

Gloucester, Salem,
Cumberland Counties
Municipal Joint
Insurance

Fund



South Jersey Communities Securing Their Future

NEW JERSEY OPEN PUBLIC RECORDS ACT

All OPRA requests must be submitted in writing to the Custodian of Records:

Mr. Paul Forlenza
Executive Director
C/O Risk Program Administrators (RPA)
6000 Sagemore Drive, Suite 6203
Marlton, New Jersey 08053
E-Mail: Paul_Forlenza@riskprogramadministrators.com

-or-

Ms. Kris Kristie
Sr. Account Representative
C/O Risk Program Administrators (RPA)
6000 Sagemore Drive, Suite 6203
Marlton, New Jersey 08053
E-Mail: Kristi_Kristie@riskprogramadministrators.com

Further instructions regarding NJ OPRA can be found at the following link:
<http://www.nj.gov/grc/index.shtml>

**GLOUCESTER, SALEM, CUMBERLAND COUNTIES
MUNICIPAL JOINT INSURANCE FUND**

**POLICY REGARDING REQUESTS
FOR
INSPECTION AND COPYING OF DOCUMENTS**

In compliance with the provisions of the New Jersey Open Public Records Act, it is appropriate for a policy to be established regarding access to records of the Gloucester, Salem, Cumberland Counties Municipal Joint Insurance Fund.

This document constitutes the policy for access to records of the Gloucester, Salem, Cumberland Counties Municipal Joint Insurance Fund.

Custodian of Records: The Fund Administrator of the Gloucester, Salem, Cumberland Counties Municipal Joint Insurance Fund is hereby designated as the Custodian of Records in accordance with the requirements of the Open Public Records Act. In the absence of the Fund Administrator, the Deputy Executive Director for the Gloucester, Salem, Cumberland Counties Municipal Joint Insurance Fund is designated as the Acting Custodian of Records for purposes of compliance with the Open Public Records Act.

There are two primary types and/or sources of information that are requested:

- I. Requests for information relating to the Joint Insurance Fund's administration (such as minutes, financial records, resolutions, correspondence, emails, etc.); and
- II. Requests for information and documents related to member municipalities.

The policy and procedures regarding the responses to these OPRA requests is as follows:

I. REQUESTS FOR INFORMATION AND RECORDS FROM THE FUND:

A. OPRA REQUESTS

All OPRA requests are required to be made in writing to the Fund Administrator, at the offices of the Fund Administrator, and the request should specify with as much detail as possible, the documents that the applicant desires to inspect or copy. If the request is directed to an officer or professional of the Fund (Solicitor, Safety Director, Treasurer, etc.) then the request should be forwarded to the Fund Administrator as the official Custodian of Records. A form for the submission of requests under the Open Public Records Act is attached. A written communication, such as a letter, fax, or email, which includes the information requested on the form

is an acceptable substitute. It is essential that the document or record requested be sufficiently identified in the request.

B. ACTION ON OPRA REQUESTS

The Fund Administrator should provide the Fund Solicitor with a copy of all requests, and the Fund Solicitor shall provide the Fund Administrator with advice and guidance regarding the request. The Fund Solicitor shall also review and approve all documents that are responsive to the OPRA request prior to the release of the documents. All requests must be responded to within seven (7) business days by either the production of the record requested or with a written response that specifies either when the record will be provided or the reason for denying access to the record requested. If the documents cannot be provided within the seven (7) day period, a written request for an extension of time to respond shall be forwarded to the requestor.

C. COSTS

The costs that are permitted to be charged in the Open Public Records Act, N.J.S.A. 47:1A-2, shall be the costs charged for copies of records in the discretion of the Fund Administrator. They are as follows:

Pages 1 through 10.....	\$0.75 per page
Pages 11 through 20.....	0.50 per page
All pages over 20.....	0.25 per page

Where there are extraordinary costs involved in providing the records requested, the actual costs of duplication may be charged by the Fund Administrator.

II. OPRA REQUESTS FOR INFORMATION DIRECTED TO MEMBER MUNICIPALITIES THAT MAY BE HELD BY THE JIF:

A. JIF-RELATED DOCUMENTS

Any OPRA requests seeking documents that are related to the Fund, whether administrative or claim/litigation related, should be immediately and carefully reviewed by the Member Municipality. The Member Municipality should immediately determine which documents that are responsive to the OPRA request are in their possession, and the Member Municipality shall produce those documents for review by the Municipal Solicitor. If the OPRA request seeks documents that are not in the Member Municipality's possession, but are believed to be in possession of the Fund, the Member Municipality should immediately forward the request for those specific documents to the Fund Administrator. The appropriate Fund Professional shall then attempt to retrieve the documents that are responsive to the request from their records and/or the records of the Fund Professionals. Once the appropriate Fund Professional has retrieved the responsive documents, the

documents shall be provided to the Fund Solicitor for review and approval as to the release of the documents. All documents that are approved for release by the Fund Solicitor shall be forwarded by the Fund Professional to the Member Municipality.

B. COSTS

1) JIF Fund Professionals:

a) For those documents responsive to an OPRA received by a Member Municipality that are held by the JIF and that the JIF has previously provided to the member municipality, the following provisions shall apply:

1) For a period of one year from the date of adoption of this Policy or January 1, 2022, whichever is later, the costs associated with the Claims Administrator and/or Fund Solicitor in retrieving, reviewing, and providing information to the Member Municipality shall be paid by the Fund at the rates established for these services in the Claims Administrator's and/or Fund Solicitor's Professional Service Contract with the Fund.

2) Effective January 1, 2023, the costs associated with the Claims Administrator and/or Fund Solicitor in retrieving, reviewing, and providing information to the Member Municipality shall be billed to the Member Municipality as an allocated file expense utilizing the specific process, and at the rates, established for these services in the Claims Administrator's and/or Fund Solicitor's Professional Service Contract with the Fund.

2) Each Member Municipality is reminded of the limits on what fees the Member Municipality can charge for copies of records, as prescribed by the Open Public Records Act (OPRA) N.J.S.A. 47:1A-2

**GLOUCESTER, SALEM, CUMBERLAND COUNTIES
MUNICIPAL JOINT INSURANCE FUND
P.O. Box 490
Marlton NJ 08053**

REQUEST FOR ACCESS TO RECORDS

FOR JIF USE ONLY

Date Request Received: _____

Date Response Provided: _____

SEE INSTRUCTIONS BELOW

Name: _____

Address: _____

Telephone [Day] _____

Information Requested:

☐ **Minutes, Agendas, Resolutions** (Specify Date and Subject for Identification):

☐ **Other [specify]** _____

A request for a copy of records should be submitted on this form which has been adopted by the Custodian of Records for requests related to the Gloucester, Salem, Cumberland Counties

Municipal Joint Insurance Fund. Some records will be immediately available during normal business hours. Some records will require time to locate and to make any copies requested, but will normally be available during normal business hours and within seven (7) business days. If any document or copy which has been requested is not a public record or cannot be provided within the seven (7) business days, you will be provided with a response with that information within the seven (7) business days. There is no fee involved in simply inspecting a document during normal business hours. This request may be filed electronically. In general:

- Except as otherwise provided by law or regulation, the fee assessed for the duplication of a printed record shall be: first page to tenth page, \$0.75 per page; eleventh page to twentieth page, \$0.50 per page; all pages over twenty, \$0.25 per page.
- Where a request is for a copy in a format other than a photocopy, reasonable efforts will be made to provide the information in the format requested. The cost will be based on the costs of producing the format requested.
- Where a legal determination must be made as to whether records are "public records" as provided by law, the request will be reviewed by the Fund Attorney.

The term "public records" generally includes those records determined to be public in accordance with *N.J.S.A. 47:1A-1*. The term does not include personnel files, investigation records, attorney communications, or other matters in which there is a right of privacy or confidentiality or which is specifically exempted by law.

The Applicant hereby acknowledges receipt of a copy of this form with the date on which the information is expected to be available and the estimated cost. The applicant hereby certifies that he or she is not seeking government records containing personal information pertaining the victim or the victim's family for any matter in which the applicant has been convicted of any indictable offense under the laws of this State, any other state or the United States as provided by *N.J.S.A. 47:1A-1 et seq.*

The information requested will be ready on

Estimated Number of Pages

Estimated Cost

Deposit

Applicant

Fund Official

Date: _____

Date: _____

PUBLIC RECORDS REQUEST RESPONSE

TO : _____

DATE : _____

The document or documents listed below and requested by you are not being provided because the document or documents are not public records as provided by law, for the following reason:

You have a right to appeal the decision that the document or documents are not public records. You may take your appeal to the Government Records Council or to the New Jersey Superior Court, as provided by *N.J.S.A. 47:1A-1 et seq.* If your request has been denied, a statement of the procedures for the appeal will be attached.

Date: _____

JIF Custodian of Records

ACKNOWLEDGMENT

I hereby acknowledge that I have received the documents requested except for any documents specifically listed above on which a determination has been made that the documents will not be provided. If any documents have not been provided, I have received information on the procedures for any appeal of the determination.

Date: _____

Applicant

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***Prevailing Party Attorney's Fees*
Supplemental Findings and Recommendations of the Executive Director
January 25, 2022 Council Meeting**

**Rotimi Owoh, Esq. (On Behalf of African¹
American Data & Research Institute
& Baffi Simmons)
Complainant**

GRC Complaint No. 2018-247

v.

**City of Atlantic City (Atlantic)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:³

1. Driving While Intoxicated/Driving under the Influence (“DWI/DUI”) complaints, summonses, and tickets prepared and filed by the Atlantic City Police Department (“ACPD”) from January 2016 through present.
2. Drug possession complaints, summonses, and tickets prepared and filed by the ACPD from January 2016 through present.
3. ACPD’s “Arrest Listings” inclusive of arrest number, date, name, sex, race, and offense from January 2016 through present.
4. Drug paraphernalia complaints, summonses, and tickets prepared and filed by the ACPD from January 2016 through present.

Custodian of Record: Monica Webb

Request Received by Custodian: September 10, 2018

Response Made by Custodian: July 24, 2018

GRC Complaint Received: October 22, 2018

Background

September 28, 2021 Council Meeting:

At its September 28, 2021 public meeting, the Council considered the September 21, 2021 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, found that:

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

² Represented by Karl Timbers, Esq. (Atlantic City, NJ).

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

Rotimi Owoh, Esq. (On Behalf of African American Data & Research Institution & Baffi Simmons) v. City of Atlantic City (Atlantic), 2018-247 – Supplemental Findings and Recommendations of the Executive Director

1. The Custodian failed to comply with the Council's April 28, 2020 Interim Order. Specifically, the Custodian did not seek an extension within the five (5) business day time frame to respond to the Order. Further, the Custodian never submitted certified confirmation of compliance to the Executive Director. However, no further action is required here because the Custodian disclosed all records and the Complainant confirmed receipt of same in an e-mail to the GRC on September 16, 2021.
2. The Custodian unlawfully denied access to those records responsive to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Further, the Custodian failed to submit an SOI, which resulted in a violation of N.J.A.C. 5:105-2.4(a), and failed to comply with the Council's April 28, 2020 Interim Order. Notwithstanding, the Complainant confirmed in an e-mail to the GRC on September 16, 2021 that he received all responsive records. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council's April 28, 2020 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Custodian disclosed responsive records as a direct result of the instant complaint. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Procedural History:

On September 29, 2021, the Council distributed its Interim Order to all parties. On November 16, 2021, the Government Records Council ("GRC") advised the parties that the fee agreement time frame expired on October 28, 2021. The GRC further advised that the Complainant's Counsel had twenty (20) business days to submit a fee application. The Complainant's Counsel did not submit a fee application within the appropriate time frame to do so.⁴

⁴ On January 19, 2022, following notification to the parties of this complaint's scheduling at the January 2022 meeting, the Complainant advised the GRC via e-mail that this complaint was settled. However, the Complainant's correspondence is well beyond either time frame and is only noted herein for completeness of the record. Rotimi Owoh, Esq. (On Behalf of African American Data & Research Institution & Baffi Simmons) v. City of Atlantic City (Atlantic), 2018- 247 – Supplemental Findings and Recommendations of the Executive Director

Analysis

Compliance

At its September 28, 2021 meeting, the Council ordered the parties to “confer in an effort to decide the amount of reasonable attorney’s fees” and notify the GRC of any fee agreement. Further, the Council ordered that, should the parties not reach an agreement, the Complainant’s Counsel “shall submit a fee application . . . in accordance with N.J.A.C. 5:105-2.13.” On September 29, 2021, the Council distributed its Interim Order to all parties, providing the parties twenty (20) business days to reach a fee agreement. Thus, the parties were required to notify the GRC of any agreement by October 28, 2021.

On November 16, 2021, following the expiration of the time frame to reach a settlement, the GRC advised the parties that Complainant’s Counsel had twenty (20) business days, or until December 16, 2021 to submit a fee application in accordance with N.J.A.C. 5:105-2.13. As of December 16, 2021, the Council has received neither a fee agreement between the parties nor an application for an award of attorney’s fees from Complainant’s Counsel.

Therefore, Complainant’s Counsel failed to comply with the Council’s Interim Order because he failed to submit an application for attorney’s fees within the prescribed deadline. N.J.A.C. 5:105-2.13(b). Accordingly, the Executive Director recommends that the Council close the matter, as no further analysis is necessary.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that Complainant’s Counsel failed to comply with the Council’s Interim Order because he failed to submit an application for attorney’s fees within the prescribed deadline. N.J.A.C. 5:105-2.13(b). Accordingly, the Executive Director recommends that the Council close the matter, as no further analysis is necessary

Prepared By: Frank F. Caruso
Executive Director

January 18, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 28, 2020 Council Meeting**

**Rotimi Owoh, Esq. (On Behalf of African¹
American Data & Research Institute
& Baffi Simmons)
Complainant**

GRC Complaint No. 2018-247

v.

**City of Atlantic City (Atlantic)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:³

1. Driving While Intoxicated/Driving under the Influence (“DWI/DUI”) complaints, summonses, and tickets prepared and filed by the Atlantic City Police Department (“ACPD”) from January 2016 through present.
2. Drug possession complaints, summonses, and tickets prepared and filed by the ACPD from January 2016 through present.
3. ACPD’s “Arrest Listings” inclusive of arrest number, date, name, sex, race, and offense from January 2016 through present.
4. Drug paraphernalia complaints, summonses, and tickets prepared and filed by the ACPD from January 2016 through present.

Custodian of Record: Monica Webb

Request Received by Custodian: September 10, 2018

Response Made by Custodian: July 24, 2018

GRC Complaint Received: October 22, 2018

Background⁴

Request and Response:

On September 10, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 11, 2018, the Custodian responded in writing advising that an extension of time through September 25, 2018 was required to respond to the subject OPRA request. On September 28, 2018, the Custodian

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

² No representation listed on the record.

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

⁴ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Rotimi Owoh, Esq. (On Behalf of African American Data & Research Institution & Baffi Simmons) v. City of Atlantic City (Atlantic), 2018-247 – Findings and Recommendations of the Executive Director

responded in writing advising that additional time was needed to October 15, 2018 “for the retrieval of information responsive” to the subject OPRA request.

On October 16, 2018, the Custodian responded in writing advising the Complainant that his OPRA request was referred to the Atlantic City Municipal Court (“Court”). The Custodian asked that the Complainant complete the attached “Judiciary Records Request Form” and send same to the Court via facsimile or U.S. mail.

Denial of Access Complaint:

On October 22, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant contended that the City of Atlantic City (“City”) unlawfully required him to obtain responsive records from the Court. The Complainant argued that prior court and GRC case law support that summonses and complaints are disclosable under OPRA. See Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004). The Complainant noted that the courts have already awarded him prevailing party attorney’s fees based on an agency’s failure to disclose the records sought here. The Complainant also noted that other police departments disclosed similar records to him.

The Complainant thus requested that the GRC find that the Custodian violated OPRA. Further, the Complainant requested that the GRC determine that he is a prevailing party subject to an award of attorney’s fees.

Statement of Information:

On November 13, 2018, the GRC requested a completed Statement of Information (“SOI”) from the Custodian. On November 30, 2018, the GRC sent a “No Defense” letter to the Custodian, requesting a completed SOI within three (3) business days of receipt. The GRC did not receive any response from the Custodian thereafter.

Analysis

Failure to Submit SOI

OPRA also provides that “Custodians shall submit a completed and signed statement of information (SOI) form to the Council and the complainant simultaneously that details the custodians' position for each complaint filed with the Council[.]” N.J.A.C. 5:105-2.4(a).

OPRA further provides that:

Custodians shall submit a completed and signed SOI for each complaint to the Council's staff and the complainant not later than five business days from the date of receipt of the SOI form from the Council's staff . . . Failure to comply with this time period may result in the complaint being adjudicated based solely on the submissions of the complainant.

[N.J.A.C. 5:105-2.4(f).]

Finally, OPRA provides that “[a] custodian’s failure to submit a completed and signed SOI . . . may result in the Council’s issuing a decision in favor of the complainant.” N.J.A.C. 5:105-2.4(g). In Alterman, Esq. v. Sussex Cnty. Sheriff’s Office, GRC Complaint No. 2013-353 (September 2014), the custodian failed to provide a completed SOI to the GRC within the allotted deadline. Thus, the Council noted the custodian’s failure to adhere to N.J.A.C. 5:105-2.4(a). See also Kovacs v. Irvington Police Dep’t (Essex), GRC Complaint No. 2014-196 (January 2015); Howell v. Twp. of Greenwich (Warren), GRC Complaint No. 2015-249 (November 2016).

In the instant matter, the Custodian did not comply with the GRC’s initial request for an SOI. After the expiration of the five (5) business day deadline, the GRC again attempted to obtain a completed SOI from the Custodian by sending a “No Defense” letter and requesting a completed SOI within three (3) business days of receipt. This transmission also included a copy of the original SOI letter providing detailed instructions on how to properly submit an SOI. The GRC received no response thereafter.

Accordingly, the Custodian’s failure to provide a completed SOI to the GRC, despite more than one request, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian’s failure to respond additionally obstructed the GRC in its efforts to “receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . .” N.J.S.A. 47:1A-7(b).

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.

Here, the Complainant submitted an OPRA request to the ACPD and was advised to obtain requested records from the Court. Thereafter, the Complainant filed this Denial of Access Complaint arguing that the courts and GRC both determined that the requested records were disclosable (citing Merino, GRC 2003-110). The Custodian failed to file an SOI inclusive of certifications, arguments, and evidence to support the City’s position.

The GRC finds that in the absence of an SOI, there is no support for the Custodian’s initial response that the Complainant had to submit a request to the Court to obtain responsive records. N.J.A.C. 5:105-2.4(f). Thus, it follows that the Custodian did not prove that directing the Complainant to contact the Court was a proper response under OPRA. Such a finding is consistent with both OPRA and GRC regulations. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-6; N.J.A.C. 5:105-2.4(g).

Therefore, the Custodian may have unlawfully denied access to the responsive records at issue in this complaint. N.J.S.A. 47:1A-6. Specifically, the Custodian failed to prove that directing

the Complainant to the Court was a proper response under OPRA. Thus, the Custodian must locate and disclose those records requested by the Complainant. Should the Custodian determine that no records exist, she must certify to this fact.

The GRC finally notes that the instant decision should not be construed to allow for unmitigated access to every type of record at issue here. Indeed, there may be circumstances present in other complaints that could affect the Council's ruling. Further, this decision could be distinguishable from future complaints as the facts may dictate.

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.

Prevailing Party Attorney's Fees

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to provide a completed Statement of Information to the GRC, despite more than one request, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian's failure to respond additionally obstructed the GRC in its efforts to "receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . ." N.J.S.A. 47:1A-7(b).
2. The Custodian may have unlawfully denied access to the responsive records at issue in this complaint. N.J.S.A. 47:1A-6. Specifically, the Custodian failed to prove that directing the Complainant to the Court was a proper response under OPRA. Thus, the Custodian must locate and disclose those records requested by the Complainant. Should the Custodian determine that no records exist, she must certify to this fact.
3. **The Custodian shall comply with conclusion No. 2 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 deliver⁵**

⁵ 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.

Rotimi Owoh, Esq. (On Behalf of African American Data & Research Institution & Baffi Simmons) v. City of Atlantic City (Atlantic), 2018-247 – Findings and Recommendations of the Executive Director

certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁶ to the Executive Director.⁷

4. 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.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Executive Director

April 21, 2020

⁶ "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."

⁷ 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.

Rotimi Owoh, Esq. (On Behalf of African American Data & Research Institution & Baffi Simmons) v. City of Atlantic City (Atlantic), 2018-247 – Findings and Recommendations of the Executive Director



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

March 29, 2022 Government Records Council Meeting

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

Complaint No. 2019-33

v.

Somerdale Police Department (Camden)
Custodian of Record

At the March 29, 2022 public meeting, the Government Records Council ("Council") considered the March 22, 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 Interim Order seeking confirmation of the Complainant's willingness or refusal to pay the special service charge. Specifically, the Custodian did not submit her certification until three (3) business days after the expiration of the deadline. Notwithstanding, the GRC need not address this issue any further because the Complainant took no action and the Custodian certified to this fact. Thus, per the Council's Order, the Custodian is under no obligation to disclose the records.
2. Because no denial of access occurred, the Council should decline to address whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.
3. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Complainant failed to achieve the relief sought in his Denial of Access Complaint. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 71.

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 29th Day of March 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: March 31, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 22, 2022 Council Meeting**

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

GRC Complaint No. 2019-33

v.

**Somerdale Police Department (Camden)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:³

1. Driving While Intoxicated/Driving Under the Influence (“DWI/DUI”) complaints and summonses prepared by your police department from January 2017 through present.
2. Drug possession complaints and summonses prepared by your police department from January 2017 through present.
3. Drug paraphernalia complaints and summonses prepared by your police department from January 2017 through present.

Custodian of Record: Michele D. Miller
Request Received by Custodian: November 15, 2018
Response Made by Custodian: December 18, 2018
GRC Complaint Received: February 13, 2019

Background⁴

Request and Response:

On November 11, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 15, 2018, the Custodian responded in writing requesting an extension of time to respond. The Custodian stated that the request had been forwarded to the Somerdale Police Department’s (“SPD”) Chief of Police, but that fourteen (14) days were needed to respond. On November 16, 2018, the Complainant consented to the extension.

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

² Represented by John Kearney, Esq., of Kearney & Assoc. (Haddon Heights, NJ).

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

⁴ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Rotimi Owoh, Esq., (On Behalf of African American Data & Research Institute) v. Somerdale Police Department (Camden), 2019-33 – Findings and Recommendations of the Executive Director

On November 29, 2018, the Custodian requested another fourteen (14) days to respond to the OPRA request. On November 30, 2018, the Complainant consented to the additional extension.

On December 18, 2018, the Custodian responded to the Complainant, stating that responsive records needed to be hand searched and copied. The Custodian stated also that the process would take one day and cost \$400.00. On December 24, 2018, the Complainant responded to the Custodian, asking whether SPD had access to eCDR. On January 3, 2019, Deputy Chief of Police James Walsh responded to the Complainant stating that SPD had access to eCDR for entry purposes only. On January 27, 2019, the Complainant responded stating that the special service charge was excessive and questioned the claim that SPD's access to eCDR was limited to entry purposes. The Complainant requested that the Custodian reconsider the special service charge.

Denial of Access Complaint:

On February 13, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that the request was valid in light of Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012). The Complainant also argued that the special service charge was unwarranted, asserting that police departments have greater access to eCDR than just for "entry purposes," and could access the requested records electronically. The Complainant requested the GRC compel compliance and to award counsel fees.

Statement of Information:

On February 22, 2019, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on November 15, 2018. The Custodian certified that she responded in writing that same day stating that an extension was needed to respond. The Custodian certified that she thereafter notified the Complainant that an additional extension was needed. The Custodian certified that the Complainant consented to both extensions. The Custodian certified that on December 18, 2018, she responded to the Complainant in writing, stating that a special service charge of \$400.00 would be assessed to fulfill the OPRA request.

The Custodian, through Counsel, argued that the Complainant did not justify his doubts on SPD's limited access to eCDR. The Custodian also asserted that the only entity that can access the data within eCDR is the Judiciary via its website. The Custodian also asserted that if the Complainant still desires the records, then a breakdown and justification of the charges would be provided.

Additional Submissions:

On February 28, 2019, the Complainant submitted a brief in response to the SOI. The Complainant argued that SPD and the Borough's Municipal Prosecutor have the ability to print complaints, summonses, and warrants from the eCDR system without the help or authorization from a court official. The Complainant included a copy of a handbook entitled "eCDR – Law Enforcement" and a copy of a presentation on eCDR, to demonstrate that the Borough's reason

for imposing a special service charge was inaccurate since the complaints and summonses could be printed electronically at little to no cost.

On March 4, 2019, the Custodian submitted a letter to the GRC, in response to the Complainant. The Custodian asserted that the Complainant's reference to the Municipal Prosecutor's or police officer's ability to print documents off eCDR was irrelevant to the situation at hand. The Custodian contended that the necessity to hand search for the relevant records would exist regardless of whether the Custodian relied on the original documents in the casefile or copies printed via eCDR. The Custodian maintained that the request should have been made to the Judiciary.

On February 2, 2022, the GRC requested a 14-point special service analysis from the Custodian. On February 8, 2022, the Custodian provided the following responses to the 14-point analysis:

1. What records are requested?

Response:

1. Copies of DWI/DUI complaints that were prepared and filed by the SPD from January of 2017 to the present.
2. Copies of drug possession complaints that were prepared and filed by the SPD from January of 2017 to the present.
3. Copies of SPD's "Arrest Listings" from January 2017 to present.
4. Copies of drug paraphernalia complaints that were prepared and filed by the SPD from January of 2017 to the present.

2. Give a general nature description and number of the government records requested.

Response: Copies of summons, complaints, and arrest records from the SPD.

3. What is the period of time over which the records extend?

Response: January 1, 2017 – December 31, 2017.

4. Are some or all of the records sought archived or in storage?

Response: No.

5. What is the size of the agency (total number of employees)?

Response: SPD has 15 sworn police officers and one (1) clerical worker.

6. What is the number of employees available to accommodate the records request?

Response: One (1).

7. To what extent do the requested records have to be redacted?

Response: Each record.

8. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to locate, retrieve, and assemble the records for copying?

Response: See attached memo from Chief Walsh.

9. What is the level of personnel, hourly rate, and number of hours, if any, required for a government employee to monitor the inspection or examination of the records requested?

Response: See attached memo from Chief Walsh.

10. What is the level of personnel, hourly rate, and number of hours, if any, required for a government employee to return records to their original storage place?

Response: See attached memo from Chief Walsh.

11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?

Response: Police Chief is the only employee with complete access to the records and the knowledge as to how the system works.

12. Who (name and job title) in the agency will perform the work associated with the records request and that person's hourly rate?

Response: Police Chief; \$55.59 per hour.

13. What is the availability of information technology and copying capabilities?

Response: Available.

14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce, and return the requested documents.

Response: See attached memo from Chief Walsh.

The Custodian included a memo from Chief Walsh as part of the analysis. Chief Walsh asserted that SPD has access to eCDR for entry purposes for subjects charged with criminal offenses. Chief Walsh asserted that the requested records were instead retrieved from SPD's records management system. Chief Walsh stated that SPD's secretary was not familiar with eCDR's "back-end" functions and did not have administrative access to the records management

system. Chief Walsh asserted that while he was familiar with the administrative functions of eCDR, he had to contact another agency and vendor to determine whether he could retrieve reports containing information responsive to the request items. Chief Walsh stated that the records management system had the ability to retrieve the information but had to be amended and revised to create the reports to satisfy the requestor's OPRA request.

Regarding request item No. 1, Chief Walsh asserted that he had to pull up the "Master Name Index Report" using the relevant time frame and then had to sort through the 510 cases and pull out the DWI complaints requested in item No. 1. Chief Walsh then asserted that he had to go through each case individually, copy sixty-nine (69) summonses, and redact them using Adobe software. Chief Walsh asserted that the task took approximately six (6) hours and fifteen (15) minutes.

Regarding request item Nos. 2 & 4, Chief Walsh asserted that he pulled up the "Incident/CFS Search List" pertaining to narcotics violations using the relevant time frame. Chief Walsh then stated that he sorted through sixty-one (61) cases and pull out the drug possession and drug paraphernalia complaints. Chief Walsh then stated that he had to review each case and copy twenty-six (26) summonses or complaints and redact using Adobe software. Chief Walsh asserted that the task took approximately one (1) hour and forty-five (45) minutes.

Regarding request item No. 3, Chief Walsh asserted that he took a listing of 520 subjects and create a report listing the relevant information requested. Chief Walsh asserted that the task took approximately thirty-five (35) minutes. Chief Walsh asserted that the grand total time expended to fulfill the OPRA request was approximately eight (8) hours at \$55.59 per hour, for a total estimated charge of \$444.73.

Analysis

Special Service Charge

Whenever a records custodian asserts that fulfilling an OPRA records request requires an "extraordinary" expenditure of time and effort, a special service charge may be warranted pursuant to N.J.S.A. 47:1A-5(c). In this regard, OPRA provides that:

Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an *extraordinary expenditure of time and effort to accommodate the request*, the public agency may charge, in addition to the actual cost of duplicating the record, a *special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies . . .*

[Id. (emphasis added).]

The determination of what constitutes an “extraordinary expenditure of time and effort” under OPRA must be made on a case-by-case basis and requires an analysis of a variety of factors. These factors were discussed in Courier Post, 360 N.J. Super. at 199. There, the plaintiff publisher filed an OPRA request with the defendant school district, seeking to inspect invoices and itemized attorney bills submitted by four law firms over a period of six and a half years. Id. at 193. Lenape assessed a special service charge due to the “extraordinary burden” placed upon the school district in responding to the request. Id.

Based upon the volume of documents requested and the amount of time estimated to locate and assemble them, the court found the assessment of a special service charge for the custodian’s time was reasonable and consistent with N.J.S.A. 47:1A-5(c). Id. at 202. The court noted that it was necessary to examine the following factors in order to determine whether a records request involves an “extraordinary expenditure of time and effort to accommodate” pursuant to OPRA: (1) the volume of government records involved; (2) the period of time over which the records were received by the governmental unit; (3) whether some or all of the records sought are archived; (4) the amount of time required for a government employee to locate, retrieve and assemble the documents for inspection or copying; (5) the amount of time, if any, required to be expended by government employees to monitor the inspection or examination; and (6) the amount of time required to return the documents to their original storage place. Id. at 199.

The court determined that in the context of OPRA, the term “extraordinary” will vary among agencies depending on the size of the agency, the number of employees available to accommodate document requests, the availability of information technology, copying capabilities, the nature, size and number of documents sought, as well as other relevant variables. Id. at 202. “[W]hat may appear to be extraordinary to one school district might be routine to another.” Id.

In Rivera v. Rutgers, The State Univ. of N.J., GRC Complaint No. 2009-311 (Interim Order dated May 29, 2012), the complainant sought in part motor vehicle recording (“MVR”) footage from the Rutgers University Police Department (“RUPD”). The custodian certified that there was one (1) out of the seventy-five (75) employees qualified to fulfill the complainant’s OPRA request. The employee certified that he expended approximately twelve (12) hours fulfilling the entire request, but RUPD charged only for the two (2) hours spent locating and copying the requested MVR footage on his work computer. The employee also certified that while creating a copy of the footage, he was unable to perform any other work on his computer. The Council held that the disruption to the employee’s regular duties, as well as the fact that RUPD did not charge the entire time expended to fulfill the request, warranted the special service charge.

In the instant matter, the Complainant disputed the originally assessed special service charge of \$400.00. The Complainant asserted that the charge was unwarranted on the basis that the Custodian had greater access to eCDR than claimed. Conversely, the Custodian argued that the charge was warranted because the limited access to eCDR required a manual review of the case files to locate the responsive records. The Custodian also argued that even if SPD had greater access to eCDR, a manual review of the files would still be required to fulfill the request. The Custodian’s 14-point analysis reveals that the Police Chief would be tasked with processing the request, as he was the only employee with full access to SPD’s records management system. The

Custodian also certified that SPD's total personnel was fifteen (15) officers and one (1) clerical worker.

A review of the forgoing supports that SPD's estimated expenditure of eight (8) hours represents an extraordinary time and effort to produce responsive records given the size of the agency and the comparatively high volume of cases Chief Walsh reviewed to obtain the requested records. See Rivera, GRC 2009-311. In particular, the Custodian's 14-point analysis and Chief Walsh's memo detailed the process through which Chief Walsh located, retrieved, and accessed the records. Particularly, Chief Walsh's usage of SPD's records management system which did not have an intuitive method of locating potentially relevant casefiles. Chief Walsh also noted that those located casefiles had to be manually retrieved and their complaints and summonses pulled for copying and redaction. Furthermore, given the agency's size of sixteen (16) employees is a fraction of the RUPD in Rivera, Chief Walsh's expenditure of eight (8) hours comprised an "extraordinary" effort incurred in processing the request. See Courier Post, 360 N.J. Super. at 202. Additionally, the Custodian and Chief Walsh demonstrate that Chief Walsh is the lowest paid employee capable of performing the work, as he has complete access to SPD's records management system.

Accordingly, the Custodian has borne her burden of proof that the proposed special service charge of \$444.73 comprised of eight (8) hours at an hourly rate of \$55.59 to locate and review 571 cases, and assemble, copy, and redact 95 summonses and complaints is warranted and reasonable here. N.J.S.A. 47:1A-5(c); Courier Post, 360 N.J. Super. at 202; Rivera, GRC 2009-311. Thus, the Custodian shall disclose the responsive records, with redactions where applicable, to the Complainant upon receipt of the proposed special service charge. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).

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.

Prevailing Party Attorney's Fees

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has borne her burden of proof that the proposed special service charge of \$444.73 comprised of eight (8) hours at an hourly rate of \$55.59 to locate and review 571 cases, and assemble, copy, and redact 95 summonses and complaints is warranted and reasonable here. N.J.S.A. 47:1A-5(c); Courier Post v. Lenape Reg'l High Sch. Dist., 360 N.J. Super. 191, 202 (Law Div. 2002); Rivera v. Rutgers, The State Univ. of

N.J., GRC Complaint No. 2009-311 (Interim Order dated January 31, 2012). Thus, the Custodian shall disclose the responsive records, with redactions where applicable, to the Complainant upon receipt of the proposed special service charge. See Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).

2. **The Complainant shall comply with conclusion No. 1 above within five (5) business days of receipt of such statement by delivering to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase these records. The Complainant's failure to take any action within the allotted five (5) business days shall be construed as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5(b) and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within ten (10) business days from receipt of the Council's Interim Order, the Custodian shall deliver⁵ to the Executive Director a statement with respect to the Complainant's willingness or refusal to purchase the requested records. The Custodian's response shall be in the form of a legal certification in accordance with N.J. Court Rules, R. 1:4-4.⁶**
3. 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.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado
Staff Attorney

February 15, 2022

⁵ 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.

⁶ "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."

Rotimi Owoh, Esq., (On Behalf of African American Data & Research Institute) v. Somerdale Police Department (Camden), 2019-33 – Findings and Recommendations of the Executive Director



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

INTERIM ORDER

April 26, 2022 Government Records Council Meeting

Rotimi Owoh, Esq. (o/b/o Baffi Simmons)
Complainant

Complaint No. 2020-157

v.

Glassboro Police Department (Gloucester)
Custodian of Record

At the April 26, 2022 public meeting, the Government Records Council ("Council") considered the April 19, 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 complied with the Council's February 22, 2022 Interim Order because she responded in the prescribed time frame providing records upon receipt of payment and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian's initial special service charge estimate was unreasonable. N.J.S.A. 47:1A-5(c). However, the Custodian demonstrated that she provided the Complainant with responsive records upon receipt of payment for the revised special service charge. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council's February 22, 2022 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Custodian was ordered to revise the special service charge amount assessed to the Complainant to process his OPRA request. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 71. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall**

promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.

Interim Order Rendered by the
Government Records Council
On The 26th Day of April 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: April 27, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 22, 2022 Council Meeting**

**Rotimi Owoh, Esq. (On Behalf of
Baffi Simmons)¹
Complainant**

GRC Complaint No. 2020-157

v.

**Glassboro Police Department (Gloucester)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:³

1. Records, reports, and notifications showing and tracking the number of police officers who triggered the [Early Warning System (“EW System”)] performance indicators, the conduct that triggered the EW System, and the remedial actions and disciplinary actions that were taken by the police department against police officers from January 2018 to the present. Please feel free to redact the names and personal identifying information about specific police officers.
2. Records showing use of force incidents involving your police officer(s) from 2018 to the present. Please include the names of the specific officer(s) involved in the incidents.

Custodian of Record: Samantha Bellebuono
Request Received by Custodian: May 6, 2020
Response Made by Custodian: July 27, 2020
GRC Complaint Received: August 13, 2020

Background⁴

Request and Response:

On April 16, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 27, 2020, the Custodian responded in writing, stating that a special service charge would be assessed to process request item No. 1. The Custodian estimated that it would take approximately four (4) hours to complete and would be handled by Lt. Rick Watt of the Glassboro Police Department (“GPD”). The

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

² Represented by Timothy D. Scaffidi, Esq., of the Law Office of Timothy D. Scaffidi (Woodbury, NJ), and Gary M. Marek, Esq., of the Law Offices of Gary M. Marek (Mount Laurel, NJ).

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

⁴ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Rotimi Owoh, Esq. (On Behalf of Baffi Simmons) v. Glassboro Police Department (Gloucester), 2020-157 – Findings and Recommendations of the Executive Director

Custodian stated that Lt. Watt's hourly rate was \$66.28, and the total estimated cost would be \$265.12. Regarding request item No. 2, the Custodian stated that a special service charge would be assessed and would also be fulfilled by Lt. Watt. The Custodian stated that the process would take approximately five (5) hours and total \$331.40.

Denial of Access Complaint:

On August 13, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that the estimated special service charges were excessive. The Complainant therefore requested the GRC to reject the special service charge assessment and to award counsel fees.

Statement of Information:

On September 29, 2020, the Custodian filed a Statement of Information ("SOI") attaching a certification from. The Custodian certified that she received the Complainant's OPRA request on May 6, 2020. The Custodian certified that the search for records included conferences with Lt. Watt and the Borough Solicitor regarding the scope of the request and location of responsive records. On July 27, 2020, the Custodian responded to the Complainant in writing, stating that a special service charge would be assessed to process to request items at issue.

The Custodian maintained that processing the request items required a substantial and extraordinary level of work to fulfill. The Custodian included a certification from Lt. Watt, detailing the basis and justification for the charge. The Custodian asserted that the total expenditure of nine (9) hours to complete the request represents an extraordinary time and effort to produce responsive records given the size of the agency, and the disruption to Lt. Watt's regular duties. Rivera v. Rutgers, The State Univ. of N.J., GRC Complaint No. 2009-311 (Interim Order dated May 29, 2012); Rotimi Owoh, Esq. (O.B.O. AADARI) v. Borough of Fair Lawn (Monmouth), GRC Complaint No. 2018-146 (Interim Order dated May 19, 2020).

In his certification, Lt. Watt provided information normally requested via the GRC's 14-point special service charge analysis. Lt. Watt certified that GPD employed a total of sixty-six (66) personnel. Lt. Watt certified that he was one of three (3) Lieutenants at GPD, and his primary duties pertained to Internal Affairs matters, including disciplinary matters. Lt. Watt certified that he was also in charge of GPD's Firearms Unit, Bike Unit, and K-9 Unit.

Lt. Watt certified that processing the request could not be delegated to another party due to the sensitive nature of the records, which included juvenile matters, domestic violence matters, disciplinary matters, and other records containing private information. Lt. Watt certified that the estimated nine (9) hours of labor did not include additional time expended by the Custodian and Borough Solicitor for their roles in processing the request.

Lt. Watt certified that regarding item No. 1, a preliminary search located eleven (11) notifications stemming from the EW System. Lt. Watt certified that the actual number of records stemming from those notifications would be far greater than eleven (11) pages, since the request sought various types of "records, reports, and notifications" of the "conduct" which triggered the

EW System. Lt. Watt certified that he provided his estimate of four (4) hours to complete this portion of the request based upon his familiarity with the types of records potentially responsive to item No. 1.

Regarding item No. 2, Lt. Watt certified that a preliminary search of available records located approximately 237 separate Use of Force Reports (“UFRs”) that would be responsive to the Complainant’s request. Lt. Watt certified that based upon his familiarity with the records, he estimated that it would take five (5) hours to process this portion of the request. Lt. Watt certified that the estimate was based upon the time needed to compile the requested records, plus the average time of one (1) minute to review and redact each UFR. Lt. Watt also certified that while preliminary redactions could have been done by a Police Records clerk, he would nonetheless have to spend the identical amount of time to review the UFRs.

Lt. Watt further certified that the estimated nine (9) hours to complete the request equaled one-quarter of his entire work week. Lt. Watt also certified that the COVID-19 pandemic brought in additional unforeseen effects to GPD, including staggered work schedules and additional duties. Lt. Watt certified that one example was a major influx in firearms applications, the processing of which was one of his duties.

Analysis

Special Service Charge

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.

Whenever a records custodian asserts that fulfilling an OPRA records request requires an “extraordinary” expenditure of time and effort, a special service charge may be warranted pursuant to N.J.S.A. 47:1A-5(c). In this regard, OPRA provides:

Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an extraordinary expenditure of time and effort to accommodate the request, the public agency may charge, in addition to the actual cost of duplicating the record, a special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies . . .

[N.J.S.A. 47:1A-5(c).]

The determination of what constitutes an “extraordinary expenditure of time and effort” under OPRA must be made on a case by case basis and requires an analysis of the variety of factors

discussed in The Courier Post v. Lenape Reg'l High Sch., 360 N.J. Super. 191, 199 (Law Div. 2002). There, the plaintiff publisher filed an OPRA request with the defendant school district, seeking to inspect invoices and itemized attorney bills submitted by four law firms over a period of six and a half years. Id. at 193. Lenape assessed a special service charge due to the “extraordinary burden” placed upon the school district in responding to the request. Id.

Based upon the volume of documents requested and the amount of time estimated to locate and assemble them, the court found the assessment of a special service charge for the custodian’s time was reasonable and consistent with N.J.S.A. 47:1A-5(c). Id. at 202. The court noted that it was necessary to examine the following factors in order to determine whether a records request involves an “extraordinary expenditure of time and effort to accommodate” pursuant to OPRA: (1) the volume of government records involved; (2) the period of time over which the records were received by the governmental unit; (3) whether some or all of the records sought are archived; (4) the amount of time required for a government employee to locate, retrieve and assemble the documents for inspection or copying; (5) the amount of time, if any, required to be expended by government employees to monitor the inspection or examination; and (6) the amount of time required to return the documents to their original storage place. Id. at 199.

The court determined that in the context of OPRA, the term “extraordinary” will vary among agencies depending on the size of the agency, the number of employees available to accommodate document requests, the availability of information technology, copying capabilities, the nature, size and number of documents sought, as well as other relevant variables. Id. at 202. “[W]hat may appear to be extraordinary to one school district might be routine to another.” Id.

In Palkowitz v. Borough of Hasbrouck Heights (Bergen), GRC Complaint No. 2014-302 (Interim Order dated May 26, 2015), the Council was tasked with determining whether a proposed special service charge was warranted and reasonable. The custodian provided to the GRC a response to its 14-point analysis request that included specific details such as the hours spent by employee, the task performed during those hours, and the hourly rate. The Council reviewed the response and found that the charge was warranted. However, the Council also found that the charge was not reasonable. Specifically, the Council found that the Borough Administrator was not the lowest paid employee qualified to perform some of the work the custodian credited him with in the 14-point analysis response. Thus, the Council adjusted the fee less the amount identified as unreasonable. Id. at 8.

In the instant matter, the Custodian argued that the estimated fee was warranted and reasonable. The Custodian argued that potentially responsive records would invariably contain sensitive information requiring review and redaction. The Custodian further asserted that Lt. Watt was the lowest paid employee capable of performing the necessary work, and that allocating nine (9) hours to process the request would substantially disrupt the performance of his other duties and responsibilities at GPD. Lt. Watt further noted GPD’s size of 66 employees and how the COVID-19 pandemic further affected the department’s daily functions. Lt. Watts contended that the estimated time was based upon allocating one (1) minute to each of the estimated 237 UFRs responsive to item No. 2, as well as reviewing the records responsive to item No. 1.

The GRC must determine whether the assessed charge was reasonable and warranted. When special service charges are at issue, the GRC will typically require a custodian to complete a 14-point analysis questionnaire prior to deciding on the charge issue. However, the facts of this complaint as presented to the GRC do not require the submission of such a questionnaire.

In first determining whether the assessed charge was warranted, the GRC compares the facts here with those in Rivera v. Borough of Fort Lee Police Dep't (Bergen), GRC Complaint No. 2009-285 (Interim Order dated May 24, 2011). There, the custodian's 14-point analysis indicated that the Borough of Fort Lee Police Department ("BPD") comprised approximately 100 employees, whereas GPD employed more than one-quarter fewer at sixty-six (66). Also, the custodian identified a member of the BPD as one of the employees capable of performing work on the request, just as the Custodian did in the instant matter. Furthermore, although the BPD estimated seven (7) hours of work to review and redact 411 pages of records compared to the nine (9) hours for an estimated fewer than 300 pages here, Lt. Watt adequately demonstrated how the allocation would have interfered with his other responsibilities in addition to handling internal affairs and disciplinary matters. Based on the forgoing, the GRC is persuaded that, in principle, a special service charge is warranted in this complaint.

However, the Council must now address whether the proposed fee is reasonable. In Courier Post, 360 N.J. Super. at 204, the court held that it would be appropriate to calculate the hourly wage rates of the clerical and professional staff involved in satisfying a request and multiplying those figures by the total hours spent, if the custodian can prove that the professional level of human resource was needed to fulfill the request. Thus, as part of the calculation of a special service charge, a custodian must prove that same was based upon the lowest paid, qualified employee's hourly rate to perform the work required to respond to the subject OPRA request. Palkowitz, GRC 2014-302. See also Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (December 2007).

Here, Lt. Watt calculated the charge based upon his own hourly rate (\$66.28) for all nine (9) hours. However, the GRC is not satisfied that this number is a correct calculation, given that Lt. Watt certified that a records clerk at the police department could have completed the task of redacting the records. Notwithstanding this admission, Lt. Watt asserted that he would still be tasked with reviewing the redactions made, and still calculated the charge based upon his hourly rate. For this reason, the estimated charge should be revised to reflect the hourly rate of the lowest paid employee capable of performing the work.

Therefore, although the Custodian proved that a special service charge is warranted here, the total cost is unreasonable. Specifically, the evidence does not support that the full nine (9)-hour charge should be calculated based solely on Lt. Watt's hourly rate. See N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); Courier Post, 360 N.J. Super. at 199, 204; Janney, GRC 2006-205; Palkowitz, GRC 2014-302. Thus, the Custodian must calculate a new special service charge based on a detailed accounting of the hourly rate of the lowest paid employee capable of performing the work to respond to the OPRA request. See Palkowitz.

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.

Prevailing Party Attorney's Fees

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian proved that a special service charge is warranted here, the total cost is unreasonable. Specifically, the evidence does not support that the full nine (9)-hour charge should be calculated based solely on Lt. Rick Watt's hourly rate. See N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(c); The Courier Post v. Lenape Reg'l High Sch., 360 N.J. Super. 191, 199 (Law Div. 2002); Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (December 2007); Palkowitz v. Borough of Hasbrouck Heights (Bergen), GRC Complaint No. 2014-302 (Interim Order dated May 26, 2015). Thus, the Custodian must calculate a new special service charge based on a detailed accounting of the hourly rate of the lowest paid employee capable of performing the work to respond to the OPRA request. See Palkowitz.
2. **The Custodian shall comply with conclusion No. 1 above by providing the amount of the recalculated charge available to the Complainant within five (5) business days from receipt of the Council's Interim Order. The Complainant shall, within five (5) business days from receipt of the special service charge, deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase the records. The Complainant's failure to take any action within said time frame shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Should the Complainant remit payment, the Custodian shall provide access to the responsive records and simultaneously deliver⁵ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁶ to the Executive Director⁷ within ten (10) business days following receipt of said payment. Conversely, if the Complainant declined to purchase the records, the Custodian shall deliver to the**

⁵ 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.

⁶ "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."

⁷ 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.

Rotimi Owoh, Esq. (On Behalf of Baffi Simmons) v. Glassboro Police Department (Gloucester), 2020-157 – Findings and Recommendations of the Executive Director

Executive Director a statement confirming the Complainant's refusal to purchase the requested records and such statement shall be in the form of a certification as described above.

3. 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.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado
Staff Attorney

February 15, 2022



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

May 31, 2022 Government Records Council Meeting

Brian F. McBride
Complainant

Complaint No. 2020-231

v.

Township of Washington (Gloucester)
Custodian of Record

At the May 31, 2022 public meeting, the Government Records Council ("Council") considered the May 24, 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 the Custodian borne her burden of proof that she lawfully denied access to the Complainant's OPRA request because the Custodian certified, and the record reflects, that no responsive record exists. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005); Perry v. N.J. Dep't of Corr., GRC Complaint No. 2012-237 (June 2013).

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 31st Day of May 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: June 2, 2022



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 31, 2022 Council Meeting**

**Brian F. McBride¹
Complainant**

GRC Complaint No. 2020-231

v.

**Township of Washington (Gloucester)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of the body worn camera (“BWC”) footage taken by Officer Kris Hice during an incident occurring on August 6, 2019 at 10:00AM.

Custodian of Record: Christine Ciallella

Request Received by Custodian: May 15, 2020

Response Made by Custodian: June 18, 2020

GRC Complaint Received: December 1, 2020

Background³

Request and Response:

On May 15, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. That same day, the Custodian responded to the Complainant in writing stating that all OPRA requests required an extension of time to respond. On June 18, 2020, the Custodian responded to the Complainant stating that no responsive records exist.

Denial of Access Complaint:

On December 1, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the police report in his possession⁴ indicated that Officer Hice’s BWC was activated during the incident in question. The Complainant also asserted that the Custodian’s response provided no explanation for the discrepancy. The Complainant contended that the lack of responsive records was a violation of the Washington Police Department’s (“WPD”) general orders regarding BWCs.

¹ No legal representation listed on record.

² Represented by Patrick J. Madden, Esq. of Law Offices of Patrick J. Madden, L.L.C. (Haddonfield, NJ). Previously represented by Carmen Saginario, Jr., Esq. of Capehart & Scatchard, P.A. (Mount Laurel, 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.

⁴ The Complainant included a copy of the police report as part of his complaint.

Statement of Information:

On March 12, 2021, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on May 15, 2020. The Custodian certified that her search included contacting WPD’s Clerk. The Custodian certified that she responded in writing on June 18, 2020, stating that no responsive records exist.

The Custodian asserted that the requested BWC footage no longer existed since the request was made approximately nine (9) months after the incident at issue. The Custodian asserted that in accordance with WPD General Order 13:25, and consistent with the Attorney General’s Guidelines, BWC footage is retained for ninety (90) days and then purged automatically from the storage system. The Custodian argued that since the incident at issue occurred on August 6, 2019, the BWC footage would have been purged on or about September 6, 2019. The Custodian attached a copy of the Attorney General Law Enforcement Directive No. 2015-1 (“Directive No. 2015-1”) and WPD General Order 13:25 (“GO 13:25”) as part of the SOI.

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 Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). In Perry v. N.J. Dep’t of Corr., GRC Complaint No. 2012-237 (June 2013), the complainant submitted an OPRA request on June 11, 2012, seeking access to surveillance footage recorded on May 9, 2012. The custodian initially denied access under the New Jersey Department of Corrections’ regulations, but subsequently certified in the SOI that any recorded footage would have been overwritten prior to the date of the OPRA request in accordance with the retention guidelines. The Council thus held that the custodian lawfully denied access to said records, if any, because none existed. *Id.* at 4 (citing Pusterhofer, GRC 2005-49). See also Stolte v. N.J. State Police, GRC Complaint Nos. 2015-33 & 2015-89 (November 2015).

A review of the evidence supports a finding consistent with Perry, GRC 2012-237. The Complainant submitted his OPRA request on May 15, 2020, seeking BWC footage pertaining to an incident that occurred on August 6, 2019, and included a copy of the police report indicating that BWC footage was taken at the time. However, the Custodian certified that no responsive records exist, stating that the footage had been purged per WPD policy. The Custodian provided copies of Directive No. 2015-1 and GO 13:25, indicating that BWC footage is automatically purged ninety (90) days after the incident. Thus, the BWC in question would have been purged on or about November 4, 2019, or more than six (6) months prior to the request. Additionally, the Complainant did not provide any evidence to refute the Custodian’s certification.

Therefore, the Custodian borne her burden of proof that she lawfully denied access to the Complainant's OPRA request because the Custodian certified, and the record reflects, that no responsive record exists. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49; Perry, GRC 2012-237.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian borne her burden of proof that she lawfully denied access to the Complainant's OPRA request because the Custodian certified, and the record reflects, that no responsive record exists. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005); Perry v. N.J. Dep't of Corr., GRC Complaint No. 2012-237 (June 2013).

Prepared By: Samuel A. Rosado
Staff Attorney

May 24, 2022



State of New Jersey
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

May 31, 2022 Government Records Council Meeting

Rotimi Owoh, Esq.
(o/b/o Baffi Simmons)
Complainant

Complaint No. 2020-137

v.
Clayton Police Department (Gloucester)
Custodian of Record

At the May 31, 2022 public meeting, the Government Records Council ("Council") considered the May 24, 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 the Council dismiss this complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant's Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

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 31st Day of May 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: June 2, 2022



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 22, 2022 Council Meeting**

**Rotimi Owoh, Esq. (On Behalf of
Baffi Simmons)¹
Complainant**

GRC Complaint No. 2020-137

v.

**Clayton Police Department (Gloucester)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:³

1. Driving Under the Influence (“DUI”) and Driving While Intoxicated (“DWI”) summonses and complaints that were prepared by the Police Department from January 2019 through present.
2. Drug possession complaints and summonses prepared and filed by the Police Department from January 2019 through present.
3. Drug paraphernalia complaints and summonses prepared and filed by the Police Department from January 2019 through present.
4. Records, reports, and notifications showing and tracking the number of police officers who triggered the [Early Warning System (“EW System”)] performance indicators, the conduct that triggered the EW System, and the remedial actions and disciplinary actions that were taken by the police department against police officers from 2019 to the present. Please feel free to redact the names and personal identifying information about specific police officers.

Custodian of Record: Chief Andrew Davis
Request Received by Custodian: April 28, 2020
Response Made by Custodian: June 15, 2020
GRC Complaint Received: July 22, 2020

Background⁴

Request and Response:

On April 28, 2020, the Complainant submitted an Open Public Records Act (“OPRA”)

¹ The Complainant represents Baffi Simmons.

² Represented by Timothy D. Scaffidi, Esq., of the Law Office of Timothy D. Scaffidi, Esq. (Woodbury, NJ).

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

⁴ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Rotimi Owoh, Esq. (On Behalf of Baffi Simmons) v. Clayton Police Department (Gloucester), 2020-137 – Findings and Recommendations of the Executive Director

request to the Custodian seeking the above-mentioned records. On June 15, 2020, the Custodian responded in writing stating that for item Nos. 1-3, the Clayton Police Department (“CPD”) utilizes eCDR and therefore did not maintain responsive records. Simmons v. Mercado, 464 N.J. Super. 77 (App. Div. 2020), rev’d, 247 N.J. 24 (2021). Regarding item No. 4, the Custodian stated that the records constituted confidential records not subject to disclosure under OPRA, citing the Attorney General Internal Affairs Police & Procedures § 9.6 (Dec. 2019) (“IAPP”); and Attorney General Directive No. 2018-3 (March 20, 2018) (“Directive”). Additionally, then Custodian stated that the records constituted personnel records and not subject to disclosure under OPRA. Kovalcik v. Somerset Cnty. Prosecutor’s Office, 206 N.J. 581, 588 (2011); N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor’s Office, 405 N.J. Super. 386 (App. Div. 2009).

Denial of Access Complaint:

On July 22, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that New Jersey police departments have direct access to eCDR as well as the ATS/ACS database. The Complainant argued that CPD did not need the assistance or permission of the municipal court to access the databases containing the responsive records.

The Complainant argued that police departments within the State were required to retain summonses and complaints until thirty (30) days after disposition of same, and municipal prosecutors also retained copies for discovery purposes during the pendency of the cases. The Complainant noted that copies were retained while testing was done by the New Jersey State Police to confirm whether the substance was in fact an illegal drug. The Complainant further asserted that municipalities were required to retain these records for at least fifteen (15) years.⁵

The Complainant further asserted that he was unlawfully denied access to item No. 4 by not providing copies of the requested records with redactions made to confidential information, and the time to comply with the OPRA request has been expired. The Complainant therefore requested the GRC compel compliance with the OPRA request and to award counsel fees.

Statement of Information:⁶

On December 28, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on April 28, 2020. The Custodian certified that on June 15, 2020, he responded to the Complainant in writing stating that records responsive to item Nos. 1-3 were maintained by the Judiciary under the eCDR system and records responsive to item No. 4 were confidential and personnel records not subject to disclosure.

⁵ The Complainant noted that he should have been given access to the records under the “common law.” However, the GRC does not have the authority to address a requestor’s common law right to access records. N.J.S.A. 47:1A-7(b); Rowan, Jr. v. Warren Hills Reg’l Sch. Dist. (Warren), GRC Complaint No. 2011-347 (January 2013); Kelly v. N.J. Dep’t of Transp., GRC Complaint No. 2010-215 (November 2011) at 2. Thus, the GRC cannot address any common law right of access to the requested records.

⁶ On September 17, 2020, the Complaint was transferred to mediation. On November 25, 2020, the matter was sent back to the GRC for adjudication.

Rotimi Owoh, Esq. (On Behalf of Baffi Simmons) v. Clayton Police Department (Gloucester), 2020-137 – Findings and Recommendations of the Executive Director

Regarding item Nos. 1-3, the Custodian asserted that CPD relied on the on the Appellate Division in Simmons, which superseded the superior court decisions referenced by the Complainant. Additionally, the Custodian argued that the Complainant's complaint suggested that the Custodian expand scope of the search to include records that may have been received and maintained by prosecutors and records clerks. The Custodian argued that fulfilling the request to this extent would require her to either review every case file at the agency since January 2020 or conduct research to determine which case file may contain a responsive complaint or summons. The Custodian asserted that she was not obligated to conduct research to fulfill an OPRA request. Simmons, 464 N.J. Super. at 83.

Regarding item No. 4, the Custodian maintained that the request item sought records they fell under the category of confidential internal affairs records and/or personnel records. The Custodian asserted that IAPP §3.4.1 states that the outlined triggers of the EW System may result in an internal affairs investigation. The Custodian also asserted that IAPP §9.6.1 noted that the "nature and source" of internal allegations, as well as "the progress" and "resulting materials" stemming from the investigations were confidential information. The Custodian argued that if the EW System was the "nature and source" of an internal affairs investigation, then it would be exempt from disclosure under the IAPP. The Custodian also argued that any records of remedial or disciplinary action would also fall within the scope of confidential internal affairs records. IAPP §9.6; see Rivera v. Union Cnty. Prosecutor's Office, 2020 N.J. Super. Unpub. LEXIS 1192 (App. Div. 2020).

The Custodian also asserted that OPRA's personnel records exemption applied to records responsive to item No. 4 as well. Kovalcik, 206 N.J. at 588. The Custodian argued that the exemption included documents that may not be explicitly personnel records but bear the indicia of personnel records.

Additional Submissions:

On December 28, 2020, the Complainant filed a letter brief in opposition to the Custodian's SOI. Therein, the Complainant argued that even in the Simmons decision, the municipality provided summonses responsive to item No. 1. The Complainant argued that DUI/DWI summonses were stored separately from CDR-1 complaints for drug related offenses and should be available for production.

The Complainant also stated that the Simmons decision was being actively reviewed by the New Jersey Supreme Court. The Complainant also argued that the Custodian did not deny that hard copies of the records may be available in case files and held as required pursuant to the Records Retention Schedule for both Municipal Police Departments and Municipal Prosecutors.

Regarding item No. 4, the Complainant argued that redacted copies of responsive records were subject to disclosure under the Directive. The Complainant maintained that the GRC should require the Custodian to make the records available to the Complainant and award counsel fees.

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.

Item Nos. 1-3

OPRA also provides that the GRC “shall not have jurisdiction over the Judicial or Legislative Branches of State Government or any agency, officer, or employee of those branches. N.J.S.A. 47:1A-7(g). In Pitts v. N.J. Dep’t of Corr., GRC Complaint No. 2013-299 (September 2014), the custodian argued in part that because the requested presentence report was a court record created by the Judiciary, it was not a government record under N.J.S.A. 47:1A-1.1, and not within the GRC’s jurisdiction under N.J.S.A. 47:1A-7(g). However, the Council disagreed holding that because the agency received and kept on file a copy of the record, it still met the definition of a government record. N.J.S.A. 47:1A-1.1.

Additionally, in Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004), the custodian argued that the requested complaints and summonses were not subject to access since they were dated beyond the required retention period via the State’s retention schedule. The Council held that if the agency in fact possessed the responsive records, they were subject to access under OPRA even if they were supposed to have been destroyed in accordance with the retention schedule. See also Mawhinney v. Egg Harbor City Police Dep’t (Atlantic), GRC Complaint No. 2015-85 (January 2016).

Furthermore, although decided during the pendency of this complaint, the GRC finds the Court’s holding in Simmons v. Mercado, 247 N.J. 24 (2021) relevant and binding. There, the Complainant requested the same records as those at issue in the instant matter, with the custodian asserting that the records were not maintained by the Millville Police Department (“MPD”) once its officers created and submitted the records through eCDR. Simmons, 247 N.J. at 24. The Court reversed the Appellate Division and found that the requested records were government records subject to disclosure under OPRA. Id. The Court found that notwithstanding which government branch created the CDR-1 and -2 forms, it is the information contained within those forms by MPD officers that is sought by AADARI. Id. at 26. Thus, the Court held that:

Because MPD officers create the completed CDR-1s by populating the forms with the information necessary to generate a summons and submit it to the court, there is no question that the CDR-1s are government records subject to disclosure pursuant to OPRA.

[Id. at 27.]

Additionally, the Court rejected MPD's argument that they did not maintain the records, holding that OPRA's definition of a government record is not restricted to records maintained by the agency, but rather includes records it creates, even if not maintained. Id. at 26. Thus, the Court found, "that the Judiciary might maintain on its servers the information that MPD made does not absolve MPD of its obligation to produce that information pursuant to a proper OPRA request made to MPD." Id. at 29.

In the current matter, the Custodian asserted that CPD did not maintain responsive records, relying upon the Appellate Division's holding in Simmons, 464 N.J. Super. 77. The Complainant asserted that the decision was under review by the Supreme Court at the time of the request, and that records were provided for item No. 1 by the defendant municipality.

Initially, the GRC addresses the Complainant's arguments pertaining to retention schedules. Upon review, the Complainant's reliance on Merino, GRC 2003-110 to contend that NBPd and the City's Municipal Prosecutor are required by law to maintain the requested records based upon the retention schedules ignores the prevailing caselaw. Instead, the retention schedules determine how records that may be in an agency's possession are to be maintained, and are not a legal requirement to make, maintain, or keep on file every identified record. See N. Jersey Media Grp. Inc., 229 N.J. at 568.

However, considering the Court's decision in Simmons, the Custodian maintains the obligation to provide the Complainant with the responsive records available through eCDR. Notwithstanding whether the CPD maintained physical copies of same, the Court held that since police departments created the CDR-1s and CDR-2s when inputting information, they were government records even if the records are maintained by the Judiciary's electronic databases. Simmons, 247 N.J. at 29.

Accordingly, the Custodian may have unlawfully denied access to the requested complaints and summonses responsive to the Complainant's OPRA request item Nos. 1-3. N.J.S.A. 47:1A-6. Specifically, the Custodian had an obligation to conduct a search for responsive records through CPD's access to eCDR. Simmons, 247 N.J. at 29. Thus, the Custodian shall perform a search for the responsive complaints and summonses through eCDR or maintained physically by CPD. Should the Custodian not locate such records, she must certify to this fact. Also, should the Custodian determine that a special service charge is warranted thereafter, she must provide the Complainant with the amount of the special service charge required to purchase the requested summonses and complaints.

Item No. 4

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, 206 N.J. at 589. In Merino, GRC 2003-110, the Council held that:

[t]he Complainant's request to review the records of complaints filed against Officer Tuttle were properly denied by the Custodian. N.J.S.A. 47:1A-10 provides in pertinent [part] that "the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a public record and shall not be made available for public access" [emphasis omitted]. As a result, records of complaints filed against Officer Tuttle and/or reprimands he has received are not subject to public access.

[Id.]

In Rodriguez v. Kean Univ., GRC Complaint No. 2013-296 (June 2014), the Council held that "disciplinary actions are not specifically identified as personnel information subject to disclosure under OPRA." Id. at 5. Furthermore, the Appellate Division has held that the personnel records exemption may apply to records that ". . . bear many of the indicia of personnel files." North Jersey Media Grp. v. Bergen Cnty. Prosecutor's Office, 405 N.J. Super. 386, 390 (App. Div. 2009). See also McGee, 416 N.J. Super. at 616 (noting that OPRA's personnel records exemption "is not limited to the items included in a personnel file").

In O'Shea v. Twp. of West Milford, 410 N.J. Super. 371, 382 (App. Div. 2009), the Appellate Division held that Attorney General directives, like guidelines, "cannot be ignored" and are "binding and enforceable on local law enforcement agencies. . . ." Like the IAPP, the Directive derives its authority from Attorney General's status as the chief law enforcement officer of the State and tasked with the general supervision of criminal justice. See N.J.S.A. 52:17B-97 to -117. Thus, the Directive has the force of law for police entities.

The purpose of the Directive was to require implementation of the EW System to all law enforcement agencies in New Jersey.⁷ The EW System is a management tool intended to detect trends in police conduct and help identify and remediate a potentially problematic officer before conduct escalates to becoming a substantial risk to public safety.⁸ The Directive provides a minimal set of "performance indicators" monitored by the EW System.⁹ The Directive also provides guidelines on a tracking system, how an incident may trigger one of the performance indicators, and the types of remedial action taken when an officer triggers the EW System review process.¹⁰ Notably, the Directive states that the EW System "should be administered by the agency's internal affairs unit."¹¹

Furthermore, the Directive provides in part:

All EW System policies adopted by law enforcement agencies shall be made available to the public upon request and shall be posted on the agency's website. Annual reports from the County Prosecutors to the Attorney General (as required

⁷ Directive at 1.

⁸ Id.

⁹ Id. at 2.

¹⁰ Id. at 3-4.

¹¹ Id. at 3.

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by Section II.I above) also shall be made available to the public upon request and shall be posted on the agency's website.

All written reports created or submitted pursuant to this Directive that identify specific officers are confidential and not subject to public disclosure.¹²

In the instant matter, the Complainant asserted that the Directive permits the disclosure of "records, reports, and notifications showing and tracking the number of police officers who triggered the [EW System] performance indicators, the conduct that triggered the EW System, and the remedial actions . . . that were taken by [CPD]," so long as the names of specific officers are redacted. The Custodian asserted that the records were exempt under the Directive's internal affairs confidentiality exemption and/or OPRA's personnel records exemption.

Upon review, any underlying records produced under the Directive are integrally related to the internal personnel management of police officers. The Directive's confidentiality section should therefore be read through the lens of personnel records, which favor a presumption against disclosure. See Kolvalcik, 206 N.J. 581. Thus, the Directive's plain language indicates that the requested records and reports are deemed confidential and not subject to public disclosure other than the expressly identified "EW System polices" and the "annual report" provided to the Attorney General from the County Prosecutor. Just as internal affairs records are deemed confidential in their entirety under the IAPP, so too are the underlying records generated from the EW System pursuant to the Directive. Furthermore, to the extent that the Complainant seeks reports and records detailing any disciplinary actions taken against police officers flagged via the EW System, such records are exempt from disclosure via Merino, GRC 2003-110.

Accordingly, the Custodian lawfully denied access to the Complainant's OPRA request item No. 4 seeking records, reports, and notifications generated from CPD's EW System, as same are exempt from disclosure pursuant to the Directive. N.J.S.A. 47:12A-6; O'Shea, 410 N.J. Super. at 382. Additionally, to the extent the Complainant seeks disciplinary records, same are exempt under OPRA's personnel records exemption. N.J.S.A. 47:1A-10; Merino, GRC 2003-110.

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.

Prevailing Party Attorney's Fees

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

¹² Id. at 4-5.

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Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian may have unlawfully denied access to the requested complaints and summonses responsive to the Complainant's OPRA request item Nos. 1-3. N.J.S.A. 47:1A-6. Specifically, the Custodian had an obligation to conduct a search for responsive records through Clayton Police Department's ("CPD") access to eCDR. Simmons v. Mercado, 247 N.J. 24 (2021). Thus, the Custodian shall perform a search for the responsive complaints and summonses through eCDR or maintained physically by CPD. Should the Custodian not locate such records, she must certify to this fact. Also, should the Custodian determine that a special service charge is warranted thereafter, she must provide the Complainant with the amount of the special service charge required to purchase the requested summonses and complaints.
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order by disclosing the responsive records with any appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously providing certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,¹³ to the Executive Director.¹⁴**
3. **In the event the Custodian determines that a special service charge is applicable, the Custodian shall complete the GRC's 14-point analysis¹⁵ and calculate the appropriate special service charge. The Custodian shall then make the amount of the charge, together with the completed 14-point analysis, available to the Complainant within five (5) business days from receipt of the Council's Interim Order. The Complainant shall, within five (5) business days from receipt of the special service charge, deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase the records. The Complainant's failure to take any action within said time frame shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within twenty (20) business days following the Complainant's payment of the special service charge, the Custodian shall deliver to the Executive Director certified confirmation of compliance as first provided above. Conversely, if the Complainant declined to purchase the records, the Custodian shall deliver to the Executive Director a statement confirming the Complainant's refusal to purchase the requested records and such statement shall be in the form of a certification in accordance with R. 1:4-4. The completed 14-**

¹³ "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."

¹⁴ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium.

¹⁵ See <https://nj.gov/grc/pdf/OPRASpecialServiceCharge.pdf>.

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point analysis shall be attached to the certification and incorporated therein by reference.

4. The Custodian lawfully denied access to the Complainant's OPRA request item No. 4 seeking records, reports, and notifications generated from Clayton Police Department's Early Warning System, as same are exempt from disclosure pursuant to the Attorney General Law Enforcement Directive No. 2018-3. N.J.S.A. 47:12A-6; O'Shea v. Twp. of West Milford, 410 N.J. Super. 371, 382 (App. Div. 2009). Additionally, to the extent the Complainant seeks disciplinary records, same are exempt under OPRA's personnel records exemption. N.J.S.A. 47:1A-10; Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004).
5. 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.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado
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February 15, 2022