



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 28, 2020 Government Records Council Meeting

Ryan Cruz
Complainant

Complaint No. 2018-17

v.

Township of Hillside (Union)
Custodian of Record

At the April 28, 2020 public meeting, the Government Records Council (“Council”) considered the April 3, 2020 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 February 26, 2020 Interim Order because she responded in the extended time frame disclosing the responsive personnel information to the Complainant. The current Custodian also simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian did not originally disclose certain Year-To-Date and overtime information responsive to the Complainant’s OPRA requests, she did disclose some of the requested information from the outset of said requests. Further, the current Custodian complied with the Council’s February 26, 2020 Interim Order by providing the outstanding information to the Complainant within the extended time frame to comply. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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



Final Decision Rendered by the
Government Records Council
On The 28th Day of April 2020

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: April 30, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
April 28, 2020 Council Meeting**

**Ryan Cruz¹
Complainant**

GRC Complaint No. 2018-17

v.

**Township of Hillside (Union)²
Custodial Agency**

Records Relevant to Complaint:

November 8, 2017 OPRA request: Hard copies via pickup of overtime amounts accrued for Deputy Chiefs Doug Ferrigno, Sr., William Pellettiere, and Jude De Lane from 2014 to present.

December 6, 2017 OPRA request: Hard or electronic copies of overtime amounts accrued for Deputy Chiefs Ferrigno, Pellettiere, and De Lane from 2014 to present.

December 18, 2017 OPRA request: Electronic copies via e-mail of “ADP” earnings statements (pay stubs) for Deputy Chiefs Ferrigno, Pellettiere, and De Lane for the pay period ending December 5, 2017 (pay date of December 14, 2017).

January 16, 2018 OPRA request: Electronic copies via e-mail of “Year[-]To[-]Date” (“YTD”) salaries for Township of Hillside (“Township”) Fire Department (“HFD”) employees from 2017.

Custodian of Record: Lorraine Messiah³

Request Received by Custodian: November 8, 2017; December 6, 2017; December 19, 2017; January 16, 2018

Response Made by Custodian: November 27, 2017; December 15, 2017; December 28, 2017; January 25, 2018

GRC Complaint Received: February 6, 2018

Background

February 26, 2020 Council Meeting:

At its February 26, 2020 public meeting, the Council considered the January 21, 2020 Supplemental Findings and Recommendations of the Executive Director and all related

¹ No legal representation listed on record.

² Represented by Ellen M. Harris, Esq. (Bridgewater, NJ). Previously represented by Rhea Moore, Esq. (Hillside, NJ).

³ The current custodian of record is Beverly Harris. The prior custodian of record was Hassana Salaam-Rivers.

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 current Custodian failed to comply with the Council's November 12, 2019 Interim Order. First, the current Custodian failed to timely respond to the Council's Order by approximately twenty-seven (27) business days. Additionally, the current Custodian's response did not cure any of the current outstanding issues relating to the existence of responsive 2014 overtime figures and "Year-To-Date" numbers.
2. Pursuant to Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-218, *et seq.* (Interim Order dated April 26, 2016), the Council is giving the current Custodian a final opportunity to conduct a sufficient search for the responsive 2014 overtime information, as well as the responsive "Year-To-Date" figures sought by the Complainant. Upon conducting said search, the current Custodian shall disclose the responsive information to the Complainant. However, should the current Custodian's sufficient search fail to yield the responsive information, the Custodian must certify to this fact, inclusive of a detailed explanation of said search.
3. **The Custodian shall comply with conclusion Nos. 1 and 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver⁴ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁵ to the Executive Director.⁶**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On February 28, 2020, the Council distributed its Interim Order to all parties. On March 5, 2020, Custodian's Counsel e-mailed the Government Records Council ("GRC") seeking an extension of time until March 10, 2020 to respond to the Interim Order. On the same day, the GRC responded granting an extension of five (5) business days, or until March 12, 2020, to respond to the Interim Order.

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.

On March 12, 2020, the current Custodian responded to the Council's Interim Order copying the Complainant and attaching a legal certification from Payroll Accountant Imebet Cummings. Therein, the current Custodian certified that in response to the November 12, 2019 Interim Order, she provided to the Complainant the YTD earnings⁷ she received from Ms. Cummings.

The current Custodian certified that after receiving the February 26, 2020 Interim Order, she contacted Ms. Cummings to obtain responsive information from ADP, the Township's former payroll company. Cummings Cert. ¶ 2. The current Custodian certified that she was disclosing to the Complainant the records obtained from ADP's system that the Township maintained following a contract termination. The current Custodian certified that the system capabilities were limited due to the contract termination; thus, she was providing the records in the format in which they existed. Cummings Cert. ¶ 2-3

Analysis

Compliance

At its February 26, 2020 meeting, the Council ordered the current Custodian to conduct a sufficient search for and disclose the responsive 2014 overtime information and YTD figures sought by the Complainant, or to certify if no records could be located. The Council also ordered the current Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule, R. 1:4-4, to the Executive Director. On February 28, 2020, 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 March 6, 2020.

On March 5, 2020, Custodian's Counsel sought an extension of time, which the GRC granted through March 12, 2020. On March 12, 2020, the final business day of the extended time frame, the Custodian responded to the Interim Order. Therein, the current Custodian certified that Ms. Cummings accessed ADP's system to locate potentially responsive records. The current Custodian certified that she was providing to the Complainant all those records extracted from the system in their original format.

A review of the disclosed records reveals that the current Custodian has complied with the Council's Order. Specifically, the current Custodian provided overtime information for each Deputy Chief from 2014. The current Custodian also provided YTD earnings for each individual Deputy Chief for 2017, which was included in the seventeen (17) pages of records disclosed to the Complainant. The GRC is thus satisfied that the current Custodian has complied with the Council's Order.

Therefore, the Custodian complied with the Council's February 26, 2020 Interim Order because she responded in the extended time frame disclosing the responsive personnel information

⁷ The GRC notes that said document, which the Township twice supplied to the Complainant as responsive, identified the YTD totals effective as of January 22, 2018. There was no indication in that record that the YTD totals reflected 2017 earnings nor did any party certify to such.

to the Complainant. The current Custodian also simultaneously provided certified confirmation of compliance to the Executive Director.

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)).

In the matter before the Council, although the Custodian did not originally disclose certain YTD and overtime information responsive to the Complainant’s OPRA requests, she did disclose some of the requested information from the outset of said requests. Further, the current Custodian complied with the Council’s February 26, 2020 Interim Order by providing the outstanding information to the Complainant within the extended time frame to comply. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council’s February 26, 2020 Interim Order because she responded in the extended time frame disclosing the responsive personnel information to the Complainant. The current Custodian also simultaneously provided certified confirmation of compliance to the Executive Director.

2. Although the Custodian did not originally disclose certain Year-To-Date and overtime information responsive to the Complainant's OPRA requests, she did disclose some of the requested information from the outset of said requests. Further, the current Custodian complied with the Council's February 26, 2020 Interim Order by providing the outstanding information to the Complainant within the extended time frame to comply. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso
Executive Director

April 3, 2020



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

February 26, 2020 Government Records Council Meeting

Ryan Cruz
Complainant

Complaint No. 2018-17

v.

Township of Hillside (Union)
Custodian of Record

At the February 26, 2020 public meeting, the Government Records Council (“Council”) considered the January 21, 2020 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 current Custodian failed to comply with the Council’s November 12, 2019 Interim Order. First, the current Custodian failed to timely respond to the Council’s Order by approximately twenty-seven (27) business days. Additionally, the current Custodian’s response did not cure any of the current outstanding issues relating to the existence of responsive 2014 overtime figures and “Year-To-Date” numbers.
2. Pursuant to Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-218, *et seq.* (Interim Order dated April 26, 2016), the Council is giving the current Custodian a final opportunity to conduct a sufficient search for the responsive 2014 overtime information, as well as the responsive “Year-To-Date” figures sought by the Complainant. Upon conducting said search, the current Custodian shall disclose the responsive information to the Complainant. However, should the current Custodian’s sufficient search fail to yield the responsive information, the Custodian must certify to this fact, inclusive of a detailed explanation of said search.
3. **The Custodian shall comply with conclusion Nos. 1 and 2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver¹**

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.

certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³

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

Interim Order Rendered by the
Government Records Council
On The 26th Day of February 2020

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 28, 2020

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**

**Supplemental Findings and Recommendations of the Executive Director
February 26, 2020 Council Meeting**

**Ryan Cruz¹
Complainant**

GRC Complaint No. 2018-17

v.

**Township of Hillside (Union)²
Custodial Agency**

Records Relevant to Complaint:

November 8, 2017 OPRA request: Hard copies via pickup of overtime amounts accrued for Deputy Chiefs Doug Ferrigno, Sr., William Pellettiere, and Jude De Lane from 2014 to present.

December 6, 2017 OPRA request: Hard or electronic copies of overtime amounts accrued for Deputy Chiefs Ferrigno, Pellettiere, and De Lane from 2014 to present.

December 18, 2017 OPRA request: Electronic copies via e-mail of “ADP” earnings statements (pay stubs) for Deputy Chiefs Ferrigno, Pellettiere, and De Lane for the pay period ending December 5, 2017 (pay date of December 14, 2017).

January 16, 2018 OPRA request: Electronic copies via e-mail of “Year[-]To[-]Date” (“YTD”) salaries for Township of Hillside (“Township”) Fire Department (“HFD”) employees from 2017.

Custodian of Record: Lorraine Messiah³

Request Received by Custodian: November 8, 2017; December 6, 2017; December 19, 2017; January 16, 2018

Response Made by Custodian: November 27, 2017; December 15, 2017; December 28, 2017; January 25, 2018

GRC Complaint Received: February 6, 2018

Background

November 12, 2019 Council Meeting:

At its November 12, 2019 public meeting, the Council considered the October 30, 2019 Findings and Recommendations of the Executive Director and all related documentation submitted

¹ No legal representation listed on record.

² Represented by Ellen M. Harris, Esq. (Bridgewater, NJ). Previously represented by Rhea Moore, Esq. (Hillside, NJ).

³ The current custodian of record is Beverly Harris. The prior custodian of record was Hassana Salaam-Rivers.

by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian may have unlawfully denied access to overtime information for the Deputy Chiefs from 2014. N.J.S.A. 47:1A-6. Thus, the Custodian shall disclose the Deputy Chiefs' overtime information. N.J.S.A. 47:1A-10. Alternatively, if no overtime information for one or more of the Deputy Chiefs does not exist, the Custodian must certify to this fact.
2. The Custodian may have unlawfully denied access to the Complainant's December 18, 2017 and January 16, 2018 OPRA requests to the extent that they sought year-to-date earnings. N.J.S.A. 47:1A-6. Specifically, year-to-date earnings is identifiable "payroll" information that should be disclosed if possible. N.J.S.A. 47:1A-10; Jackson v. Kean Univ., GRC Complaint No. 2002-98 (February 2004). Thus, the Custodian must disclose pay stubs responsive to the Complainant's December 18, 2017 OPRA request inclusive of the year-to-date earnings of the Deputy Chiefs as of December 5, 2017, with applicable redactions in accordance with O'Shea v. Twp. of West Milford (Passaic), GRC Complaint No. 2008-283 (November 2009). Further, the Custodian must disclose the year-to-date earnings for all employees current to the date of the January 16, 2018 OPRA request. Should the Custodian be unable to produce the year-to-date earnings for either or both OPRA requests, she must provide a detailed certification that no records exist with an explanation of why she could not produce same.
3. **The Custodian shall comply with conclusion Nos. 1 and 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver⁴ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁵ to the Executive Director.⁶**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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.

Procedural History:

On November 14, 2019, the Council distributed its Interim Order to all parties.⁷ On December 27, 2019, the Government Records Council (“GRC”) e-mailed the current Custodian advising that her response to the Council’s Order was “woefully late.” The GRC summarized the Council’s Order and required that the current Custodian respond by close of business on January 6, 2020. The GRC noted that the current Custodian’s failure to respond would result in the adjudication of this complaint absent compliance.

On January 3, 2020, the current Custodian responded to the Council’s Interim Order attaching a legal certification from Payroll Accountant Imebet Cummings. Therein, the current Custodian certified that she was not the custodian of record at the time of the subject OPRA request. The current Custodian affirmed that upon review of the Township’s responses, she found that the Complainant previously received YTD earnings and overtime information for each of the Deputy Chiefs. Imebet Cert. ¶ 2-3. The current Custodian further certified that no additional responsive records existed. Imebet Cert. ¶ 3. The current Custodian noted that she attached those responses to the instant certification.

Analysis

Compliance

At its November 12, 2019 meeting, the Council ordered the Custodian to disclose outstanding overtime and YTD information or to certify if none existed for either and a detailed explanation as to why. Further, the Custodian was required to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On November 14, 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 November 21, 2019.

Following the expiration of the compliance time frame, the GRC attempted to procure a response from the current Custodian, with a final notice sent via e-mail on December 27, 2019. Thereafter, on January 3, 2020, approximately thirty-two (32) business day after receipt of the Council’s Order, the current Custodian provided a certification in response to same. Therein, the current Custodian certified that the Township provided to the Complainant all responsive records, including overtime and YTD information already supplied. The current Custodian further certified that the Township’s prior responses were attached to the certification.

Upon review of the evidence of record, as well as the current Custodian’s response to the Council’s Order, the GRC is not satisfied that the current Custodian complied with same. Specifically, the responses attached to the certification were those initially sent to the Complainant. It was those responses that prompted him to file the instant complaint arguing that the Township failed to provide responsive overtime and YTD information. It was also those responses that

⁷ Following the expiration of the compliance time frame, GRC staff attempted to contact the Township to seek a status on compliance. On or about November 27, 2019, the Township advised of a custodian of record change and that it would respond to the Council’s Order.

prompted the Council to require additional disclosures or a “detailed explanation” as to why the Township could not produce it. Further, the current Custodian and Ms. Imebet certified that no additional records existed; however, neither certification gives details of the search conducted. Thus, the same deficiencies raised by the Council in its Interim Order remain unchanged.

Therefore, the current Custodian failed to comply with the Council’s November 12, 2019 Interim Order. First, the current Custodian failed to timely respond to the Council’s Order by approximately twenty-seven (27) business days. Additionally, the current Custodian’s response did not cure any of the current outstanding issues relating to the existence of responsive 2014 overtime figures and YTD numbers.

In the past, the GRC has provided custodians a “final opportunity to disclose [records required to be disclosed] and/or provide comprehensive arguments as to why same are not subject to disclosure.” See Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-218, *et seq.* (Interim Order dated April 26, 2016) at 4. In Carter, the custodian submitted compliance in response to the Council’s September 29, 2015 Interim Order. However, in reviewing that compliance, it became evident that it was incomplete. Specifically, several attachments were not disclosed, and the custodian did not provide an explanation for the nondisclosure. The Council thus held that the custodian did not comply fully with the its Order and provided him “a ‘final opportunity’” to comply. Carter, GRC 2014-218 (citing Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-287 (Interim Order dated April 28, 2015) at 7).

Here, the current Custodian responded to the Council’s Order, but failed to adequately address same. It is not clear here whether the current Custodian misunderstood the Order or simply believed that the Township adequately responded to the Complainant’s OPRA requests. Notwithstanding, the fact remains that the evidence of record does not support a finding that the Deputy Chiefs’ 2014 overtime information and YTD salary figures do not exist. As was the case in Carter, the current Custodian’s compliance here was incomplete, albeit more so here. An additional order should ensure that the current Custodian conducts a sufficient search for the responsive overtime and YTD information. Thereafter, the Custodian shall either disclose the responsive information that exists or certify if no records existed, inclusive of a detailed explanation of the steps taken to locate same.

Accordingly, and pursuant to Carter, GRC 2014-218, the Council is giving the current Custodian a final opportunity to conduct a sufficient search for the responsive 2014 overtime information, as well as the responsive YTD figures sought by the Complainant. Upon conducting said search, the current Custodian shall disclose the responsive information to the Complainant. However, should the current Custodian’s sufficient search fail to yield the responsive information, the Custodian must certify to this fact, inclusive of a detailed explanation of said search.

Knowing & Willful

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The current Custodian failed to comply with the Council's November 12, 2019 Interim Order. First, the current Custodian failed to timely respond to the Council's Order by approximately twenty-seven (27) business days. Additionally, the current Custodian's response did not cure any of the current outstanding issues relating to the existence of responsive 2014 overtime figures and "Year-To-Date" numbers.
2. Pursuant to Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-218, *et seq.* (Interim Order dated April 26, 2016), the Council is giving the current Custodian a final opportunity to conduct a sufficient search for the responsive 2014 overtime information, as well as the responsive "Year-To-Date" figures sought by the Complainant. Upon conducting said search, the current Custodian shall disclose the responsive information to the Complainant. However, should the current Custodian's sufficient search fail to yield the responsive information, the Custodian must certify to this fact, inclusive of a detailed explanation of said search.
3. **The Custodian shall comply with conclusion Nos. 1 and 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver⁸ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁹ to the Executive Director.¹⁰**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Executive Director

January 21, 2020¹¹

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.

¹¹ This complaint was prepared for adjudication at the Council's January 28, 2020 meeting, but could not be adjudicated due to lack of quorum.



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

PHILIP D. MURPHY
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LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

November 12, 2019 Government Records Council Meeting

Ryan Cruz
Complainant

Complaint No. 2018-17

v.

Township of Hillside (Union)
Custodian of Record

At the November 12, 2019 public meeting, the Government Records Council (“Council”) considered the October 30, 2019 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 may have unlawfully denied access to overtime information for the Deputy Chiefs from 2014. N.J.S.A. 47:1A-6. Thus, the Custodian shall disclose the Deputy Chiefs’ overtime information. N.J.S.A. 47:1A-10. Alternatively, if no overtime information for one or more of the Deputy Chiefs does not exist, the Custodian must certify to this fact.
2. The Custodian may have unlawfully denied access to the Complainant’s December 18, 2017 and January 16, 2018 OPRA requests to the extent that they sought year-to-date earnings. N.J.S.A. 47:1A-6. Specifically, year-to-date earnings is identifiable “payroll” information that should be disclosed if possible. N.J.S.A. 47:1A-10; Jackson v. Kean Univ., GRC Complaint No. 2002-98 (February 2004). Thus, the Custodian must disclose pay stubs responsive to the Complainant’s December 18, 2017 OPRA request inclusive of the year-to-date earnings of the Deputy Chiefs as of December 5, 2017, with applicable redactions in accordance with O’Shea v. Twp. of West Milford (Passaic), GRC Complaint No. 2008-283 (November 2009). Further, the Custodian must disclose the year-to-date earnings for all employees current to the date of the January 16, 2018 OPRA request. Should the Custodian be unable to produce the year-to-date earnings for either or both OPRA requests, she must provide a detailed certification that no records exist with an explanation of why she could not produce same.
3. **The Custodian shall comply with conclusion Nos. 1 and 2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for**

each redaction, 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 Executive Director.³

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

Interim Order Rendered by the
Government Records Council
On The 12th Day of November 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: November 14, 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 Executive Director
November 12, 2019 Council Meeting**

**Ryan Cruz¹
Complainant**

GRC Complaint No. 2018-17

v.

**Township of Hillside (Union)²
Custodial Agency**

Records Relevant to Complaint:

November 8, 2017 OPRA request: Hard copies via pickup of overtime amounts accrued for Deputy Chiefs Doug Ferrigno, Sr., William Pellettiere, and Jude De Lane from 2014 to present.

December 6, 2017 OPRA request: Hard or electronic copies of overtime amounts accrued for Deputy Chiefs Ferrigno, Pellettiere, and De Lane from 2014 to present.

December 18, 2017 OPRA request: Electronic copies via e-mail of “ADP” earnings statements (pay stubs) for Deputy Chiefs Ferrigno, Pellettiere, and De Lane for the pay period ending December 5, 2017 (pay date of December 14, 2017).

January 16, 2018 OPRA request: Electronic copies via e-mail of “Year[-]To[-]Date” (“YTD”) salaries for Township of Hillside (“Township”) Fire Department (“HFD”) employees from 2017.

Custodian of Record: Lorraine Messiah

Request Received by Custodian: November 8, 2017; December 6, 2017; December 19, 2017; January 16, 2018

Response Made by Custodian: November 27, 2017; December 15, 2017; December 28, 2017; January 25, 2018

GRC Complaint Received: February 6, 2018

Background³

Request and Response:

On November 8, 2017, the Complainant submitted an Open Public Records Act (“OPRA”)

¹ No legal representation listed on record.

² Represented by Rhea Moore, Esq. (Hillside, 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 Executive Director the submissions necessary and relevant for the adjudication of this complaint.

request to the Custodian seeking the above-mentioned records. On November 27, 2017, Deputy Clerk Ashely Wyatt responded in writing on behalf of the Custodian three (3) pages of reports for the Deputy Chiefs from 2015, 2016, and 2017.

On December 6, 2017, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records, noting that this was his second attempt. The Complainant further noted that he was only seeking overtime earnings and not “straight time.” On December 15, 2017, Imebet Cummings e-mailed Ms. Wyatt stating that the records provided in response to the November 8, 2017 OPRA request were correct. Ms. Cummings noted that not all employees “get 1.5%.” Ms. Cummings finally noted that “[a]ll overtime [is] straight time.” On December 15, 2017, Ms. Wyatt responded in writing on behalf of the Custodian providing a copy of Ms. Cummings’ e-mail to the Complainant.

On December 18, 2017, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On December 27, 2017, Ms. Wyatt e-mailed the former Township attorney requesting that she review the attached pay stubs. Ms. Wyatt noted that she did not believe any redactions were warranted, but they nonetheless wanted the attorney’s opinion. On December 28, 2017, Ms. Wyatt responded in writing on behalf of the Custodian disclosing six (6) pages of pay stubs for the Deputy Chiefs within the identified pay period. On the same day, the Complainant responded alleging that the YTD information was not included in the disclosed records. The Complainant thus requested that the information be produced. Ms. Wyatt responded noting that the pay stubs came directly from the Finance Department and that she was confused as to what could be missing. The Complainant responded clarifying that the pay stubs appeared to be missing the “[YTD] column.” The Complainant requested that Ms. Wyatt explain why this information was not included and whether any additional information, such as overtime earned, was redacted or excluded. Ms. Wyatt forwarded the Complainant’s e-mails to Ms. Cummings asking whether another version of the pay stub containing YTD earnings.

On December 29, 2017, Daihnalee Cardona e-mailed the Complainant seeking an extension through January 10, 2018 to respond. On January 3, 2018, Ms. Wyatt sought an update on whether alternate pay stubs existed. On January 5, 2018, Ms. Wyatt e-mailed the Complainant advising that no additional records would be provided. Ms. Wyatt noted that she was not sure if the electronic record came in any other format.

January 16, 2018, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On January 25, 2018, the Custodian responded in writing disclosing three (3) pages of reports for the Deputy Chiefs from 2015, 2016, and 2017.

Denial of Access Complaint:

On February 6, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that on four (4) occasions, he sought access to “[YTD] amount earnings” for members of HFD. The Complainant argued that in each instance, the Township disclosed records that did not include said information. The Complainant further argued that he did not believe that the disclosed records contained no redactions.

Statement of Information:⁴

On March 26, 2018, the Custodian filed a Statement of Information (“SOF”). The Custodian certified that she received the Complainant’s four (4) OPRA requests on November 8, 2017, December 6, 2017, December 19, 2017, and January 16, 2018 respectively. The Custodian certified that in each instance, her office forwarded the subject OPRA requests to the Finance Department, who in return provided responsive records for disclosure. The Custodian certified that her office responded in writing to the Complainant’s OPRA requests on November 27, 2017, December 15, 2017, December 28, 2017, and January 25, 2018 disclosing responsive records. The Custodian provided no additional arguments regarding the Complainant’s Denial of Access Complaint allegations.

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.

Regarding personnel records, OPRA begins with a presumption against disclosure and “proceeds with a few narrow exceptions that . . . need to be considered.” Kovalcik v. Somerset Cnty. Prosecutor's Office, 206 N.J. 581, 594 (2011). These are:

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

[N.J.S.A. 47:1A-10 (emphasis added).]

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

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

1. The beginning and ending dates;

⁴ On February 15, 2018, this complaint was referred to mediation. On March 20, 2018, this complaint was referred back to the GRC for adjudication.

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

[Id. (emphasis added).]

Also, in O’Shea v. Twp. of West Milford (Passaic), GRC Complaint No. 2008-283 (November 2009), the complainant challenged the custodian’s redaction of paycheck deductions made to a payroll check register. The Council held that while the register itself fell within the definition of a “payroll records,” the custodian lawfully redacted the itemized deductions because they were not considered “payroll” information. Id. at 7 (citing N.J.S.A. 47:1A-10; Executive Order No. 26 (Gov. McGreevey, 2002)).

In the instant matter, the Complainant argued in the Denial of Access Complaint that the Custodian failed provide records responsive to each of the four (4) OPRA requests at issue here. Specifically, the Complainant argued that the Township failed to provide HFD YTD earnings in response to each of his OPRA requests. In the SOI, the Custodian certified that no unlawful denial of access occurred because the Township provided records responsive to each OPRA request.

November 8, and December 6, 2017 OPRA requests

It should initially be noted that the Complainant did not seek YTD earnings in either his November 8, or December 6, 2017 OPRA requests. Instead, the Complainant sought overtime amounts accrued for three (3) employees from 2014 through present. The Complainant clearly acknowledged this in his December 6, 2017 OPRA request, where he noted that he was “[n]ot requesting straight time wages but overtime earned.” In response to the November 8, 2017 OPRA request, Ms. Wyatt disclosed three (3) pages of records for 2015, 2016 and 2017. In response to the December 6, 2017 OPRA request, Ms. Wyatt confirmed with Ms. Cummings that the three (3) pages provided were accurate and advised the Complainant accordingly.

A review of the evidence of record supports that the three (3) pages Ms. Wyatt disclosed to the Complainant were responsive to these two (2) OPRA requests. Specifically, in response to the December 6, 2017 OPRA request, Ms. Cummings explained that all overtime was billed as “straight time” and not at 1.5%. Ms. Cummings thus stated that the three (3) pages were “correct.” This statement is supported by the paystubs disclosed in response to the Complainant’s December 18, 2017 OPRA request. That disclosure included overtime stub for the Deputy Chiefs marked as

“Str Time,” which coincides with the “Str Time” heading on the pages disclosed in response to these requests.

However, absent from the disclosure was a record showing overtime amounts for 2014. Further, the Custodian did not certify that no overtime accounting for 2014 existed. Thus, an unlawful denial to overtime information for the Deputy Chiefs from 2014 may have occurred.

Accordingly, the Custodian may have unlawfully denied access to overtime information for the Deputy Chiefs from 2014. N.J.S.A. 47:1A-6. Thus, the Custodian shall disclose the Deputy Chiefs’ overtime information. N.J.S.A. 47:1A-10. Alternatively, if no overtime information for one or more of the Deputy Chiefs does not exist, the Custodian must certify to this fact.

December 18, 2017 and January 16, 2018 OPRA requests

In his December 18, 2017 OPRA request, the Complainant sought YTD earnings, but specifically identified “pay stubs” as the record sought. After receiving copies of electronic stubs not including YTD earnings, the Complainant attempted to compel the Township to disclose pay stub containing same. Ms. Wyatt eventually advised the Complainant that no additional pay stubs would be provided, noting that she did not know if the electronic stubs came in any other format. Thus, the Complainant submitted an OPRA request on January 16, 2018 seeking the YTD earnings of every HFD employee. Ms. Wyatt disclosed a listing of all employees “as of 01/22/2018” that appeared to contain only the annual salary of each. This complaint followed, wherein the Complainant contended that the Township failed to disclose YTD earnings.

Initially, the GRC notes that YTD earnings certainly fall within the definition of a “payroll record” as discussed in Jackson, GRC 2002-98. Further, the GRC notes that the Custodian, through Ms. Wyatt, disclosed pay stubs without deduction redactions, which she could have applied based on O’Shea, GRC 2008-283. Notwithstanding, and upon review of the evidence of record here, the GRC finds that the existence of YTD earnings responsive to these two (2) OPRA requests is still in controversy.

Regarding the December 18, 2017 OPRA request, the Township disclosed pay stubs that did not include the YTD earnings. Although Ms. Wyatt advised the Complainant that she was not providing additional records, she also confirmed she was unsure of the existence of pay stubs beyond those provided. This calls into question whether the Township had on file, or could have obtained from its payroll vendor, stubs containing YTD earnings. Regarding the January 16, 2018 OPRA request, the report disclosed does not indicate that earnings were YTD in nature. Rather, the report appeared to show “[a]nnual [s]alar[ies].” The most obvious indicator is that the earnings column contains the heading “Annual Salary.” Further, the report, which is “[e]ffective as of 01/22/2018,” contains significant earnings compared to the fact that it was run twenty-two (22) calendar days into year. Based on the forgoing, the GRC cannot find that the Township properly satisfied these two (2) OPRA requests, nor can it adequately find that no YTD earnings “existed.”

Therefore, the Custodian may have unlawfully denied access to the Complainant’s December 18, 2017 and January 16, 2018 OPRA requests to the extent that they sought YTD earnings. N.J.S.A. 47:1A-6. Specifically, YTD earnings is identifiable “payroll” information that

should be disclosed if possible. N.J.S.A. 47:1A-10; Jackson, GRC 2002-98. Thus, the Custodian must disclose pay stubs responsive to the Complainant's December 18, 2017 OPRA request inclusive of the YTD earnings of the Deputy Chiefs as of December 5, 2017, with applicable redactions in accordance with O'Shea, GRC 2008-283. Further, the Custodian must disclose the YTD earnings for all employees current to the date of the January 16, 2018 OPRA request. Should the Custodian be unable to produce the YTD earnings for either or both OPRA requests, she must provide a detailed certification that no records exist with an explanation of why she could not produce same.

Knowing & Willful

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian may have unlawfully denied access to overtime information for the Deputy Chiefs from 2014. N.J.S.A. 47:1A-6. Thus, the Custodian shall disclose the Deputy Chiefs' overtime information. N.J.S.A. 47:1A-10. Alternatively, if no overtime information for one or more of the Deputy Chiefs does not exist, the Custodian must certify to this fact.
2. The Custodian may have unlawfully denied access to the Complainant's December 18, 2017 and January 16, 2018 OPRA requests to the extent that they sought year-to-date earnings. N.J.S.A. 47:1A-6. Specifically, year-to-date earnings is identifiable "payroll" information that should be disclosed if possible. N.J.S.A. 47:1A-10; Jackson v. Kean Univ., GRC Complaint No. 2002-98 (February 2004). Thus, the Custodian must disclose pay stubs responsive to the Complainant's December 18, 2017 OPRA request inclusive of the year-to-date earnings of the Deputy Chiefs as of December 5, 2017, with applicable redactions in accordance with O'Shea v. Twp. of West Milford (Passaic), GRC Complaint No. 2008-283 (November 2009). Further, the Custodian must disclose the year-to-date earnings for all employees current to the date of the January 16, 2018 OPRA request. Should the Custodian be unable to produce the year-to-date earnings for either or both OPRA requests, she must provide a detailed certification that no records exist with an explanation of why she could not produce same.
3. **The Custodian shall comply with conclusion Nos. 1 and 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for**

each redaction, if applicable. Further, the Custodian shall simultaneously deliver⁵ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁶ to the Executive Director.⁷

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

Prepared By: Frank F. Caruso
Executive Director

October 30, 2019

⁵ 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.

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."

⁷ 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.