



**State of New Jersey**  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
*Governor*

KIM GUADAGNO  
*Lt. Governor*

CHARLES A. RICHMAN  
*Commissioner*

**FINAL DECISION**

**January 26, 2016 Government Records Council Meeting**

Clarence F. Lear, III  
Complainant

Complaint No. 2014-426

v.

City of Cape May (Cape May)  
Custodian of Record

At the January 26, 2016 public meeting, the Government Records Council (“Council”) considered the January 19, 2016 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that the Council dismisses the complaint because the Complainant withdrew same via an e-mail to the GRC on January 14, 2016, based on a settlement between the parties. Therefore, no further adjudication is required.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the  
Government Records Council  
On The 26<sup>th</sup> Day of January, 2016

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: January 29, 2016**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***Reconsideration*  
Supplemental Findings and Recommendations of the Executive Director  
January 26, 2016 Council Meeting**

**Clarence F. Lear, III<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-426**

**v.**

**City of Cape May (Cape May)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

November 10, 2014 OPRA request No. 1: Electronic copies via e-mail of:

1. Documentation authorizing the City of Cape May (“City”) to conduct an investigation of the Cape May Police Department (“CMPD”) and its members to include resolutions, authorizations, *etc.*
2. Documentation authorizing the City to hire and compensate an investigator to conduct interviews of CMPD members.
3. Records of payments to CMPD officers for “buy back” of vacation, sick, personal, terminal leave, and any other time (compensatory, on-call, *etc.*) from 2001 to present. The records should reflect the officers, years for which compensation was paid, the amount paid, and identification of the time bought back.

November 10, 2014 OPRA request No. 2: Electronic copies via e-mail of financial records listing total money paid to the Custodian’s Counsel or his law firm from 2009 to 2014.<sup>3</sup>

**Custodian of Record:** Louise Cummiskey  
**Request Received by Custodian:** November 12, 2014  
**Response Made by Custodian:** November 20, 2014  
**GRC Complaint Received:** December 12, 2014

**Background**

November 17, 2015 Council Meeting:

At its November 17, 2015 public meeting, the Council considered the November 10, 2015 Findings and Recommendations of the Executive Director and all related documentation

---

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

<sup>2</sup> Represented by Anthony P. Monzo, Esq., of Monzo, Catanese & Hillegass, P.C. (Cape May Court House, NJ).

<sup>3</sup> The Complainant requested additional records that are not at issue in this complaint.

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 to the Complainant's OPRA request No. 1, item Nos. 1 and 2, and OPRA request No. 2, within the extended time frame pursuant to N.J.S.A. 47:1A- 5(i), the Custodian's response was legally insufficient because she failed to provide a specific lawful basis for said denial of access. Therefore, the Custodian violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and DeAppolonio v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009). *See also* Downing v. NJ Dep't of Children & Family Serv., GRC Complaint No. 2010-295 (April 2012).
2. The Complainant's OPRA request No. 1, item No. 3, seeking "buy back" compensation for Cape May Police Department officer time, is a valid request for "payroll" information. Specifically, OPRA provides that the responsive payroll information is expressly considered a government record under OPRA. N.J.S.A. 47:1A-10; Jackson v. Kean Univ., GRC Complaint No. 2002-98 (February 2004); Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156 *et seq.* (Interim Order dated June 29, 2010). Thus, the Custodian unlawfully denied access to the responsive "buy back" information and must disclose same. N.J.S.A. 47:1A-6. If no responsive records exist encompassing the responsive "buy back" information for a certain year, the Custodian must legal certify to that fact.
3. The Custodian may have unlawfully denied access to the resolutions and authorizations responsive to the Complainant's OPRA request No. 1, item Nos. 1 and 2, because same are not inherently exempt under OPRA. N.J.S.A. 47:1A-6. The Custodian must therefore disclose the responsive records to the Complainant with redactions, where applicable. Should no records responsive exist, the Custodian must certify to that fact.
4. The Custodian may have unlawfully denied access to the bills responsive to the Complainant's OPRA request No. 2, because they are inherently not exempt under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. The Custodian must thus disclose the responsive records to the Complainant with redactions, where applicable. Should no records responsive exist for time periods, the Custodian must certify to the fact.
5. **The Custodian shall comply with item Nos. 2, 3, and 4 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>4</sup> to the Executive Director.<sup>5</sup>**

---

<sup>4</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>5</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the

6. **If applicable, the Custodian shall advise the Complainant of any proposed special service charge within three (3) business days from receipt of the Council's Interim Order. The Custodian shall disclose to the Complainant the requested records with any appropriate redactions, if necessary, and a detailed document index explaining the lawful basis for any such redaction upon the Complainant's payment of the special service charge, if any, within ten (10) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance to the Executive Director. Should the Complainant reject the proposed charge, the Custodian shall provide certified confirmation of compliance to the Executive Director to such within ten (10) business days from receipt of the Council's Interim Order.**
7. 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.

Procedural History:

On November 18, 2015, the Council distributed its Interim Order to all parties.

On November 24, 2015, the Custodian's Counsel filed a request for reconsideration of the Council's Order based on a mistake. Counsel argued that the Council erroneously required the Custodian to disclose attorney bills because the Complainant did not request such records. Rather, Counsel argued that the Complainant sought "financial records listing total money paid to" Counsel or his law firm. Counsel argued that upholding the Order would require the Custodian to disclose records the Complainant did not request. Counsel also noted that the parties recently entered into a "Settlement Agreement and Mutual Release," whereby the parties agreed to settle all matters to include the instant complaint. Counsel asserted that he reached out to the Complainant's attorney<sup>6</sup> and that he expected the complaint to be withdrawn shortly.<sup>7</sup>

On November 30, 2015, the Complainant submitted objections to the request for reconsideration. Specifically, the Complainant disputed that he was dismissing this complaint. Further, the Complainant noted that he is not represented by an attorney in this matter.

On January 14, 2016, the GRC contacted the parties advising that the GRC was recently made aware that the Complainant and City might have reached a settlement agreement that may have included the withdrawal of this complaint. On the same day, both the Complainant and City responded, advising that they had reached a settlement agreement and that this complaint is to be withdrawn. Both parties provided to the GRC a copy of the relevant settlement agreement.

---

record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

<sup>6</sup> The GRC notes that there is no evidence in the record to indicate that the Complainant is represented by counsel in this matter.

<sup>7</sup> The Custodian's Counsel also requested a stay of the Council's Order and included an analysis of the factors as required under N.J.A.C. 5:105-2.12(f). However, procedurally, in instances where the GRC has received a request for reconsideration from a party, said request effectively stayed compliance pending the Council's determination.

**Analysis**

No analysis required.

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council dismiss the complaint because the Complainant withdrew same via an e-mail to the GRC on January 14, 2016, based on a settlement between the parties. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso  
Communications Specialist/Resource Manager

Reviewed By: Joseph D. Glover  
Executive Director

January 19, 2016



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Commissioner

**INTERIM ORDER**

**November 17, 2015 Government Records Council Meeting**

Clarence F. Lear, III  
Complainant

Complaint No. 2014-426

v.

City of Cape May (Cape May)  
Custodian of Record

At the November 17, 2015 public meeting, the Government Records Council (“Council”) considered the November 10, 2015 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 to the Complainant’s OPRA request No. 1, item Nos. 1 and 2, and OPRA request No. 2, within the extended time frame pursuant to N.J.S.A. 47:1A- 5(i), the Custodian’s response was legally insufficient because she failed to provide a specific lawful basis for said denial of access. Therefore, the Custodian violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and DeAppolonio v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009). *See also* Downing v. NJ Dep;t of Children & Family Serv., GRC Complaint No. 2010-295 (April 2012).
2. The Complainant’s OPRA request No. 1, item No. 3, seeking “buy back” compensation for Cape May Police Department officer time, is a valid request for “payroll” information. Specifically, OPRA provides that the responsive payroll information is expressly considered a government record under OPRA. N.J.S.A. 47:1A-10; Jackson v. Kean Univ., GRC Complaint No. 2002-98 (February 2004); Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156 *et seq.* (Interim Order dated June 29, 2010). Thus, the Custodian unlawfully denied access to the responsive “buy back” information and must disclose same. N.J.S.A. 47:1A-6. If no responsive records exist encompassing the responsive “buy back” information for a certain year, the Custodian must legal certify to that fact.
3. The Custodian may have unlawfully denied access to the resolutions and authorizations responsive to the Complainant’s OPRA request No. 1, item Nos. 1 and 2, because same are not inherently exempt under OPRA. N.J.S.A. 47:1A-6. The Custodian must therefore disclose the responsive records to the Complainant with redactions, where applicable. Should no records responsive exist, the Custodian must certify to that fact.



4. The Custodian may have unlawfully denied access to the bills responsive to the Complainant's OPRA request No. 2, because they are inherently not exempt under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. The Custodian must thus disclose the responsive records to the Complainant with redactions, where applicable. Should no records responsive exist for time periods, the Custodian must certify to the fact.
5. **The Custodian shall comply with item Nos. 2, 3, and 4 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>1</sup> to the Executive Director.<sup>2</sup>**
6. **If applicable, the Custodian shall advise the Complainant of any proposed special service charge within three (3) business days from receipt of the Council's Interim Order. The Custodian shall disclose to the Complainant the requested records with any appropriate redactions, if necessary, and a detailed document index explaining the lawful basis for any such redaction upon the Complainant's payment of the special service charge, if any, within ten (10) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance to the Executive Director. Should the Complainant reject the proposed charge, the Custodian shall provide certified confirmation of compliance to the Executive Director to such within ten (10) business days from receipt of the Council's Interim Order.**
7. 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 17<sup>th</sup> Day of November, 2015

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: November 18, 2015**

---

<sup>1</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
November 17, 2015 Council Meeting**

**Clarence F. Lear, III<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2014-426**

v.

**City of Cape May (Cape May)<sup>2</sup>**  
**Custodial Agency**

**Records Relevant to Complaint:**

November 10, 2014 OPRA request No. 1: Electronic copies via e-mail of:

1. Documentation authorizing the City of Cape May (“City”) to conduct an investigation of the Cape May Police Department (“CMPD”) and its members to include resolutions, authorizations, *etc.*
2. Documentation authorizing the City to hire and compensate an investigator to conduct interviews of CMPD members.
3. Records of payments to CMPD officers for “buy back” of vacation, sick, personal, terminal leave, and any other time (compensatory, on-call, *etc.*) from 2001 to present. The records should reflect the officers, years for which compensation was paid, the amount paid, and identification of the time bought back.

November 10, 2014 OPRA request No. 2: Electronic copies via e-mail of financial records listing total money paid to the Custodian’s Counsel or his law firm from 2009 to 2014.<sup>3</sup>

**Custodian of Record:** Louise Cummiskey  
**Request Received by Custodian:** November 12, 2014  
**Response Made by Custodian:** November 20, 2014  
**GRC Complaint Received:** December 12, 2014

**Background<sup>4</sup>**

**Request and Response:**

On November 12, 2014, the Complainant submitted two (2) Open Public Records Act

---

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

<sup>2</sup> Represented by Anthony P. Monzo, Esq., of Monzo, Catanese & Hillegass, P.C. (Cape May Court House, NJ).

<sup>3</sup> The Complainant requested additional records that are not at issue in this complaint.

<sup>4</sup> 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.

Clarence F. Lear, III v. City of Cape May (Cape May), 2014-426 – Findings and Recommendations of the Executive Director



(“OPRA”) requests to the Custodian seeking the above-mentioned records. On November 20, 2014, the Custodian responded in writing, confirming the Complainant’s agreement to an extension of time until December 4, 2014, to respond to the subject OPRA requests.

On December 2, 2014, the Custodian responded to the Complainant’s OPRA requests in writing, denying access to OPRA request No. 1, items 1 and 2, stating that the responsive records are exempt in light of an open internal affairs investigation. The Custodian also denied access to OPRA request No. 1, item 3, as overly broad, noting that the request needed to be more specific. Additionally, the Custodian denied access to OPRA request No. 2, stating that Custodian Counsel’s detailed billing records were “not public documents.”<sup>5</sup>

Denial of Access Complaint:

On December 12, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”), disputing the Custodian’s denial of access to his OPRA requests.

Statement of Information:

On January 15, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian further certified that she received the Complainant’s OPRA requests on November 12, 2014. The Custodian certified that she initially responded in writing on November 20, 2014, confirming that the Complainant agreed to an extension of time until December 4, 2014, to respond. The Custodian affirmed that she responded on December 2, 2014, denying access to the Complainant’s OPRA requests.

The Custodian argued that records responsive to OPRA request No. 1, items 1 and 2, are exempt from disclosure under N.J.S.A. 47:1A-3(a). The Custodian asserted that the records are related to an on-going investigation of the CMPD and its members. Further, the Custodian contended that the Complainant’s OPRA request No. 1, item 3, failed to identify specific government records. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). The Custodian noted that she sought clarification of the request item.

Finally, the Custodian contended that she provided reports and corresponding summaries to the Complainant in response to OPRA request No. 2.

Additional Submissions:

On June 10, 2015, the Complainant e-mailed the GRC regarding a January 12, 2015, e-mail from the Custodian’s Counsel to his attorney.<sup>6</sup> The Complainant stated that Counsel asked

---

<sup>5</sup> The Custodian disclosed reports and corresponding summaries for the years 2009 through 2014 in lieu of the billing records.

<sup>6</sup> The Complainant did not identify the attorney as his representative in the instant complaint. Clarence F. Lear, III v. City of Cape May (Cape May), 2014-426 – Findings and Recommendations of the Executive Director

the Complainant to withdraw this complaint. The Complainant contended that he believed the request to withdraw was an intimidation tactic, based on the fact that one of the requests sought Counsel's billing records. The Complainant questioned whether Counsel's request violated any ethical or professional standards.<sup>7</sup>

### Analysis

#### Sufficiency of the Custodian's Response

OPRA provides that if a “. . . custodian is unable to comply with a request for access, the custodian *shall indicate the specific basis therefor* . . . on the request form and promptly return it to the requestor.” N.J.S.A. 47:1A-5(g)(emphasis added). The Council has held that for a denial of access to be in compliance with OPRA, it must be specific and sufficient to prove that a custodian's denial is authorized by OPRA. See DeAppolonio v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009); Morris v. Trenton Police Dep't (Mercer), GRC Complaint No. 2007-160 (May 2008). Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In Downing v. NJ Dep't of Children & Family Serv., GRC Complaint No. 2010-295 (April 2012), the custodian denied access to records as “confidential.” The Council determined that the custodian's response was insufficient, reasoning that:

[T]he evidence of record indicates that the Custodian denied the Complainant access to the requested records stating that according to New Jersey law, the records the Complainant sought were confidential. The evidence of record additionally indicates that the Custodian failed to identify an applicable State statute as the specific lawful basis for denying access.

Id. at 4.

Here, the Custodian responded to the Complainant's OPRA request No. 1, item Nos. 1 and 2, stating that responsive records were exempt because of an open internal affairs investigation. Additionally, the Custodian denied access to the Complainant's OPRA request No. 2, advising that detailed billing records “are not public documents.” The Custodian's response here was similar to the custodian's response in Downing, in that the responses did not identify an applicable statute as to the specific lawful basis for denial. Thus, the Custodian's response to these request items was insufficient.

Accordingly, although the Custodian responded in writing to the Complainant's OPRA request No. 1, item Nos. 1 and 2 and OPRA request No. 2, within the extended time frame pursuant to N.J.S.A. 47:1A- 5(i), the Custodian's response was legally insufficient because she failed to provide a specific lawful basis for said denial of access. Therefore, the Custodian

---

<sup>7</sup> The GRC does not have the authority to adjudicate ethics and professionalism issues. N.J.S.A. 47:1A-7(b); Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-137 *et seq.* (Interim Order dated November 18, 2014) at 3, FN 8.

violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and DeAppolonio, GRC 2008-62. *See also Downing*, GRC 2010-295.

### **Validity of Request**

The New Jersey Appellate Division has held that:

While 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.*

MAG, 375 N.J. Super. at 546 (emphasis added).

The Court reasoned that:

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 (emphasis added).

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.” Id. (emphasis added). Bent, 381 N.J. Super. at 37,<sup>8</sup> NJ Builders, 390 N.J. Super. at 180; Schuler, GRC 2007-151.

In LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009), the complainant requested the number of Jamesburg residents that hold library cards. The GRC deemed that the complainant's request was a request for information, holding that “. . . because request Item No. 2 of the Complainant's June 25, 2008 OPRA request seeks information rather than an identifiable government record, the request is invalid pursuant to [MAG] . . .” Id. at 6. *See also Ohlson v. Twp. of Edison (Middlesex)*, GRC Complaint No. 2007-233 (August 2009).

However, regarding personnel records, OPRA begins with a presumption against

---

<sup>8</sup> Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004). Clarence F. Lear, III v. City of Cape May (Cape May), 2014-426 – Findings and Recommendations of the Executive Director

disclosure and “proceeds with a few narrow exceptions that . . . need to be considered.” Kovalcik v. Somerset Cnty. Prosecutor's Office, 206 N.J. 581, 594 (2011). Those are:

[A]n individual’s name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of any pension received shall be government record;

[P]ersonnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and

[D]ata contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.

N.J.S.A. 47:1A-10.

In Jackson v. Kean Univ., GRC Complaint No. 2002-98 (February 2004), the Council was tasked with defining the term “payroll record” because that term is not addressed in OPRA. The Council looked to the ordinary meaning of the term as set forth in Black's Law Dictionary (7th Ed., 1999) and N.J.A.C. 12:16-2.1, a Department of Labor regulation entitled “Payroll records.” The Council held that “payroll” records referred to the following:

Every employing unit having workers in employment, regardless of whether such unit is or is not an “employer” as defined in the Unemployment Compensation Law, shall keep payroll records that shall show, for each pay period:

1. The beginning and ending dates;
2. The full name of each employee and the day or days in each calendar week on which services for remuneration are performed;
3. The total amount of remuneration paid to each employee showing separately cash, including commissions and bonuses; the cash value of all compensation in any medium other than cash; gratuities received regularly in the course of employment if reported by the employee, or if not so reported, the minimum wage rate prescribed under applicable laws of this State or of the United States or the amount of remuneration actually received by the employee from his employing unit, whichever is the higher; and service charges collected by the employer and distributed to workers in lieu of gratuities and tips;
4. The total amount of all remuneration paid to all employees;
5. The number of weeks worked.

Id.

Moreover, in Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156 *et seq.* (Interim Order dated June 29, 2010), the Council determined that “name, title, position, salary, payroll record and length of service” is information which is specifically considered to be a government record under N.J.S.A. 47:1A-10, and that “payroll records” must be disclosed pursuant to Jackson, GRC 2002-98. The Council thus held that the complainant’s March 25, 2009, request for “[t]he name, position, salary, payroll record and length of service for every Board/District employee who was employed in whole or part from January 1, 2008, to March 24, 2009” was a valid request pursuant to OPRA. Id. at 5. Additionally, prior GRC case law supports the disclosure of database information regarding personnel actions. See Matthews v. City of Atlantic City (Atlantic), GRC Complaint No. 2008-123 (February 2009). Further, the Council has previously required that responding to an OPRA request for personnel information requires a custodian provide the most comprehensive records containing the responsive information. Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2011-64 (Interim Order dated August 28, 2012).

Here, the Complainant’s OPRA request No. 1, item No. 3, sought “buy back” payments to CMPD officers buying back vacation, sick, personal, terminal leave and other compensatory time for roughly thirteen and a half years. This “buy back” information certainly fits within the Council’s definition of “the total amount of remuneration paid to each employee . . . including . . . the cash value of all compensation.” Based on the foregoing, the Council’s holding in Danis is applicable in that the Complainant’s request item sought “information” specifically designated as a “government record” under N.J.S.A. 47:1A-10.

Accordingly, the Complainant’s OPRA request No. 1, item No. 3, seeking “buy back” compensation for CMPD officers time is a valid request for “payroll” information. Specifically, OPRA provides that the responsive payroll information is expressly considered a government record under OPRA. N.J.S.A. 47:1A-10; Jackson, GRC 2002-98; Danis, GRC 2009-156 *et seq.* Thus, the Custodian unlawfully denied access to the responsive “buy back” information and must disclose same. N.J.S.A. 47:1A-6. If no responsive records exist encompassing the responsive “buy back” information for a certain year, the Custodian must legal certify to that fact.

### **Unlawful Denial of Access**

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

### **OPRA request No. 1, item Nos. 1 and 2**

OPRA provides that:

[W]here it shall appear that the record or records which are sought to be inspected, copied, or examined shall pertain to an investigation in progress by any

public agency, the right of access provided for in [OPRA] may be denied if the inspection, copying or examination of such record or records shall be inimical to the public interest; provided, however, that this provision shall not be construed to allow any public agency to prohibit access to a record of that agency that was open for public inspection, examination, or copying before the investigation commenced.

N.J.S.A. 47:1A-3(a).

Here, the Complainant's OPRA request No. 1, item Nos. 1 and 2, sought resolutions and authorizations allowing the City to conduct an investigation of the CMPD and hire an investigator.<sup>9</sup> The Custodian denied access to both request items, advising the Complainant that same were exempt in light of an open internal affairs investigation. In the SOI, the Custodian asserted that the responsive records were exempt under N.J.S.A. 47:1A-3(a).

Notwithstanding the asserted exemptions, it is unclear whether the requested resolutions or authorizations fall within the "investigation in progress" exemption. Initially, the evidence of record does not indicate whether the responsive records were available prior to the investigation's commencement. Additionally, the Custodian provided no additional arguments as to why disclosure of the requested records would be inimical to the public interest. This is especially true, given that the Complainant is acutely aware of the investigator's identity because he included an e-mail from the investigator as part of the Denial of Access Complaint. Thus, the GRC is not satisfied that the "investigation in progress" exemption applied to the responsive records.

Accordingly, the Custodian may have unlawfully denied access to the resolutions and authorizations responsive to the Complainant's OPRA request No. 1, item Nos. 1 and 2, because same are not inherently exempt under OPRA. N.J.S.A. 47:1A-6. The Custodian must therefore disclose the responsive records to the Complainant with redactions, where applicable. Should no records responsive exist, the Custodian must certify to that fact.

### OPRA request No. 2

OPRA provides that a "government record" shall not include "any record within the attorney-client privilege. This paragraph *shall not be construed as exempting from access attorney or consultant bills or invoices except that such bills or invoices may be redacted to remove any information protected by the attorney-client privilege . . .*" N.J.S.A. 47:1A-1.1 (emphasis added).

Here, the Complainant's OPRA request No. 2 sought attorney financial records from 2009 to 2014. The Custodian denied access to "detailed billing statements," stating that same were "not public documents." However, to the extent that said statements were "attorney . . .

---

<sup>9</sup> The Complainant's OPRA request identified other records as "documentation;" however, the Council has found that type of request invalid. See Reed v. Camden Cnty. Police Dep't, GRC Complaint No. 2014-158 (January 2015). For purposes of this complaint, the GRC will only address those identifiable records within the request: resolutions and authorizations.

bills or invoices,” the plain language of OPRA is clear on the disclosability of same. N.J.S.A. 47:1A-1.1.

Accordingly, the Custodian may have unlawfully denied access to the bills responsive to the Complainant’s OPRA request No. 2, because they are inherently not exempt under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. The Custodian must therefore disclose the responsive records to the Complainant with redactions, where applicable. Should no records responsive exist for time periods, the Custodian must certify to that fact.

### **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.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian responded in writing to the Complainant’s OPRA request No. 1, item Nos. 1 and 2, and OPRA request No. 2, within the extended time frame pursuant to N.J.S.A. 47:1A- 5(i), the Custodian’s response was legally insufficient because she failed to provide a specific lawful basis for said denial of access. Therefore, the Custodian violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and DeAppolonio v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009). *See also* Downing v. NJ Dep;t of Children & Family Serv., GRC Complaint No. 2010-295 (April 2012).
2. The Complainant’s OPRA request No. 1, item No. 3, seeking “buy back” compensation for Cape May Police Department officer time, is a valid request for “payroll” information. Specifically, OPRA provides that the responsive payroll information is expressly considered a government record under OPRA. N.J.S.A. 47:1A-10; Jackson v. Kean Univ., GRC Complaint No. 2002-98 (February 2004); Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156 *et seq.* (Interim Order dated June 29, 2010). Thus, the Custodian unlawfully denied access to the responsive “buy back” information and must disclose same. N.J.S.A. 47:1A-6. If no responsive records exist encompassing the responsive “buy back” information for a certain year, the Custodian must legal certify to that fact.
3. The Custodian may have unlawfully denied access to the resolutions and authorizations responsive to the Complainant’s OPRA request No. 1, item Nos. 1 and 2, because same are not inherently exempt under OPRA. N.J.S.A. 47:1A-6. The Custodian must therefore disclose the responsive records to the Complainant with redactions, where applicable. Should no records responsive exist, the Custodian must certify to that fact.

4. The Custodian may have unlawfully denied access to the bills responsive to the Complainant's OPRA request No. 2, because they are inherently not exempt under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. The Custodian must thus disclose the responsive records to the Complainant with redactions, where applicable. Should no records responsive exist for time periods, the Custodian must certify to the fact.
5. **The Custodian shall comply with item Nos. 2, 3, and 4 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>10</sup> to the Executive Director.<sup>11</sup>**
6. **If applicable, the Custodian shall advise the Complainant of any proposed special service charge within three (3) business days from receipt of the Council's Interim Order. The Custodian shall disclose to the Complainant the requested records with any appropriate redactions, if necessary, and a detailed document index explaining the lawful basis for any such redaction upon the Complainant's payment of the special service charge, if any, within ten (10) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance to the Executive Director. Should the Complainant reject the proposed charge, the Custodian shall provide certified confirmation of compliance to the Executive Director to such within ten (10) business days from receipt of the Council's Interim Order.**
7. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso  
Communications Specialist/Resource Manager

Reviewed By: Joseph D. Glover  
Executive Director

November 10, 2015

---

<sup>10</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>11</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.  
Clarence F. Lear, III v. City of Cape May (Cape May), 2014-426 – Findings and Recommendations of the Executive Director