



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

FINAL DECISION

May 28, 2013 Government Records Council Meeting

Rashaun Barkley
Complainant

Complaint No. 2012-34

v.

Essex County Prosecutor's Office
Custodian of Record

At the May 28, 2013 public meeting, the Government Records Council ("Council") considered the May 21, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian has complied with the terms of the Council's April 30, 2013 Interim Order by providing the GRC's Executive Director with certified confirmation within the required five (5) business days that the Custodian provided the Complainant with the most comprehensive record containing the requested salary and payroll information, citing the specific legal basis for the redactions, and certifying that the requested arrest report no longer exists.
2. The Custodian unlawfully denied access to request item no. 1 of the Complainant's OPRA request, with the exception of the pension records which do not exist. Additionally, the Custodian unlawfully denied access to request item no. 2 of the Complainant's OPRA request because arrest reports are government records and because OPRA delineates the specific information contained on an arrest report which must be disclosed to the public. N.J.S.A. 47:1A-1.1. and N.J.S.A. 47:1A-3(b). On April 30, 2013, the Council ordered the Custodian to disclose said records to the Complainant. On May 8, 2013, the Custodian disclosed to the Complainant the most comprehensive record containing the requested salary and payroll information, and certified that the requested arrest report no longer exists. As such, the Custodian complied with the terms of the Council's April 30, 2013 Interim Order. 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. Although the Complainant requested attorney's fees, the Complainant is not entitled to reasonable attorney's fees pursuant to OPRA because the Complainant is not represented by an attorney in this matter.



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 28th Day of May, 2013

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 5, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
May 28, 2013 Council Meeting**

**Rashaun Barkley¹
Complainant**

GRC Complaint No. 2012-34

v.

**Essex County Prosecutor's Office²
Custodian of Records**

Records Relevant to Complaint:

1. Salary, position, title, payroll records, length of service, date of service and separation, the reason for separation, the amount and type of any pension plan for:
 - a. Richard O'Malley
 - b. Patrick DeFrancisci
 - c. Henry Dillon
 - d. Milton Medina
 - e. Louis Portella
 - f. Louis E. Greenleaf
 - g. Timothy K. Braun
2. Arrest report in State v. Green, Indictment No. 4378-12-92 (handguns)

Request Made: December 20, 2011³

Response Made: December 27, 2011

GRC Complaint Filed: February 7, 2012⁴

Background

At its April 30, 2013 public meeting, the Council considered the April 23, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian unlawfully denied access to request item no. 1 of the Complainant's OPRA request, with the exception of the pension records which do not exist. Pursuant to Valdes v. Union City Board of Education (Hudson), GRC Complaint No.

¹ No legal representation listed on record.

² Debra G. Simms, Esq., Custodian of Records. Represented by James Paganelli, Esq., of Office of the Essex County Counsel (Newark, NJ).

³ The Complainant's OPRA request is actually dated December 4, 2011; however, the Complainant states in his Denial of Access Complaint that the date of the OPRA request is December 20, 2011. Further, the Custodian certifies in her Statement of Information that she received the OPRA request on December 20, 2011.

⁴ The GRC received the Denial of Access Complaint on said date.

2011-64 (Interim Order dated August 28, 2012), the Custodian should have retrieved the most comprehensive record that contained the requested personnel information and provided same to the Complainant. As such, the Custodian must disclose the records responsive to request item no. 1, with the exception of the pension records which do not exist, to the Complainant.

2. The Custodian unlawfully denied access to request item no. 2 of the Complainant's OPRA request because arrest reports are government records pursuant to N.J.S.A. 47:1A-1.1 and because N.J.S.A. 47:1A-3.b. delineates the specific information contained on an arrest report which must be disclosed to the public. As such, the Custodian must disclose the arrest report to the Complainant.
3. **The Custodian shall comply with items #1-2 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, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁵ to the Executive Director.⁶**
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.

On May 1, 2013, the Council distributed its Interim Order to all parties. Pursuant to said Order, the Custodian's compliance was due within five (5) business days from receipt of said Order.

On May 8, 2013, the fifth (5th) business day following receipt of the Council's Interim Order, the Custodian responded to the GRC certifying that she is simultaneously providing the Complainant with a one-page document containing the salary, position, title, length of service, date of service, separation and reason for separation for the named individuals, with the exception of Milton Medina for whom no records exist. The Custodian also certifies that the Prosecutor's Office does not maintain payroll records for its employees; such records are maintained by the County of Essex. The Custodian certifies that in order to not appear obstructionist, she requested that the County of Essex provide her with the payroll records for the last year of service for the named individuals.⁷ The Custodian certifies that the length of service for the individuals encompasses numerous years: two individuals worked for 20 years each, two

⁵ "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."

⁶ 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.

⁷ A custodian is obligated to obtain government records from a third party when said records are maintained by the third party on behalf of a public agency. See Burnett v. County of Gloucester, 415 N.J.Super. 506 (App. Div. 2010).

worked for 14 years each, one worked for 6 years, and the last for 10.6 years. The Custodian states it is her position that a proper OPRA request must identify with reasonable clarity those documents that are desired and a party cannot satisfy this requirement by simply requesting all of an agency's documents. Bent v. Township of Stafford Police Department, 381 N.J. Super. 30, 39 (App. Div. 2005); MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Reda v. Township of West Milford, GRC Complaint No. 2002-58 (January 2003); Asarnow v. Department of Labor and Workforce Development, GRC Complaint No. 2006-24 (May 2006); and Bart v. Passaic County Public Housing Agency, 406 N.J. Super. 446 (App. Div. 2009).

The Custodian certifies that the Complainant's open-ended request has caused and will cause considerable disruption of the County's operation. N.J.S.A. 47:1A-5(g). The Custodian certifies that she interpreted the Complainant's request to seek records from the last year of service because the Complainant's request failed to include any specific timeframe. The Custodian certifies that she has redacted the social security numbers from the payroll records pursuant to N.J.S.A. 47:1A-1.1.

Additionally, the Custodian certifies that in search of the record responsive to request item no. 2, the Custodian determined that the case file for State v. Green, Indictment No. 4378-12-92 was destroyed on June 22, 2009, pursuant to the Prosecutor's Office records retention schedule and therefore, the arrest record no longer exists.

Analysis

Compliance

On April 30, 2013, the Council ordered the Custodian to disclose to the Complainant the most comprehensive record containing the salary, position, title, payroll records, length of service, date of service and separation, and the reason for separation for seven (7) individuals. The Council also ordered the Custodian to disclose to the Complainant the arrest report in State v. Green, Indictment No. 4378-12-92. Said Order required the Custodian to comply with its terms within five (5) business days from receipt of same, and provide certified confirmation of compliance to the GRC's Executive Director.

On May 1, 2013, the Council distributed its Interim Order to all parties, resulting in a May 8, 2013 compliance deadline for the Custodian. On May 8, 2013, the Custodian provided certified confirmation to the GRC's Executive Director that she was simultaneously providing the Complainant with a one-page document containing the salary, position, title, length of service, date of service, separation and reason for separation for the named individuals, with the exception of Milton Medina for whom no records exist. The Custodian certified that she interpreted the Complainant's request to seek records from the last year of service because the Complainant's request failed to include any specific timeframe. The Custodian also certified that she redacted the social security numbers from the payroll records pursuant to N.J.S.A. 47:1A-1.1.

Additionally, the Custodian certified that the case file for State v. Green, Indictment No. 4378-12-92 was destroyed on June 22, 2009, pursuant to the Prosecutor's Office records retention schedule and therefore, the arrest record no longer exists.

Therefore, the Custodian has complied with the terms of the Council's April 30, 2013 Interim Order by providing the GRC's Executive Director with certified confirmation within the required five (5) business days that the Custodian provided the Complainant with the most comprehensive record containing the requested salary and payroll information, citing the specific legal basis for the redactions, and certifying that the requested arrest report no longer exists.

Knowing & Willful

OPRA states that:

“[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ...” N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

“... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

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

Here, the Custodian unlawfully denied access to request item no. 1 of the Complainant's OPRA request, with the exception of the pension records which do not exist. Additionally, the Custodian unlawfully denied access to request item no. 2 of the Complainant's OPRA request because arrest reports are government records and because OPRA delineates the specific information contained on an arrest report which must be disclosed to the public. N.J.S.A. 47:1A-1.1. and N.J.S.A. 47:1A-3(b). On April 30, 2013, the Council ordered the Custodian to disclose

said records to the Complainant. On May 8, 2013, the Custodian disclosed to the Complainant the most comprehensive record containing the requested salary and payroll information, and certified that the requested arrest report no longer exists. As such, the Custodian complied with the terms of the Council's April 30, 2013 Interim Order. 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.

Prevailing Party Attorney's Fees

OPRA provides that:

"[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:

- institute a proceeding to challenge the custodian's decision by filing an action in Superior Court...; or
- in lieu of filing an action in Superior Court, file a complaint with the Government Records Council...

A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6.

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Court held that a complainant is a "prevailing party" if he/she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct. *Id.* at 432. Additionally, the Court held that attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. *Id.*

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

Here, although the Complainant requested attorney's fees, the Complainant is not entitled to reasonable attorney's fees pursuant to OPRA because the Complainant is not represented by an attorney in this matter.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has complied with the terms of the Council's April 30, 2013 Interim Order by providing the GRC's Executive Director with certified confirmation within the required five (5) business days that the Custodian provided the Complainant with the most comprehensive record containing the requested salary and payroll information, citing the specific legal basis for the redactions, and certifying that the requested arrest report no longer exists.
2. The Custodian unlawfully denied access to request item no. 1 of the Complainant's OPRA request, with the exception of the pension records which do not exist. Additionally, the Custodian unlawfully denied access to request item no. 2 of the Complainant's OPRA request because arrest reports are government records and because OPRA delineates the specific information contained on an arrest report which must be disclosed to the public. N.J.S.A. 47:1A-1.1. and N.J.S.A. 47:1A-3(b). On April 30, 2013, the Council ordered the Custodian to disclose said records to the Complainant. On May 8, 2013, the Custodian disclosed to the Complainant the most comprehensive record containing the requested salary and payroll information, and certified that the requested arrest report no longer exists. As such, the Custodian complied with the terms of the Council's April 30, 2013 Interim Order. 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. Although the Complainant requested attorney's fees, the Complainant is not entitled to reasonable attorney's fees pursuant to OPRA because the Complainant is not represented by an attorney in this matter.

Prepared By: Dara L. Barry
Communications Manager

Approved By: Brandon D. Minde, Esq.
Executive Director

May 21, 2013



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

April 30, 2013 Government Records Council Meeting

Rashaun Barkley
Complainant

Complaint No. 2012-34

v.

Essex County Prosecutor's Office
Custodian of Record

At the April 30, 2013 public meeting, the Government Records Council ("Council") considered the April 23, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian unlawfully denied access to request item no. 1 of the Complainant's OPRA request, with the exception of the pension records which do not exist. Pursuant to Valdes v. Union City Board of Education (Hudson), GRC Complaint No. 2011-64 (Interim Order dated August 28, 2012), the Custodian should have retrieved the most comprehensive record that contained the requested personnel information and provided same to the Complainant. As such, the Custodian must disclose the records responsive to request item no. 1, with the exception of the pension records which do not exist, to the Complainant.
2. The Custodian unlawfully denied access to request item no. 2 of the Complainant's OPRA request because arrest reports are government records pursuant to N.J.S.A. 47:1A-1.1 and because N.J.S.A. 47:1A-3.b. delineates the specific information contained on an arrest report which must be disclosed to the public. As such, the Custodian must disclose the arrest report to the Complainant.
3. **The Custodian shall comply with items #1-2 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, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**

¹ "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."

² 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.

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.

Interim Order Rendered by the
Government Records Council
On The 30th Day of April, 2013

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: May 1, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 30, 2013 Council Meeting**

**Rashaun Barkley¹
Complainant**

GRC Complaint No. 2012-34

v.

**Essex County Prosecutor's Office²
Custodian of Records**

Records Relevant to Complaint:

1. Salary, position, title, payroll records, length of service, date of service and separation, the reason for separation, the amount and type of any pension plan for:
 - a. Richard O'Malley
 - b. Patrick DeFrancisci
 - c. Henry Dillon
 - d. Milton Medina
 - e. Louis Portella
 - f. Louis E. Greenleaf
 - g. Timothy K. Braun
2. Arrest report in State v. Green, Indictment No. 4378-12-92 (handguns)

Request Made: December 20, 2011³

Response Made: December 27, 2011

GRC Complaint Filed: February 7, 2012⁴

Background⁵

Request and Response:

On December 20, 2011, the Complainant submitted an Open Public Records Act ("OPRA") request seeking the above listed records. On December 27, 2011, the fourth (4th) business day following the Custodian's receipt of said request, the Custodian responded in

¹ No legal representation listed on record.

² Debra G. Simms, Esq., Custodian of Records. Represented by James Paganelli, Esq., of Office of the Essex County Counsel (Newark, NJ).

³ The Complainant's OPRA request is actually dated December 4, 2011; however, the Complainant states in his Denial of Access Complaint that the date of the OPRA request is December 20, 2011. Further, the Custodian certifies in her Statement of Information that she received the OPRA request on December 20, 2011.

⁴ The GRC received the Denial of Access Complaint on said date.

⁵ 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.

writing. The Custodian denied access to request item no. 1 on the basis that the Prosecutor's Office does not maintain pension information relating to its employees. Additionally, the Custodian denied access to request item no. 2 on the basis that the arrest report is a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1 and Janeczko v. Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80. Finally, the Custodian denied access to the arrest report on the basis that "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." N.J.S.A. 47:1A-1.

Denial of Access Complaint:

On February 7, 2012, the Complainant filed this Denial of Access Complaint challenging the Custodian's denial of his OPRA request dated December 20, 2011.

Statement of Information:

On March 5, 2012, the GRC received the Custodian's Statement of Information ("SOI") in response to the Complainant's Denial of Access Complaint. The Custodian certifies that she received the Complainant's OPRA request on December 20, 2011 and provided a written response to the request on December 27, 2011. Regarding request item no. 1 of the Complainant's OPRA request, the Custodian certifies that the Prosecutor's Office does not maintain pension information relating to its employees. Additionally, the Custodian asserts that this request item seeks information and is not a valid OPRA request pursuant to Asarnow v. Department of Labor and Workforce Development, GRC Complaint No. 2006-24 (May 2006) (denied records were not readily identifiable and the request was a blanket request for a class of various records). Regarding request item no. 2 of the Complainant's OPRA request, the Custodian asserts that the arrest report is exempt from public access because it is a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1. The Custodian also cites to Daily Journal v. Police Department, 351 N.J. Super. 110, 120 (App. Div. 2002), certif. den. 174 N.J. 364 (2002); Johnson/Press of Atlantic City v. Division of State Police, GRC Complaint No. 2004-46; Harvey v. Division of State Police, GRC Complaint No. 2004-65; and Janeczko v. Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80.

On July 15, 2012, the Complainant submitted notification to the GRC that he is seeking prevailing party attorney's fees in the event he prevails in this Denial of Access Complaint.

Analysis⁶

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

⁶ There may be other OPRA issues in this matter; however, the Council's analysis is based solely on the claims made in the Complainant's Denial of Access Complaint.

“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 Custodian certified in her SOI that she denied access to request item no. 1 on the basis that the Prosecutor’s Office does not maintain pension information regarding its employees. Additionally, the Custodian asserted that request item no. 1 seeks information rather than identifiable government records. In support of her assertion, the Custodian references Asarnow v. Department of Labor and Workforce Development, GRC Complaint No. 2006-24 (May 2006). In said complaint, the complainant sought access to:

“all ‘Delinquent Reports’ notices sent to employees in Monmouth and Essex County during the period of 12/13/05 thru 1/13/06, inclusive and containing the name and address of employer, date notice sent, and years claimed delinquent and payments owed. If the number of reports exceeds 250 for each county, state the number of reports sent to each county during this period and produce only the first 250 reports for each county starting with employers whose name begin with the letter ‘A.’”

The Council held that:

“the Complainant’s request in this case was overbroad and unclear based on the fact that the Custodian would seemingly have to do research to find documents ‘inclusive and containing the name and address of employer, date notice sent, and years claimed delinquent and payments owed,’ as well as, ‘only the first 250 reports for each county starting with employers whose name begin with the letter ‘A.’”

The Council’s decision in Asarnow is distinguishable from this instant matter. On its face, request item no. 1 does appear to seek information rather than actual records. However, the language the Complainant used in his request comes directly from OPRA itself at N.J.S.A. 47:1A-10 which provides that “an individual’s name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record...” The Council has previously addressed whether an OPRA request seeking this specific information is a valid OPRA request.

In Valdes v. Union City Board of Education (Hudson), GRC Complaint No. 2011-64 (Interim Order dated August 28, 2012), the complainant sought access to the custodian’s title, position, salary and length of service from 2003 through 2004. The custodian denied access to the request contending that the complainant did not specifically identify a government record. The Council reasoned that:

“OPRA indicates that such records 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* shall be a government record...’ (Emphasis added) N.J.S.A. 47:1A-10.”

Thus, the Council held that:

“because the Custodian should have retrieved the most comprehensive record that contained the requested information and provided same to the Complainant, the Custodian’s denial of the Complainant’s OPRA request was unlawful pursuant to N.J.S.A. 47:1A-6. Accordingly the Custodian shall disclose any personnel record responsive to the Complainant’s OPRA request which contains the Custodian’s title, position, salary and length of service from 2003 through 2004.”

Notwithstanding the Council’s decision in Valdes, the Custodian in this instant matter also certified that the Prosecutor’s Office does not maintain any pension records regarding its employees. While that may be the case, the Complainant’s request item no. 1 seeks more than just pension records. Said item also seeks the “salary, position, title, payroll records, length of service, date of service and separation, the reason for separation” for seven (7) employees.

Therefore, the Custodian unlawfully denied access to request item no. 1 of the Complainant’s OPRA request, with the exception of the pension records which do not exist. Pursuant to Valdes, *supra*, the Custodian should have retrieved the most comprehensive record that contained the requested personnel information and provided same to the Complainant. As such, the Custodian must disclose the records responsive to request item no. 1, with the exception of the pension records which do not exist, to the Complainant.

Regarding request item no. 2 of the Complainant’s OPRA request, the Custodian certified in her SOI that she denied access to the requested arrest report on the basis that said record is a criminal investigatory record exempt from public access pursuant to N.J.S.A. 47:1A-1.1. The Custodian also cites to Daily Journal v. Police Department, 351 N.J. Super. 110, 120 (App. Div. 2002), certif. den. 174 N.J. 364 (2002); Johnson/Press of Atlantic City v. Division of State Police, GRC Complaint No. 2004-46; Harvey v. Division of State Police, GRC Complaint No. 2004-65; and Janeczko v. Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80.

First, the court’s holding in Daily Journal is inapplicable to this complaint because the court based its decision under the Right to Know Law, not OPRA. The definition of a government record is different under the Right to Know Law⁷ than under OPRA⁸. Moreover, the records at issue in Daily Journal are police investigatory records, not arrest reports. Similarly, the GRC’s decisions in Johnson/Press of Atlantic City v. Division of State Police, GRC Complaint No. 2004-46 and Janeczko v. Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 are also not applicable because the records at issue are police investigatory records, not arrest reports.

OPRA does contain an exemption from public access for criminal investigatory records, which are deemed to be confidential pursuant to N.J.S.A. 47:1A-1.1. Notwithstanding this exception, however, certain information with respect to a crime must be disclosed pursuant to

⁷ Records *required by law* to be made, maintained or kept on file.

⁸ Any record made, maintained or kept on file, regardless of the whether the record is required by law to be maintained.

N.J.S.A. 47:1A-3.b. Relevant to the instant complaint is the information this subsection requires to be disclosed after a criminal arrest has been made.

Although specific arrest 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. The Superior Court made this clear in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, by noting “[OPRA] is not intended as a research tool...to force government officials to identify and siphon useful information.” *Id* at 546. Accordingly, pursuant to OPRA, this information must be disclosed in the form of a *government record* (emphasis added). The most comprehensive government record containing information subject to disclosure pursuant to N.J.S.A. 47:1A-3.b is the police arrest report, alternatively referred to as a uniform arrest report. Further, arrest reports typically contain the arrestee’s (defendant’s) name, age, residence, occupation, marital status, time and place of arrest, text of the charges, arresting agency, identity of the arresting personnel, amount of bail and whether it was posted. This is the same information that is mandated for disclosure pursuant to N.J.S.A. 47:1A-3.b. Under this reasoning, the Council has previously ordered the disclosure of arrest reports to the extent the report contains the information listed in N.J.S.A. 47:1A-3.b. *See Morgano v. Essex County Prosecutor’s Office*, GRC Complaint No. 2007-156 (Interim Order dated February 27, 2008). *See also Bart v. City of Passaic (Passaic)*, GRC Complaint No. 2007-162 (Interim Order dated February 27, 2008).⁹

Therefore, the Custodian unlawfully denied access to request item no. 2 of the Complainant’s OPRA request because arrest reports are government records pursuant to N.J.S.A. 47:1A-1.1 and because N.J.S.A. 47:1A-3.b. delineates the specific information contained on an arrest report which must be disclosed to the public. As such, the Custodian must disclose the arrest report to the Complainant.

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 unlawfully denied access to request item no. 1 of the Complainant’s OPRA request, with the exception of the pension records which do not exist.

⁹ The Council’s decisions in Morgano and Bart effectively overturned the Council’s decision in Harvey v. Division of State Police, GRC Complaint No. 2004-65, to which the Custodian cited in her SOI in support of her denial.

Pursuant to Valdes v. Union City Board of Education (Hudson), GRC Complaint No. 2011-64 (Interim Order dated August 28, 2012), the Custodian should have retrieved the most comprehensive record that contained the requested personnel information and provided same to the Complainant. As such, the Custodian must disclose the records responsive to request item no. 1, with the exception of the pension records which do not exist, to the Complainant.

2. The Custodian unlawfully denied access to request item no. 2 of the Complainant's OPRA request because arrest reports are government records pursuant to N.J.S.A. 47:1A-1.1 and because N.J.S.A. 47:1A-3.b. delineates the specific information contained on an arrest report which must be disclosed to the public. As such, the Custodian must disclose the arrest report to the Complainant.
3. **The Custodian shall comply with items #1-2 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, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹⁰ to the Executive Director.¹¹**
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: Dara L. Barry
Communications Manager

Approved By: Brandon D. Minde, Esq.
Executive Director

April 23, 2013

¹⁰ "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."

¹¹ 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.