



State of New Jersey

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Lieutenant Governor

JACQUELYN A. SUÁREZ
Acting Commissioner

FINAL DECISION

October 3, 2023 Government Records Council Meeting

David Weiner
Complainant

Complaint No. 2021-319

v.

County of Essex
Custodian of Record

At the October 3, 2023 public meeting, the Government Records Council (“Council”) considered the September 26, 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. Detective Lloyd’s failure to locate responsive records until after he conducted a more reasonable search following receipt of the Denial of Access Complaint supports that his initial search was insufficient. Thus, Detective Lloyd unlawfully denied access to the 370 pages of records responsive to Complainant’s OPRA request item Nos. 2 and 3. N.J.S.A. 47:1A-6; Schneble v. N.J. Dep’t of Env’tl. Protection, GRC Complaint No. 2007-220 (April 2008).
2. The Custodian has borne her burden of proof that she lawfully denied access to the Complainant’s OPRA request item No. 1. Specifically, the Custodian certified in the Statement of Information, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The Custodian lawfully denied access to most of the redacted information in the 370 pages of timesheets disclosed to the Complainant in response to OPRA request item Nos. 2 and 3. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-1.1. However, the Custodian has unlawfully denied access to officer names present at 320-321 University Avenue. N.J.S.A. 47:1A-10; Barker v. Borough of Lakehurst (Ocean), GRC Complaint No. 2015-26 (Interim Order dated Interim Order dated March 28, 2017). Thus, the Custodian shall redisclose the timesheets without redactions for the names of those officers assigned to 320-321 University Avenue.
4. **The Custodian shall comply with conclusion No. 3 above within twenty (20) business days from receipt of the Council’s Final Decision. In the circumstance where the records ordered for disclosure are not provided to the Complainant,**

the Council's Final Decision may be enforced in the Superior Court of New Jersey. N.J. Court Rules, R. 4:67-6; N.J.A.C. 5:105-2.9(c).

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 3rd Day of October 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: October 10, 2023

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 3, 2023 Council Meeting**

**David Weiner¹
Complainant**

GRC Complaint No. 2021-319

v.

**County of Essex²
Custodial Agency**

Records Relevant to Complaint: Copies of:

1. “Any and all documents delineating” financial agreements between the Division of Family Assistance and Benefits (“DFAB”) and Essex County (“County”) to pay for Essex County Sheriff’s Office (“ECSO”) officers to guard the County owned building at 320-321 University Avenue from May 2020 to present.
2. “Any and all documents delineating” the names and rank of ECSO officers to guard the County owned building at 320-321 University Avenue and their “prescribed duties” from May 2020 to present.
3. “Any and all documents delineating” the method by which the above cited [ECSO] officers denote their arrival and departure from” the building from May 2020 to present.

Custodian of Record: Olivia Schumann, Esq.
Request Received by Custodian: October 22, 2021
Response Made by Custodian: October 22, 2021
GRC Complaint Received: December 2, 2021

Background³

Request and Response:

On October 21, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On October 22, 2021, the Custodian responded in writing advising the Complainant that an extension of time to respond through November 12, 2021 would be required due to lingering disruptions from the COVID-19

¹ No legal representation listed on record.

² No legal representation listed on record.

³ 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.

public health emergency. On November 29, 2021,⁴ the Custodian responded in writing stating that “all relevant Departments have indicated they do not have responsive records.”

Denial of Access Complaint:

On December 2, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant disputed the denial but did not include any additional arguments identifying his reasons for said dispute.

Statement of Information:⁵

On August 8, 2022, the Custodian filed a Statement of Information (“SOI”) attaching certifications from Al Fusco from DFAB and Detective Sergeant Welby Lloyd from the ECSO. The Custodian certified that she received the Complainant’s OPRA request on October 22, 2021 and immediately sought an extension of time to respond to same. The Custodian certified that her search included contacting DFAB and ECSO to perform a search for potential responsive records. The Custodian affirmed that neither department was able to locate responsive records and advised her of such. See Fusco Cert. ¶ 4; Lloyd Cert. ¶ 4. The Custodian certified that she thus responded to the Complainant in writing on November 29, 2021 stating that no records existed.

The Custodian certified that following the filing of this complaint, and as part of her preparation of the SOI, she contacted Mr. Fusco and Detective Lloyd at the end of July 2022 asking them to conduct a final search. The Custodian affirmed that Mr. Fusco again determined that no records existed. See Fusco Cert. ¶ 6. The Custodian further affirmed that Detective Lloyd located 370 pages of sign-in sheets covering the time period identified in the OPRA request, but no other records. See Lloyd Cert. ¶ 6-7. The Custodian averred that both Mr. Fusco and Detective Lloyd certified that no other records existed, noting that Detective Lloyd indicated that the County did not reimburse ECSO for officer coverage. See Fusco Cert. ¶ 7; Lloyd Cert. ¶ 6, 8. The Custodian affirmed that the 370 pages of sign-in sheets, which contain redactions for officer names, and sign-in/sign-out times, was being provided to the Complainant as part of the SOI.

The Custodian argued that she lawfully redacted the disclosed sign-in sheets leaving only the identified location (where applicable) based on the “security and surveillance” exemption. N.J.S.A. 47:1A-1.1. The Custodian contended that disclosing the officer names and shift times would risk the safety and security of those individuals, as well as the facility at 320-321 University Avenue. The Custodian asserted that specifically, individuals armed with this information could target the facility during a time where security was minimal or target a specific officer. The Custodian contended that in order balance OPRA’s aim for transparency, the facility name was left unredacted where it appeared on individually dated timesheets. The Custodian asserted that the foregoing allowed the Complainant to ascertain the specific number of officers at the facility on any given date.

⁴ The GRC notes that the Custodian’s response post-dated the expiration of the extended deadline, which results in a “deemed” denial of access. N.J.S.A. 47:1A5(i). However, the GRC will not address this issue in its analysis because the Complainant did not raise same as an issue in his Denial of Access Complaint.

⁵ On January 3, 2022, this complaint was referred to mediation. On July 8, 2022, this complaint was referred back to the GRC for adjudication.

The Custodian finally argued that the GRC has consistently held that no unlawful denial of access occurred here because the County disclosed all responsive records that existed. Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005); Owens v. Mt. Holly Twp. (Burlington), GRC Complaint No. 2013-233 (February 2014). The Custodian argued that here, she has provided sufficient evidence with multiple certifications and that no competent, credible, evidence existed to refute same. The Custodian thus contended that no unlawful denial of access occurred here because all responsive records were disclosed to the Complainant.

Analysis

Insufficient Search

It is the custodian's responsibility to perform a complete search for the requested records before responding to an OPRA request, as doing so will help ensure that the custodian's response is accurate and has an appropriate basis in law. In Schneble v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008), the custodian initially stated that no records responsive to the complainant's OPRA request existed. The custodian certified that after receipt of the complainant's denial of access complaint, which contained e-mails responsive to the complainant's request, the custodian conducted a second search and found records responsive to the complainant's request. The GRC held that the custodian had performed an inadequate search and thus unlawfully denied access to the responsive records. See also Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (January 2011).

Here, the Custodian received the subject OPRA request and directed same to Mr. Fusco and Detective Lloyd. In her response, the Custodian stated that both confirmed that no records responsive to the Complainant's OPRA request existed. This complaint followed: the Custodian certified that in preparing the SOI, she asked both Mr. Fusco and Detective Lloyd to conduct a final search. The Custodian further affirmed that while Mr. Fusco reconfirmed that DFAB had no responsive records, Detective Lloyd located 370 pages of ECSO sign-in sheets. These records appear to contain information responsive to both OPRA request item Nos. 2 and 3 (namely officer names and attendance "method"). The Custodian ultimately disclosed those pages with redactions to the Complainant as part of the SOI.

The facts here are on point with those in Schneble, GRC 2007-220; thus, it follows that an insufficient search occurred in the instant complaint. However, the evidence in the record indicates that this insufficient search rests with Detective Lloyd. In reaching this conclusion, the GRC relies on the Custodian's SOI certification regarding the search conducted, as well as Detective Lloyd's certification regarding both of his searches. The GRC notes that while OPRA request item No. 3 generically seeks "[a]ny documents delineating the method by which" ECSO officers "denote their arrival and departure" at 320-321 University Avenue and thus may be technically overly broad,⁶ sign-in/sign-out sheets clearly "denote" the method of attendance.

Accordingly, Detective Lloyd's failure to locate responsive records until after he conducted a more reasonable search following receipt of the Denial of Access Complaint supports that his

⁶ See MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546, 549 (App. Div. 2005); Feiler-Jampel v. Somerset Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008).

initial search was insufficient. Thus, Detective Lloyd unlawfully denied access to the 370 pages of records responsive to Complainant's OPRA request item Nos. 2 and 3. N.J.S.A. 47:1A-6; Schneble, GRC 2007-220.

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 Request item No. 1:

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). Here, the Complainant's OPRA request item No. 1 sought financial agreements between the County and DFAB to pay ECSO officers to guard 320-321 University Avenue from May 2020 to present. The Custodian responded advising that no responsive records existed. Following the filing of this complaint, the Custodian certified the SOI that no records existed because the County did not reimburse ECSO for security services. The Custodian provided a certification from both Mr. Fusco and Detective Lloyd confirming that no agreements existed.

A review of the facts available to the GRC in this complaint support that the Custodian lawfully denied access to OPRA request item No. 1 on the basis that no records existed. Specifically, the Custodian has certified to this fact and Detective Lloyd has certified that the County does not reimburse ECSO for security services. Further, both Mr. Fusco and Detective Lloyd certified that no records existed. Thus, a conclusion in line with Pusterhofer is appropriate here.

Accordingly, the Custodian has borne her burden of proof that she lawfully denied access to the Complainant's OPRA request item No. 1. Specifically, the Custodian certified in the SOI, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

OPRA Request item Nos. 2 and 3:

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).

Further, OPRA provides that "[n]otwithstanding 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 . . . shall not be considered a government record . . .” 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 v. Somerset Cty. Prosecutor’s Office, 206 N.J. 581 (2011). These include “an individual’s *name, title, position, salary [and] payroll record.*” Id. (emphasis added). See also Jackson v. Kean Univ., GRC Complaint No. 2002-98 (February 2004) (defining a “payroll record” for purposes of OPRA as records relating to payment of a public employee). Further, the Council has previously required that responding to an OPRA request for personnel information requires that 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); Richardson v. N.J. Office of the Attorney General, GRC Complaint No. 2014-277 (Interim Order dated May 26, 2015). As to the disclosability of attendance records, the Council has routinely required disclosure of same under the “payroll record” exception in N.J.S.A. 47:1A-10. See e.g. Burdick v. Franklin Twp. Bd. of Educ. (Hunterdon), GRC Complaint No. 2007-74 (Interim Order dated October 31, 2007); Vargas (O.B.O. Philadelphia Inquirer) v. Camden City Sch. Dist. (Camden), GRC Complaint No. 2011-315 (Interim Order dated January 29, 2013); Vandy v. Burlington Cnty. Bd of Social Servs., GRC Complaint No. 2016-319 (November 13, 2018).

However, the GRC has contemplated whether certain information within an attendance record may be considered exempt from disclosure under OPRA based on other exemptions. For instance, in Barker v. Borough of Lakehurst (Ocean), GRC Complaint No. 2015-26 (Interim Order dated Interim Order dated March 28, 2017), the Council was tasked with determining whether the custodian lawfully denied access to redacted handwritten timesheets and “work schedules.” The handwritten timesheets were comprised of individual monthly sheets by officer listing each day worked, with specific time-in/time-out entries for multiple types of work, comments, and compensation time columns. The work schedules comprised of specific individual officer scheduling information. The Council conducted an *in camera* review of the records and looked to both the “personnel” and “security and surveillance” exemptions to determine whether a lawful denial of access occurred. Id. at 6. While the Council determined that the Custodian properly denied access to the work schedules in their entirety under the “security and surveillance” exemption, it found that certain portions of the timesheets should have been disclosed:

[T]he 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 . . .

[Id. at 7.]

Here, the Complainant’s OPRA request item Nos. 2 and 3 sought “name and rank” of ECSO officers working security at 320-321 University Avenue and records reflecting the method of arrival and departure from that location between May 2020 and present. In response, the Custodian has disclosed 370 pages of redacted copies of “Daily Attendance” sheets covering the applicable time frame. Those sheets largely comprised of daily attendance sheets for 320-321 University Avenue, wherein all entries were redacted. However, in a few instances the responsive

records include ECSO general, "Transportation," and "Courts" division attendance sheets where officers from multiple locations were noting their sign-in times. In these instances, the Custodian redacted all entries except for identification of the facility that was typically entered into the "Signature" column; the remainder of the information was redacted to protect officer names and sign-in/sign-out dates.

In looking to Barker, GRC 2015-26 for guidance, the attendance sheets disclosed here are similar to the timesheets reviewed. Based on this, the GRC is persuaded that any time accounting on these sheets is exempt from disclosure under the "security and surveillance" exemption. N.J.S.A. 47:1A-1.1. Specifically, the GRC agrees that disclosure of this information for security personnel at 320-321 University Avenue would place the facility and its inhabitants at significant risks of nefarious individuals by providing them a pattern of attendance to exploit for their own gain.

However, the GRC does not agree that officer names in and of themselves carry a similar security risk on these attendance sheets. In fact, OPRA already provides that a public employee's name is a clearly disclosable "government record." N.J.S.A. 47:1A-10. Further, while the GRC notes that this information taken collectively with other pieces could result in a potential security issue, the GRC looks directly to Barker and how it addressed those timesheets in finding that the Custodian unlawfully redacted officer names. Requiring disclosure of the officer names while allowing for the redaction of the sign-in/sign-out times within the responsive attendance sheets alleviates the security risk and does not implicate a personnel pattern that nefarious individuals may use to exploit the facility.

Accordingly, the Custodian lawfully denied access to most of the redacted information in the 370 pages of timesheets disclosed to the Complainant in response to OPRA request item Nos. 2 and 3. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-1.1. However, the Custodian has unlawfully denied access to officer names present at 320-321 University Avenue. N.J.S.A. 47:1A-10; Barker, GRC 2015-26. Thus, the Custodian shall redisclose the timesheets without redactions for the names of those officers assigned to 320-321 University Avenue.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Detective Lloyd's failure to locate responsive records until after he conducted a more reasonable search following receipt of the Denial of Access Complaint supports that his initial search was insufficient. Thus, Detective Lloyd unlawfully denied access to the 370 pages of records responsive to Complainant's OPRA request item Nos. 2 and 3. N.J.S.A. 47:1A-6; Schneble v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008).
2. The Custodian has borne her burden of proof that she lawfully denied access to the Complainant's OPRA request item No. 1. Specifically, the Custodian certified in the Statement of Information, and the record reflects, that no responsive records exist.

N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

3. The Custodian lawfully denied access to most of the redacted information in the 370 pages of timesheets disclosed to the Complainant in response to OPRA request item Nos. 2 and 3. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-1.1. However, the Custodian has unlawfully denied access to officer names present at 320-321 University Avenue. N.J.S.A. 47:1A-10; Barker v. Borough of Lakehurst (Ocean), GRC Complaint No. 2015-26 (Interim Order dated Interim Order dated March 28, 2017). Thus, the Custodian shall redisclose the timesheets without redactions for the names of those officers assigned to 320-321 University Avenue.
4. **The Custodian shall comply with conclusion No. 3 above within twenty (20) business days from receipt of the Council's Final Decision. In the circumstance where the records ordered for disclosure are not provided to the Complainant, the Council's Final Decision may be enforced in the Superior Court of New Jersey. N.J. Court Rules, R. 4:67-6; N.J.A.C. 5:105-2.9(c).**

Prepared By: Frank F. Caruso
Executive Director

September 26, 2023