



**State of New Jersey**  
DEPARTMENT OF COMMUNITY AFFAIRS  
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**PHILIP D. MURPHY**  
*Governor*

**LT. GOVERNOR SHEILA Y. OLIVER**  
*Commissioner*

**FINAL DECISION**

**January 31, 2019 Government Records Council Meeting**

Benny Cardona (o/b/o City of Newark  
Public Safety Department, Fire Division)  
Complainant

Complaint No. 2016-265

v.

NJ Department of Health, Division of Public Health  
Infrastructure Laboratories and Emergency Preparedness  
Custodian of Record

At the January 31, 2019 public meeting, the Government Records Council (“Council”) considered the January 22, 2019 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that the Custodian has borne his burden of proof that he lawfully denied access to the Complainant’s OPRA request seeking the remaining BLS and ALS quarterly reports for University Hospital and Ironbound. N.J.S.A. 47:1A-6. Specifically, the Custodian certified that all responsive records have been provided, and that the information contained in the requested quarterly reports are now provided directly to DOH via an electronic system. See Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), and Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

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 31<sup>st</sup> Day of January, 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: February 5, 2019**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff  
January 31, 2019 Council Meeting**

**Benny Cardona (on behalf of City of Newark<sup>1</sup>  
Public Safety Dep't, Fire Div.)  
Complainant**

**GRC Complaint No. 2016-265**

v.

**N.J. Dep't of Health, Div. of Public Health<sup>2</sup>  
Infrastructure Lab. and Emergency Preparedness  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies of:

1. All quarterly EMS reports from 2013, 2014, and 2015 from University Hospital EMS Newark ("University Hospital") for both BLS & ALS.
2. All quarterly EMS reports from 2013, 2014, and 2015 from Ironbound EMS ("Ironbound") for BLS.

**Custodian of Record:** Thomas Starr

**Request Received by Custodian:** July 13, 2016

**Response Made by Custodian:** August, 23, 2016; September 12, 2016

**GRC Complaint Received:** September 28, 2016

**Background**<sup>3</sup>

**Request and Response:**

On July 13, 2016, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On August 23, 2016, the Custodian responded in writing stating that BLS reports sought in item No. 1 for University Hospital are not yet available for the requested years. The Custodian further stated that the ALS reports are no longer required to be filed quarterly since they have moved to electronic charting. Regarding item No. 2, the Custodian attached reports for the years 2013 and 2015, but stated that reports for the 2014 year could not be located.

**Supplemental Correspondence:**

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

<sup>2</sup> Represented by Deputy Attorney General Stephen Slocum.

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

Benny Cardona (on behalf of City of Newark) v. N.J. Dep't of Health & Senior Services, Division of Health Emergency Preparedness & Response, 2016-265 – Findings and Recommendations of the Council Staff

On August 26, 2016, the Complainant replied to the Custodian, inquiring as to why University Hospital had not filed BLS reports for the requested years and whether they were penalized for failing to file. On August 30, 2016, the Custodian responded to the Complainant, stating that like the ALS reports, University Hospital's BLS reports were moved to electronic charting, and are not required to be filed quarterly. The Custodian clarified that his previous statement that the BLS reports were not yet available was erroneous.

On September 12, 2016, the Custodian elaborated further on his response to the the OPRA request and the Complainant's follow up questions. The Custodian stated that because University Hospital moved to electronic charting, they no longer file BLS or ALS reports quarterly, and thus no records responsive to item No. 1 exist. The Custodian then stated that the Complainant asked him to create BLS reports through the electronic charting system. The Custodian stated that he is not required to create such records pursuant to OPRA, citing Sussez Commons Assocs., LLC v. Rutgers, 210 N.J. 531, 544 (2012), Bent v. Twp. of Stratford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005), MAG Entm't, LLC v. Div. Alcoholic Beverage Control, 375 N.J. Super. at 546-47 (App. Div. 2005), and Paff v. Galloway Twp., 444 N.J. Super. 495 (App. Div. 2016) rev'd, 229 N.J. 340 (2017).

#### Denial of Access Complaint:

On September 28, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that pursuant to N.J.A.C. 8:40-6.15(e)3, a BLS ambulance service is required to file a quarterly report for emergency responses. The Complainant therefore asserted that University Hospital should be able to provide the requested reports regardless of how it is submitted. The Complainant included an older, but similar request that was settled in mediation,<sup>4</sup> with the requested information provided.

#### Statement of Information:<sup>5</sup>

On February 13, 2017, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on July 13, 2016. The Custodian certified that the responsive records were stored with Thomas Hendrickson ("Mr. Hendrickson") of the Office of Emergency Medical Services ("OEMS"). The Custodian certified that on July 23, 2016, he directed Mr. Hendrickson to provide the requested records. The Custodian certified that Mr. Hendrickson located hard copies of the Ironbound BLS reports for the years 2013 and 2015, but could not find them for the 2014 year. The Custodian also certified that Mr. Hendrickson told him that no BLS reports were located for University Hospital and believed that none had been filed.

The Custodian certified that he responded to the Complainant on August 23, 2016, providing the Ironbound reports for 2013 and 2015 years, and stated that 2014 reports could not

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<sup>4</sup> Cardona v. N.J. Dep't of Health & Senior Servs., Div. of Health Emergency Preparedness & Response, GRC Complaint No. 2011-295 (January 2012).

<sup>5</sup> The matter was transferred to mediation proceedings on October 27, 2016. The matter was then referred back from mediation on January 31, 2017.

Benny Cardona (on behalf of City of Newark) v. N.J. Dep't of Health & Senior Services, Division of Health Emergency Preparedness & Response, 2016-265 – Findings and Recommendations of the Council Staff

be located. The Custodian also stated that ALS reports for University Hospital did not exist as they were converted to electronic format and directly submitted with the Department of Health (“DOH”). The Custodian also stated that he was unable to locate BLS reports for University Hospital and believed they had yet to be filed.

The Custodian then certified that he was informed by Timothy Seplaki of OEMS that University Hospital utilized electronic charting for BLS as well as ALS, and no longer filed quarterly reports since they are shared directly with DOH. The Custodian certified that he notified the Complainant of this information on August 30, 2016.

The Custodian first argued that all responsive records were provided, and that no other responsive records existed. The Custodian contended that, absent evidence to the contrary, his certification is sufficient to demonstrate that there was no denial of access. See Pusterhofer v. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005); Dalal v. Borough of Bergenfield, GRC Complaint No. 2015-322 (January 2016). The Custodian also argued that contrary to the Complainant’s contention, there was no violation of N.J.A.C. 8:40-6.15(e)3 since University Hospital fulfills its reporting obligations via electronic charting and shared directly with DOH. The Custodian also argued that even if there were a violation of this regulation, OPRA cannot be used as an enforcement mechanism for same.

The Custodian certified that electronic charting was not shared with DOH as individual entries from each provider on a quarterly basis. The Custodian certified that instead DOH collects ALS information from all providers throughout the State of New Jersey on an annual basis. The Custodian certified that all ALS data has been shared through electronic charting since 2010.

The Custodian also certified that quarterly BLS reports could not be generated through the electronic charting system, stating that the system contains information that was not included in the quarterly reports. Like the ALS reports, the Custodian certified that the system compiles data from every provider in the State, and organized on an annual basis. Therefore, the Custodian asserted that DOH would have to create a new record to satisfy the Complainant’s request.

The Custodian argued that it is well-settled that “OPRA does not require public agencies to create records.” Paff, 444 N.J. Super. at 502 (quoting Sussex Commons Assocs., LLC, 210 N.J. at 544). Furthermore, the Custodian asserted that “a records custodian is not required to conduct research among its records . . . and correlate data from various government records in the custodian’s possession.” Id. (quoting Bent, 381 N.J. Super. at 37). The Custodian noted that in Paff, the Appellate Division held that “OPRA does not require the creation of a new government record that does not exist at the time of a request, even if the information sought to be included in the new government record is stored or maintained electronically in other government records.” 444 N.J. Super. at 504. The Custodian also stated that even if the record could be created in a few minutes, the request still remained invalid.

The Custodian asserted that in this matter, creating a new record via the electronic system would only be partially responsive, and take approximately one (1) hour to create per year requested by the Complainant. The Custodian stated that these estimates are for BLS and ALS data each. Moreover, the Custodian asserted that the extracted data would also include information that

was not previously available within the quarterly reports. The Custodian concluded that he was not required to create the record in accordance with OPRA and relevant case law, and requested that the GRC uphold the denial of access.

### 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 Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), the custodian certified that the record provided to the complainant was the only record responsive to the request. Id. The Council found that there had thus been no unlawful denial of access. Id. See also Kohn v. Twp. of Livingston, GRC Complaint No. 2009-203 & 2009-211 (January 2011)(holding custodian did not unlawfully deny access when he certified that he provided all responsive records to complainant, and there existed no credible evidence in record to refute such certification). Additionally, the Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

In the instant complaint, the Complainant asserted that the Custodian should possess the remaining quarterly reports as Ironbound and University Hospital are required to provide them to DOH in accordance with N.J.A.C. 8:40-6.15(e)3. However, the Custodian certified that the data contained in those quarterly reports were now provided electronically and shared directly with DOH. As was the case in Burns, the Custodian certified that DOH no longer received those quarterly reports, and therefore do not have any responsive records beyond what was already provided. GRC 2005-68. Additionally, there is no evidence in the record to refute the Custodian’s certification.

Accordingly, the Custodian has borne his burden of proof that he lawfully denied access to the Complainant’s OPRA request seeking the remaining BLS and ALS quarterly reports for University Hospital and Ironbound. N.J.S.A. 47:1A-6. Specifically, the Custodian certified that all responsive records have been provided, and that the information contained in the requested quarterly reports are now provided directly to DOH via an electronic system. See Burns, GRC 2005-68, and Pusterhofer, GRC 2005-49.

Finally, in evaluating the OPRA request based on the evidence of record, the GRC must address the impact of Paff in this complaint. 444 N.J. Super. at 495. In the SOI, the Custodian argued that he was not required to create new records in accordance with Paff, 444 N.J. Super. at 495. However, following the submission of the SOI, the Supreme Court reversed the Appellate Division’s decision in Paff v. Galloway Twp., 227 N.J. 340 (2017). The Supreme Court held that basic e-mail information stored electronically is a “government record” under OPRA, unless an

exemption applies to that information. Id. at 353, 358. The Court further concluded that “electronically stored information extracted from an email is not the creation of a new record or new information; it is a government record.” Id. at 353.

Notwithstanding, the Court’s decision does not change the GRC’s analysis, because the Custodian’s certification provided that the requested information was not readily available as electronic data. The Custodian certified that although the BLS and ALS data are stored electronically, they were no longer organized on a quarterly basis as they were in paper format. The Custodian also certified that the process to convert just some of the requested data into quarterly reports would take approximately one (1) hour to compile per year, per agency. Such actions go well beyond extracting electronic information from a database or e-mail system; thus, Paff is not applicable here. 227 N.J. at 340.

### **Conclusions and Recommendations**

The Council Staff respectfully recommends the Council find that the Custodian has borne his burden of proof that he lawfully denied access to the Complainant’s OPRA request seeking the remaining BLS and ALS quarterly reports for University Hospital and Ironbound. N.J.S.A. 47:1A-6. Specifically, the Custodian certified that all responsive records have been provided, and that the information contained in the requested quarterly reports are now provided directly to DOH via an electronic system. See Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), and Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

Prepared By: Samuel A. Rosado  
Staff Attorney

January 22, 2019