



State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lieutenant Governor

JACQUELYN A. SUÁREZ
Acting Commissioner

FINAL DECISION

November 8, 2023 Government Records Council Meeting

Brett Coulter
Complainant

v.

NJ State Police
Custodian of Record

Complaint No. 2021-87

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 Custodian’s Counsel has failed to establish in his request for reconsideration of the Council’s December 13, 2022 Final Decision that either 1) the Council’s decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. Custodian’s Counsel failed to establish that the complaint should be reconsidered based on a “mistake.” Custodian’s Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, no compelling evidence or arguments on the record exists to support the narrow use of the “Glomar response” as a lawful denial. Thus, Custodian Counsel’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). **Thus, the Council’s December 13, 2022 Final Decision remains in effect and the Custodian must comply accordingly.**

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**

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

**Brett Coulter¹
Complainant**

GRC Complaint No. 2021-87

v.

**N.J. State Police²
Custodial Agency**

Records Relevant to Complaint: Hardcopies via U.S. mail of “any and all documents related to mid-October 2020” and another situation in December 2020 “in which the N.J. State Police [(“NJSP”)] became involved with” the Complainant after an individual “supposedly filed a complaint” against him.

Custodian of Record: DSFC Kristina Pados
Request Received by Custodian: February 16, 2021
Response Made by Custodian: February 25, 2021
GRC Complaint Received: April 22, 2021

Background

December 13, 2022 Council Meeting:

At its December 13, 2022 public meeting, the Council considered the December 6, 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. The Custodian has not borne her burden of proving a lawful denial of access to any records potentially responsive to the subject OPRA request through a “Glomar response”. N.J.S.A. 47:1A-6. Specifically, the Custodian did not provide sufficient evidence to support that acknowledging the existence of responsive records would run contrary to OPRA or that any exemptions apply to the potentially responsive records. N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor’s Office, 447 N.J. Super. 182, 203 (App. Div. 2016). Thus, the Custodian shall identify to the Complainant those records responsive to the subject OPRA request in a document index and disclose those not otherwise exempt from disclosure, with redactions where applicable. If a particular

¹ No legal representation listed on record.

² Represented by Deputy Attorney General (“DAG”) Patrick Jhoo. Previously represented by DAG Valentina DiPippo.

record is redacted or the Custodian asserts that it is exempt from disclosure, she shall cite the specific lawful basis for such denial as part of the document index.

- 2. The Custodian shall comply with conclusion No. 1 above within ten (10) 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).**

Procedural History:

On December 15, 2022, the Council distributed its Final Decision to all parties. On December 29, 2022, Custodian's Counsel announced his appearance into the complaint and requested additional time through January 9, 2023 to submit a request for reconsideration. On December 30, 2022, the GRC granted Custodian Counsel's request for an extension until January 9, 2023.

On January 9, 2023, Custodian's Counsel filed a request for reconsideration of the Council's December 13, 2022 Final Decision based on a "mistake." Counsel argued that the Council made a mistake because the "Glomar response" was justified here. Counsel further argued that the decision attempted to distinguish itself from precedential case law by "stray[ing] into a common law right of access analysis" beyond the Council's "jurisdiction." Counsel contended that the Final Decision was "based on plainly flawed reasoning that overlooked not only the basis for, but also the consequences of its decision."

Custodian's Counsel contends that the Council's Final Decision failed to appreciate that the facts of this complaint are on point with N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor's Office, 447 N.J. Super. 182, 203 (App. Div. 2016) and Harmon v. Morris Cnty. Prosecutor's Office, GRC Complaint No. 2017-38 (February 2019). Counsel argued that because the OPRA request sought records pertaining to an investigation and no charges or arrests have resulted therefrom, the "Glomar response" was appropriate. Counsel further argued that rather than relying on this precedential case law, the Council ordered disclosure based on the Complainant's "identity and particularized interest." Counsel contended that OPRA does not consider the identity of the requestor in this circumstance and that such a "common law" analysis is not within the Council's jurisdiction. Ciesla v. N.J. Dep't of Health & Sr. Servs., 429 N.J. Super. 127, 147 (App. Div. 2012).

Counsel argued that even if the Council could consider the Complainant's identity and interest, the decision "ignores two of the three reasons for confidentiality recognized by" N. Jersey Media Grp., Inc., 447 N.J. Super. 182: 1) the need to protect witnesses from potential harassment or harm; and 2) to preserve the effectiveness of the investigation. Counsel contended that confirming an investigation in the instant matter could, as implicated in N. Jersey Media Grp., Inc., be injurious to witnesses that the Complainant loosely or directly identified in his OPRA request. Counsel further contended that acknowledging the existence of investigation, especially where the Complainant asserted that he had not yet been contacted, could be injurious to the process by

skewing the objectivity of “third-party witnesses” and “chill the willingness of complainants to come forward.”

Analysis

Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, Custodian’s Counsel filed a request for reconsideration of the Council’s December 13, 202 Final Decision on January 9, 2023, the last day of the extended deadline to do so.

Applicable case law holds that:

“A party should not seek reconsideration merely based upon dissatisfaction with a decision.” D’Atria v. D’Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a “palpably incorrect or irrational basis;” or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D’Atria, . . . 242 N.J. Super. at 401. “Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.” Ibid.

[In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).]

Upon review of Counsel’s request for reconsideration, the GRC is persuaded that same should be denied because the Council did not make a “mistake.” Counsel’s argument that the decision ignores precedential case law and takes a common law approach is in error for two (2) reasons. First, the N. Jersey Media Grp., Inc. court was clear that to effectively prove that the “Glomar response” was appropriate:

[T]he agency that relies upon a Glomar response must prove the applicability of a specific exemption . . . The agency may satisfy this burden by submitting an affidavit that “describe[s] the justifications for nondisclosure with reasonably

specific detail, demonstrate[s] that the information withheld logically falls within the claimed exemptions, and show[s] that the justifications are not controverted by contrary evidence in the record or by evidence of [] bad faith.”

[Id. at 197 (internal citations omitted).]

In the Statement of Information, the only argument provided by the Custodian was that this complaint was the same as N. Jersey Media Grp., Inc. and that the “Glomar response” should similarly apply. “However, the mere recitation of an applicable exemption will generally be insufficient because the custodian may not rely upon ‘conclusory and generalized allegations of exemptions.’” Id. The N. Jersey Media Grp., Inc. court did not create a blanket exemption allowing custodians to deploy “Glomar response” exemption without proving a sufficient explanation for its application. Here, the Council clearly indicated that the Custodian’s general explanation that the “Glomar response” applied failed to include justifications of specific applicable OPRA exemptions requiring nondisclosure. See Coulter v. N.J State Police, GRC Complaint No. 2021-87 (Final Decision dated December 13, 2022) at 4 (“the vagueness of the Custodian’s SOI arguments does not articulate a sufficient basis . . .”). It should also be noted that both public agencies in N. Jersey Media Grp., Inc. and Harmon, GRC 2017-38 provided detailed arguments rooted in existing OPRA exemptions. Based on the forgoing, it cannot be said that the Council made a “mistake” where an agency did not avail itself of the opportunity to provide a sufficient defense of its denial.

Further, the GRC rejects the argument that addressing the identity of the Complainant resulted in a “common law” analysis outside of the GRC’s jurisdiction. Instead, the Council’s decision was the result of a complaint filed because of a denied OPRA request and not a “common law” request. N.J.S.A. 47:1A-6. Additionally, while Counsel is correct that the identity of a requestor typically does not come into play under OPRA, there are certainly instances where said fact is dispositive. See *e.g.* N.J.S.A. 47:1A-1 (privacy interest); N.J.S.A. 47:1A-1.1 (allowing victims to access certain records); N.J.S.A. 47:1A-2.2 (barring individuals convicted of indictable offenses from accesses records of their victims); N.J.S.A. 47:1A-10 (allowing an individual in interest to waive their right to the confidentiality of personnel records).

Moreover, the Complainant’s identity here actually creates a distinguishable fact from both N. Jersey Media Grp., Inc. and Harmon. Specifically, those decisions rely partially on the fact that the requestor was not the subject of the potential investigation, but instead a news organization and complaining party. To this end, both the court and GRC had to consider the agency’s asserted privacy interest issue. Here, a similar privacy interest of the potential investigation target cannot exist because the Complainant is that target. Thus, it cannot be said that acknowledging the existence of an investigation would result in the Complainant “fac[ing] irreparable public condemnation.” N. Jersey Media Grp., Inc., 447 N.J. Super. at 204.

Now, Custodian’s Counsel has introduced as part of the request for reconsideration a more detailed explanation for applying the “Glomar response”. Counsel contends that the “Glomar response” applied here because of the concern that identifying individuals filing complaints could result in concerns over witness protection and harassment. Nero v. Hyland, 76 N.J. 213, 224 (1978). Counsel noted that the Complainant appears to know the names of the complaining parties

since he identified a few in his OPRA request. Further, Counsel asserted that there was a potential detriment to the investigation process because the Complainant was aware that parties were contacted, but that he had not been. Counsel argued that acknowledgment of an investigation could reveal the reasons the Complainant was not contacted, such as the potential to corrupt third party witnesses or chill them from coming forward.

The GRC begins by noting that it will briefly address the more substantive argument while stressing that the Council was not provided with same until after issuance of the December 13, 2023 Final Decision. Upon review of the additional arguments, the GRC is still not persuaded that the “Glomar response” was appropriate here. Reliance on the lack of arrest or charges, according to the N. Jersey Media Grp., Inc. court, “protects the privacy interest of the individual who . . . would face irremediable public condemnation.” Id. at 204. It cannot be said here that such a privacy interest issue for the potential investigation target, who is clearly the Complainant, exists. Further, the GRC is not persuaded that acknowledging the existence of an investigation in this instance would result in the asserted chilling effect or witness harassment. Finally, there is no evidence in the record to support that acknowledging a investigation would reveal any critical investigative techniques.

As the moving party, Custodian’s Counsel was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings, 295 N.J. Super. at 384. Custodian’s Counsel failed to establish that the complaint should be reconsidered based on a “mistake.” Custodian’s Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. See D’Atria, 242 N.J. Super. at 401. Specifically, no compelling evidence or arguments on the record exists to support the narrow use of the “Glomar response” as a lawful denial. Thus, Complainant Counsel’s request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D’Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6. **Thus, the Council’s December 13, 2022 Final Decision remains in effect and the Custodian must comply accordingly.**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that Custodian’s Counsel has failed to establish in his request for reconsideration of the Council’s December 13, 2022 Final Decision that either 1) the Council's decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. Custodian’s Counsel failed to establish that the complaint should be reconsidered based on a “mistake.” Custodian’s Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, no compelling evidence or arguments on the record exists to support the narrow use of the “Glomar response” as a lawful denial. Thus, Custodian Counsel’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). **Thus, the**

Council's December 13, 2022 Final Decision remains in effect and the Custodian must comply accordingly.

Prepared By: Frank F. Caruso
Executive Director

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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

December 13, 2022 Government Records Council Meeting

Brett Coulter
Complainant

Complaint No. 2021-87

v.

NJ State Police
Custodian of Record

At the December 13, 2022 public meeting, the Government Records Council (“Council”) considered the December 6, 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. The Custodian has not borne her burden of proving a lawful denial of access to any records potentially responsive to the subject OPRA request through a “Glomar response”. N.J.S.A. 47:1A-6. Specifically, the Custodian did not provide sufficient evidence to support that acknowledging the existence of responsive records would run contrary to OPRA or that any exemptions apply to the potentially responsive records. N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor’s Office, 447 N.J. Super. 182, 203 (App. Div. 2016). Thus, the Custodian shall identify to the Complainant those records responsive to the subject OPRA request in a document index and disclose those not otherwise exempt from disclosure, with redactions where applicable. If a particular record is redacted or the Custodian asserts that it is exempt from disclosure, she shall cite the specific lawful basis for such denial as part of the document index.
2. **The Custodian shall comply with conclusion No. 1 above within ten (10) 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 13th Day of December 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: December 15, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 13, 2022 Council Meeting**

**Brett Coulter¹
Complainant**

GRC Complaint No. 2021-87

v.

**N.J. State Police²
Custodial Agency**

Records Relevant to Complaint: Hardcopies via U.S. mail of “any and all documents related to mid-October 2020” and another situation in December 2020 “in which the N.J. State Police [(“NJSP”)] became involved with” the Complainant after an individual “supposedly filed a complaint” against him.

Custodian of Record: DSFC Kristina Pados
Request Received by Custodian: February 16, 2021
Response Made by Custodian: February 25, 2021
GRC Complaint Received: April 22, 2021

Background³

Request and Response:

On February 16, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On February 25, 2021, Lt. David Robbins responded in writing on behalf of the Custodian stating that an extension of time until March 15, 2021 to respond to the subject OPRA request was necessary.

On March 15, 2021, the Custodian responded in writing denying the subject OPRA request because NJSP could neither confirm nor deny the existence of an investigation or responsive records therefor. N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor’s Office, 447 N.J. Super. 182, 203 (App. Div. 2016). The Custodian noted that unless an arrest is made, charges are filed, or a grand jury returns an indictment, the NJSP “will not respond to an inquiry about the receipt or possession of documents or the existence or non-existence of a criminal investigation.”

¹ No legal representation listed on record.

² “Represented by Deputy Attorney General Valentina DiPippo.

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.

Denial of Access Complaint:

On April 22, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant surmised that perhaps his OPRA request was “too broad:” he sought basic police reports filed by three (3) individuals as proof that they filed actual complaints against him. The Complainant contended that NJSP’s “confidentiality exemption” benefited the individuals, whom he alleged “filed false reports.”

Statement of Information:

On June 17, 2021, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on February 16, 2021. The Custodian certified that NJSP conducted a search of NJSP’s Records Management System for the identified time period. The Custodian certified that, following an extension of the response time period, she responded in writing on March 15, 2021 denying the request on a basis that NJSP could neither confirm nor deny the existence of an investigation or responsive records.

The Custodian contended that she properly denied the subject OPRA request in accordance with N. Jersey Media Grp., Inc., 447 N.J. Super. at 203, which allowed a public agency to deny an OPRA request through a “Glomar response.” See Philippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976). The Custodian argued that the N. Jersey Media Grp., Inc. court set forth a two-prong test for applying this response: 1) an OPRA exemption applies that would preclude the acknowledgement that records exist; and 2) the agency can demonstrate that the exemption applies. Id. at 189. The Custodian further argued that the court stated that “information received or maintained by law enforcement agencies regarding a person who has not been arrested or charged with an offense” is exempt from disclosure under N.J.S.A. 47:1A-9(b). Id. at 204.

The Custodian contended that here, the Complainant sought information pertaining to an investigation he believed to be conducted by NJSP. The Custodian asserted that acknowledgement of the existence of records would reveal that a possible criminal investigation is ongoing. The Custodian also noted that at the time of the subject OPRA request, no arrest was made and charges filed. The Custodian thus argued that she lawfully applied the “Glomar response” to the subject OPRA request and this complaint should be dismissed.

Analysis

Unlawful Denial of Access

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

The New Jersey Appellate Division has previously ruled on the issue of whether an agency can “neither confirm nor deny” the existence of records in response to an OPRA request. N. Jersey

Media Grp., Inc., 447 N.J. Super. 182. In that case, the plaintiff sought records under OPRA concerning an individual who was not charged with a crime. The court established a two-part test to determine when an agency may employ a “Glomar response”⁴ to an OPRA request:

[T]he agency [must] (1) rel[y] upon the exemption authorized by OPRA that would itself preclude the agency from acknowledging the existence of such documents and (2) present[] a sufficient basis for the court to determine that the claimed exemption applies.

[N. Jersey Media Grp., Inc., 447 N.J. Super. at 188.]

In N. Jersey Media Grp., Inc., the defendant’s initial response to the OPRA request argued that a confirmation of whether or not the subject of the request has been arrested, charged, or involved in an investigation could cause “irreparable harm” to the subject and open the defendant and its employees to civil liability. Id. at 205. It was not until after the plaintiff challenged the defendant in court that they listed specific OPRA exemptions: the criminal investigatory records and ongoing investigation exemption. Id. The court rejected those exemptions because they only applied where government records actually existed. Id. at 207.

However, the N. Jersey Media Grp., Inc. court noted that N.J.S.A. 47:1A-9(b) protected a preexisting grant of confidentiality for records if established by, among other authorities, judicial case law. Id. at 202. The court then highlighted pre-OPRA precedent, demonstrating the need for confidentiality pertaining to whether an individual has been arrested or charged. Id. at 203. According to the court, the grant of confidentiality benefited law enforcement in conducting investigations as well as protects the privacy interests of individuals. Id. at 203-204. Therefore, the court held that the defendant satisfied its two-part test and found that its “Glomar response” was valid. Id. at 206.

The Council first addressed the application of the “Glomar response” in Harmon v. Morris Cnty. Prosecutor’s Office, GRC Complaint No. 2017-38 (February 2019). There, the complainant sought records pertaining to possible criminal investigations based on her complaints to that office regarding another individual. The custodian responded denying access to the subject OPRA request and employing the “Glomar response”. In response to the Denial of Access Complaint, the custodian maintained his position in the SOI that he could neither confirm nor deny the existence of responsive records. In support of his position, the custodian argued his denial was consistent with N. Jersey Media Grp., Inc. and N.J.S.A. 47:1A-9(b) and the complainant’s personal knowledge of a potential investigation did not abrogate the “Glomar response”. The Council agreed, holding that the Custodian’s use of the “Glomar response” was appropriate because the facts were “on point with N. Jersey Media Grp., Inc..” Id. at 4.

Here, the Custodian utilized the “Glomar response” to deny access to the subject OPRA request. The Complainant filed this complaint noting that it is possible his OPRA request may have been overly broad but that he sought “basic” police reports stemming from three (3)

⁴ The moniker stems from Phillippi v. CIA, 546 F.2d 1009, 1011 (D.C. Cir. 1979), where the CIA responded to a Freedom of Information Act request regarding the *Hughes Glomar Explorer*, an oceanic ship allegedly owned by the federal government but officially listed as a private vessel.

individuals meeting with NJSP about him. The Complainant further challenged the denial to those reports and argued that he sought the “filed false reports” for proof of their existence. In the SOI, the Custodian maintained her position that the “Glomar response” was appropriate here because: 1) acknowledging the existence of records could reveal the presence of an on-going criminal investigation; and 2) no party has been arrested and charged.

In reviewing the Custodian’s denial, the GRC finds her reliance on a “Glomar response” to be unpersuasive here. As set forth in N. Jersey Media Grp., Inc., 447 N.J. Super. 182 the Custodian must meet the two-prong test evaluated in that case to qualify under the response. For both prongs of the test, the Custodian mirrored arguments set forth in N. Jersey Media Grp., Inc., without any additional explanation as to how acknowledgement of the complaint filings would fit within an exemption. Further, there is no persuasive arguments that acknowledgement of the existence of records here warrant a “Glomar” response”.

As noted in N. Jersey Media Grp., Inc., “[w]hen evaluating a ‘Glomar’ response, federal courts must ‘accord ‘substantial weight’ to the agency’s affidavits.’” Id. at 209 (citing Wilner v. NSA, 592 F.3d 60, 68 (2d Cir. 2009) (quoting Minier v. CIA, 88 F.3d 79, 803-04 (9th Cir. 1996)). However, the vagueness of the Custodian’s SOI arguments does not articulate a sufficient basis for the GRC to determine that reliance on the “Glomar response” was lawful. Further, the facts here differ significantly from those in both N. Jersey Media Grp., Inc. and Harmon, GRC 2017-38 in that the Complainant here is not a third-party or accuser: he is the alleged accused seeking the basic filed complaints. To this end, the Custodian fails to successfully argue that the “Glomar response” should apply to an accused party attempting to determine whether a complaint or complaints were filed. Further, the Complainant is obviously aware that he has not been arrested; thus, acknowledgement of the existence of records would not cause irreparable harm to him, as could be the case with acknowledgement to a third party.

The above is not to say that it is possible that some of the responsive records or portions thereof do not fit within a viable OPRA exemption. However, the evidence of record does not support that the Custodian could deploy the “Glomar response” here for the reasons stated above.

Accordingly, the Custodian has not borne her burden of proving a lawful denial of access to any records potentially responsive to the subject OPRA request through a “Glomar response”. N.J.S.A. 47:1A-6. Specifically, the Custodian did not provide sufficient evidence to support that acknowledging the existence of responsive records would run contrary to OPRA or that any exemptions apply to the potentially responsive records. N. Jersey Media Grp., Inc., 447 N.J. Super. 182. Thus, the Custodian shall identify to the Complainant those records responsive to the subject OPRA request in a document index and disclose those not otherwise exempt from disclosure, with redactions where applicable. If a particular record is redacted or the Custodian asserts that it is exempt from disclosure, she shall cite the specific lawful basis for such denial as part of the document index.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has not borne her burden of proving a lawful denial of access to any records potentially responsive to the subject OPRA request through a “Glomar response”. N.J.S.A. 47:1A-6. Specifically, the Custodian did not provide sufficient evidence to support that acknowledging the existence of responsive records would run contrary to OPRA or that any exemptions apply to the potentially responsive records. N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor’s Office, 447 N.J. Super. 182, 203 (App. Div. 2016). Thus, the Custodian shall identify to the Complainant those records responsive to the subject OPRA request in a document index and disclose those not otherwise exempt from disclosure, with redactions where applicable. If a particular record is redacted or the Custodian asserts that it is exempt from disclosure, she shall cite the specific lawful basis for such denial as part of the document index.

2. **The Custodian shall comply with conclusion No. 1 above within ten (10) 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

December 6, 2022