



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

April 30, 2019 Government Records Council Meeting

Matthew Drange
Complainant

Complaint No. 2015-229

v.

City of Plainfield Police Department (Union)
Custodian of Record

At the April 30, 2019 public meeting, the Government Records Council (“Council”) considered the April 23, 2019 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s March 26, 2019 Interim Order because he responded within the extended time frame providing records and simultaneously provided certified confirmation of compliance to the Council Staff.
2. The original Custodian violated N.J.S.A. 47:1A-6 by improperly redacting and withholding responsive records. However, the Custodian properly complied with the Council’s June 26, 2018 and March 26, 2019 Interim Orders. Additionally, the evidence of record does not indicate that the original Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original 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 30th Day of April 2019

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: May 3, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
April 30, 2019 Council Meeting**

**Matthew Drange¹
Complainant**

GRC Complaint No. 2015-229

v.

**City of Plainfield Police Department (Union)²
Custodial Agency**

Records Relevant to Complaint: “Electronic records of all incidents of possible gunshots by ShotSpotter Flex sensors used to generate summary reports for the city from January 1, 2013 to the date this request is processed, including:

- Date and time of the incident (with detail to the minute if available – for example, 1/1/13 4:32pm)
- Location (latitude and longitude)PI
- Address
- Incident type (multiple gunshots, single gunshot, or possible gunshot(s))
- Beat (for example, “25X”)

Please provide the data in a machine-readable format (for example, Excel [XLS, XLSX], comma-separated value [CSV], or ESRI ArcGIS files). In addition, I’d like copies of the most recent contract between the city and ShotSpotter and any and all supporting materials that document the city’s efforts to verify the accuracy of the data provided by ShotSpotter.”

Custodian of Record: Capt. David M. Guarino³
Requests Received by Custodian: May 8, 2015
Response Made by Custodian: July 14, 2015
GRC Complaint Received: July 22, 2015

Background

March 26, 2019 Council Meeting:

At its March 26, 2019 public meeting, the Council considered the March 19, 2019 *In Camera* Findings and Recommendations of the Council Staff 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 No representation listed on record.

² Represented by Brian P. Trelease, Esq., of Rainone, Coughlin, Minchello, LLC (Iselin, N.J.).

³ The original Custodian was Captain Steven W. Soltys.

1. The Custodian complied with the Council's June 26, 2018 Interim Order because he responded in the prescribed extended time frame providing records for *in camera* review and simultaneously provided certified confirmation of compliance to the Council Staff.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order. Further, the Custodian shall simultaneously deliver⁴ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁵ to the Council Staff.⁶**
3. As to the sender, recipients, date, time, subject, and salutations (where applicable) contained within the responsive memos, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010). Thus, the Custodian must disclose all of these portions of the responsive memos to the Complainant.
4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁷ to the GRC.⁸**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On March 28, 2019, the Council distributed its Interim Order to all parties. On April 3, 2019, the Custodian requested an extension of time to respond, which the GRC granted to until the end of business on April 11, 2019.

⁴ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁶ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

⁷ "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."

⁸ 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.

On April 9, 2019, the Custodian responded to the Council's Interim Order. The Custodian provided a certification, indicating that he delivered to the Complainant the requested records with the revised redactions made in accordance with the Interim Order.

Analysis

Compliance

At its March 26, 2019 meeting, the Council ordered the Custodian to provide the Complainant with the responsive records as amended, and to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Council Staff. On March 28, 2019, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on April 4, 2019.

On April 3, 2019 the fourth (4th) business day after receipt of the Council's Order, the Custodian requested an extension of time to respond, which was granted to until the end of business on April 11, 2019. On April 9, 2019, the Custodian responded to the Council's Order, certifying that he delivered the responsive records to the Complainant that same day.

Therefore, the Custodian complied with the Council's March 26, 2019 Interim Order because he responded within the extended time frame providing records and simultaneously provided certified confirmation of compliance to the Council Staff.

Knowing & Willful

OPRA states that "[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . ." N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically, OPRA states ". . . [i]f 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 (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); 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)).

The original Custodian violated N.J.S.A. 47:1A-6 by improperly redacting and withholding responsive records. However, the Custodian properly complied with the Council's June 26, 2018 and March 26, 2019 Interim Orders. Additionally, the evidence of record does not indicate that the original Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original 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 Council Staff respectfully recommends the Council find that:

1. The Custodian complied with the Council's March 26, 2019 Interim Order because he responded within the extended time frame providing records and simultaneously provided certified confirmation of compliance to the Council Staff.
2. The original Custodian violated N.J.S.A. 47:1A-6 by improperly redacting and withholding responsive records. However, the Custodian properly complied with the Council's June 26, 2018 and March 26, 2019 Interim Orders. Additionally, the evidence of record does not indicate that the original Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original 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: Samuel A. Rosado
Staff Attorney

April 23, 2019



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

March 26, 2019 Government Records Council Meeting

Matthew Drange
Complainant

Complaint No. 2015-229

v.

City of Plainfield Police Department (Union)
Custodian of Record

At the March 26, 2019 public meeting, the Government Records Council (“Council”) considered the March 19, 2019 Supplemental Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s June 26, 2018 Interim Order because he responded in the extended time frame providing records for *in camera* review and simultaneously provided certified confirmation of compliance to the Council Staff.
2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order. Further, the Custodian shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Council Staff.³**
3. As to the sender, recipients, date, time, subject, and salutations (where applicable) contained within the responsive memos, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010). Thus, the Custodian must disclose all of these portions of the responsive memos to the Complainant.
4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions,**

¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

² "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."

³ 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.

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 Rules, R. 1:4-4, to the GRC.

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

Interim Order Rendered by the
Government Records Council
On The 26th Day of March, 2019

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: March 28, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Council Staff
March 26, 2019 Council Meeting**

**Matthew Drange¹
Complainant**

GRC Complaint No. 2015-229

v.

**City of Plainfield Police Department (Union)²
Custodial Agency**

Records Relevant to Complaint: “Electronic records of all incidents of possible gunshots by ShotSpotter Flex sensors used to generate summary reports for the city from January 1, 2013 to the date this request is processed, including:

- Date and time of the incident (with detail to the minute if available – for example, 1/1/13 4:32pm)
- Location (latitude and longitude)PI
- Address
- Incident type (multiple gunshots, single gunshot, or possible gunshot(s))
- Beat (for example, “25X”)

Please provide the data in a machine-readable format (for example, Excel [XLS, XLSX], comma-separated value [CSV], or ESRI ArcGIS files). In addition, I’d like copies of the most recent contract between the city and ShotSpotter and any and all supporting materials that document the city’s efforts to verify the accuracy of the data provided by ShotSpotter.”

Custodian of Record: Capt. David M. Guarino³
Requests Received by Custodian: May 8, 2015
Response Made by Custodian: July 14, 2015
GRC Complaint Received: July 22, 2015

Records Submitted for *In Camera* Examination: Nine (9) redacted and unredacted copies of the ShotSpotter incident data from January 1, 2013 to the date of the request, and the contract between the City of Plainfield (“City”). Additionally, nine (9) copies of the memos withheld from disclosure.

¹ No representation listed on record.

² Represented by Brian P. Trelease, Esq., of Rainone, Coughlin, Minchello, LLC (Iselin, N.J.).

³ The original Custodian was Captain Steven W. Soltys.

Background

June 28, 2018 Council Meeting:

At its June 26, 2018 public meeting, the Council considered the June 19, 2018 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The GRC must conduct an *in camera* review of the redacted and withheld records in order to validate the Custodian's assertions that the documents are, in fact, exempt from disclosure based on OPRA's exemptions for security and surveillance measures, and/or proprietary information or trade secrets, pursuant to N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see #1 above), nine (9) copies of the redacted records, a document or redaction index⁵, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁶ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On June 28, 2018 the Council distributed its Interim Order to all parties. That same day, the newly appointed Counsel for the Custodian requested and was granted an extension of time to respond to until July 20, 2018.

On July 19, 2018, Captain David M. Guarino, the current Custodian, responded to the Council's Interim Order. The Custodian provided nine (9) redacted and unredacted copies of the requested records for review. The Custodian also provided a Vaughn Index describing the redactions made to the requested contract and incident data, as well as a certified confirmation of compliance.

⁴ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁵ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁶ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Analysis

Compliance

At its June 26, 2018 meeting, the Council ordered the Custodian to provide nine (9) copies of the redacted and unredacted ShotSpotter incident data, the contract between the City and ShotSpotter, and internal memos for *in camera* review within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance to the Council Staff. On June 28, 2018, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on Friday, July 6, 2018.

On June 28, 2018, the Custodian's Counsel requested an extension of time to respond to the Council's Order. The GRC granted an extension to the end of business on July 20, 2018. On July 19, 2018, the Custodian responded to the Council's Order, providing nine (9) copies of the redacted and unredacted records as well as a signed certification.

Therefore, the Custodian complied with the Council's June 26, 2018 Interim Order because he responded in the extended time frame providing records for *in camera* review and simultaneously provided certified confirmation of compliance to the Council Staff.

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. N.J.S.A. 47:1A-6.

Trade Secrets/Proprietary Information

The Custodian asserted that the incident reports were redacted to protect information which ShotSpotter considered trade secrets or proprietary information. See N.J.S.A. 47:1A-1.1. Information is proprietary when it is not intended for wide dissemination, the expectation of confidentiality was manifest, and the parties' agreement delineates the specific terms and specific persons who are permitted to review this information. Newark Morning Star Ledger Co. v. New Jersey Sports & Exposition Auth., 423 N.J. Super. 140, 168 (App. Div. 2011). Additionally, trade secrets consist of information used in one's business which provides an advantage over competitors who do not know or use it. Id.

Security Measures and Techniques

Regarding the portions of the incident data and the contract, the Custodian contended that release of same without redactions would jeopardize the safety of persons, property, electronic data or software. N.J.S.A. 47:1A-1.1. The Custodian also redacted two (2) internal memos in their

entirety on this basis. In Burton v. N.J. Dep't of Law & Pub. Safety, Div. of State Police, GRC Complaint No. 2010-330 (May 2011), the Council held that:

The Custodian has lawfully denied access to the requested payroll records because said records are exempt from public access under N.J.S.A. 47:1A-9(a), which upholds exemptions contained in an Executive Order of the Governor or any regulation promulgated pursuant to an Executive Order of the Governor. Executive Order No. 47 (Christie 2010) permits rules proposed by the N.J. Department of Law & Public Safety to remain in full effect. N.J.A.C. 13:1E-3-2(a)3 exempts records which may reveal an agency's surveillance, security, or investigative techniques or procedures, and N.J.A.C. 13:1E-3.2(a)7 exempts '[t]he duty assignment of an individual law enforcement officer or any personally identifiable information that may reveal or lead to information that may reveal such duty assignment, including, but not limited to, overtime data pertaining to an individual law enforcement officer.' Despite payroll records being public records under N.J.S.A. 47:1A-10, the release of said records in this instance leaves the Executive Protection Bureau vulnerable to how heavy of a security level it places on protecting various dignitaries and are therefore exempt under the regulations cited above.

[Id. at 12-13.]

Additionally, in Rivera v. City of Plainfield Police Dep't (Union), GRC Complaint No. 2009-317 (May 2011), the Council held that:

Because request Items No. 3 and 10 sought police daily duty logs, which records necessarily include details regarding surveillance techniques and staffing levels which, if disclosed, could pose a risk to the safety of police personnel as well as civilians employed by the Plainfield Police Department, such records are exempt from the definition of a government record pursuant to N.J.S.A. 47:1A-1.1.

[Id.]

More recently, in Drange v. Camden Cnty. Office of Archives and Records Mgmt., GRC Complaint No. 2015-265 (Interim Order dated December 18, 2018), the complainant sought the same records as in the current matter. The custodian redacted portions of the incident data in accordance with ShotSpotter's recommendations. The Council held that while most of the redacted data qualified under the security measures and surveillance techniques exemption, the number of rounds fired, and ID number of each incident were unlawfully redacted.

The GRC conducted an *in camera* examination on the submitted record. The results of this examination are set forth in the following table:

Record Number	Record Name/Date	Description of Record or Redaction	Custodian's Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination ⁷
Plainfield 9	Contract between City of Plainfield and ShotSpotter. dated July 11, 2011.	Coverage area.	Redacted to prevent disclosure of the exact coverage area of the ShotSpotter technology which would jeopardize the City's surveillance techniques. <u>N.J.S.A. 47:1A-1.1.</u>	The GRC agrees with the Custodian in that release of the exact coverage area would pose a risk to the City's surveillance techniques. Therefore, the Custodian lawfully denied access. <u>N.J.S.A. 47:1A-1.1. Drange</u> , GRC 2015-265.
Plainfield 10	Contract between City of Plainfield and ShotSpotter dated July 11, 2011.	Aerial image of coverage area.	Redacted to prevent disclosure of the exact coverage area of the ShotSpotter technology which would jeopardize the City's surveillance techniques. <u>N.J.S.A. 47:1A-1.1.</u>	The GRC agrees with the Custodian in that release of the exact coverage area would pose a risk to the City's surveillance techniques. Therefore, the Custodian lawfully denied access. <u>N.J.S.A. 47:1A-1.1. Drange</u> , GRC 2015-265.

⁷ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

Plainfield 11	Contract between City of Plainfield and ShotSpotter dated July 11, 2011.	Coverage area disclosed.	Redacted to prevent disclosure of the exact coverage area of the ShotSpotter technology which would jeopardize the City's surveillance techniques. <u>N.J.S.A. 47:1A-1.1.</u>	The GRC agrees with the Custodian in that release of the exact coverage area would pose a risk to the City's surveillance techniques. Therefore, the Custodian lawfully denied access. <u>N.J.S.A. 47:1A-1.1. Drange</u> , GRC 2015-265.
Plainfield 25-38	Records of incidents recorded by ShotSpotter from January 2013 until August 2015.		Redacted to prevent disclosure of addresses, ID numbers, specific times, rounds fired, and CAD numbers which would jeopardize City's surveillance techniques and contains confidential trade secret information. <u>N.J.S.A. 47:1A-1.1.</u>	In accordance with <u>Drange</u> , GRC 2015-265, release of ID numbers and the number of rounds fired would not pose a risk to the City's surveillance techniques or contain confidential trade secret information. Thus, the Custodian unlawfully denied access to the identified redacted content. <u>N.J.S.A. 47:1A-6.</u>
Plainfield 39	Memo from S. Soltys to 911-sworn dated April 20, 2015.		Denied to prevent disclosure of trade secrets and which would jeopardize the City's surveillance techniques. <u>N.J.S.A. 47:1A-1.1.</u>	The body of the memo appears to indicate general policy information regarding ShotSpotter alarm activation. The body of the memo does not fall within the asserted exemptions because it does not contain trade secrets or security or

				surveillance techniques. Thus, the Custodian has unlawfully denied access to this memo and must disclose same. N.J.S.A. 47:1A-6.
Plainfield 40	Memo from S. Soltys to M. Hellwig dated August 13, 2012.		Denied to prevent disclosure of trade secrets and which would jeopardize the City's surveillance techniques. <u>N.J.S.A. 47:1A-1.1.</u>	<p>Within the body of the memo, sentences 3-5, 7, 9, and 10 contain information ShotSpotter sensor data results which, if disclosed, could pose a risk to the City's surveillance techniques. <u>N.J.S.A. 47:1A-1.1.</u> Sentences 7, 9, and 10 also contained proprietary information regarding ShotSpotter sensor function and capabilities. <u>N.J.S.A. 47:1A-1.1.</u> Therefore, the Custodian lawfully denied access.</p> <p>The remainder of the body of the memo does not contain trade secrets or information protected under the security and surveillance techniques exemption. Thus, the Custodian unlawfully denied</p>

				access to the remainder of the memo and must disclose same. <u>N.J.S.A. 47:1A-6.</u>
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Thus, the Custodian unlawfully redacted or withheld a portion of the requested records, and lawfully redacted to other portions. N.J.S.A. 47:1A-1.1. The Custodian shall thus comply with the findings of the *In Camera* Examination set forth in the above table.

Additionally, consistent with N.J.S.A. 47:1A-5(g), if the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to OPRA, the custodian must delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and must promptly permit access to the remainder of the record. In prior decisions, the Council has routinely required disclosure of certain information contained within e-mails, to include sender, recipients, date, time, subject, and salutations (where applicable). See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010); Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-287 (Interim Order dated June 30, 2015).

Accordingly, as to the sender, recipients, date, time, subject, and salutations (where applicable) contained within the responsive memos, the Custodian has unlawfully denied access. See Ray, GRC 2009-185. Thus, the Custodian must disclose all of these portions of the responsive memos to the Complainant.

Knowing & Willful

The Council defers analysis of whether the original 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 Council Staff respectfully recommends the Council find that:

1. The Custodian complied with the Council’s June 26, 2018 Interim Order because he responded in the extended time frame providing records for *in camera* review and simultaneously provided certified confirmation of compliance to the Council Staff.
2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order. Further, the**

Custodian shall simultaneously deliver⁸ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁹ to the Council Staff.¹⁰

3. As to the sender, recipients, date, time, subject, and salutations (where applicable) contained within the responsive memos, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010). Thus, the Custodian must disclose all of these portions of the responsive memos to the Complainant.
4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the GRC.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado
Staff Attorney

March 26, 2019

⁸ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

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.



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

June 26, 2018 Government Records Council Meeting

Matthew Drange
Complainant

Complaint No. 2015-229

v.

City of Plainfield Police Department (Union)
Custodian of Record

At the June 26, 2018 public meeting, the Government Records Council ("Council") considered the June 19, 2018 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The GRC must conduct an *in camera* review of the redacted and withheld records in order to validate the Custodian's assertions that the documents are, in fact, exempt from disclosure based on OPRA's exemptions for security and surveillance measures, and/or proprietary information or trade secrets, pursuant to N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see #1 above), nine (9) copies of the redacted records, nine a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,³ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

¹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

² The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

³ "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."



Interim Order Rendered by the
Government Records Council
On The 26th Day of June, 2018

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: June 28, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
June 26, 2018 Council Meeting**

**Matthew Drange¹
Complainant**

GRC Complaint No. 2015-229

v.

**City of Plainfield Police Department (Union)²
Custodial Agency**

Records Relevant to Complaint: “Electronic records of all incidents of possible gunshots by ShotSpotter Flex sensors used to generate summary reports for the city from January 1, 2013 to the date this request is processed, including:

- Date and time of the incident (with detail to the minute if available – for example, 1/1/13 4:32pm)
- Location (latitude and longitude)PI
- Address
- Incident type (multiple gunshots, single gunshot, or possible gunshot(s))
- Beat (for example, “25X”)

Please provide the data in a machine-readable format (for example, Excel [XLS, XLSX], comma-separated value [CSV], or ESRI ArcGIS files). In addition, I’d like copies of the most recent contract between the city and ShotSpotter and any and all supporting materials that document the city’s efforts to verify the accuracy of the data provided by ShotSpotter.”

Custodian of Record: Capt. Steven W. Soltys
Requests Received by Custodian: May 8, 2015
Response Made by Custodian: July 14, 2015
GRC Complaint Received: July 22, 2015

Background³

Request and Response:

On May 8, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 14, 2015, the Custodian

¹ No representation listed on record.

² Represented by Alice M. Bergen, Esq., or DeCotiis, FitzPatrick & Cole, LLP (Teaneck, NJ).

³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Council Staff the submissions necessary and relevant for the adjudication of this complaint.

responded in writing, denying access to the “ShotSpotter records,” but stated that he could provide the number of activations. The Custodian denied access on the grounds that the request sought criminal investigatory records, and therefore exempt under N.J.S.A. 47:1A-1.1. The Complainant responded on July 21, 2015, asking the Custodian for a response to the remaining portions of his OPRA request.

Denial of Access Complaint:

On July 22, 2015 the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the records sought do not fall under the criminal investigatory records exemption. The Complainant claimed that according City of Plainfield (“City”), most gunshots detected by ShotSpotter do not result in any criminal case or investigation. Additionally, the Complainant asserted that even if one or more of these recorded gunshots resulted in an investigation, the mere acknowledgment of its existence would not interfere or hinder the investigation in any way. The Complainant asserted that he is seeking metadata surrounding recorded gunshots, rather than investigatory reports or case-specific information.

Additionally, the Complainant asserted that the Custodian failed to provide a copy of the contract between itself and ShotSpotter as requested, in violation of OPRA. The Complainant noted that this information has been provided by other municipalities which have identical contracts with ShotSpotter.

Supplemental Response:

On July 30, 2015, the Custodian provided an additional response to the Complainant. Therein the Custodian provided the ShotSpotter contract with redactions. The Custodian asserted that the redactions were based upon OPRA’s exemptions for security measures and surveillance techniques, as well as computer security. Additionally, in response to the portion of the request pertaining to the City’s efforts to verify the accuracy of the ShotSpotter data, the Custodian stated that “if a document of this type existed it would be exempt from disclosure as it would contain confidential information that is exempt from disclosure.”

On August 14, 2015, the Custodian provided a listed of ShotSpotter incidents from January 1, 2013 to the present as requested by the Complainant. However, the list only provided the type of incident and date and redacted the remaining information.

Statement of Information:

On August 21, 2015 the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on June 29, 2015. The Custodian certified that his office conducted a diligent search to locate and identify responsive records. On July 7, 2015, the Custodian certified that he contacted the Complainant via telephone to notify him that responsive records would be redacted for security purposes. The Custodian certified that he memorialized this conversation via e-mail dated July 14, 2015. The Custodian certified that on or about July 29, 2015, he contacted ShotSpotter to request a current copy of the contract between

the company and the City. The Custodian certified that he responded in writing on July 30, 2015, providing a redacted copy of the contract, and a response to the request for records confirming the accuracy of the ShotSpotter data. The Custodian also certified that he provided the redacted list of ShotSpotter incidents to the Complainant on August 15, 2015.⁴

The Custodian asserted that the incident data and contract was properly redacted under OPRA's exemption for security measures and surveillance techniques. See N.J.S.A. 47:1A-1.1. The Custodian also referenced N.J.A.C. 13:1E-3.2(a)(2), which exempts "[r]ecords . . . that may reveal: . . . an agency's surveillance, security, tactical, investigative, or operational techniques, measures, or procedures, which, if disclosed, would create a risk to the safety of persons, property, electronic data, or software, or compromise an agency's ability to effectively conduct investigations." The Custodian also referenced N.J.A.C. 13:1E-3.2(a)(7), which exempts records that reveal "[t]he duty assignment of an individual law enforcement officer or any personally identifiable information that may reveal or lead to information that may reveal such duty assignment, including, but not limited to, overtime data pertaining to an individual law enforcement officer."

The Custodian asserted that in this matter, the requested data is a log of purported gunfire detected by ShotSpotter sensors. Once detected, an alert is sent to law enforcement, allowing personnel to respond to incidents in a more efficient manner over time. The Custodian asserted that the redaction of addresses and locations of the sensors was self-evident, as making them public would allow potential criminals to avoid those locations, rendering the sensors useless. The Custodian also contended that the redactions made to CAD numbers, the exact time, ID numbers, and the number of rounds fired were consistent with the City's lease agreement with ShotSpotter. Additionally, the Custodian contended that the list was provided in paper format in accordance with the lease agreement, which prevented disclosure of the data in any other format.

As to the last portion of the request, the Custodian asserted that when usage of ShotSpotter began, limited data was collected under a report entitled "ShotSpotter Incidents." The Custodian stated that the data collected was between July 1, 2012 and August 6, 2012. The Custodian asserted that the report contains confidential information that if disclosed would jeopardize the safety and security measures implemented by the City. Additionally, the Custodian asserted that disclosure of this report is also prohibited pursuant to the lease agreement between the City and ShotSpotter, which protects disclosure of proprietary information and trade secrets. See N.J.S.A. 47:1A-1.1. The Custodian referenced Boost Co. v. Faunce, 13 N.J. Super. 63, 68 (Ch. Div. 1951) aff'd, 17 N.J. Super. 458 (App. Div. 1952) to highlight what New Jersey courts have defined as trade secrets, as well as Hammock by Hammock v. Hoffman-LaRoche, Inc., 142 N.J. 356, 384 (1995) to determine whether a particular document contains a trade secret. The Custodian asserted that the list and contract contain, in part, ShotSpotter's trade secrets. Particularly, the Custodian asserted that ShotSpotter's lease agreement states that they are the sole and exclusive owners of its data, and any release of the data to anyone outside of the City is expressly prohibited without ShotSpotter's consent. The Custodian contended that ShotSpotter asserts that the data is the company's main product, and their business stems from selling the data to other customers. According to ShotSpotter, should the data be made publicly available, the value of the data would

⁴ Although the Custodian certified that he responded on August 15, 2015, the evidence in the record indicates that the actual date of response was August 14, 2015.

be diminished. The Custodian included a letter from ShotSpotter, which states that the data may be released, but with redactions made to avoid damaging their business.

Furthermore, the Custodian asserted that in addition to the report, two (2) internal memoranda were located which dealt with ShotSpotter, but are prohibited from disclosure to protect the City's surveillance techniques. Beyond these records, the Custodian claimed that no other responsive records exist regarding the City's oversight of ShotSpotter's accuracy.

Additional Submissions

On September 8, 2015, the Complainant responded to the Custodian's SOI. The Complainant asserted that the exemption for information relating to an agency's surveillance or security measures or procedures does not apply to the data contained in the incident list. The Complainant argued that basic information regarding when and where a possible gunshot occurred would not be covered by the exemption. The Complainant also contended that he did not request the exact locations of the sensors, and added that the location information within the data would not reveal this information. Moreover, the Complainant argued that these sensors are in the public domain, in view of the public where anyone can locate and avoid, and therefore neutralizes the City's argument.

Regarding the trade secrets exemption, the Complainant stated that just because ShotSpotter says its data is a trade secret does not make it so, and the Custodian cannot rely solely upon this assertion. The Complainant stated that he is not looking for the software used to create the data, but rather the data itself. The Complainant argued that the data does not reveal "any formula, pattern, device, or compilation of information." The Complainant noted that several other municipalities with contracts with ShotSpotter have provided this data, notwithstanding the contracts containing similar disclosure restrictions.

On September 16, 2015, the Custodian replied to the Complainant's response to the SOI. The Custodian argued that sensors and data created comprise the security measures and surveillance techniques used by the City, the disclosure of such would compromise public safety. The Custodian also asserted that the should potential criminals have access to the precise locations of the sensors, they would be able to discern areas where there is a lack of coverage by the sensors. The Custodian contended that the sensors could also be open to possible vandalism.

Additionally, the Custodian argued that proprietary data and trade secrets is defined broadly and includes "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." Restatement of Torts 757, cmt. B (1939). The Custodian also noted that qualifying documents include financial information, customer data, merchandise information and vendor information, audit manuals, and customer lists. The Custodian restated that the requested records qualify pursuant to this definition.

On September 17, 2015, the Complainant responded to the Custodian's reply, restating that he is not seeking information that would fall under the security and surveillance, or the trade secrets exemptions under OPRA.

Analysis

Unlawful Denial of Access

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

In Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the GRC, which dismissed the complaint by accepting the custodian’s legal conclusion for the denial of access without further review. The court stated that:

OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.

[Paff, 379 N.J. Super. at 354.]

The court also stated that:

The statute . . . contemplates the GRC’s *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the Open Public Meetings Act, N.J.S.A. 10:4-6 to 10:4-21, it also provides that the GRC “may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.” N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

[Id. at 355.]

Further, the court stated that:

We hold only that GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal. . . . There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC’s obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

[Id.]

Here, the Custodian has argued that the responsive records provided to the Complainant were redacted pursuant to N.J.S.A. 47:1A-1.1, where the information contained security measures and surveillance techniques, as well as proprietary information and trade secrets. Additionally, the Custodian argued that the report and memos regarding the City's assessment of ShotSpotter's accuracy was also withheld under the surveillance and security measures exemption. N.J.S.A. 47:1A-1.1. Without inspecting the withheld records, and in light of the Custodian's burden to prove a lawful denial of access, the GRC cannot conduct the "meaningful review of the basis for an agency's decision to withhold government records" contemplated under OPRA. Id. at 354.

Therefore, the GRC must conduct an *in camera* review of the redacted and withheld records in order to validate the Custodian's assertions that the documents are, in fact, exempt from disclosure based on OPRA's exemptions for security and surveillance measures, and/or proprietary information or trade secrets, pursuant to N.J.S.A. 47:1A-1.1.

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 Council Staff respectfully recommends the Council find that:

1. The GRC must conduct an *in camera* review of the redacted and withheld records in order to validate the Custodian's assertions that the documents are, in fact, exempt from disclosure based on OPRA's exemptions for security and surveillance measures, and/or proprietary information or trade secrets, pursuant to N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see #1 above), nine (9) copies of the redacted records, nine a document or redaction index⁶, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁷ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

⁵ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁶ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁷ "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."

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

Prepared By: Samuel A. Rosado
Staff Attorney

June 19, 2018