



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. 2015-252

v.

Paterson Police Department (Passaic)
Custodian of Record

At the April 30, 2017 public meeting, the Government Records Council (“Council”) considered the March 19, 2019 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s March 26, 2019 Interim Order because the Custodian in a timely manner forwarded through Counsel certified confirmation of compliance to the Council Staff, wherein she certified that on April 4, 2019, she complied with paragraphs #3 and #4 of the Interim Order and that no records responsive to request item number 3 exist.
2. Although the Custodian failed to respond to the Complainant’s OPRA request in a timely manner, and failed to respond to each request item individually, the Custodian did comply in a timely manner with the terms of the Council’s March 26, 2019 Interim Order. Moreover, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian’s actions did 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. 2015-252

v.

Paterson Police Department (Passaic)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 [May 8, 2015], 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: Sonia L. Gordon
Request Received by Custodian: July 28, 2015
Response Made by Custodian: July 31, 2015
GRC Complaint Received: August 4, 2015

Background³

March 26, 2019 Council Meeting:

At its March 26, 2019 public meeting, the Government Records Council (“Council”) considered the March 19, 2019 Findings and Recommendations of the Council Staff and all related

¹ No legal representation listed on record.

² Represented by Domenick Stampone, Esq. and Harlyne A. Lack, Esq. (Paterson, 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.

documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian's response was insufficient because she failed to respond in writing to each request item contained in the request individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time immediately results in a "deemed" denial of the Complainant's OPRA request for the most recent contract between the city and ShotSpotter pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody v. Middletown Twp. Public Schools, GRC Complaint No. 2005-98 (December 2005). See also Harris v. NJ Dep't of Corr., GRC Complaint No. 2011-65 (August 2012).
3. The Custodian unlawfully denied access to the records of the ShotSpotter incident data requested by the Complainant. N.J.S.A. 47:1A-6. Thus, the Custodian shall disclose said records, redacted to deny access to the time, address, and precise coordinates for each incident. N.J.S.A. 47:1A-1.1. See Drange v. Camden County Office of Archives and Records Management, GRC Complaint No. 2015-265 (Interim Order December 18, 2018).
4. The Custodian failed to bear her burden of proving that the denial of access to request item number 2, a copy of the most recent contract between the City and ShotSpotter, was lawful. N.J.S.A. 47:1A-6. Therefore, the Custodian shall disclose said record to the Complainant.
5. **The Custodian shall comply with paragraphs #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, if applicable. Further, the Custodian shall simultaneously deliver certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Council Staff.**
6. The Custodian failed to bear her burden of proving that the denial of access to request item number 3, any record(s) documenting the City's efforts to verify the accuracy of the data provided by ShotSpotter, was lawful. N.J.S.A. 47:1A-6. Therefore, the Custodian must disclose said record(s) to the Complainant, if any.
7. **The Custodian shall comply with paragraph #6 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, if applicable. In the event the Custodian is unable to comply with**

paragraph #6, the Custodian shall provide proof that the denial of access is lawful. Further, the Custodian shall simultaneously deliver a certification of compliance or the reason(s) for noncompliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Council Staff.

8. 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 March 26, 2019 Interim Order to all parties. On April 4, 2019, the Custodian's Council responded to the Council's Interim Order by providing the Custodian's certified confirmation of compliance to the Council Staff.

Analysis

Compliance

On March 26, 2019, the Council ordered the above-referenced compliance. 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. Therefore, compliance was due on or before April 4, 2019. On April 4, 2019, the fifth (5th) business day following receipt of the Interim Order, the Custodian forwarded certified confirmation of compliance to the Council Staff averring that she complied with the terms of said Order through Counsel on April 4, 2019.

On April 4, 2019, the Custodian's Counsel forwarded a certification to the Council Staff. Counsel certified that on April 4, 2019, on behalf of the Custodian, she complied with paragraphs #3 and #4 of the Interim Order by disclosing to the Complainant the ordered ShotSpotter data and the most recent contract between the City and ShotSpotter, respectively. The Custodian's Counsel also certified that no records responsive to request item number 3, records documenting the City's efforts to verify the accuracy of the data provided by ShotSpotter, exist.

Therefore, the Custodian complied with the Council's March 26, 2019 Interim Order because the Custodian in a timely manner forwarded through Counsel certified confirmation of compliance to the Council Staff, wherein she certified that on April 4, 2019, she complied with paragraphs #3 and #4 of the Interim Order and that no records responsive to request item number 3 exist.

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 (Berg); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Although the Custodian failed to respond to the Complainant’s OPRA request in a timely manner, and failed to respond to each request item individually, the Custodian did comply in a timely manner with the terms of the Council’s March 26, 2019 Interim Order. Moreover, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian’s actions did 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 the Custodian in a timely manner forwarded through Counsel certified confirmation of compliance to the Council Staff, wherein she certified that on April 4, 2019, she complied with paragraphs #3 and #4 of the Interim Order and that no records responsive to request item number 3 exist.
2. Although the Custodian failed to respond to the Complainant’s OPRA request in a timely manner, and failed to respond to each request item individually, the Custodian did comply in a timely manner with the terms of the Council’s March 26, 2019 Interim Order. Moreover, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian’s actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: John E. Stewart

March 19, 2019



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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. 2015-252

v.

Paterson Police Department (Passaic)
Custodian of Record

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

1. The Custodian’s response was insufficient because she failed to respond in writing to each request item contained in the request individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time immediately results in a “deemed” denial of the Complainant’s OPRA request for the most recent contract between the city and ShotSpotter pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody v. Middletown Twp. Public Schools, GRC Complaint No. 2005-98 (December 2005). See also Harris v. NJ Dep’t of Corr., GRC Complaint No. 2011-65 (August 2012).
3. The Custodian unlawfully denied access to the records of the ShotSpotter incident data requested by the Complainant. N.J.S.A. 47:1A-6. Thus, the Custodian shall disclose said records, redacted to deny access to the time, address, and precise coordinates for each incident. N.J.S.A. 47:1A-1.1. See Drange v. Camden County Office of Archives and Records Management, GRC Complaint No. 2015-265 (Interim Order December 18, 2018).
4. The Custodian failed to bear her burden of proving that the denial of access to request item number 2, a copy of the most recent contract between the City and ShotSpotter, was lawful. N.J.S.A. 47:1A-6. Therefore, the Custodian shall disclose said record to the Complainant.

5. **The Custodian shall comply with paragraphs #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, if applicable. 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**
6. The Custodian failed to bear her burden of proving that the denial of access to request item number 3, any record(s) documenting the City's efforts to verify the accuracy of the data provided by ShotSpotter, was lawful. N.J.S.A. 47:1A-6. Therefore, the Custodian must disclose said record(s) to the Complainant, if any.
7. **The Custodian shall comply with paragraph #6 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, if applicable. In the event the Custodian is unable to comply with paragraph #6, the Custodian shall provide proof that the denial of access is lawful. Further, the Custodian shall simultaneously deliver a certification of compliance or the reason(s) for noncompliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Council Staff.**
8. 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

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.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

Matthew Drange¹
Complainant

GRC Complaint No. 2015-252

v.

Paterson Police Department (Passaic)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 [May 8, 2015], 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: Sonia L. Gordon
Request Received by Custodian: July 28, 2015
Response Made by Custodian: July 31, 2015
GRC Complaint Received: August 4, 2015

Background³

Request and Response:

The Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian dated May 8, 2015, seeking the above-mentioned records. The Custodian certified that

¹ No legal representation listed on record.

² Represented by Domenick Stampone, Esq. and Harlynn A. Lack, Esq. (Paterson, 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.

she received the request on July 28, 2015, and on July 31, 2015, the third (3rd) business day following receipt of said request, the Custodian responded in writing denying the request based upon language contained in the SST contract. The Custodian set forth the referenced language as follows: “[u]nder the terms and conditions of the ShotSpotter Flex™ Services Agreement between SST and its customers, all ShotSpotter data is the sole and exclusive property of SST, Inc.⁴ ShotSpotter customers are expressly prohibited from distributing or making ShotSpotter data available to others outside the contracting agency without SST’s permission.”⁵ The Custodian also stated that “SST and its confidential, proprietary data are protected under the exemptions defined in the federal Freedom of Information Act (FOIA) and the Public Records Acts (PRA) of virtually all states and are not, therefore, subject to release in response to ... requests.”

Denial of Access Complaint:

On August 4, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian denied his request for the records relevant to this complaint citing “language contained in a SST contract.” The Complainant stated that the Custodian asserted no legal basis for the denial other than the contract language. The Complainant further stated that the Custodian failed to provide a copy of the contract between itself and ShotSpotter. The Complainant noted that the information he is seeking has been provided by other municipalities which have identical contracts with ShotSpotter.

Statement of Information:

On September 21, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on July 28, 2015, and responded in writing on July 31, 2015. The Custodian certified that the Complainant seeks electronic records of all incidents of possible gunshots recorded by ShotSpotter Flex sensors used to generate summary reports for the city from January 1, 2013 to present including: (1) date and time of incident; (2) location (latitude and longitude); (3) address; (4) incident type; and (5) beat.

The Custodian asserted that the report sought by the Complainant is trade secret and proprietary commercial or financial information pursuant to N.J.S.A. 47:1A-1.1 and should therefore be dismissed. The Custodian cites Communication Workers of America, et al. v. Rousseau et al., 417 N.J. Super. 412 (Law Div. 2008), wherein the plaintiff’s OPRA request for investment agreements and side letters with the Department of Treasury was denied as trade secret and proprietary commercial or financial information pursuant to N.J.S.A. 47:1A-1.1. The Custodian asserted that the court found that the requested records were proprietary and financial records. The Custodian then stated that the court set forth six factors which must be considered to conclude whether there was a proper denial: (1) the extent to which the information is known outside of the owner’s business; (2) the extent to which it is known by employees and others involved in the owner’s business; (3) the extent of measures taken by the owner to guard

⁴ SST, Inc. (“SST”) was formerly ShotSpotter Inc. SST is the vendor for ShotSpotter Gunshot Location System solutions. See <https://www.officer.com/command-hq/technology/communications/company/10032280/sst-inc-formerly-shotspotter-inc>

⁵ The Custodian did not mention whether, upon receipt of the request, there was an attempt to obtain SST’s permission to “. . . distribut[e] or mak[e] Shotspotter data available to others outside the contracting agency ...”

the secrecy of the information; (4) the value of the information to the owner and to his competitors; (5) the amount of effort or money expended by the owner in developing this information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. The Custodian certified that in Communication Workers, the court held that the requested agreements met the six part test and were properly denied as trade secret confidential information.

The Custodian certified that upon receiving the request in the instant complaint, the Law Department contacted SST about its contract with the City. The Custodian stated that SST asserted that per the agreement, all ShotSpotter data are the sole and exclusive property rights of SST and the City is prohibited from disclosing the data. The Custodian certified that SST also informed the Law Department that the requested data are the company's main product and the company derives substantial economic value from retaining the right to resell the data to other customers. Thus, SST keeps the data confidential by inserting confidentiality clauses in all customer agreements.

The Custodian certified that SST provided the City with a redacted version of the ShotSpotter report, which details the incident type, date of the incident and an abbreviated version of the latitude and longitude. The Custodian attached this report to the SOI as Exhibit C. The Custodian certified that if the Complainant were to look up the coordinates he would see a neighborhood instead of a specific address. However, the Custodian stated that SST uses the redacted information to sell to other government agencies, therefore “. . . this information must remain confidential to ensure that SST continues to operate.”⁶

The Custodian certified that SST takes precautions to ensure the secrecy of their proprietary information by including confidentiality clauses in their contracts and by denying requests for similar information. The Custodian argued that the Council should uphold the City's denial pursuant to Communication Workers, 417 N.J. Super. 412.

Analysis

Sufficiency of Response

OPRA provides that a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g). Further, in Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008), the GRC held that “. . . [t]he Custodian's response was legally insufficient because he failed to respond to each request item individually.” Therefore, the Custodian has violated N.J.S.A. 47:1A-5(g).

Here, the Custodian responded to the Complainant's OPRA request on July 31, 2015 by denying the ShotSpotter data; however, the Custodian did not set forth each request item individually. By failing to list each request item individually, the Custodian did not address the Complainant's request for a copy 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.”

⁶ The Custodian did not reconcile her disclosure of the redacted report as Exhibit C of the SOI with her certification that “this information must remain confidential.”

Therefore, the Custodian's response was insufficient because she failed to respond in writing to each request item contained in the request individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff, GRC 2007-272.

Timeliness

Unless a shorter time period is otherwise provided, a custodian must grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond accordingly results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁷ Thus, a custodian's failure to respond in writing to a complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Likewise, barring extenuating circumstances, a custodian's failure to respond immediately in writing to a complainant's OPRA request for immediate access records, either granting access, denying access, seeking clarification, or requesting an extension of time, also results in a "deemed" denial of the request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody v. Middletown Twp. Public Schools, GRC Complaint No. 2005-98 (December 2005) and Harris v. NJ Dep't of Corr., GRC Complaint No. 2011-65 (August 2012). See also Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007), holding that the custodian was obligated to immediately notify the complainant as to the status of immediate access records.

OPRA provides that "[i]mmediate access ordinarily shall be granted to budgets, bills, vouchers, *contracts*, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information." (Emphasis added.) N.J.S.A. 47:1A-5(e). Here, the Complainant requested, *inter alia*, ... the most recent contract between the city and ShotSpotter ..." However, the Custodian failed to grant access, deny access, seek clarification or request an extension of time with respect to the request item. Further, the Custodian failed to provide an explanation that would reasonably justify a delay in access to the requested records.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time immediately results in a "deemed" denial of the Complainant's OPRA request for the most recent contract between the city and ShotSpotter pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody, GRC 2005-98. See also Harris, GRC 2011-65.

⁷ A custodian's written response, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

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.

Request item number 1 - records of all incidents of possible gunshots by ShotSpotter Flex sensors used to generate summary reports for the city from January 1, 2013 to May 8, 2015.

In Drange v. Camden County Office of Archives and Records Management, GRC Complaint No. 2015-265 (Interim Order December 18, 2018), the complainant requested ShotSpotter data.⁸ The custodian denied access via redaction of the ID number, time, address, rounds fired, and latitude and longitude coordinates beyond three decimal places for each incident. The custodian denied access to these segments of the record for one of the same reasons set forth in the instant complaint; to wit, that the contractual agreement prohibited disclosure of the data because it consists of trade secret and/or proprietary information. In Drange, GRC 2015-265, the Council conducted an *in camera* examination of the record. The Council found that the record listed alleged gun shots detected from audio sensors installed by ShotSpotter. The Council also found that the record assigns each incident an identification number that identifies whether the incident involved one or more gunshots, the date and time of the incident, a nearby address, the approximate number of rounds fired, and latitude and longitude coordinates.

Following the *in camera* examination, the Council noted that although the custodian asserted that its contractual agreement with ShotSpotter prevents them from disclosing the redacted information, such confidentiality agreements do not operate to exempt records from disclosure under OPRA. Specifically, the Council determined that confidentiality agreements with vendors do not fall under the protections afforded by N.J.S.A. 47:1A-9 for other laws, regulations and privileges. Therefore, the Council concluded that the custodian could not solely rely upon the language contained in a vendor contract to deny access to government records.

With respect to information which ShotSpotter considered trade secret or proprietary information exempt under N.J.S.A. 47:1A-1.1, the Council in Drange, GRC 2015-265 looked to Newark Morning Star Ledger Co. v. New Jersey Sports & Exposition Auth., 423 N.J. Super. 140, 168 (App. Div. 2011). In Newark Morning Star Ledger the court noted that 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. Additionally, Newark Morning Star Ledger determined that trade secrets consist of information used in one’s business which provides an advantage over competitors who do not know or use it. Id. The Council found that neither the custodian nor ShotSpotter provided an adequate explanation on how the incident data qualified as “proprietary” or “trade secrets” under OPRA.

⁸ These are the same records that are at issue in request item number 1 of the instant complaint.

Although in the instant complaint, the Custodian did more cogently argue that the vendor was entitled to confidentiality of its proprietary information, the GRC is not convinced that the Custodian's argument should preclude disclosure of *all* of the records sought by the Complainant. The Custodian relied upon a Law Division decision which was very fact sensitive with respect to financial information. And, as did the custodian in Drange, GRC 2015-265, the Police Department and the Custodian here pointed to its agreement with ShotSpotter which stated in part that the data obtained via the software and devices remain the exclusive property of ShotSpotter.

Although, the Council has previously held that records cannot be withheld from disclosure based solely upon the contractual terms of a third-party vendor, a persuasive argument was made in Drange, GRC 2015-265, that portions of the requested data could be used to pinpoint the exact location of a shooting incident. This could lead to identification of a victim and/or witness, thereby placing them in jeopardy. Furthermore, ShotSpotter devices are used to notify police of potential gunfire and thereby facilitate a rapid response. Disclosing the exact coordinates could reveal the location of the ShotSpotter devices and subject them to damage or theft, compromising a rapid response to shooting incidents. Therefore, in Drange, GRC 2015-265, the Council decided that disclosing the requested data in unredacted form could pose a risk to surveillance measures and techniques utilized by law enforcement under N.J.S.A. 47:1A-1.1, and concluded that the custodian lawfully redacted the time, address, and precise coordinates for each incident.

Therefore here, the Custodian unlawfully denied access to the records of the ShotSpotter incident data requested by the Complainant. N.J.S.A. 47:1A-6. Thus, the Custodian shall disclose said records, redacted to deny access to the time, address, and precise coordinates for each incident. N.J.S.A. 47:1A-1.1. See Drange, GRC 2015-265 (I/O December 2018).

Request item number 2 - the most recent contract between the city and ShotSpotter.

The Complainant, in his request, sought a copy of the “most recent contract between the city and ShotSpotter.” However, the Custodian neither addressed the requested record in her response nor provided a legal explanation for denying the record.

Therefore, the Custodian failed to bear her burden of proving that the denial of access to request item number 2, a copy of the most recent contract between the City and ShotSpotter, was lawful. N.J.S.A. 47:1A-6. Therefore, the Custodian shall disclose said record to the Complainant.

Request item number 3 – any and all supporting materials that document the city’s efforts to verify the accuracy of the data provided by ShotSpotter.

The Complainant requested a copy of “any and all supporting materials that document the city’s efforts to verify the accuracy of the data provided by ShotSpotter.” However, the Custodian neither addressed the requested record in her response nor provided a legal explanation for denying the record, if any.

Therefore, the Custodian failed to bear her burden of proving that the denial of access to request item number 3, any record(s) documenting the City’s efforts to verify the accuracy of the

data provided by ShotSpotter, was lawful. N.J.S.A. 47:1A-6. Therefore, the Custodian must disclose said record(s) to the Complainant, if any.

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 Custodian's response was insufficient because she failed to respond in writing to each request item contained in the request individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time immediately results in a "deemed" denial of the Complainant's OPRA request for the most recent contract between the city and ShotSpotter pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody v. Middletown Twp. Public Schools, GRC Complaint No. 2005-98 (December 2005). See also Harris v. NJ Dep't of Corr., GRC Complaint No. 2011-65 (August 2012).
3. The Custodian unlawfully denied access to the records of the ShotSpotter incident data requested by the Complainant. N.J.S.A. 47:1A-6. Thus, the Custodian shall disclose said records, redacted to deny access to the time, address, and precise coordinates for each incident. N.J.S.A. 47:1A-1.1. See Drange v. Camden County Office of Archives and Records Management, GRC Complaint No. 2015-265 (Interim Order December 18, 2018).
4. The Custodian failed to bear her burden of proving that the denial of access to request item number 2, a copy of the most recent contract between the City and ShotSpotter, was lawful. N.J.S.A. 47:1A-6. Therefore, the Custodian shall disclose said record to the Complainant.
5. **The Custodian shall comply with paragraphs #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, if applicable. Further, the Custodian shall simultaneously deliver⁹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,¹⁰ to the Council Staff.¹¹

6. The Custodian failed to bear her burden of proving that the denial of access to request item number 3, any record(s) documenting the City's efforts to verify the accuracy of the data provided by ShotSpotter, was lawful. N.J.S.A. 47:1A-6. Therefore, the Custodian must disclose said record(s) to the Complainant, if any.
7. **The Custodian shall comply with paragraph #6 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, if applicable. In the event the Custodian is unable to comply with paragraph #6, the Custodian shall provide proof that the denial of access is lawful. Further, the Custodian shall simultaneously deliver a certification of compliance or the reason(s) for noncompliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Council Staff.**
8. 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: John E. Stewart
Staff Attorney

March 19, 2019

⁹ 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.

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

¹¹ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.