



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

**INTERIM ORDER**

**February 26, 2013 Government Records Council Meeting**

Ali S. Morgano  
Complainant

Complaint No. 2011-145

v.

New Jersey Department of Treasury,  
Division of Pensions & Benefits  
Custodian of Record

At the February 26, 2013 public meeting, the Government Records Council (“Council”) considered the February 19, 2013 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 issue of whether Officer Eutsey has a right to intervene in this matter shall be afforded the due process rights of a full hearing. As such, this complaint should be referred to the Office of Administrative Law, pursuant to *N.J.A.C. 1:1-16.2(b)*, to determine whether Officer Eutsey should be permitted to intervene in this complaint. The Office of Administrative Law should also determine if the Custodian knowingly and willfully violated OPRA if found to have unlawfully denied access to the requested records.

Interim Order Rendered by the  
Government Records Council  
On The 26<sup>th</sup> Day of February, 2013

I attest the foregoing is a true and accurate record of the Government Records Council.

Robin Berg Tabakin, Esq., Chair  
Government Records Council

**Decision Distribution Date: February 27, 2013**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
February 26, 2013 Council Meeting**

**Ali S. Morgano<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-145**

v.

**New Jersey Department of Treasury,  
Division of Pensions & Benefits<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Title, position, and salary, payroll records, length of service, date of separation and reason, the amount and type of pension received for City of Newark Police Officer, Elbert N. Eutsey (“Police Officer Eutsey”), also known as Jack Eutsey.

**Request Made:** January 27, 2011

**Response Made:** February 16, 2011

**Custodian:** Florence Sheppard

**GRC Complaint Filed:** May 2, 2011<sup>3</sup>

**Background**

**December 18, 2012**

Government Records Council’s (“Council”) Interim Order. At its December 18, 2012 public meeting, the Council considered the November 20, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties.<sup>4</sup> The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Although Ms. O’Hare responded in writing to the Complainant’s January 27, 2011 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., she failed to respond immediately to the Complainant’s OPRA request for salary information in violation of N.J.S.A. 47:1A-5.e. *See Herron v. Township of Montclair*, GRC Complaint No. 2006-178 (February 2007).
2. Ms. O’Hare’s response to the Complainant’s OPRA request was insufficient because it failed to grant access, deny access, seek clarification or request an

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by DAG Heather Lynn Anderson, on behalf of the NJ Attorney General.

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

<sup>4</sup> This complaint was prepared and scheduled for adjudication at the Council’s November 27, 2012 meeting; however, said meeting was cancelled due to a lack of a quorum.

extension of time pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i and James v. NJ Department of Law & Public Safety, Division of Consumer Affairs, GRC Complaint No. 2011-36 (August 2012). *See Paff v. Willingboro Board of Education (Burlington)*, GRC Complaint No. 2007-272 (May 2008).

3. Since the Custodian identified five (5) records responsive to the Complainant's OPRA request and the Custodian failed to bear her burden of proving a lawful denial of access, Ms. O'Hare should have provided these records to the Complainant. Accordingly, the Custodian must disclose the five (5) identified personnel records responsive to the Complainant's OPRA request. *See Morgano v. Essex County Prosecutor's Office*, GRC Complaint No. 2007-156 (February 2008) and N.J.S.A. 47:1A-2.2 N.J.S.A. 47:1A-10.
4. **The Custodian shall comply with item #3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>5</sup> to the Executive Director.<sup>6</sup>**
5. Because the Custodian certified in the Statement of Information that salary and payroll records do not exist, and there is no evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied the Complainant access to these records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

### **December 19, 2012**

Council's Interim Order ("Order") distributed to the parties.

### **December 28, 2012**

Letter from Mr. Anthony Fusco, Esq., on behalf of Officer Eutsey, to the GRC. Mr. Fusco provides notice of his office's intent to intervene with the Denial of Access Complaint. Mr. Fusco also states that Officer Eutsey objected to the release of his personnel records but the GRC issued an Order authorizing the release of such records.

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<sup>5</sup> "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."

<sup>6</sup> 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.

### **January 25, 2013**

Letter from the GRC to Mr. Fusco. The GRC states that Mr. Fusco's office expressed a notice of intent to intervene with the Denial of Access Complaint. The GRC also states that as of January 25, 2013, it was not in receipt of any motion to intervene. The GRC further states that if it did not receive Mr. Fusco's motion to intervene by January 30, 2013, the GRC will move forward with its December 18, 2012 Order and direct the Custodian to release Officer Eutsey's personnel records.

### **January 29, 2013**

Police Officer Eutsey's Motion to Intervene. On behalf of Officer Eutsey, Mr. Fusco asserts that releasing the requested personnel records would place Officer Eutsey's life in danger and thus violate his reasonable expectation of privacy. Mr. Fusco also asserts that OPRA "simultaneously requires public agencies to safeguard from public access a citizen's personal information when disclosure would violate a person's reasonable expectation of privacy" pursuant to N.J.S.A. 47:1A-1.1. Mr. Fusco further asserts that when considering requests not specifically stated in the statute, the New Jersey Supreme Court held in Burnett v. County of Bergen, 198 N.J. 408 (2009) that it will balance the parties interest of access to government records against safeguarding a citizen's reasonable expectation of privacy.

Mr. Fusco argues that the New Jersey Supreme Court in Doe v. Poritz, 142 N.J. 1 (1995), outlined the following factors to consider when balancing the parties interest: "1) the type of record requested; 2) the information it does or might contain; 3) the potential for harm in any subsequent nonconsensual disclosure; 4) the injury from disclosure to the relationship in which the record was generated; 5) the adequacy of safeguards to prevent unauthorized disclosure; 6) the degree of need for access; and 7) whether there is an express statutory mandate, articulated public policy or other recognized public interest militating toward access."

Mr. Fusco states that balancing these factors, weigh in favor of non-disclosure of the personnel records. Mr. Fusco asserts that the type of records requested hold very little value for the Complainant. Mr. Fusco argues that OPRA was passed to encourage government transparency in order to prevent and mitigate corruption and inefficiency. Mr. Fusco states that a private citizen seeking the records of a single police officer does not promote such goal. Mr. Fusco asserts that the Complainant's request is more aligned with an individual seeking personal vengeance against an officer. Mr. Fusco also asserts that the Complainant has no need for this information and is attempting to track down Officer Eutsey in order to seek violent vengeance against him and his family. Mr. Fusco further asserts that although OPRA does specifically permit the disclosure of the requested records; under the current circumstances public policy would support denying access given the fact that the requestor is a dangerous felon who is requesting information about the Officer who arrested him. Mr. Fusco also argues that access to public records should be granted when the information sought will be beneficial to the public, not when it potentially places Officer Eutsey's life in jeopardy. Lastly, Mr. Fusco asserts that after balancing the factors and considering the totality of the circumstances, the GRC should deny the Complainant's OPRA request.

## Analysis

### **Whether the Government Records Council should grant Office Eutsey's Motion to Intervene in this matter?**

The Administrative Procedures Act provides that:

“[a]ny person or entity not initially a party, who has a statutory right to intervene or who will be substantially, specifically and directly affected by the outcome of a contested case, may on motion, seek leave to intervene.” *N.J.A.C. 1:1-16.1(a)*.

The Administrative Procedures Act also states that:

“The agency head may rule upon the motion to intervene or may reserve decision for action by a judge after the case has been filed with the Office of Administrative Law.” *N.J.A.C. 1:1-16.2(b)*.

On January 29, 2013, Mr. Fusco, on behalf of Officer Eutsey, filed a Motion to Intervene in the instant complaint to prohibit the release of Police Officer Eutsey's personnel records. In support of said motion, Mr. Fusco argued that Officer Eutsey arrested the Complainant who is a notorious gang member and is currently incarcerated in the New Jersey State Prison. Mr. Fusco also argued that the purpose of the Complainant's request is to seek violent vengeance against Officer Eutsey and his family. Mr. Fusco further argues that given these factors public policy would support denying access because the Complainant is a dangerous felon who is requesting information about the Police Officer who arrested him.

Therefore, because of the potential danger towards Officer Eutsey, the issue of whether Officer Eutsey has a right to intervene in this matter shall be afforded the due process rights of a full hearing. As such, this complaint should be referred to the Office of Administrative Law, pursuant to *N.J.A.C. 1:1-16.2(b)*, to determine whether Officer Eutsey should be permitted to intervene in this complaint. The Office of Administrative Law should also determine if the Custodian knowingly and willfully violated OPRA if found to have unlawfully denied access to the requested records.

## Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the issue of whether Officer Eutsey has a right to intervene in this matter shall be afforded the due process rights of a full hearing. As such, this complaint should be referred to the Office of Administrative Law, pursuant to *N.J.A.C. 1:1-16.2(b)*, to determine whether Officer Eutsey should be permitted to intervene in this complaint. The Office of Administrative Law should also determine if the Custodian knowingly and willfully violated OPRA if found to have unlawfully denied access to the requested records.

Prepared By: Harlyne A. Lack, Esq.  
Case Manager

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

February 19, 2013



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE  
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Commissioner

INTERIM ORDER

December 18, 2012 Government Records Council Meeting

Ali S. Morgano  
Complainant

Complaint No. 2011-145

v.

NJ Department of Treasury,  
Division of Administration  
Custodian of Record

At the December 18, 2012 public meeting, the Government Records Council (“Council”) considered the November 20, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Although Ms. O’Hare responded in writing to the Complainant’s January 27, 2011 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., she failed to respond immediately to the Complainant’s OPRA request for salary information in violation of N.J.S.A. 47:1A-5.e. See Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007).
2. Ms. O’Hare’s response to the Complainant’s OPRA request was insufficient because it failed to grant access, deny access, seek clarification or request an extension of time pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i and James v. NJ Department of Law & Public Safety, Division of Consumer Affairs, GRC Complaint No. 2011-36 (August 2012). See Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).
3. Since the Custodian identified five (5) records responsive to the Complainant’s OPRA request and the Custodian failed to bear her burden of proving a lawful denial of access, Ms. O’Hare should have provided these records to the Complainant. Accordingly, the Custodian must disclose the five (5) identified personnel records responsive to the Complainant’s OPRA request. See Morgano v. Essex County Prosecutor’s Office, GRC Complaint No. 2007-156 (February 2008) and N.J.S.A. 47:1A-2.2 N.J.S.A. 47:1A-10.
4. **The Custodian shall comply with item #3 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each**



**redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>1</sup> to the Executive Director.<sup>2</sup>**

5. Because the Custodian certified in the Statement of Information that salary and payroll records do not exist, and there is no evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied the Complainant access to these records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 18<sup>th</sup> Day of December, 2012

Robin Berg Tabakin, Chair  
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Denise Parkinson Vetti, Secretary  
Government Records Council

**Decision Distribution Date: December 19, 2012**

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<sup>1</sup> "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."

<sup>2</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
December 18, 2012 Council Meeting**

**Ali S. Morgano<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-145**

v.

**New Jersey Department of Treasury,  
Division of Pensions & Benefits<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Title, position, and salary, payroll records, length of service, date of separation and reason, the amount and type of pension received for City of Newark Police Officer, Elbert N. Eutsey (“Police Officer Eutsey”), also known as Jack Eutsey.

**Request Made:** January 27, 2011

**Response Made:** February 16, 2011

**Custodian:** Florence Sheppard

**GRC Complaint Filed:** May 2, 2011<sup>3</sup>

**Background**

**January 27, 2011**

Complainant’s Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

**February 16, 2011**

Manager of the Government Records Access Unit, Ms. Barbara O’Hare’s (“Ms. O’Hare”) response to the OPRA request. Ms. O’Hare responds in writing via letter to the Complainant’s OPRA request on the seventh (7<sup>th</sup>) business day following receipt of such request.<sup>4</sup> Ms. O’Hare states that pursuant to N.J.S.A. 47:1A-2.2, access to certain information by a convict is prohibited, such as records containing a victim’s or the victim family’s personal information shall be denied. Ms. O’Hare requests the Complainant to complete a certification for the following information, 1) county and state of conviction; 2) United States district in which the conviction was obtained; 3) date(s) of conviction(s); 4) indictment number(s), complaint/docket number(s) or case number(s); 5) statement of all charges for which the Complainant was convicted. Ms. O’Hare additionally states

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by DAG Heather Lynn Anderson, on behalf of the NJ Attorney General.

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

<sup>4</sup> The Custodian certifies in the Statement of Information that the Department of Treasury received the Complainant’s OPRA request on February 7, 2011.

that the Complainant's request will be on hold until the Department of Treasury ("Department") receives the Complainant's certification.<sup>5</sup>

### **March 21, 2011**

Letter from Ms. O'Hare to the Complainant. Ms. O'Hare requests an additional seven (7) business days to respond to the Complainant's OPRA request. Ms. O'Hare states that additional time is needed to gather and review the records responsive to the request. Ms. O'Hare states that the new due date will be March 30, 2011.

### **March 23, 2011**

Letter from Police Officer Eutsey to Ms. O'Hare. Police Officer Eutsey states that he objects to any of his personal information being relayed to the Complainant or any other person who may have a relationship to him. Police Officer Eutsey states that he arrested the Complainant for a crime of which he was ultimately convicted. Police Officer Eutsey also states that the Complainant is a prisoner of the New Jersey Department of Corrections and has committed numerous offenses while incarcerated and as a result received additional time in prison. Police Officer Eutsey further states that the Complainant is a notorious member of a New Jersey gang and has made numerous threats against him. Police Officer Eutsey additionally states that he also arrested the Complainant's co-defendant at the same time, who may possibly already be released from prison.

### **March 30, 2011**

Letter from Ms. O'Hare to the Complainant. Ms. O'Hare requests an additional three (3) business days to respond to the Complainant's OPRA request. Ms. O'Hare states that the additional time is needed to review the records responsive to the Complainant's request. Ms. O'Hare also states that the new due date will be April 4, 2011.

### **April 4, 2011**

Letter from Ms. O'Hare to the Complainant. Ms. O'Hare states that the Department has no payroll records responsive to the Complainant's OPRA request. Ms. O'Hare also states that the Complainant's request for pension records is denied on privacy grounds pursuant to N.J.S.A. 47:1A-1.1, which states "a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy." Ms. O'Hare further states that the Complainant's request for pension records is also denied pursuant to N.J.S.A. 47:1A-2.2, which states that access to certain information is prohibited "where it shall appear that a person who is convicted of any indictable offense under the laws of this State, any other state or the United States is seeking government records containing personal information pertaining to the person's victim..."

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<sup>5</sup> The Complainant nor the Department provided the Complainant's certification to the GRC in response to Ms. O'Hare's letter dated February 16, 2011.

**May 2, 2011**

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the following attachments:

- Complainant’s OPRA request dated January 27, 2011
- Letter from Ms. O’Hare to the Complainant dated February 16, 2011
- Letter from Ms. O’Hare to the Complainant dated March 21, 2011
- Letter from Ms. O’Hare to the Complainant dated March 30, 2011
- Letter from Ms. O’Hare to the Complainant dated April 4, 2011.

The Complainant states he filed an OPRA request on January 27, 2011 seeking “the title, position, and salary, payroll records, length of service, date of separation and reason, the amount and type of pension received for City of Newark Police Officer Elbert N. Eutsey.” The Complainant states that Ms. O’Hare denied his OPRA request on April 4, 2011 pursuant to N.J.S.A. 47:1A-2.2. The Complainant asserts that the requested records do not contain any personal identifying information pertaining to any victim of a crime for which he was convicted. The Complainant requests that the Department provide a certification indicating if there are any records filed under the name of “Jack Eutsey” as being employed with the City of Newark Police Department.

**May 4, 2011**

Offer of Mediation sent to both parties.

**May 10, 2011**

The Custodian agrees to mediate this complaint.

**May 31, 2011**

The Complainant agrees to mediate this complaint.

**May 31, 2011**

The Complainant’s Denial of Access Complaint is transferred to mediation.

**July 19, 2011**

The Complainant’s Denial of Access Complaint is referred back to the GRC for adjudication.

**July 22, 2011**

Request for the Statement of Information (“SOI”) sent to the Custodian.

**July 29, 2011**

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated January 27, 2011
- Letter from Police Officer Eutsey to Ms. O’Hare dated March 23, 2011
- Letter from Ms. O’Hare to the Complainant dated April 4, 2011.

The Custodian certifies that the Division of Pensions and Benefits (“Division”) and the Department searched its computer databases for records responsive to the Complainant’s request. The Custodian also certifies that no records responsive have been destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services.

The Custodian certifies that the Department received the Complainant’s OPRA request on February 7, 2011. The Custodian also certifies that Ms. O’Hare initially responded to the Complainant’s request on February 16, 2011 stating that pursuant to N.J.S.A. 47:1A-2.2, access to certain information by a convict is prohibited, such as records containing a victim’s or the victim’s family personal information shall be denied. The Custodian further certifies that Ms. O’Hare requested the Complainant to complete a certification for the following information, 1) county and state of conviction; 2) United States district in which the conviction was obtained; 3) date(s) of conviction(s); 4) indictment number(s), complaint/docket number(s) or case number(s); 5) statement of all charges for which the Complainant was convicted.

The Custodian certifies that on March 23, 2011 Police Officer Eutsey, the subject of the requested records, objected to the release of his personal information via letter to the Department. The Custodian argues that pursuant to Gill v. NJ Department of Banking & Insurance, 404 N.J.Super. 1 (App. Div. 2008), the Department denied Police Officer Eutsey’s request to allow an opportunity to defend his objection to release of the requested records. The Custodian also states that she believes Police Officer Eutsey has also filed an objection with the GRC and the Division is currently waiting for a resolution of Police Officer Eutsey’s objection with the GRC.<sup>6</sup>

The Custodian certifies that neither the Department nor the Division have any salary or payroll records responsive to the Complainant’s request. The Custodian also certifies that the Division directed the Complainant to the City of Newark for these records. The Custodian also provides the following document index:

<b>(A)</b> <b>List of all records responsive to Complainant’s OPRA request (include the number of pages for each record).</b>	<b>(B)</b> <b>List the Records Retention Requirement and Disposition Schedule for each records responsive to the Complainant’s OPRA request</b>	<b>(C)</b> <b>List of all records provided to Complainant, in their entirety or with redactions (include the date such records were provided).</b>	<b>(D)</b> <b>If records were disclosed with redactions, give a general nature description of the redactions.</b>	<b>(E)</b> <b>If records were denied in their entirety, give a general nature description of the record.</b>	<b>(F)</b> <b>List the legal explanation and statutory citation for the denial of access to records in their entirety or with redactions.</b>
Account History System	Must be permanently	None	N/A	Member information	<u>N.J.S.A. 47:1A-2.2, Gill v. Department</u>

<sup>6</sup> There is no correspondence from Police Officer Eutsey to the GRC stating that he objects to his pension records being released.

(1 page)	maintained				of Banking & Insurance, 404 N.J. Super. 1 (App. Div. 2008).
Retired Pension Payroll System (1 page)	Must be permanently maintained	None	N/A	Statistical information	N.J.S.A. 47:1A-2.2, Gill v. Department of Banking & Insurance, 404 N.J. Super. 1 (App. Div. 2008).
Retired Pension Payroll System (1 page)	Must be permanently maintained	None	N/A	Standard check history	N.J.S.A. 47:1A-2.2, Gill v. Department of Banking & Insurance, 404 N.J. Super. 1 (App. Div. 2008).
PFRS Application (2 pages)	Must be permanently maintained	None	N/A	Application for retirement	N.J.S.A. 47:1A-2.2, Gill v. Department of Banking & Insurance, 404 N.J. Super. 1 (App. Div. 2008).
PFRS Application (1 page)	Must be permanently maintained	None	N/A	Enrollment application	N.J.S.A. 47:1A-2.2, Gill v. Department of Banking & Insurance, 404 N.J. Super. 1 (App. Div. 2008).

### Analysis

#### **Whether Ms. O’Hare timely and sufficiently responded to the Complainant’s OPRA request?**

The Council will first (1<sup>st</sup>) address whether Ms. O’Hare timely responded to the Complainant’s request for records responsive to information related to Police Officer Eutsey’s salary.

OPRA provides that:

*“Immediate access ordinarily shall be granted to budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.”* (Emphasis added.) N.J.S.A. 47:1A-5.e.

OPRA also provides that:

*“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the*

form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g.

OPRA further provides that:

[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order a custodian of a government record shall grant access...or deny a request for access...as soon as possible, but *not later than seven business days after receiving the request...*In the event a custodian fails to respond within seven business days after receiving the request, *the failure to respond shall be deemed a denial of the request...*(Emphasis added.) N.J.S.A. 47:1A-5.i.

In the instant complaint, Ms. O’Hare responded in writing to the Complainant’s January 27, 2011 OPRA request on February 16, 2011, the seventh (7<sup>th</sup>) business day after receipt of such request.

The salary information requested by the Complainant is specifically classified under OPRA as “immediate access” records pursuant to N.J.S.A. 47:1A-5.e. In Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007), the GRC held that “immediate access language of OPRA (N.J.S.A. 47:1A-5.e.) suggests that the Custodian was still obligated to immediately notify the Complainant...” Inasmuch as OPRA requires a custodian to respond within a statutorily required time frame, when immediate access records are requested, a custodian must respond to the request for those records immediately, granting or denying access, requesting additional time to respond or requesting clarification of the request.

Although Ms. O’Hare responded in writing to the Complainant’s January 27, 2011 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., she failed to respond immediately to the Complainant’s OPRA request for salary information in violation of N.J.S.A. 47:1A-5.e. See Herron, *supra*.

The Council will next address whether Ms. O’Hare’s response to the Complainant’s OPRA request was sufficient.

OPRA states that:

“where it shall appear that a person who is convicted of any indictable offense under the laws of this State, any other state or the United States is seeking government records containing personal information pertaining to the person's victim or the victim's family, including but not limited to a victim's home address, home telephone number, work or school address, work telephone number, social security account number, medical history or any other identifying information, the right of access provided for in [OPRA] shall be denied...a custodian shall not comply with an anonymous request for a government record which is protected under the provisions of this section.” N.J.S.A. 47:1A-2.2.

The custodian in James v. NJ Department of Law & Public Safety, Division of Consumer Affairs, GRC Complaint No. 2011-36 (August 2012) timely responded to the complainant's OPRA request stating that he is required to review information pertaining to any indictable offense for which the complainant was convicted. The Council held that since the custodian's response failed to grant access, deny access, seek clarification or request an extension of time, said response was insufficient pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

Like the custodian in James, *supra*, Ms. O'Hare in the instant complaint, timely responded in writing stating that she must review information pertaining to any indictable offense for which the Complainant was convicted. Ms. O'Hare requested the Complainant to provide her with the following information: 1) county and state of conviction; 2) United State district in which the conviction was obtained; 3) date(s) of conviction(s) 4) indictment number(s), complaint/docket number(s) or case number(s); and 5) statement of all charges for which the Complainant was convicted. Ms. O'Hare also informed the Complainant the Complainant's request will be on hold until the Department receives the Complainant's certification. Ms. O'Hare also stated that pursuant to N.J.S.A. 47:1A-2.2, access to certain information by a convict is prohibited, such as records containing a victim's or the victim family's personal information shall be denied.

Moreover, N.J.S.A. 47:1A-2.2 prohibits a Custodian's compliance with an anonymous request for a government record and further provides that a request for victim's records from an individual convicted of an indictable offense should be denied. However, in the matter before the Council, the Complainant's request was clearly not anonymous nor did it seek victim's records. Thus, the Custodian's requirement that the Complainant provide details pertaining to the nature of his offense was an improper limitation on the Complainant's right to access pursuant to N.J.S.A. 47:1A-2.2. See James, *supra*.

Therefore, Ms. O'Hare's response to the Complainant's OPRA request was insufficient because it failed to grant access, deny access, seek clarification or request an extension of time pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i and James, *supra*. See also Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).

### **Whether Ms. O'Hare unlawfully denied access to the requested records?**

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*" (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document,

information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

OPRA further states 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 government record and shall not be made available for public access, except that an individual’s name, *title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of pension received* shall be a government record...” (Emphasis added) N.J.S.A. 47:1A-10.

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.

In Morgano v. Essex County Prosecutor’s Office, GRC Complaint No. 2007-156 (February 2008), the Council determined that if information must be disclosed under OPRA, but there is no record which contains such information exclusively, then the custodian could look to a more comprehensive record and tailor it by redaction to fulfill the complainant’s request. In Morgano, the Council found that when “...specific...information must be disclosed, the Custodian is under no duty to extract and synthesize such information from government records in order to comply with the provisions of OPRA.” Rather, the Council directed the custodian to retrieve the most comprehensive record containing the information that was subject to disclosure, and to redact such record so that only the information required to be disclosed was revealed.

Further, OPRA indicates that the records responsive to the Complainant’s request may be found in an employee’s personnel and/or pension records because OPRA provides that “the personnel or pension records... shall not be considered a government record...except that an individual’s name, *title, position, salary...length of service date of separation and the reason therefor, and the amount and type of any pension received* shall be a government record shall be a government record...” (Emphasis added) N.J.S.A. 47:1A-10.



The Complainant's OPRA request sought Police Officer's Eutsey's "title, position, salary, payroll records, length of service, date of separation and reason, the amount and type of pension received." Ms. O'Hare denied the Complainant access to the requested pension records on April 4, 2011 via letter pursuant to N.J.S.A. 47:1A-1.1, which states "a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy." Ms. O'Hare further stated that access is also denied pursuant to N.J.S.A. 47:1A-2.2, which states "where it shall appear that a person who is convicted of any indictable offense under the laws of this State, any other state or the United States is seeking government records containing personal information pertaining to the person's victim." In the SOI, the Custodian identified five (5) records responsive to the Complainant's OPRA request and asserted that access to these records were denied pursuant to N.J.S.A. 47:1A-2.2.

In his Denial of Access Complaint, the Complainant asserted that the requested records do not contain any personal identifying information pertaining to any victim of a crime for which he was convicted. Conversely, in the SOI the Custodian certified that on March 23, 2011 Police Officer Eutsey objected to the Department, via letter, to the release of his personal information. The Council previously held in James, *supra* that since the Complainant's request was clearly not anonymous or sought victim's records N.J.S.A. 47:1A-2.2 is inapplicable in the instant complaint.

Since the Custodian identified five (5) records responsive to the Complainant's OPRA request and the Custodian failed to bear her burden of proving a lawful denial of access, Ms. O'Hare should have provided these records to the Complainant. Accordingly, the Custodian must disclose the five (5) identified personnel records responsive to the Complainant's OPRA request. See Morgano v. Essex County Prosecutor's Office, GRC Complaint No. 2007-156 (February 2008) and N.J.S.A. 47:1A-10.

### **Whether copies of the "salary and payroll records" responsive to the Complainant's OPRA request exist?**

The Complainant also requested Police Officer Eutsey's salary and payroll records. Ms. O'Hare informed the Complainant in writing on April 4, 2011 that the Department has no payroll records responsive to the Complainant's OPRA request. The Custodian also certified in the SOI that the Department does not have any salary or payroll records responsive to the Complainant's request. The Custodian also certified that the Division directed the Complainant to the City of Newark for these records. The Complainant did not submit any evidence to refute the Custodian's certification.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The custodian responded stating that there was no record of any telephone calls made to the complainant. The custodian subsequently certified that no records responsive to the complainant's request existed. The complainant failed to submit any evidence to refute the custodian's certification. The GRC held that the custodian did not unlawfully deny access to the

requested records because the custodian certified that no records responsive to the request existed.

Therefore, because the Custodian certified in the Statement of Information that salary and payroll records do not exist, and there is no evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied the Complainant access to these records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.

**Whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

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

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Although Ms. O'Hare responded in writing to the Complainant's January 27, 2011 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., she failed to respond immediately to the Complainant's OPRA request for salary information in violation of N.J.S.A. 47:1A-5.e. See Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007).
2. Ms. O'Hare's response to the Complainant's OPRA request was insufficient because it failed to grant access, deny access, seek clarification or request an extension of time pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i and James v. NJ Department of Law & Public Safety, Division of Consumer Affairs, GRC Complaint No. 2011-36 (August 2012). See Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).
3. Since the Custodian identified five (5) records responsive to the Complainant's OPRA request and the Custodian failed to bear her burden of proving a lawful denial of access, Ms. O'Hare should have provided these records to the Complainant. Accordingly, the Custodian must disclose the five (5) identified personnel records responsive to the Complainant's OPRA request. See Morgano v. Essex County Prosecutor's Office, GRC Complaint No. 2007-156 (February 2008) and N.J.S.A. 47:1A-2.2 N.J.S.A. 47:1A-10.
4. **The Custodian shall comply with item #3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified**

**confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>7</sup> to the Executive Director.<sup>8</sup>**

5. Because the Custodian certified in the Statement of Information that salary and payroll records do not exist, and there is no evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied the Complainant access to these records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Harlynn A. Lack, Esq.  
Case Manager

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

November 20, 2012<sup>9</sup>

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<sup>7</sup> "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."

<sup>8</sup> 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.

<sup>9</sup> This complaint was prepared and scheduled for adjudication at the Council's November 27, 2012 meeting; however, said meeting was cancelled due to a lack of a quorum.