



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

July 31, 2012 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2012-49

v.

City of Bayonne (Hudson)
Custodian of Record

At the July 31, 2012 public meeting, the Government Records Council (“Council”) considered the July 24, 2012 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. Although the Custodian disclosed to the Complainant all records ordered for disclosure pursuant to the Council’s May 29, 2012 Order by making copies of the records available in the City Clerk’s office on May 28, 2012, and although the Custodian provided certified confirmation of compliance to the Executive Director within the time period provided for compliance with said Order, the Custodian failed to fully comply with the Order because the Custodian failed to convert the records in order to provide them electronically via e-mail pursuant to N.J.S.A. 47:1A-5.d., Paff v. County of Camden, GRC Complaint No. 2009-25 (March 2011), and Wolosky v. Township of Frankford (Sussex), GRC Complaint No. 2008-254 (November 2009). However, the Council declines to order the Custodian to provide the requested records electronically because the Custodian certified to the GRC on June 4, 2012 that he disclosed to the Complainant the requested records by making the records available in hard-copy format on May 28, 2012 at the City Clerk’s office.
2. Although the Custodian failed to provide the requested records to the Complainant in the medium requested by the Complainant, and although the Custodian failed to provide to the GRC a supplemental certification averring whether the requested records for the instant complaint were made available in redacted or unredacted form, the Custodian did certify in a timely manner that he made the requested records available to the Complainant. Moreover, 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, it is concluded that 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.



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 July, 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: August 6, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
July 31, 2012 Council Meeting**

**Richard Rivera¹
Complainant**

GRC Complaint No. 2012-49

v.

**City of Bayonne (Hudson)²
Custodian of Records**

Records Relevant to Complaint: Copies of unredacted Bayonne Police Department use of force incident reports from January 1, 2011 to November 18, 2011.

Request Made: November 18, 2011

Response Made: November 29, 2011

Custodian: Robert F. Sloan

GRC Complaint Filed: February 27, 2012³

Background

May 29, 2012

At the May 29, 2012 public meeting, the Government Records Council (“Council”) considered the May 22, 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, found that:

1. Although the Custodian responded in writing within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response is insufficient under OPRA because he failed to provide a specific lawful basis for denying access to the requested records contrary to N.J.S.A. 47:1A-5.g. and DeAppolonio, Esq. v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009).
2. Because the Superior Court in O’Shea v. Township of West Milford, 410 N.J. Super. 371 (App. Div. 2009) found that use of force reports cannot be exempt from disclosure under OPRA as criminal investigatory records because they are required to be made, and because the Custodian failed to otherwise cite a valid legal basis for exempting the requested records from access, the Custodian failed to meet his burden of proving that denial of access to the

¹ No legal representation listed on record.

² Represented by Edward Florio, Esq. (Hoboken, NJ).

³ The GRC received the Denial of Access Complaint on said date.

requested records is authorized by law pursuant to N.J.S.A. 47:1A-6., and the Custodian shall therefore disclose to the Complainant copies of Bayonne Police Department use of force reports from January 1, 2011 to November 18, 2011 in unredacted form, except for the names of subjects not arrested on those cases where there was an arrest made or where charges were made.

3. **The Custodian shall comply with the terms of paragraph #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, to the Executive Director.**
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.

May 30, 2012

Council's Interim Order ("Order") distributed to the parties.⁴

June 4, 2012

Custodian's certification. The Custodian certifies that pursuant to the terms of the Order he disclosed to the Complainant the requested records by making the records available in hard-copy format on May 28, 2012 at the City Clerk's office.

June 29, 2012

E-mail from the GRC to the Custodian. The GRC informs the Custodian that he failed to certify whether he disclosed the records in redacted or unredacted form and asks the Custodian to certify as to the form in which the records were disclosed. The GRC informs the Custodian that if the records were disclosed in redacted form that he will need to submit with his certification a document index pursuant to the terms of the Order. The GRC asks the Custodian to respond back to the GRC within three (3) business days.

June 29, 2012

E-mail from the Custodian to the GRC. The Custodian informs the GRC that he will be traveling out of state for two (2) weeks and he said that he is delegating the task of preparing and submitting the requested supplemental certification to Deputy Custodian Charles D'Amico.

July 3, 2012

E-mail from Assistant Corporation Counsel Peter Cecinini, Esq. to the GRC. Mr. Cecinini informs the GRC that the Deputy Custodian is on vacation and therefore cannot prepare a supplemental certification within three (3) business days.

⁴ UPS Next Day Air® Proof of Delivery revealed that the Order was delivered to the Custodian on May 31, 2012 at 10:14 a.m.

Analysis

Whether the Custodian complied with the Council's May 29, 2012 Interim Order?

At its May 29, 2012 public meeting, the Council determined that the Custodian shall disclose to the Complainant copies of Bayonne Police Department use of force reports from January 1, 2011 to November 18, 2011 in unredacted form, except for the names of subjects not arrested on those cases where there was an arrest made or where charges were made within five (5) business days from receipt of the Council's Interim Order with appropriate redactions as necessary, 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, to the Executive Director.

On June 4, 2012, which was the second (2nd) business day after the Custodian's receipt of the Order, the Custodian provided certified confirmation that he provided the requested records to the Complainant by making copies of the records available in the City Clerk's office on May 28, 2012. The Custodian did not certify whether he made the copies available in redacted or unredacted form; however, he did not attach to his certification a detailed document index explaining the lawful basis for any redactions.

The GRC by e-mail dated June 29, 2012, informed the Custodian that the GRC needed a supplemental certification of compliance for another matter and asked the Custodian to include in that certification a statement as to whether the requested records for the instant complaint were made available in redacted or unredacted form. The GRC also informed the Custodian that if the requested records were made available in redacted form he would have to attach to his certification a document index pursuant to the terms of the Council's Order. The GRC informed the Custodian that it would need the supplemental certification within three (3) business days.

The Custodian by reply e-mail dated June 29, 2012, informed the GRC that he would be traveling out of state for two (2) weeks and he said that he was delegating the task of preparing and submitting the requested supplemental certification to Deputy Custodian D'Amico. Upon receipt of the Custodian's reply e-mail, the GRC forwarded it to the Custodian's Counsel and asked Counsel to have the Deputy Custodian prepare the supplemental certification and submit it to the GRC as per the directions in the GRC's e-mail to the Custodian dated June 29, 2012.⁵

The Custodian had an affirmative duty to provide the requested records to the Complainant in the medium requested by the Complainant, unless the agency did not maintain the record in such a medium, in which case the Custodian was required to either convert the record to the requested medium or provide a copy in another meaningful medium. Specifically, OPRA provides that:

“[a] custodian shall permit access to a government record and provide a copy thereof in the medium requested if the public agency maintains the

⁵ Neither the Custodian's Counsel nor the Deputy Custodian responded to the GRC's correspondence. Richard Rivera v. City of Bayonne (Hudson), 2012-49 – Supplemental Findings and Recommendations of the Executive Director

record in that medium. If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium.” N.J.S.A. 47:1A-5.d.

The GRC interprets the last sentence to mean a medium which is meaningful to the requestor since all limitations on access shall be construed in favor of the public pursuant to N.J.S.A. 47:1A-1. See Paff v. County of Camden, GRC Complaint No. 2009-25 (March 2011). In this instance, making a copy of the requested records available to the Complainant is not meaningful to the Complainant because the Complainant specifically requested the records be forwarded to him via e-mail, which contemplates an electronic copy of the records.

In Wolosky v. Township of Frankford (Sussex), GRC Complaint No. 2008-254 (November 2009), where the complainant requested delivery of certain records via fax or e-mail and the custodian stated that she did not maintain the records in a format that was conducive to such delivery, the Council decided:

“...in this complaint, if the Custodian does not maintain any of the records responsive in an electronic medium, she is required to convert the records in order to provide them electronically via e-mail.”

Accordingly, although the Custodian herein disclosed to the Complainant all records ordered for disclosure pursuant to the Council’s May 29, 2012 Order by making copies of the records available in the City Clerk’s office on May 28, 2012, and although the Custodian provided certified confirmation of compliance to the Executive Director within the time period provided for compliance with said Order, the Custodian failed to fully comply with the Order because the Custodian failed to convert the records in order to provide them electronically via e-mail pursuant to N.J.S.A. 47:1A-5.d., Paff, *supra*, and Wolosky, *supra*. However, the Council declines to order the Custodian to provide the requested records electronically because the Custodian certified to the GRC on June 4, 2012 that he disclosed to the Complainant the requested records by making the records available in hard-copy format on May 28, 2012 at the City Clerk’s office.

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?

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, although the Custodian failed to provide the requested records to the Complainant in the medium requested by the Complainant, and although the Custodian failed to provide to the GRC a supplemental certification averring whether the requested records for the instant complaint were made available in redacted or unredacted form, the Custodian did certify in a timely manner that he made the requested records available to the Complainant. Moreover, 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, it is concluded that 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian disclosed to the Complainant all records ordered for disclosure pursuant to the Council’s May 29, 2012 Order by making copies of the records available in the City Clerk’s office on May 28, 2012, and although the Custodian provided certified confirmation of compliance to the Executive Director within the time period provided for compliance with said Order, the Custodian failed to fully comply with the Order because the Custodian failed to convert the records in order to provide them electronically via e-mail pursuant to N.J.S.A. 47:1A-5.d., Paff v. County of Camden, GRC Complaint No. 2009-25 (March 2011), and Wolosky v. Township of Frankford (Sussex), GRC Complaint No. 2008-254 (November 2009). However, the Council declines to order the Custodian to provide the requested records electronically because the Custodian certified to the GRC on June 4, 2012 that he disclosed

to the Complainant the requested records by making the records available in hard-copy format on May 28, 2012 at the City Clerk's office.

2. Although the Custodian failed to provide the requested records to the Complainant in the medium requested by the Complainant, and although the Custodian failed to provide to the GRC a supplemental certification averring whether the requested records for the instant complaint were made available in redacted or unredacted form, the Custodian did certify in a timely manner that he made the requested records available to the Complainant. Moreover, 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, it is concluded that 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.

Prepared By: John E. Stewart, Esq.

Approved By: Karyn Gordon, Esq.
Acting Executive Director

July 24, 2012



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
Acting Commissioner

INTERIM ORDER

May 29, 2012 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2012-49

v.

City of Bayonne (Hudson)
Custodian of Record

At the May 29, 2012 public meeting, the Government Records Council ("Council") considered the May 22, 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 the Custodian responded in writing within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response is insufficient under OPRA because he failed to provide a specific lawful basis for denying access to the requested records contrary to N.J.S.A. 47:1A-5.g. and DeAppolonio, Esq. v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009).
2. Because the Superior Court in O'Shea v. Township of West Milford, 410 N.J. Super. 371 (App. Div. 2009) found that use of force reports cannot be exempt from disclosure under OPRA as criminal investigatory records because they are required to be made, and because the Custodian failed to otherwise cite a valid legal basis for exempting the requested records from access, the Custodian failed to meet his burden of proving that denial of access to the requested records is authorized by law pursuant to N.J.S.A. 47:1A-6., and the Custodian shall therefore disclose to the Complainant copies of Bayonne Police Department use of force reports from January 1, 2011 to November 18, 2011 in unredacted form, except for the names of subjects not arrested on those cases where there was an arrest made or where charges were made.
3. **The Custodian shall comply with the terms of paragraph #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

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.

Interim Order Rendered by the
Government Records Council
On The 29th Day of May, 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: May 30, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 29, 2012 Council Meeting**

**Richard Rivera¹
Complainant**

GRC Complaint No. 2012-49

v.

**City of Bayonne (Hudson)²
Custodian of Records**

Records Relevant to Complaint: Copies of unredacted Bayonne Police Department use of force incident reports from January 1, 2011 to November 18, 2011.

Request Made: November 18, 2011

Response Made: November 29, 2011

Custodian: Robert F. Sloan

GRC Complaint Filed: February 27, 2012³

Background

November 18, 2011

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in a letter referencing OPRA. The Complainant indicates that the preferred method of delivery is e-mail.

November 29, 2011

Custodian's response to the OPRA request. Assistant Bayonne Corporation Counsel, Peter Cecinini, Esq., responds in writing via letter to the Complainant's OPRA request on the sixth (6th) business day following receipt of such request. The Custodian states that the Complainant's request has been forwarded to the Law Division for review.

December 16, 2011

Letter from Mr. Cecinini to the Complainant. Mr. Cecinini informs the Complainant that the requested records are police investigatory records which are not government records for purposes of OPRA pursuant to N.J.S.A. 47:1A-1.1. Mr. Cecinini also informs the Complainant that the requested records contain confidential information and are not subject to disclosure in unredacted form.

Mr. Cecinini states that he understands that the Complainant has spoken with Bayonne Corporation Counsel regarding his request. Mr. Cecinini informs the Complainant that approximately one (1) year ago the Custodian inadvertently disclosed

¹ No legal representation listed on record.

² Represented by Edward Florio, Esq. (Hoboken, NJ).

³ The GRC received the Denial of Access Complaint on said date.

similar records to the Complainant and that counsel representing the City of Bayonne notified the Complainant that the disclosure of those records was illegal and filed a motion for return of the records.

December 20, 2011

Letter from the Complainant to Mr. Cecinini. The Complainant informs Mr. Cecinini that he is entitled to the requested records and cites O'Shea v. Township of West Milford, 410 N.J. Super. 371 (App. Div. 2009) as legal authority supporting his position. The Complainant states that he is attempting to avoid litigation. The Complainant further states that he is not familiar with the motion for return of records referenced in Mr. Cecinini's letter to the Complainant dated December 16, 2011. The Complainant asks Mr. Cecinini to notify the Complainant by December 23, 2011 if the Custodian intends to disclose the requested records to the Complainant by December 30, 2011.

February 27, 2012

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

- Complainant's OPRA request dated November 18, 2011
- Custodian's response to the OPRA request dated November 29, 2011
- Letter from Mr. Cecinini to the Complainant dated December 16, 2011
- Letter from the Complainant to Mr. Cecinini dated December 20, 2011

The Complainant states that he submitted his OPRA request to the Custodian on November 18, 2011. The Complainant also states that he received a letter dated November 29, 2011 from Mr. Cecinini stating that the Complainant's OPRA request had been submitted to the Bayonne Legal Department. The Complainant states that he received another letter from Mr. Cecinini dated December 16, 2011 wherein Mr. Cecinini stated that the requested records were denied because they were criminal investigatory records not government records.

The Complainant states that he sent a letter to Mr. Cecinini dated December 20, 2011, wherein the Complainant informed Mr. Cecinini that the requested records should be disclosed to him pursuant to the court's decision in O'Shea, supra. The Complainant states that he never received a reply to his letter dated December 20, 2011. The Complainant also states that he made telephone calls to Bayonne City officials in an effort to obtain the requested records. The Complainant states that he spoke with Mayor Smith and then City Corporate Counsel in an effort to obtain the requested records and avoid filing a Denial of Access Complaint; however, the Complainant states that Corporate Counsel told him to file a complaint.

The Complainant states that he followed-up his December 20, 2011 letter with repeated telephone calls to Bayonne officials. The Complainant states that he spoke with Mayor Smith and Bayonne Corporate Counsel. The Complainant states that Bayonne Corporate Counsel told him to file a complaint.

The Complainant does not agree to mediate this complaint.

March 6, 2012

Request for the Statement of Information (“SOI”) sent to the Custodian.⁴

March 14, 2012

Letter from the GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for an SOI on March 6, 2012 and to date has not received a response. Further, the GRC states that if the SOI is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

March 15, 2012

E-mail from Mr. Cecinini to the GRC. Mr. Cecinini forwards the Custodian’s SOI to the GRC.⁵

March 16, 2012

E-mail from the GRC to Mr. Cecinini. The GRC informs Mr. Cecinini that the GRC cannot accept the SOI as prepared. The GRC informs Mr. Cecinini that the person who is named in the SOI as the Custodian on page 2 must also sign the certification. The GRC suggests that either Mr. Sloan sign the certification instead of Mr. Cecinini or that Mr. Cecinini be named as the Custodian on page 2 instead of Mr. Sloan.

April 11, 2012

E-mail from the Custodian’s Counsel to the GRC. The Custodian’s Counsel sends a representation letter to the GRC.

April 11, 2012

E-mail from the GRC to the Complainant. The GRC informs the Complainant that the Complainant has filed two (2) complaints for the identical records: the instant complaint and GRC Complaint Number 2012-87. The GRC informs the Complainant that the only difference between the complaints is the number of records requested in each. The GRC informs the Complainant that the request that formed the basis for the instant complaint seeks records to November 18, 2011, whereas the request that formed the basis for GRC Complaint Number 2012-87 requests records to February 27, 2012. The GRC asks the Complainant if he wishes to withdraw the instant complaint because the records requested in that complaint are fully included within GRC Complaint Number 2012-87.

⁴ At this time, the GRC understood that Ms. Golden was the Custodian and the request for the SOI was sent to her. By e-mail dated March 14, 2012, City Clerk Robert Sloan informed the GRC that Ms. Golden is not the Custodian, but rather a clerk typist in the Clerk’s office who processes OPRA requests for the Custodian. Mr. Sloan stated that in the instant complaint, the Complainant’s request was referred by Ms. Golden to the Bayonne Police Department, who subsequently referred it to the Law Division, whereupon Mr. Cecinini responded to the Complainant on behalf of the Law Division denying the Complainant’s request. Mr. Sloan informed the GRC that the Law Division handles OPRA requests which involve active or potential litigation and he forwarded to the GRC a copy of a resolution adopted October 14, 2009, which designated the Law Director as the Deputy Custodian for any matter that could lead to litigation. Mr. Sloan stated that Mr. Cecinini is the Law Director’s assistant and, as such, he may respond to OPRA requests on behalf of the Law Director.

⁵ The SOI names City Clerk Robert Sloan as the Custodian; however, it is signed by Mr. Cecinini as the Custodian.

April 16, 2012

E-mail from the Complainant to the GRC. The Complainant informs the GRC that he wants both the instant complaint and GRC Complaint Number 2012-87 adjudicated.

May 7, 2012

E-mail from the GRC to the Custodian's Counsel. The GRC informs Counsel that the SOI filed with the GRC for this complaint is unacceptable because the person who is named in the SOI as the Custodian on page 2 is not the same person who signed the certification. The GRC informs Counsel that the corrected SOI must be submitted to the GRC within five (5) business days.

May 7, 2012

E-mail from the Custodian's Counsel to the GRC. Counsel informs the GRC that Counsel will discuss modifications to the SOI with the Custodian and submit the corrected SOI to the GRC in a timely manner.

May 11, 2012

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated November 18, 2011
- Custodian's response to the OPRA request dated November 29, 2011
- Letter from Mr. Cecinini to the Complainant dated December 16, 2011

The Custodian certifies that his search for the requested records involved forwarding the Complainant's request to the Bayonne Police Department Bureau of Criminal Investigation. The Custodian further certifies that the request was forwarded from the Bureau of Criminal Investigation to Internal Affairs where the responsive records were located and routed to the Division of Law for legal review. The Custodian also certifies that the records that may have been responsive to the request have no records retention requirement in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management.

The Custodian certifies that he received the Complainant's OPRA request on November 18, 2011 and responded to said request on November 29, 2011. The Custodian certifies that he located two hundred (200) pages of records responsive to the Complainant's request. The Custodian further certifies that the records responsive to the request are unredacted use of force reports which are retained in the Bayonne Police Department Internal Affairs file where they have been held since 2001.

The Custodian certifies that he denied the Complainant access to the requested records because they are criminal investigatory records which contain confidential information pursuant to N.J.S.A. 47:1A-1.1. The Custodian also certifies that he denied the Complainant access to the requested records because the Complainant's request is overly broad and burdensome. The Custodian certifies that OPRA is not intended as a research tool litigants may use to force government officials to identify and siphon

information that may be useful in collateral litigation. The Custodian cites to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) in support of his position.

Analysis

Whether the Custodian's response to the Complainant's OPRA request was sufficient?

OPRA provides that:

“...[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefore 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.

In the matter before the Council, the Complainant submitted his OPRA request on November 18, 2011. The Custodian responded in writing on November 29, 2011, the sixth (6th) business day following receipt of such request, stating that the request was forwarded to the Law Division for review.

Although the Custodian's response was provided to the Complainant in writing and in a timely manner, the response did not indicate the specific lawful basis for denial or specify a date certain on which the Complainant could expect access to the requested records to be granted or denied; it merely informed the Complainant that his request had been forwarded to the Law Division for review.

The Council has repeatedly held that when responding to an OPRA request the custodian must inform the requestor of the specific lawful basis for denying access to requested records. In DeAppolonio, Esq. v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009), the complainant argued in the Denial of Access Complaint that although the custodian responded in writing in a timely manner, the custodian failed to provide some of the records responsive and further failed to provide a specific lawful basis for denying access to the missing records. The GRC held that:

“... the Council's decisions have repeatedly supported this statutory mandate by holding that custodians must provide a legally valid reason for any denial of access to records. *See* Seabrook v. Cherry Hill Police Department, GRC Complaint No. 2004-40 (April 2004), Rosenblum v. Borough of Closter, GRC Complaint No. 2005-16 (October 2005) and Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (October 2005). The Council also held that for a denial of access to be in compliance with OPRA, it must be specific and must be sufficient to prove that a custodian's denial is authorized by OPRA. *See* Morris v. Trenton Police Department, GRC Complaint No. 2007-160 (May 2008).

Here, while the Custodian's response to the Complainant's request was within the time allowed by N.J.S.A. 47:1A-5.i., his response was not in compliance with OPRA because it failed to provide a specific basis for denying the Complainant access to certain records pursuant to N.J.S.A. 47:1A-5.g. and the Council's decisions in Seabrook, *supra*, Rosenblum, *supra*, Paff, *supra* and Morris, *supra*." *Id.* at pg. 7.

Therefore, although the Custodian responded in writing within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response is insufficient under OPRA because he failed to provide a specific lawful basis for denying access to the requested records contrary to N.J.S.A. 47:1A-5.g. and DeAppolonio, *supra*.

Whether the Custodian 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 further provides that:

"A government record shall not include ... *criminal investigatory records...*" (Emphasis added) N.J.S.A. 47:1A-1.1.

OPRA defines a criminal investigatory record as:

"... a record which is not required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding..." N.J.S.A. 47:1A-1.1.

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 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 Custodian denied the Complainant access to copies of unredacted Bayonne Police Department use of force incident reports from January 1, 2011 to November 18, 2011 for two (2) reasons. First, the Custodian asserted that the Complainant’s request is overly broad and burdensome and that OPRA is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. The Custodian cited MAG, *supra*, as legal authority for denying an overly broad and burdensome request. Second, the Custodian denied access to the requested records because he certified that they are criminal investigatory records that contain confidential information and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

With respect to the Custodian’s first reason for denying the Complainant access to the requested records; to wit, because the request is overly broad, the New Jersey Superior Court has held that “[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records ‘readily accessible for inspection, copying, or examination.’ N.J.S.A. 47:1A-1.*” (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). As the court noted in invalidating MAG’s request under OPRA:

“Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past. Such an open-ended demand required the Division’s records custodian to manually search through all of the agency’s files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.” *Id.* at 549.

The Court further held that “[u]nder OPRA, *agencies are required to disclose only ‘identifiable’ government records* not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency’s files.” (Emphasis added.) *Id.*

In addition, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),⁶ the Superior Court references MAG in that the Court held that a requestor

⁶ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

must specifically describe the document sought because OPRA operates to make identifiable government records “accessible.” “As such, a proper request under OPRA 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.”⁷

Moreover, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), the court enumerated the responsibilities of a custodian and a requestor as follows:

“OPRA identifies the responsibilities of the requestor and the agency relevant to the prompt access the law is designed to provide. The custodian, who is the person designated by the director of the agency, N.J.S.A. 47:1A-1.1, must adopt forms for requests, locate and redact documents, isolate exempt documents, assess fees and means of production, identify requests that require “extraordinary expenditure of time and effort” and warrant assessment of a “service charge,” and, when unable to comply with a request, “indicate the specific basis.” N.J.S.A. 47:1A-5(a)-(j). The requestor must pay the costs of reproduction and submit the request with information that is essential to permit the custodian to comply with its obligations. N.J.S.A. 47:1A-5(f), (g), (i). *Research is not among the custodian's responsibilities.*” (Emphasis added), NJ Builders, 390 N.J. Super. at 177.

Moreover, the court cited MAG by stating that “...when a request is ‘complex’ because it fails to specifically identify the documents sought, then that request is not ‘encompassed’ by OPRA...” The court also quoted N.J.S.A. 47:1A-5.g in that “[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.” The court further stated that “...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency’s need to...generate new records...” Accordingly, the test under MAG then, is whether a requested record is a *specifically identifiable* government record.

Under such rationale, the GRC has repeatedly found that blanket requests are not valid OPRA requests. In the matter of Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009), the relevant part of the Complainant’s request sought:

2. Item No. 2: “From the Borough Engineer’s files: all engineering documents for all developments or modifications to Block 25, Lot 28; Block 25, Lot 18; Block 23, Lot 1; Block 23, Lot 1.02.
3. Item No. 3: From the Borough Engineer’s files: all engineering documents for all developments or modifications to North St., to the south and east of Wilson St.

⁷ As stated in Bent, *supra*.

4. Item No. 4: From the Borough Attorney's files: all documents related to the development or modification to Block 25, Lot 28; Block 25, Lot 18; Block 23, Lot 1; Block 23, Lot 1.02.
5. Item No. 5: From the Borough Attorney's files: all documents related to the development or modification to North Street, to the south and east of Wilson St."

In reviewing the complainant's request, the Council found that "[b]ecause the Complainant's OPRA requests # 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005)."

The facts in Schuler, *supra*, are substantially different from the facts presented in Burnett v. County of Gloucester, 415 N.J. Super. 506 (App. Div. 2010). In Burnett, the plaintiff appealed from an order of summary judgment entered against him in his suit to compel production by the County of Gloucester of documents requested pursuant to OPRA, consisting of "[a]ny and all *settlements, releases or similar documents* entered into, approved or accepted from 1/1/2006 to present." *Id.* at 508. (Emphasis added). The Appellate Division determined that the request sought a specific type of document, although it did not specify a particular case to which such document pertained, and was therefore not overly broad. *Id.* at 515-16.

In the instant case, as in Burnett, *supra*, the Complainant sought a specific type of document. The Complainant specifically identified the records he requested as "Bayonne Police Department use of force incident reports." Use of force incident reports are specific records that cannot be confused with other types of police reports. Pursuant to the *New Jersey Attorney General's Guidelines on Use of Force* ("AG Guidelines") revised June 2000, a use of force report must be prepared in all instances when physical, mechanical or deadly force is used by a law enforcement officer. Such a report may be in the form of either the AG Guidelines' "Model Use of Force Report" or an agency-designed report. Therefore, by requesting "use of force incident reports" the Complainant specifically identified the records sought. Moreover, the Complainant specified a finite time period during which the requested records would have been prepared: January 1, 2011 to November 18, 2011. As such, the Complainant's request was not overly broad or burdensome and the Custodian's argument that the records must be denied for that reason is not persuasive.

The Custodian also argued that access to the requested records was properly denied as they constitute criminal investigatory records which contain confidential information and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. The Custodian held fast to this argument despite the fact that the Complainant, in support of his request, provided the Custodian with a full and accurate citation to O'Shea, *supra*.⁸

In O'Shea, the requestor sought a municipality's use of force reports for a multi-year period. The custodian denied the request by asserting that such reports are criminal

⁸ See the Complainant's letter to Mr. Cecinini dated December 20, 2011.

investigatory records and as such are exempt from disclosure under OPRA. The trial court disagreed, held that use of force reports are not exempt from the disclosure requirements of OPRA as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1., and ordered the municipality to grant the requestor access to the requested use of force reports in unredacted form, except for the names of subjects not arrested on those cases where there was an arrest made or where charges were made.

In upholding the trial judge's decision regarding access to the records, the Appellate Division analyzed the OPRA definition of a criminal investigatory record and determined that a use of force report, in order to constitute a criminal investigatory record and thus be exempt from disclosure, must satisfy both prongs of a dual-prong test. First, the report must not be required to be made; second, it must pertain to a criminal investigation or related civil enforcement proceeding. With respect to the first prong, the court determined that:

“...there are no specific ‘statutes’ or ‘administrative rules’ that require [use of force reports] to be completed or maintained by a Township’s police department. We hold, however, that [the AG Guidelines], that requires the completion of [use of force reports] and their maintenance in the files of police departments, has the force of law for police entities.” *Id.* at 382.

Therefore, because the court found that use of force reports were required to be made, the first prong of the test could not be met. Thus the court found:

“ The [use of force reports]...are nominally subject to OPRA, and there is no governing policy or statement containing specific provisions for exempting them from OPRA’s general rule of disclosure...” *Id.* at 385.

Therefore, because the Superior Court in O’Shea, *supra*, found that use of force reports cannot be exempt from disclosure under OPRA as criminal investigatory records, the Custodian’s second reason for denial of access, that the requested records are criminal investigatory records exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1., is also without merit.

Accordingly, because the Superior Court in O’Shea found that use of force reports cannot be exempt from disclosure under OPRA as criminal investigatory records because they are required to be made, and because the Custodian failed to otherwise cite a valid legal basis for exempting the requested records from access, the Custodian failed to meet his burden of proving that denial of access to the requested records is authorized by law pursuant to N.J.S.A. 47:1A-6., and the Custodian shall therefore disclose to the Complainant copies of Bayonne Police Department use of force reports from January 1, 2011 to November 18, 2011 in unredacted form, except for the names of subjects not arrested on those cases where there was an arrest made or where charges were made.

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 the Custodian responded in writing within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response is insufficient under OPRA because he failed to provide a specific lawful basis for denying access to the requested records contrary to N.J.S.A. 47:1A-5.g. and DeAppolonio, Esq. v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009).
2. Because the Superior Court in O'Shea v. Township of West Milford, 410 N.J. Super. 371 (App. Div. 2009) found that use of force reports cannot be exempt from disclosure under OPRA as criminal investigatory records because they are required to be made, and because the Custodian failed to otherwise cite a valid legal basis for exempting the requested records from access, the Custodian failed to meet his burden of proving that denial of access to the requested records is authorized by law pursuant to N.J.S.A. 47:1A-6., and the Custodian shall therefore disclose to the Complainant copies of Bayonne Police Department use of force reports from January 1, 2011 to November 18, 2011 in unredacted form, except for the names of subjects not arrested on those cases where there was an arrest made or where charges were made.
3. **The Custodian shall comply with the terms of paragraph #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 1:4-4,⁹ to the Executive Director.¹⁰**
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.

⁹ "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."

¹⁰ 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.

Prepared By: John E. Stewart, Esq.

Approved By: Catherine Starghill, Esq.
Executive Director

May 22, 2012