



State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
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TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lieutenant Governor

JACQUELYN A. SUÁREZ
Acting Commissioner

FINAL DECISION

November 8, 2023 Government Records Council Meeting

Rotimi Owoh, Esq. (o/b/o African American
Data & Research Institute)
Complainant

Complaint No. 2021-281

v.

Fort Lee Police Department (Bergen)
Custodian of Record

At the November 8, 2023 public meeting, the Government Records Council (“Council”) considered the October 31, 2023 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s August 29, 2023 Interim Order because she responded in the prescribed time frame providing records, and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Pursuant to the Council’s August 29, 2023 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 76 (2008). Specifically, Custodian located and provided records containing the requested information in compliance with the Council’s Interim Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 76. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney’s fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney’s fees, Complainant’s Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

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 8th Day of November 2023

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: November 13, 2023

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
November 8, 2023 Council Meeting**

**Rotimi Owoh, Esq. (on behalf of African American
Data & Research Institute)¹
Complainant**

GRC Complaint No. 2021-281

v.

**Fort Lee Police Department (Bergen)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of: Names, date of hire, date of separation and reason for separation, salary at the time of separation who either resigned or retired or terminated or otherwise separated from 2008 to the present. N.J.S.A. 47:1A-10. This request includes any agreement entered with each one of the separated police officer(s).

- a. When stating the reason for separation, please note that some police officers separate due to plea deal, criminal convictions, criminal charges, sentences, and or other court agreement or court proceedings that require officers to be separated from your police department and or law enforcement jobs.
- b. Some police officers separate due to internal affairs investigations within the police departments.³

Custodian of Record: Evelyn Rosario

Request Received by Custodian: August 24, 2021

Response Made by Custodian: October 14, 2021

GRC Complaint Received: November 10, 2021

Background

August 29, 2023 Council Meeting:

At its August 29, 2023 public meeting, the Council considered the August 22, 2023 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 has not borne her burden of proving she lawfully denied access to the Complainant's OPRA request for the "[n]ames, date of hire, date of separation and reason for separation, [and] salary at the time of separation" of Borough of Fort Lee

¹ The Complainant represents the African American Data & Research Institute.

² Represented by Bradley Tishman, Esq., of Cleary, Giacobbe, Alfieri, & Jacobs, LLC (Oakland, NJ).

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

- police officers from 2008 to the date of the request. N.J.S.A. 47:1A-6; Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated June 29, 2010); Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2011-64 (Interim Order dated August 28, 2012); Matthews v. City of Atlantic City (Atlantic), GRC Complaint No. 2008-123 (February 2009). The Custodian shall identify, locate, and produce the requested personnel information. N.J.S.A. 47:1A-10. If no responsive information could be located, the Custodian shall certify to same.
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver⁴ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁵ to the Executive Director.⁶**
 3. Recognizing that the Custodian’s October 14, 2021 response to the Complainant’s August 24, 2021 OPRA request seeking settlements is no longer a lawful denial pursuant to Libertarians for Transparent Gov’t v. Cumberland Cnty., 250 N.J. 46, 56-57 (2022); his response was nonetheless lawful at that time because it was consistent with the prevailing case law prior to the Court’s ruling. N.J.S.A. 47:1A-6; Libertarians for Transparent Gov’t v. Cumberland Cnty., 465 N.J. Super. 11 (App. Div. 2020); Moore v. N.J. Dep’t of Corr., GRC Complaint No. 2009-144 (Interim Order dated October 26, 2010). Thus, the Council declines to order disclosure here.
 4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s Interim Order.

Procedural History:

On August 29, 2023, the Council distributed its Interim Order to all parties. On September 5, 2023, the Custodian’s Counsel requested an extension of time until September 27, 2023 to respond to the Council’s Interim Order. That same day, the Complainant responded via e-mail consenting to the extension. On September 22, 2023, Custodian’s Counsel requested an additional extension until October 18, 2023 to respond to the Interim Order. On September 28, 2023, the GRC granted the extension.

On October 16, 2023, the Custodian responded to the Interim Order. The Custodian certified that she attached a list of officers who separated from the Borough of Ft. Lee (“Borough”)

⁴ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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

between 2008 and the date of the Complainant's OPRA request. The Custodian certified that the list provided the requested personnel information. The Custodian next certified that the list identified the reason for separation as "retired" except for six (6) officers. The Custodian certified that she provided records detailing the reason for separation for those six (6) officers, with redactions made to home addresses pursuant to N.J.S.A. 47:1A-1.1. The Custodian also certified that she provided the Complainant with the records on October 16, 2023, and provided certified confirmation of compliance to the Executive Director.

Analysis

Compliance

At its August 29, 2023 meeting, the Council ordered the Custodian to provide the disclosable personnel information of police officers separated with the Borough. The Council also required the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On August 29, 2023, 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 September 6, 2023.

On September 5, 2023, the fourth (4th) business day after receipt of the Council's Order, the Custodian requested an extension of time to respond until September 27, 2023. On September 22, 2023 the Custodian requested an additional extension until October 18, 2023. On October 16, 2023, two (2) business days prior to the extended deadline, the Custodian responded in writing providing the Complainant with responsive records, with redactions made to home addresses pursuant to N.J.S.A. 47:1A-1.1. The Custodian also provided certified confirmation of compliance to the Executive Director.

Therefore, the Custodian complied with the Council's August 29, 2023 Interim Order because she responded in the extended time frame providing records, and simultaneously provided certified confirmation of compliance to the Executive Director.

Prevailing Party Attorney's Fees

OPRA provides that:

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

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

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

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008), the Court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” (quoting Buckhannon Bd. & Care Home v. West Virginia Dep’t of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties . . .” Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863. Further, the Supreme Court expressed concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

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

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

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

[Mason at 73-76.]

The Court in Mason, further held that:

[R]equestors are entitled to attorney’s fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) “a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved”; and (2) “that the relief ultimately secured by plaintiffs had a basis in law.” Singer v. State, 95 N.J. 487, 495, cert denied, New Jersey v. Singer, 469 U.S. 832 (1984).

[Id. at 76.]

Here, the Complainant sought the “[n]ames, date of hire, date of separation and reason for separation, salary at the time of separation who either resigned or retired or terminated or otherwise separated from 2008 to the present,” as well as any “agreements” providing the “reason for separation” from the Borough. The Custodian responded to the Complainant providing a list containing a portion of the requested information, and thereafter argued that providing all the requested information required research. The Complainant then filed the instant complaint on November 10, 2021, asserting the Custodian failed to provide the “real reason” for the officers’ separations.

In determining whether the Complainant is a prevailing party entitled to attorney’s fees, the GRC is satisfied that the evidence of record supports a conclusion in the affirmative. The Custodian initially provided a partial response, and thereafter asserted that the request was invalid. However, the Council held that the request was valid, and the Custodian located and provided records containing the requested information in response to the Council’s Interim Order. Thus, a causal nexus exists between this complaint and the change in the Custodian’s conduct. Mason, 196 N.J. at 76. Accordingly, the Complainant is a prevailing party entitled to attorney’s fees.⁷

Therefore, pursuant to the Council’s August 29, 2023 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, Custodian located and provided records containing the requested information in compliance with the Council’s Interim Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney’s fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney’s fees, Complainant’s Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

⁷ The Council makes this determination with the understanding that the Complainant acted on behalf of a bona fide client at the time of the request. Although the Complainant’s status as representing an actual client has been previously challenged, the available evidence on the record is insufficient to address that issue herein. See Owoh, Esq. (O.B.O. AADARI) v. Neptune City Police Dep’t (Monmouth), GRC Complaint No. 2018-153 (April 2020) and Owoh, Esq. (O.B.O. AADARI) v. Freehold Twp. Police Dep’t (Monmouth), GRC Complaint No. 2018-155 (Interim Order dated September 29, 2020).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's August 29, 2023 Interim Order because she responded in the prescribed time frame providing records, and simultaneously provided certified confirmation of compliance to the Executive Director.

2. Pursuant to the Council's August 29, 2023 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 76 (2008). Specifically, Custodian located and provided records containing the requested information in compliance with the Council's Interim Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 76. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Prepared By: Samuel A. Rosado
Staff Attorney

October 31, 2023



State of New Jersey

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lieutenant Governor

KIMBERLY K. HOLMES
Acting Commissioner

INTERIM ORDER

August 29, 2023 Government Records Council Meeting

Rotimi Owoh, Esq. (o/b/o African American
Data & Research Institute)
Complainant

Complaint No. 2021-281

v.

Fort Lee Police Department (Bergen)
Custodian of Record

At the August 29, 2023 public meeting, the Government Records Council (“Council”) considered the August 22, 2023 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 not borne her burden of proving she lawfully denied access to the Complainant’s OPRA request for the “[n]ames, date of hire, date of separation and reason for separation, [and] salary at the time of separation” of Borough of Fort Lee police officers from 2008 to the date of the request. N.J.S.A. 47:1A-6; Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated June 29, 2010); Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2011-64 (Interim Order dated August 28, 2012); Matthews v. City of Atlantic City (Atlantic), GRC Complaint No. 2008-123 (February 2009). The Custodian shall identify, locate, and produce the requested personnel information. N.J.S.A. 47:1A-10. If no responsive information could be located, the Custodian shall certify to same.
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³**

¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

² "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."

³ 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.

3. Recognizing that the Custodian's October 14, 2021 response to the Complainant's August 24, 2021 OPRA request seeking settlements is no longer a lawful denial pursuant to Libertarians for Transparent Gov't v. Cumberland Cnty., 250 N.J. 46, 56-57 (2022); his response was nonetheless lawful at that time because it was consistent with the prevailing case law prior to the Court's ruling. N.J.S.A. 47:1A-6; Libertarians for Transparent Gov't v. Cumberland Cnty., 465 N.J. Super. 11 (App. Div. 2020); Moore v. N.J. Dep't of Corr., GRC Complaint No. 2009-144 (Interim Order dated October 26, 2010). Thus, the Council declines to order disclosure here.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 29th Day of August 2023

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: August 29, 2023

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 29, 2023 Council Meeting**

**Rotimi Owoh, Esq. (on behalf of African American
Data & Research Institute)¹
Complainant**

GRC Complaint No. 2021-281

v.

**Fort Lee Police Department (Bergen)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of: Names, date of hire, date of separation and reason for separation, salary at the time of separation who either resigned or retired or terminated or otherwise separated from 2008 to the present. N.J.S.A. 47:1A-10. This request includes any agreement entered with each one of the separated police officer(s).

- a. When stating the reason for separation, please note that some police officers separate due to plea deal, criminal convictions, criminal charges, sentences, and or other court agreement or court proceedings that require officers to be separated from your police department and or law enforcement jobs.
- b. Some police officers separate due to internal affairs investigations within the police departments.³

Custodian of Record: Evelyn Rosario

Request Received by Custodian: August 24, 2021

Response Made by Custodian: October 14, 2021

GRC Complaint Received: November 10, 2021

Background⁴

Request and Response:

On August 24, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. That same day, Nadine Drumgoole responded on the Custodian’s behalf stating that an extension of thirty (30) business days was needed to respond to the request. On October 14, 2021, Ms. Drumgoole responded on the

¹ The Complainant represents the African American Data & Research Institute.

² Represented by Bradley Tishman, Esq., of Cleary, Jacobbe, Alfieri, & Jacobs, LLC (Oakland, NJ).

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

⁴ 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.

Rotimi Owoh, Esq. (on behalf of African American Data & Research Institute) v. Fort Lee Police Department (Bergen), 2021-281 – Findings and Recommendations of the Executive Director

Custodian's behalf in writing providing a list containing a list of officers and identifying whether they were "terminated" or "retired".

Denial of Access Complaint:

On November 10, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that the provided records did not provide the reasons for separation. The Complainant contended that simply stating "terminated", "resigned", or "retired," was insufficient under N.J.S.A. 47:1A-10.

The Complainant requested that the GRC compel the Custodian to comply fully with the OPRA request and award counsel fees.

Statement of Information:

On November 24, 2021, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on August 24, 2021. The Custodian certified that her search included requesting information from Samantha Media, the Payroll Clerk for the Borough of Fort Lee ("Borough"). The Custodian certified Ms. Drumgoole responded in writing on October 14, 2021, providing a list of officers identifying the reason for separation for each.

The Custodian also certified that she initially assumed that the Complainant sought the same records as those requested in a previous OPRA request. The Custodian certified that upon receipt of the complaint, she realized that the current request sought records from 2008 to the present, whereas the previous request sought information from 2002 to 2017. The Custodian thus certified that the Borough Police Department was reviewing personnel files to provide a more complete list from 2018 to the present. The Custodian also certified that when "terminated" is used in the database system, it includes officers who resigned or retired, in addition to those removed for cause.

The Custodian contended that the request was impermissibly vague and did not seek an identifiable government record, as it sought a myriad of personnel information of Borough police officers. MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 549 (App. Div. 2005); N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005).

The Custodian next argued that the request was more akin to a discovery demand rather than an OPRA request. The Custodian asserted that she tried to accommodate the Complainant by providing the requested information that was not unduly burdensome to ascertain, but stated there were no records which reflect the circumstances underlying the officers' reasons for separation. The Custodian thus argued that the Borough was not obligated to create a new document under OPRA, citing Sussex Commons Assocs., LLC v. Rutgers Univ., 210 N.J. 531 (2012), and Matthews v. City of Atlantic City (Atlantic), GRC Complaint No. 2008-123 (February 2009).

The Custodian next asserted that in Libertarians for Transparent Gov't v. Ocean Cnty. Prosecutor's Office, 2018 N.J. Super. Unpub. LEXIS 25 (App. Div.), cert. denied, 235 N.J. 407 (2018), the Appellate Division held that public entities were not required to ascertain and provide the reasons why an employee separated from the Borough. The Custodian argued that the Borough complied with its legal obligations by providing the reason for each officer's separation, notwithstanding the deficiency of the request.

Lastly, the Custodian contended that the Complainant and Complainant's Counsel are the same individual, and therefore not entitled to a counsel fee award pursuant to N.J.S.A. 47:1A-6.

On January 31, 2022, Custodian's Counsel submitted a supplement to the SOI. Counsel asserted that in accordance with the Custodian's certification, the Borough conducted a search for additional information and attached an updated record containing officer information from 2008 to the present.

Counsel next stated that the Borough did not specifically respond to the portion of the request seeking "agreements" between the Borough and the separated officers. Counsel asserted that in response to the Complainant's prior OPRA request, the Borough responded at the time stating that while three (3) responsive agreements were located, they were exempt from disclosure pursuant to Libertarians for Transparent Gov't v. Cumberland Cnty., 465 N.J. Super. 11 (App. Div. 2020).

Counsel stated that the Borough conducted a good faith search for any additional agreements, but none were located. Counsel nevertheless argued that the already located settlement agreements were still exempt from disclosure on the same basis as previously asserted.

Additional Submissions:

On April 1, 2022, the Complainant submitted a brief in response to the Custodian's SOI. The Complainant first noted that the New Jersey Supreme Court in Libertarians for Transparent Gov't v. Cumberland Cnty., 250 N.J. 46 (2022), and Rivera v. Union Cnty. Prosecutor's Office, 250 N.J. 124, (2022), were recently decided and supported the claim that he was entitled to redacted records providing the real reasons for separations.

The Complainant thereafter argued that the terms "terminated", "retired", or "resigned," did not sufficiently provide the "reason for separation" because they were merely types of employment separations and did not adequately describe the underlying basis thereof. The Complainant argued that the "reason" for separation was likely located within a separate document constituting a government record, and the Custodian was obligated to retrieve that record, rather than create a spreadsheet or list containing the words "terminated", "retired", or "resigned."

The Complainant next asserted that in many instances where a police officer is charged for crimes, they may enter a plea agreement which may require them to leave the police department or be removed from employment because of a conviction. The Complainant argued that it was insufficient for the Custodian to merely state the terms "retired", "resigned", or "terminated" as the reason for separation if the "real reason" was that the officer was compelled to separate as part

of a plea agreement or sentence. The Complainant thus argued that the Custodian violated OPRA by not providing the “real reasons” for any of the separations listed.

The Complainant asserted that a guilty plea agreement between an officer and prosecutor is akin to a settlement agreement normally entered into in civil proceedings. Libertarians, 465 N.J. Super. 11. The Complainant argued that civil settlement agreements are subject to OPRA, and therefore guilty plea agreements should also be subject to OPRA in accordance with Libertarians.

The Complainant contended the Borough did not want to provide the “real reasons” for separation due to the pervasive culture and predisposition to protect officers convicted of misconduct. The Complainant argued that providing single word descriptions was only partially truthful and did not promote OPRA’s goal of transparency.

The Complainant asserted that as an example of police departments’ culture, he noted that in response to a similar OPRA request, Millville Police Department stated that two (2) officers “resigned” from the department. The Complainant asserted that in fact the officers pleaded guilty to criminal charges and as part of the agreement and sentencing they were required to be separated from the department.

The Complainant requested that the GRC compel the Custodian comply fully and truthfully with the OPRA request. The Complainant also requested the GRC declare the Complainant a prevailing party and award counsel fees.⁵

On May 2, 2022, Custodian’s Counsel e-mailed the GRC. Counsel first clarified that the Borough possessed just two (2) responsive separation agreements, instead of three (3) as previously stated. Counsel asserted that the previous OPRA request sought settlement agreements between the Borough and current and former officers, whereas the current request was limited to agreements between the Borough and separated officers. Counsel next stated that considering the Court’s ruling in Libertarians, 250 N.J. 46, the Borough was amenable to releasing the two (2) agreements to the Complainant.

Counsel maintained that the Complainant insisted the Borough conduct research to discover the “real” reasons for an officer’s separation. Counsel argued the Complainant’s demands were outside the scope of OPRA’s requirements. See Lagerkvist v. Office of the Governor of State, 443 N.J. Super. 230 (App. Div. 2015); Weiner v. Cnty. of Essex, GRC Complaint No. 2019-01 (August 2020). Counsel also argued that neither the Libertarians nor Rivera cases required the Custodian to conduct the research the Complainant demands in his reply.

Counsel contended the Borough was willing to provide the two (2) separation agreements identified as responsive to the portion of the request seeking “agreements,” but requested the GRC deny any other portion requiring the Custodian to perform research.

⁵ The Complainant further noted that access to the records should have been granted under the “common law ‘right to access public records’.” However, the GRC does not have the authority to address a requestor’s common law right to access records. N.J.S.A. 47:1A-7(b); Rowan, Jr. v. Warren Hills Reg’l Sch. Dist. (Warren), GRC Complaint No. 2011-347 (January 2013); Kelly v. N.J. Dep’t of Transp., GRC Complaint No. 2010-215 (November 2011). Thus, the GRC cannot address any common law right of access to the requested records.

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Analysis

Sufficiency of Response

OPRA provides that if a “custodian is unable to comply with a request for access, the custodian *shall indicate the specific basis therefor . . .* on the request form and promptly return it to the requestor.” N.J.S.A. 47:1A-5(g) (emphasis added). A custodian’s failure to do so results in an insufficient response and a violation of OPRA. The Council has held that for a denial of access to be in compliance with OPRA, it must be specific and sufficient to prove that a custodian’s denial is authorized by OPRA. See DeAppolonio v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009); Morris v. Trenton Police Dep’t (Mercer), GRC Complaint No. 2007-160 (May 2008). Further, in Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008), the Council held that “. . . [t]he Custodian’s response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5(g).” See also Lenchitz v. Pittsgrove Twp. (Salem), GRC Complaint No. 2012-265 (Interim Order dated August 27, 2013).

Upon review, the GRC is satisfied that the Custodian provided an insufficient response. Here, the Custodian responded to the Complainant’s OPRA request by providing responsive records attached to an e-mail. However, the e-mail failed to identify whether the Custodian was denying access to any records and further failed to address each request item. Instead, the Custodian disclosed records devoid of any indication as to which request item(s) the attached documents were responsive. It was not until Custodian’s Counsel conceded in the January 31, 2022 SOI supplement that the Borough omitted responding to the portion of the request seeking “agreements” between the Borough and separated officers. The facts here are on point with those in DeAppolonio and Paff; thus, it follows there was an insufficient response in the instant complaint.

Therefore, the Custodian’s October 14, 2021 response is insufficient because the Custodian failed to provide a specific legal basis for denying access to the requested records and failed to address each request item. N.J.S.A. 47:1A-5(g). See also DeAppolonio, GRC 2008-62 and Paff, GRC 2007-272.

Validity of Request

The New Jersey Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records “readily accessible for inspection, copying, or examination.”* N.J.S.A. 47:1A-1.

[MAG, 375 N.J. Super. at 546 (emphasis added).]

The Court reasoned that:

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

[Id. at 549 (emphasis added).]

The Court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt . . . In short, OPRA does not countenance open-ended searches of an agency's files.” Id. (emphasis added). Bent, 381 N.J. Super. at 37;⁶ N.J. Builders Ass’n, 390 N.J. Super. at 180; Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

The validity of an OPRA request typically falls into three (3) categories. The first is a request that is overly broad (“any and all” requests seeking “records” generically, *etc.*) and requires a custodian to conduct research. MAG, 375 N.J. Super. at 534; Donato v. Twp. of Union, GRC Complaint No. 2005-182 (January 2007). The second is those requests seeking information or asking questions. See *e.g.* Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012). The final category is a request that is either not on an official OPRA request form or does not invoke OPRA. See *e.g.* Naples v. N.J. Motor Vehicle Comm’n, GRC Complaint No. 2008-97 (December 2008).

Names, Date of Hire, Date of Separation and Reason for Separation, Salary at the Time of Separation

Regarding requests seeking information or asking questions, there are instances in OPRA specifically identifies pieces of information as a “government record” under OPRA. By way of example, in Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated June 29, 2010), the Council determined that “name, title, position, salary, payroll record and length of service” was information specifically considered to be a “government record” under N.J.S.A. 47:1A-10 (“Section 10”). The Council thus held that the complainant’s March 25, 2009, request for “[t]he name, position, salary, payroll record and length of service for every Board/District employee who was employed in whole or part from January 1, 2008, to March 24, 2009” was a valid request pursuant to OPRA. Id. at 5.

Additionally, prior GRC case law supports the disclosure of database information regarding personnel actions. See Matthews, GRC 2008-123. Further, the Council has previously

⁶ Affirmed on appeal from Bent v. Stafford Police Dep’t, GRC Complaint No. 2004-78 (October 2004). Rotimi Owoh, Esq. (on behalf of African American Data & Research Institute) v. Fort Lee Police Department (Bergen), 2021-281 – Findings and Recommendations of the Executive Director

required that responding to an OPRA request for personnel information requires a custodian provide the most comprehensive records containing the responsive information. Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2011-64 (Interim Order dated August 28, 2012).

Here, the Complainant requested in part Section 10 information on separated police officers from 2008 to the present. On October 14, 2021, the Custodian responded to the Complainant providing a list containing the name, date of separation, and reason for separation of former police officers between the years 2002 through 2017. In the SOI, the Custodian argued that this portion of the request was invalid and required research, which she was not obligated to perform under OPRA. The Custodian contended that the list was provided as a courtesy. Further, on January 31, 2022, the Custodian provided an updated list to include officers from 2018 to present, and provided the names, date of hire, and date of separation.

Upon review, the evidence is clear that the Custodian improperly determined that this portion of the request was invalid. In accordance with Danis, the Complainant's request for Section 10 information constituted a "government record" under N.J.S.A. 47:1A-6. Notwithstanding whether the information was within several records or in an electronic database, the Custodian was obligated to provide the most comprehensive records containing the responsive information. See Valdes, GRC 2011-64 and Matthews, GRC 2008-123. Moreover, the lists provided on October 14, 2021 and January 31, 2022 contained only a portion of the information requested by the Complainant. Namely, the updated list provided on January 31, 2022 failed to include the reason for separation and salary at the time of separation for the officers.

Therefore, the Custodian has not borne her burden of proving she lawfully denied access to the Complainant's OPRA request for the "[n]ames, date of hire, date of separation and reason for separation, [and] salary at the time of separation" of Borough police officers from 2008 to the date of the request. N.J.S.A. 47:1A-6; Danis, GRC 2009-156; Valdes, GRC 2011-64; Matthews, GRC 2008-123. The Custodian shall identify, locate, and produce the requested personnel information. N.J.S.A. 47:1A-10. If no responsive information could be located, the Custodian shall certify to same.

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.

Settlement Agreements

Generally, the GRC does not retroactively apply court decisions to complaints pursuant to Gibbons v. Gibbons, 86 N.J. 515 (1981). There the Court held that "it is a fundamental principle of jurisprudence that retroactive application of new laws involves a high risk of being unfair." Id. at 522. In Moore v. N.J. Dep't of Corr., GRC Complaint No. 2009-144 (Interim Order dated October 26, 2010), the custodian denied access to responsive records in 2009 based upon a then

existing Executive Order, the custodial agency's proposed regulations, and prior Council decisions relying on same. During the pendency of the complaint, the Appellate Division in 2010 reversed a separate Council decision relying on the Executive Order and proposed regulations. The Council held that while the custodian's basis for denial was no longer valid, the denial was not unlawful since at the time the request was consistent with prior GRC case law. See also Biss v. Borough of New Providence Police Dep't (Union), GRC Complaint No. 2009-21 (February 2010); Sallie v. N.J. Dep't of Law & Public Safety, Div. of Criminal Justice, GRC Complaint No. 2008-21 (Interim Order dated June 23, 2009).

In the instant matter, the Complainant requested the "[n]ames, date of hire, date of separation and reason for separation, [and] salary at the time of separation who either resigned or retired or terminated or otherwise separated from 2008 to the present" on August 24, 2021. The Complainant also requested any settlement agreements entered between the Borough and any separated officer. On October 14, 2021, the Custodian provided responsive records pertaining to personnel information subject to disclosure under N.J.S.A. 47:1A-10, but did not mention whether separation agreements were located. In the January 31, 2022 supplement to the SOI, the Custodian argued that the Borough located separation agreements in response to the Complainant's request, but denied access pursuant to Libertarians, slip op., and Libertarians, 465 N.J. Super. 11.

At the time of the Complainant's OPRA request and the Borough's October 14, 2021 response, Libertarians, 465 N.J. Super. 11 was the precedential decision on an agency's obligation to disclose personnel records containing information subject to disclosure under N.J.S.A. 47:1A-10. In that case, the plaintiffs discovered through meeting minutes that a corrections officer was involved in a misconduct investigation along with several other officers. Id. at 13-14. The officer was to be terminated originally but was allowed to "retire in good standing" after cooperating with the investigation in accordance with a settlement agreement. Id. The plaintiffs then submitted an OPRA request seeking the settlement agreement referenced in the minutes, and the officer's "name, title, position, salary, length of service, date of separation and the reason therefore" in accordance with Section 10. Id. The defendants declined to provide the settlement agreement, claiming it was a personnel record exempt from access. Id.

The plaintiffs challenged the denial of access to the settlement agreement, asserting that the defendants "misrepresent[ed] the 'reason' for Ellis's separation from public employment" and improperly withheld a government record. Id. at 15. The trial court ordered disclosure of the settlement agreement with redactions, and the Appellate Division reversed, finding that the record was exempt as a personnel record under Section 10.

During the pendency of this complaint, the New Jersey Supreme Court reversed the Appellate Division and ordered disclosure of the settlement agreement with redactions. Libertarians, 250 N.J. 46. The Court found that under OPRA, custodians were required to disclose the actual records containing the information required to be disclosed under Section 10. Id. at 56. The Court thus held that because the requested settlement agreement contained Section 10 information, the defendants were obligated to disclose the record with appropriate redactions. Id. at 57.

Since this Denial of Access Complaint was filed before the Libertarians decision, the GRC

must determine the applicable law at the time of the response. See Moore, GRC 2009-144. Here, the Custodian responded on October 14, 2021, providing the requested information pursuant to Section 10. In the SOI supplement, the Custodian argued that the located separation agreements were not subject to disclosure. Since the Custodian responded prior to the Supreme Court's decision, the Borough was not obligated to provide the Complainant with personnel and disciplinary records which contained the "reasons" for separation. See Libertarians, 465 N.J. Super. 11; Moore, GRC 2009-144.

Therefore, recognizing that the Custodian's October 14, 2021 response to the Complainant's August 24, 2021 OPRA request is no longer a lawful denial pursuant to Libertarians, 250 N.J. at 56-57; her response was nonetheless lawful at that time because it was consistent with the prevailing case law prior to the Court's ruling. N.J.S.A. 47:1A-6; Libertarians, 465 N.J. Super. 11; Moore, GRC 2009-144. Thus, the Council declines to order disclosure here.

Prevailing Party Attorney's Fees

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has not borne her burden of proving she lawfully denied access to the Complainant's OPRA request for the "[n]ames, date of hire, date of separation and reason for separation, [and] salary at the time of separation" of Borough of Fort Lee police officers from 2008 to the date of the request. N.J.S.A. 47:1A-6; Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated June 29, 2010); Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2011-64 (Interim Order dated August 28, 2012); Matthews v. City of Atlantic City (Atlantic), GRC Complaint No. 2008-123 (February 2009). The Custodian shall identify, locate, and produce the requested personnel information. N.J.S.A. 47:1A-10. If no responsive information could be located, the Custodian shall certify to same.
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver⁷**

⁷ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

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certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁸ to the Executive Director.⁹

3. Recognizing that the Custodian's October 14, 2021 response to the Complainant's August 24, 2021 OPRA request seeking settlements is no longer a lawful denial pursuant to Libertarians for Transparent Gov't v. Cumberland Cnty., 250 N.J. 46, 56-57 (2022); his response was nonetheless lawful at that time because it was consistent with the prevailing case law prior to the Court's ruling. N.J.S.A. 47:1A-6; Libertarians for Transparent Gov't v. Cumberland Cnty., 465 N.J. Super. 11 (App. Div. 2020); Moore v. N.J. Dep't of Corr., GRC Complaint No. 2009-144 (Interim Order dated October 26, 2010). Thus, the Council declines to order disclosure here.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado
Staff Attorney

August 22, 2023

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.

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