here was specific to the records sought, as was the case in Libertarians. Further, it is obvious the Custodian addressed multiple OPRA requests in her August 10, 2017 response to the Complainant, which reasonably could have accounted for the additional time for DOL to respond. Thus, based on the evidence of record, the GRC finds that extending the response time for the subject OPRA request to the extent demonstrated in the instant matter was not excessive.

Accordingly, the Custodian has borne her burden of proof that she timely responded to the Complainant’s OPRA request based on a warranted and substantiated extension. N.J.S.A. 47:1A-6; Ciccarone, GRC 2013-280. See Libertarians, GRC 2016-193. Therefore, no “deemed” denial occurred in the instant matter. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).

### **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.

OPRA provides that:

Notwithstanding the provisions [OPRA] or any other law to the contrary, the personnel or pension records of any individual in the possession of a public agency,

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accommodate the requestor, emergency closure of the custodial agency, or the custodial agency’s need to reallocate resources to a higher priority due to *force majeure*.

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including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access . . .

[N.J.S.A. 47:1A-10.]

OPRA begins with a presumption against disclosure and “proceeds with a few narrow exceptions that . . . need to be considered.” Kovalcik, 206 N.J. at 594. These are:

[A]n individual’s name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of any pension received shall be government record;

[P]ersonnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and

[D]ata contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.

[Id.]

Further, the personnel record exemption applies to records that “. . . bear many of the indicia of personnel files.”” North Jersey Media Grp. v. Bergen Cnty. Prosecutor’s Office, 405 N.J. Super. 386, 390 (App. Div. 2009); Rodriguez v. Kean Univ., GRC Complaint No. 2013-296 (June 2014). In Rodriguez, 2013-296, the Council held that “disciplinary actions are not specifically identified as personnel information subject to disclosure under OPRA.” Id. at 5. The Council has also similarly determined that records involving employee discipline or investigations into employee misconduct are properly classified as personnel records exempt from disclosure under N.J.S.A. 47:1A-10. See Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004); Wares v. Twp. of West Milford (Passaic), GRC Complaint No. 2014-274 (May 2015).

Further, OPRA provides that:

[OPRA] shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to . . . any other statute; resolution of either or both Houses of the Legislature; *regulation promulgated under the authority of any statute* or Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.

[N.J.S.A. 47:1A-9(a) (emphasis added).]



In addition to records designated as confidential pursuant to the provisions of N.J.S.A. 47:1A-1, et seq., LPS regulations exempt access to “[r]ecords, specific to an individual employee or employees . . . and relating to or which form the basis of discipline, discharge, promotion, transfer, employee performance, employee evaluation, or other related activities, whether open, closed, or inactive, except for the final agency determination” N.J.A.C. 13:1E-3.2(a)(4).

Here, the Complainant sought access to “disciplinary actions” of DAG Berlajolli and was subsequently denied access under both OPRA and LPS regulations. This complaint ensued, wherein the Complainant alleged an unlawful denial of access. Among his arguments, the Complainant argued that disciplinary records were not personnel records. Further, the Complainant contended that the Custodian’s extension of time and response, which differed from a similar OPRA request, proved that records existed. The Complainant further argued that relevant case law supported that the responsive records were subject to access under the “Brady rule.” Conversely, the Custodian maintained her position in the SOI that she lawfully denied access to the records.

Reviewing all facts and arguments presented, the GRC finds that the Custodian lawfully denied access to the requested disciplinary records under both N.J.S.A. 47:1A-10 and N.J.A.C. 13:1E-3.2(a)(4). There is sufficient GRC and Superior Court case law supporting such a finding: disciplinary records have the “indicia” of personnel records and are not identified in the exceptions to the personnel exemption. North Jersey Media Grp., 405 N.J. Super. at 390; Rodriguez, GRC 2013-296. Further, LPS’s regulations clearly add an additional layer to the exempt status of the records sought here.

To briefly address the Complainant’s counterarguments, the so-called “Brady rule” applies to prosecutors withholding exculpatory evidence during a criminal trial. Brady v. Maryland, 373 U.S. 83 (1963). This case was referenced in Paff, 2016 N.J. Super. Unpub. LEXIS 2485 at 2-4, but only for purposes of additional detail as to the content of the records at issue therein. However, both Brady and Paff are inapposite to the instant complaint because: 1) the GRC does not engage in criminal prosecution; 2) the records in Paff were considered exempt under OPRA notwithstanding that the common law disclosability of them continued on remand; and 3) the GRC has no authority to determine an individual’s common law right to access records per N.J.S.A. 47:1A-7(b) and Rowan, Jr. v. Warren Hills Reg’l Sch. Dist. (Warren), GRC Complaint No. 2011-347 (January 2013). Thus, neither citation provides sufficient evidence to overturn years of GRC and Court precedent governing the disclosability of government employee disciplinary records.

Accordingly, the requested “disciplinary actions,” to the extent they exist, are exempt from disclosure under OPRA. N.J.S.A. 47:1A-9(a); N.J.S.A. 47:1A-10; N.J.A.C. 13:1E-3.2(a)(4); N. Jersey Media Grp., 405 N.J. Super. 386; Rodriguez, GRC 2013-296. For this reason, the Custodian lawfully denied access to the Complainant’s OPRA request. N.J.S.A. 47:1A-6.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian has borne her burden of proof that she timely responded to the Complainant’s OPRA request based on a warranted and substantiated extension.

N.J.S.A. 47:1A-6; Ciccarone v. N.J. Dep't of Treasury, GRC Complaint No. 2013-280 (Interim Order dated July 29, 2014). See Libertarians for Transparent Gov't v. Summit Pub. Sch. (Union), GRC Complaint No. 2016-193 (March 2018). Therefore, no “deemed” denial occurred in the instant matter. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).

2. The requested “disciplinary actions,” to the extent they exist, are exempt from disclosure under OPRA. N.J.S.A. 47:1A-9(a); N.J.S.A. 47:1A-10; N.J.A.C. 13:1E-3.2(a)(4); North Jersey Media Grp. v. Bergen Cnty. Prosecutor's Office, 405 N.J. Super. 386, 390 (App. Div. 2009); Rodriguez v. Kean Univ., GRC Complaint No. 2013-296 (June 2014). For this reason, the Custodian lawfully denied access to the Complainant’s OPRA request. N.J.S.A. 47:1A-6.

Prepared By: Frank F. Caruso  
Executive Director

December 8, 2021