



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

August 30, 2022 Government Records Council Meeting

Yusef Steele
Complainant

Complaint No. 2021-55

v.

Township of Piscataway (Middlesex)
Custodian of Record

At the August 30, 2022 public meeting, the Government Records Council (“Council”) considered the August 23, 2022 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 did not fully comply with the Council’s July 26, 2022 Interim Order. Specifically, although Captain Pilch, through Mr. Tucci, disclosed the responsive recording to the Complainant within the adjusted time frame, the Custodian did not simultaneously provide certified confirmation of compliance to the Executive Director.
2. An unidentified Township employee’s response was insufficient, and the Piscataway Police Department performed an insufficient search. Further, the Custodian unlawfully denied access to the responsive 911 recording because it did not meet the two-prong test necessary to be exempt as a criminal investigatory record. N.J.S.A. 47:1A-1.1. However, and notwithstanding the Custodian’s failure to fully comply with the Council’s Order, the responsive recording was sent to the Complainant via certified mail at his last known address on August 5, 2022. Additionally, the evidence of record does not indicate that either the Custodian or any of the Township’s employees’ violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, neither the Custodian nor any Township employees’ actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.



Final Decision Rendered by the
Government Records Council
On The 30th Day of August 2022

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: September 1, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
August 30, 2022 Council Meeting**

**Yusef Steele¹
Complainant**

GRC Complaint No. 2021-55

v.

**Township of Piscataway (Middlesex)²
Custodial Agency**

Records Relevant to Complaint: Copies via U.S. mail of a 911 recording made from a specific address on October 30, 2018 between 3:44 p.m. and 3:55 p.m.

Custodian of Record: Melissa A. Seader

Request Received by Custodian: January 25, 2021; February 8, 2021

Response Made by Custodian: January 26, 2021; February 9, 2021

GRC Complaint Received: March 3, 2021

Background

July 26, 2022 Council Meeting:

At its July 26, 2022 public meeting, the Council considered the July 19, 2022 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. Although the unidentified employee responded in writing to the Complainant's OPRA requests in a timely manner, both responses were insufficient because they referred the Complainant to another public agency notwithstanding that the PPD maintained responsive records. Therefore, the unidentified employee violated OPRA pursuant to N.J.S.A. 47:1A-5(g). See DeAppolonio v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009).
2. The Piscataway Police Department's failure to locate the responsive recording until after conducting a more reasonable search following receipt of the Denial of Access Complaint resulted in an insufficient search. N.J.S.A. 47:1A-6; Schneble v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008).

¹ No legal representation listed on record.

² Represented by Anthony C. Iacocca, Esq. of Hoagland, Longo, Moran, Dunst & Doukas, LLP (New Brunswick, NJ).

3. The Custodian has unlawfully denied access to the responsive 911 recording because it does not meet the two-prong test necessary to be considered a criminal investigatory record exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; Serrano v. South Brunswick Twp., 358 N.J. Super. 352 (App. Div. 2003); N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017). Thus, the Custodian shall disclose the responsive recording to the Complainant, with redactions if applicable.
4. **The Custodian shall comply with conclusion No. 3 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 deliver³ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁴ to the Executive Director.⁵**
5. The Complainant is not entitled to reasonable attorney’s fees pursuant to OPRA because the courts have determined that the State’s fee-shifting statutes are intended to compensate an attorney hired to represent a plaintiff, and not a *pro se* filer representing himself without legal representation. See Pitts v. N.J. Dep’t of Corr., GRC Complaint No. 2005-71 (April 2006).
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Procedural History:

On July 27, 2022, the Council distributed its Interim Order to all parties. On August 5, 2022, Captain Michelle Pilch responded to the Council’s Interim Order attaching a legal certification from Law Clerk Mauro T. Tucci, Esq. Therein, Captain Pilch certified that she received the Council’s Order on August 1, 2022. Captain Pilch further certified that on August 3, 2022, she sent a copy of the 911 recording via e-mail to Hoagland, Long. See Tucci Cert. ¶ 2. Captain Pilch further certified that Hoagland, Long sent the responsive recording on an encrypted thumb drive to the Complainant via certified mail on August 5, 2022. See Tucci Cert. ¶ 3-4.

Additional Submissions:

On August 10, 2022, Mr. Tucci e-mailed the Government Records Council (“GRC”) advising that the thumb drive was returned because the Complainant was no longer at address

³ 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.

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

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

identified in the Denial of Access Complaint. Mr. Tucci asked the GRC whether it had any knowledge of the Complainant's address change and a new address to which he could resend the responsive records. On the same day, the GRC e-mailed Mr. Tucci and advised that it appeared the Complainant was released from incarceration on June 10, 2022. The GRC further advised that it did not possess a viable post-release address for the Complainant.⁶

Analysis

Compliance

At its July 26, 2022 meeting, the Council ordered the Custodian to disclose the responsive 911 recording to the Complainant and to submit certified confirmation of compliance, in accordance with R 1:4-4, to the Executive Director. On July 27, 2022, 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 August 3, 2022.

On August 5, 2022, Captain Pilch responded to the Order first certifying that she did not receive same until August 1, 2022. Captain Pilch further certified that she caused the 911 recording to be sent to the Complainant via certified mail through Hoagland, Long. Thus, while the Township complied with the portion of the Order requiring disclosure through Captain Pilch and Mr. Tucci, compliance has not been fully achieved in this matter for the following reasons. First, the timeliness of the compliance response is in question because the evidence of record is unclear whether the Custodian received the Interim Order on July 27, 2022 when it was distributed to all parties.⁷ Second, the Custodian did not submit certified confirmation of compliance to the Executive Director, as required by the Order.

Therefore, the Custodian did not fully comply with the Council's July 26, 2022 Interim Order. Specifically, although Captain Pilch, through Mr. Tucci, disclosed the responsive recording to the Complainant within the adjusted time frame, the Custodian did not simultaneously provide certified confirmation of compliance to the Executive Director.

Knowing & Willful

OPRA states that "[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . ." N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states ". . . [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . ." N.J.S.A. 47:1A-7(e).

⁶ The GRC also received by return mail the Complainant's hard copy of the Interim Order on August 17, 2022 marked "[a]ttempted not known."

⁷ The GRC notes that the failed delivery due to the Complainant's release from incarceration on June 10, 2022 and failure to provide updated contact information does not impact the compliance analysis.

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

In the matter before the Council, an unidentified Township employee's response was insufficient, and the Piscataway Police Department performed an insufficient search. Further, the Custodian unlawfully denied access to the responsive 911 recording because it did not meet the two-prong test necessary to be exempt as a criminal investigatory record. N.J.S.A. 47:1A-1.1. However, and notwithstanding the Custodian's failure to fully comply with the Council's Order, the responsive recording was sent to the Complainant via certified mail at his last known address on August 5, 2022. Additionally, the evidence of record does not indicate that either the Custodian or any of the Township's employees' violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, neither the Custodian nor any Township employees' actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not fully comply with the Council's July 26, 2022 Interim Order. Specifically, although Captain Pilch, through Mr. Tucci, disclosed the responsive recording to the Complainant within the adjusted time frame, the Custodian did not simultaneously provide certified confirmation of compliance to the Executive Director.
2. An unidentified Township employee's response was insufficient, and the Piscataway Police Department performed an insufficient search. Further, the Custodian unlawfully denied access to the responsive 911 recording because it did not meet the two-prong test necessary to be exempt as a criminal investigatory record. N.J.S.A. 47:1A-1.1. However, and notwithstanding the Custodian's failure to fully comply with the Council's Order, the responsive recording was sent to the Complainant via certified mail at his last known address on August 5, 2022. Additionally, the evidence of record does not indicate that either the Custodian or any of the Township's employees' violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, neither the Custodian nor any Township employees' actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso
Executive Director

August 23, 2022



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

PHILIP D. MURPHY
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LT. GOVERNOR SHEILA Y. OLIVER
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INTERIM ORDER

July 26, 2022 Government Records Council Meeting

Yusef Steele
Complainant

Complaint No. 2021-55

v.

Township of Piscataway (Middlesex)
Custodian of Record

At the July 26, 2022 public meeting, the Government Records Council (“Council”) considered the July 19, 2022 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Although the unidentified employee responded in writing to the Complainant’s OPRA requests in a timely manner, both responses were insufficient because they referred the Complainant to another public agency notwithstanding that the PPD maintained responsive records. Therefore, the unidentified employee violated OPRA pursuant to N.J.S.A. 47:1A-5(g). See DeAppolonio v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009).
2. The Piscataway Police Department’s failure to locate the responsive recording until after conducting a more reasonable search following receipt of the Denial of Access Complaint resulted in an insufficient search. N.J.S.A. 47:1A-6; Schneble v. N.J. Dep’t of Env’tl. Protection, GRC Complaint No. 2007-220 (April 2008).
3. The Custodian has unlawfully denied access to the responsive 911 recording because it does not meet the two-prong test necessary to be considered a criminal investigatory record exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; Serrano v. South Brunswick Twp., 358 N.J. Super. 352 (App. Div. 2003); N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017). Thus, the Custodian shall disclose the responsive recording to the Complainant, with redactions if applicable.
4. **The Custodian shall comply with conclusion No. 3 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**

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.

certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³

5. The Complainant is not entitled to reasonable attorney's fees pursuant to OPRA because the courts have determined that the State's fee-shifting statutes are intended to compensate an attorney hired to represent a plaintiff, and not a *pro se* filer representing himself without legal representation. See Pitts v. N.J. Dep't of Corr., GRC Complaint No. 2005-71 (April 2006).
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 26th Day of July 2022

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: July 27, 2022

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.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 26, 2022 Council Meeting**

**Yusef Steele¹
Complainant**

GRC Complaint No. 2021-55

v.

**Township of Piscataway (Middlesex)²
Custodial Agency**

Records Relevant to Complaint: Copies via U.S. mail of a 911 recording made from a specific address on October 30, 2018 between 3:44 p.m. and 3:55 p.m.

Custodian of Record: Melissa A. Seader

Request Received by Custodian: January 25, 2021; February 8, 2021

Response Made by Custodian: January 26, 2021; February 9, 2021

GRC Complaint Received: March 3, 2021

Background³

Request and Response:

On January 16, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 26, 2021, an unidentified Piscataway Police Department (“PPD”) Central Records employee responded in writing on behalf of the Custodian stating that the “case in question was transferred” to the Middlesex County Prosecutor’s Office (“MCPO”). The employee thus stated that any requests for recordings should be submitted to that agency.

On January 29, 2021, the Complainant submitted another OPRA request to the Custodian seeking the above-mentioned records. The Complainant noted that if the Custodian was intent on denying access to the request, she should state such so that he may file an appeal. On February 9, 2021, an unidentified PPD Central Records employee responded in writing on behalf of the Custodian first stating that the Complainant used the Township of Piscataway (“Township”) OPRA request form instead of the PPD-specific form. The employee next stated that this OPRA request was a rehashing of the January 16, 2021 OPRA request for which the PPD already

¹ No legal representation listed on record.

² Represented by Anthony C. Iacocca, Esq. of Hoagland, Longo, Moran, Dunst & Doukas, LLP (New Brunswick, NJ).

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.

responded on January 26, 2021. The employee thus reiterated that “the case in question was transferred” to MCPO and that the Complainant should submit his OPRA request to that agency.

Denial of Access Complaint:

On March 3, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant argued that the record sought here, a 911 call, is a “government record” subject to disclosure under OPRA. See Serrano v. South Brunswick Twp., 358 N.J. Super. 352 (App. Div. 2003). The Complainant disputed the Township’s response directing him to MCPO without providing a specific lawful basis for denial resulted in a violation of OPRA. The Complainant contended that the PPD, while alleging the request was not on the correct form, erred by attempting to transfer their duty to a third-party agency. N.J.S.A. 47:1A-5(g); Golden v. N.J. Inst. of Tech., 934 F.3d 302 (3d Cir. 2019). The Complainant also argued that the PPD erroneously “misinformed [him] to submit a request to the wrong agency.” See Mowad City of Bayonne, 2018 N.J. Super. Unpub. LEXIS 2487, 4 (App. Div. 2018) (stating that “a request for access to a governmental record must be served on the ‘appropriate custodian’ of the records sought”).

The Complainant further argued that the Township erred by noting that his OPRA request was not on the correct OPRA request form. The Complainant noted that both the Township and PPD’s forms mirror each other and attached a February 9, 2021 OPRA request on the PPD’s form as evidence. The Complainant also argued that per Renna v. Cnty. of Union, 407 N.J. Super. 230 (App. Div. 2009), the Township could not deny his OPRA request because he was not required to submit same on any form in the first place.

In closing, the Complainant argued that the Township failed to provide a valid reason for denying him access to the requested 911 call, which is a “government record” for purposes of OPRA. The Complainant further contended that the Township could not shift its obligation to disclose the responsive record simply because another agency is also maintaining it. The Complainant finally argued that he should be entitled to reasonable attorney fees in the amount of \$36,300.00 for time spent researching, preparing, and submitting the instant complaint in a *pro se* capacity.

Statement of Information:

On March 18, 2021, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA requests on January 25, 2021 and February 8, 2021 respectively. The Custodian certified that her search included forwarding both OPRA requests to the PPD for review and response. The Custodian certified that the PPD responded in writing on her behalf on January 26, 2021 and February 9, 2021 directing the Complainant to MCPO because the “case in question was transferred there.”

The Custodian contended that the 911 call sought, which has a retention period of thirty-one (31) calendar days, was exempt from disclosure under OPRA’s criminal investigatory exemption. N.J.S.A. 47:1A-1.1; N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017); Janeczko v. N.J. Dep’t of Law & Pub. Safety, Div. of Criminal Justice, GRC Complaint

No. 2002-79 *et seq.* (June 2004). The Custodian argued that this position is consistent with multiple cases where the request record pertained to a criminal investigation and was not required to be made, maintained, or kept on file. See e.g. Solloway v. Bergen Cnty. Prosecutor's Office, GRC Complaint No. 2011- 39 (January 2013). The Custodian also contended that the PPD's failure to assert this exemption at the time of its responses did not waive the Township's ability to apply it now. Paff v. Twp. of Plainsboro, 2007 N.J. Super. Unpub. LEXIS 2135 (App. Div. 2007) (certif. denied, 193 N.J. 292 (2007)).

Additional Submissions:

On March 22, 2021, the Complainant submitted a letter refuting the SOI. Therein, the Complainant contended that the Custodian failed to prove that the responsive 911 recording pertained to a "criminal investigation pending" or qualified as "criminal records" under N.J.S.A. 47:1A-1.1 or N.J.S.A. 47:1A-3(a). The Complainant further contended that the Serrano court's finding that the 911 call at issue predated the subsequent criminal investigation is applicable here.

On April 8, 2022, the GRC sought additional information from the Custodian. The GRC noted that the evidence and arguments presented caused confusion as to whether the PPD maintained a copy of the responsive 911 recording at the time the Complainant submitted the subject OPRA request. The GRC thus requested that the Custodian respond to the following:

1. Notwithstanding referring the Complainant to MCPO, did the Township make, maintain, receive, or keep on file the responsive 911 recording in the course of official business at the time of submission of the subject OPRA request?
 - a. If no, please identify whether the recording was previously destroyed/overwritten or not retained by the Township upon the case's referral to the MCPO.

The GRC requested that the Custodian provide her legal certification by close of business on April 13, 2022.

On April 28, 2022, Custodian's Counsel e-mailed the GRC a response to its request for additional information from Captain Michelle Pilch. Therein, Captain Pilch certified that at the time of the subject OPRA request, PPD personnel believed that the 911 call was deleted in accordance with the thirty-one (31) calendar retention policy. Captain Pilch affirmed that notwithstanding the forgoing, PPD "recently" discovered the 911 recording on their "records drive in connection with the criminal investigation." Captain Pilch averred that the 911 record is nonetheless exempt under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1.

On May 3, 2022, the Complainant sent a letter to the GRC arguing that Captain Pilch did not identify the date that the 911 recording became a "criminal investigatory" record and that the PPD's police report from the incident and resulting trial discovery index does not identify it as "evidence." The Complainant noted that the investigation concluded on May 21, 2019 due to the "True Bill" relevant to Indictment No. 19-05-00831. The Complainant thus argued that the Custodian could not reply on the criminal investigatory exemption because the recording was not part of the actual investigation.

The Complainant also argued that Captain Pilch did not certify to the date the 911 recording was “deleted.” The Complainant thus contended that the 911 recording was maintained beyond the thirty-one (31) day retention period and was still in its possession at the time of the subject OPRA request.

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). 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).

Here, in response to both of OPRA requests, an unidentified PPD employee referred the Complainant to the MCPO. The Complainant argued in the Denial of Access Complaint that the Township’s initial responses were in error because neither contained a specific lawful basis for denying access. The GRC agrees that neither response granted access, denied access, sought clarification, or obtained an extension of time. Instead, the initial responses insinuated that PPD did not maintain any responsive records. Further, at no point prior to the SOI did either the unidentified employee or the Custodian provide any specific lawful basis for denying access to the responsive recording. However, Captain Pilch has now certified that the 911 recording was in the PPD’s possession at the time of the subject OPRA requests and ensuing complaint. Thus, it follows that the Custodian’s referral to another agency even though the PPD maintained the responsive record resulted in an insufficient response.

Accordingly, although the unidentified employee responded in writing to the Complainant’s OPRA requests in a timely manner, both responses were insufficient because they referred the Complainant to another public agency notwithstanding that the PPD maintained responsive records. Therefore, the unidentified employee violated OPRA pursuant to N.J.S.A. 47:1A-5(g). See DeAppolonio, GRC 2008-62.

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 unidentified PPD employee responded to the Complainant's two (2) OPRA requests directing him to contact MCPO because "the case in question was transferred" to that agency. Following the filing of this complaint, the Custodian argued that the responsive recording was exempt from disclosure under the criminal investigatory exemption. The Custodian also noted that recordings had a thirty-one (31) day retention period. This response prompted the GRC to seek additional information regarding the existence of the recording. In response to the GRC's request for additional information, Captain Pilch certified that PPD believed the recording was destroyed in accordance with the retention schedule. Captain Pilch certified, however, that the PPD "recently" discovered the recording on a drive "in connection with the criminal investigation."

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. That is, it is reasonable to conclude that the PPD assumed that the record was either not maintained because of MCPO's involvement or otherwise destroyed; thus, it did not conduct any meaningful search prior to being questioned further by the GRC. However, the evidence in the record indicates that this insufficient search rests with the PPD and Captain Pilch. In reaching this conclusion, the GRC relies on the Custodian's SOI certification regarding the search conducted, as well as Captain Pilch's certification regarding the PPD's search.

Accordingly, the PPD's failure to locate the responsive recording until after conducting a more reasonable search following receipt of the Denial of Access Complaint resulted in an insufficient search. 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 defines a criminal investigatory record as "a record which is not required by law to be made, maintained, or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding." N.J.S.A. 47:1A-1.1. Therefore, for a record to be considered exempt from disclosure under OPRA as a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1, that record must meet both prongs of a two-prong test. See O'Shea v. Twp. of West Milford, 410 N.J. Super. 371 (App. Div. 2009).

The New Jersey Supreme Court considered this two-prong test in N. Jersey Media Grp., Inc., 229 N.J. 541, on appeal from N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 441 N.J. Super. 70 (App. Div. 2015). In the appeal, the Court affirmed that OPRA's criminal investigatory records exemption applies to police records which originate from a criminal investigation. However, the court stated that "to qualify for the exception — and be exempt from disclosure —

a record (1) must not be ‘required by law to be made,’ and (2) must ‘pertain[] to a criminal investigation.’ N.J.S.A. 47:1A-1.1.” Id. at 564.

The Court made it clear that if the first prong cannot be met because such a record is required by law to be made, then that record “cannot be exempt from disclosure under OPRA’s criminal investigatory records exemption. N.J.S.A. 47:1A-1.1.” Id. at 365. Although the Court agreed with the Appellate Division’s analysis in O’Shea, 410 N.J. Super. at 382, that a clear statement of policy to police officers from the State Attorney General has “the force of law for police entities,” it refused to conclude that records retention schedules adopted by the State Records Committee meet OPRA’s “required by law” standard.

The Court also noted that even if a record is not required by law to be made, it must still be found to pertain to a criminal investigation. The Court reiterated the Appellate Division’s observation that “some police records relate to an officer’s community-caretaking function; others to the investigation of a crime.” Id. at 569 (citing N. Jersey Media Grp., Inc., 441 N.J. Super. at 105).⁴ Therefore, the Court reasoned that determining whether such records pertain to a criminal investigation requires a “case-by-case analysis.” However, the Court pointed out that police records that stem from “an investigation into *actual or potential* violations of criminal law,” such as “detailed investigative reports and witness statements,” will satisfy the second prong of OPRA’s criminal investigatory records exemption. Id. (emphasis added).

The Council has long held that once a record is determined to be a criminal investigatory record, it is exempt from access. In Janeczko, GRC Complaint No. 2002-79, *et seq.*, the Council held that “criminal investigatory records include records involving all manner of crimes, resolved or unresolved, and includes information that is part and parcel of an investigation, confirmed and unconfirmed.”⁵ Moreover, with respect to concluded investigations, the Council pointed out in Janeczko that, “[the criminal investigatory records exemption] does not permit access to investigatory records once the investigation is complete.” Id.

However, where a particular record to which a custodian is exempting access under the criminal-investigatory exemption does not meet the two-prong test, then an unlawful denial of access may have occurred. For instance, in earlier decisions regarding the disclosability of autopsy reports, the Council has determined that same were exempt as criminal investigatory records. Leak v. Union Cnty. Prosecutor’s Office, GRC Complaint No. 2007-148 (Interim Order dated February 25, 2009); Crook v. Atlantic Cnty. Prosecutor’s Office, GRC Complaint No. 2010-92 (March 2011); Lado v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2010-102 (May 2011). However, in Schulz v. N.J. State Police, GRC Complaint No. 2014-390 (Interim Order dated June 30, 2015), the GRC reversed course based on the custodian’s acknowledgement that N.J.S.A. 52:17B-88 required the creation of same. Based on this, the Council required disclosure of the requested autopsy report, reasoning that:

⁴This is instructive for police agencies because it underscores the fact that their role in society is multi-faceted; hence, not all of their duties are focused upon investigation of criminal activity. And only those records created in their capacity as criminal investigators are subject to OPRA’s criminal investigatory records exemption.

⁵ The GRC’s ruling was affirmed in an unpublished opinion of the Appellate Division.

[A]utopsy reports generally are not exempt as criminal investigatory records by virtue of the fact that they do not meet the two-prong test contemplated by both OPRA and precedential case law. O’Shea, 410 N.J. Super. at 380-381. However, the GRC is not prepared to determine that autopsy reports must be disclosed in their entirety going forward, as certain information contained therein may fall within other exemptions not contemplated herein.

[Id. at 5.]

To the above, the classification of 911 recordings as a potential criminal-investigatory record was addressed in Serrano, 358 N.J. Super. 352 (App. Div. 2003). There, the Appellate Division was tasked with determining whether the Council correctly held that the custodian unlawfully denied access to a 911 recording made hours before the commission of a crime. The court quickly acknowledged that 911 calls “are required to by law to be recorded . . . and that tapes must be retained for ‘no less than 31 days.’ See N.J.S.A. 52:17C-1 and N.J.A.C. 17:24-2.4.” Id. at 364. The court then went on to affirm the Council’s decision to disclose because the agency failed to prove that the record was part of an “investigation in progress” where disclosure would be inimical to the public interest. Id. at 366-367.

Here, there is little evidence on the record from the parties describing the nature of the call or how it related to a criminal investigation. In fact, the only relevant information regarding this issue is gleaned from Steele v. Mangione, 2020 U.S. Dist. LEXIS 221195 (D.N.J. Nov. 23, 2020), wherein the Complainant sought to raise a claim of false arrest before the federal district court. Specifically, the Complainant stayed at a hotel in October 2008 in Piscataway and was in a dispute wherein he vacated the premise. According to the Court, he was temporarily detained by police after returning the next day at the behest of hotel management. However, it was not until March 2009 that PPD formally arrested and charged the Complainant on allegations that he was distributing drugs from the hotel. Whether the Complainant, who at the time of this complaint was incarcerated in New Brunswick, was eventually indicted and convicted of the offenses for which he was arrested is unclear.

As for the current matter, the Custodian argued in the SOI that the responsive recording was exempt under the criminal investigatory exemption. However, Serrano clearly states that 911 recordings cannot meet the two-prong test because they are required by law to be made and maintained. N.J.S.A. 52:17C-1 and N.J.A.C. 17:24-2.4. Thus, the Custodian’s reliance on this exemption is misplaced and must be rejected. Further, in the absence of no other exemptions advanced by the Custodian, the Council is vested with finding that the responsive recording was disclosable and that an unlawful denial of access occurred.

Accordingly, the Custodian has unlawfully denied access to the responsive 911 recording because it does not meet the two-prong test necessary to be considered a criminal investigatory record exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; Serrano, 358 N.J. Super. 352; N. Jersey Media Grp., Inc., 229 N.J. 541. Thus, the Custodian shall disclose the responsive recording to the Complainant, with redactions if applicable.

In closing, the GRC does not reach the issue of whether the PPD's actions regarding usage of the form resulted in a violation of OPRA because same was never relied upon as a basis for denial. However, the GRC does note that in Renna v. Cnty. of Union, 407 N.J. Super. 230 (App. Div. 2009), the Appellate Division held that although requestors shall continue to use public agencies' OPRA request forms for making requests, no custodian shall withhold such records if the written request is not presented on the official form. The written request shall include the requisite information prescribed in N.J.S.A. 47:1A-5(f). Id. Therefore, requestors may submit a request not on an official form if it sufficiently invokes OPRA.

Prevailing Party Attorney's Fees

Before proceeding, the GRC notes that it will typically address the fee issue once all other issues have been solved. However, the GRC deviates from the typical practice here because this issue can be resolved absent the presence of addition unresolved issues.

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.

The more complicated aspect of this issue is whether the Complainant would qualify for reasonable attorney's fees. According to the New Jersey Supreme Court, the New Jersey Legislature has promulgated a "substantial number of statutes authorizing an award of a reasonable counsel fee *to the attorney for* the prevailing party." (emphasis added) New Jerseyans For A Death Penalty Moratorium v. N.J. Dep't of Corrections and Devon Brown, 182 N.J. 628 (2005)(decision without a published opinion)(quoting Rendine v. Pantzer, 141 N.J. 292 (1995)). Although the underlying purpose of those statutes may vary, they share a common rationale for incorporating a fee-shifting measure: to ensure "that plaintiffs with bona fide claims are able to find lawyers to represent them[,] . . . to attract competent counsel in cases involving statutory rights, . . . and to ensure justice for all citizens." New Jerseyans (quoting Coleman v. Fiore Bros., 113 N.J. 594, 598 (1989)). Thus, the courts of the State have determined that the state's fee-shifting statutes are intended to compensate an attorney hired to represent a plaintiff, not an attorney who is the plaintiff representing himself.

OPRA provides that a person who is denied access to a government record may either file a proceeding in Superior Court or file action with the GRC. N.J.S.A. 47:1A-6. Further, it is generally true that *pro se* litigants are not entitled to attorney's fees; this position has been uniformly applied to OPRA's fee shifting provision. See Feld v. City of Orange Twp., 2019 N.J. Super. Unpub. LEXIS 903 (App. Div. 2019). In Pitts v. N.J. Dep't of Corr., GRC Complaint No. 2005-71 (April 2006), the Council denied the complainant's request for attorney's fees because he was a *pro se* litigant representing himself. In reaching this conclusion, the Council reasoned that "[t]he courts of the state have determined that the State's fee-shifting statutes are intended to compensate an attorney hired to represent a plaintiff not the plaintiff representing himself."

Here, the Complainant sought an award of attorney's fees in the amount of \$36,000.00 for time spent litigating this complaint. However, the Complainant filed this complaint *pro se* and did not hire an attorney to represent him. Thus, regardless of whether the Complainant prevailed here, he does not qualify to recoup costs under OPRA's fee-shifting provision. To wit, and consistent with Pitts, GRC 2005-71, the Complainant cannot obtain a prevailing party fee award because he acted in a *pro se* capacity and is not represented by a licensed attorney.

Therefore, the Complainant is not entitled to reasonable attorney's fees pursuant to OPRA because the courts have determined that the State's fee-shifting statutes are intended to compensate an attorney hired to represent a plaintiff, and not a *pro se* filer representing himself without legal representation. See Pitts, GRC 2005-71.

Knowing & Willful

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the unidentified employee responded in writing to the Complainant's OPRA requests in a timely manner, both responses were insufficient because they referred the Complainant to another public agency notwithstanding that the PPD maintained responsive records. Therefore, the unidentified employee violated OPRA pursuant to N.J.S.A. 47:1A-5(g). See DeAppolonio v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009).
2. The Piscataway Police Department's failure to locate the responsive recording until after conducting a more reasonable search following receipt of the Denial of Access Complaint resulted in an insufficient search. N.J.S.A. 47:1A-6; Schneble v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008).

3. The Custodian has unlawfully denied access to the responsive 911 recording because it does not meet the two-prong test necessary to be considered a criminal investigatory record exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; Serrano v. South Brunswick Twp., 358 N.J. Super. 352 (App. Div. 2003); N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017). Thus, the Custodian shall disclose the responsive recording to the Complainant, with redactions if applicable.
4. **The Custodian shall comply with conclusion No. 3 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 deliver⁶ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁷ to the Executive Director.⁸**
5. The Complainant is not entitled to reasonable attorney's fees pursuant to OPRA because the courts have determined that the State's fee-shifting statutes are intended to compensate an attorney hired to represent a plaintiff, and not a *pro se* filer representing himself without legal representation. See Pitts v. N.J. Dep't of Corr., GRC Complaint No. 2005-71 (April 2006).
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Executive Director

July 19, 2022

⁶ 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.

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

⁸ 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.