



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

November 9, 2022 Government Records Council Meeting

Rotimi Owoh, Esq. (o/b/o African
American Data & Research Institute)
Complainant

Complaint No. 2020-80

v.

City of Hoboken (Hudson)
Custodian of Record

At the November 9, 2022 public meeting, the Government Records Council (“Council”) considered the October 27, 2022 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that the Council dismiss this complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant’s Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

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

Final Decision Rendered by the
Government Records Council
On The 9th Day of November 2022

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 15, 2022



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Executive Director
November 9, 2022 Council Meeting**

**Rotimi Owoh, Esq. (On Behalf of
African American Data & Research Institute)¹
Complainant**

GRC Complaint No. 2020-80

v.

**City of Hoboken (Hudson)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:³

1. Record showing the name, rank, and date of hire of each employee in your Police Department who has access to eCDR. For clarification, we need to know how many members of your Police Department have access to eCDR.
2. Record showing the name, rank, and date of hire of each employee in your Police Department who has access to ATS/ACS. For clarification, we need to know how many members of your Police Department have access to ATS/ACS.
3. The Law Enforcement Manual for eCDR or Standard Operating Procedure (“SOP”) for eCDR or Directive for eCDR that is used by your Police Department.

Custodian of Record: Michael Mastropasqua⁴
Request Received by Custodian: February 22, 2020
Response Made by Custodian: March 4, 2020
GRC Complaint Received: April 22, 2020

Background

September 28, 2022 Council Meeting:

At its June 28, 2022 public meeting, the Council considered the June 21, 2022 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, found that:

¹ The Complainant represents the African American Data & Research Institute.

² Represented by Alyssa Wells, Esq., Assistant Corporation Counsel (Hoboken, NJ).

³ The Complainant sought additional records that are not at issue in this complaint.

⁴ The current Custodian of Record is James J. Farina.

1. The current Custodian did not fully comply with the Council’s June 29, 2021, Interim Order because although Custodian’s Counsel responded in the extended time frame providing the Complainant with responsive records, the current Custodian failed to timely provide certified confirmation of compliance to the Executive Director.
2. The Custodian did not unlawfully deny access to the Complainant’s OPRA request item No. 1 seeking the “name, rank, and date of hire” of HPD employees with access to eCDR. N.J.S.A. 47:1A-6. Specifically, the Custodian had no legal duty to conduct research to manually generate a list or compile information containing the requested information. MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Lagerkvist v. Office of the Governor, 443 N.J. Super. 230, 236-37 (App. Div. 2015); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint Nos. 2011-147, 2011-157, 2011-172, and 2011-181 (July 2012).
3. The Custodian unlawfully denied access to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Additionally, the current Custodian failed to fully comply with the Council’s June 29, 2021 Interim Order. However, the current Custodian demonstrated that he provided responsive records to the Complainant in accordance with said Order. 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.
4. Pursuant to the Council’s June 29, 2021 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Custodian was ordered to produce the responsive records maintained by Hoboken Police Department. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 71. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney’s fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant’s Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Procedural History:

On June 29, 2022, the Council distributed its Interim Order to all parties. On July 19, 2022, Custodian's Counsel e-mailed the Government Records Council ("GRC") requesting an additional twenty (20) business days for the parties to settle the issue of counsel fees. Complainant's Counsel expressed his consent to the extension that same day. On July 28, 2022, the GRC granted the extension request until August 25, 2022.

On August 25, 2022, Custodian's Counsel requested an additional twenty (20) business days for the parties to settle the issue of counsel fees. On August 26, 2022, Complainant's Counsel consented to the time extension. On September 9, 2022, the GRC granted the second extension request until September 23, 2022.

On September 23, 2022, Complainant's Counsel notified the GRC that a settlement had been reached between the parties on the issue of counsel fees. Complainant's Counsel also thanked the GRC for granting the extensions to make the settlement possible.

Analysis

Compliance

At its June 28, 2022 meeting, the Council ordered the parties to "confer in an effort to decide the amount of reasonable attorney's fees" and notify the GRC of any fee agreement. Further, the Council ordered that, should the parties not reach an agreement, the Complainant's Counsel "shall submit a fee application . . . in accordance with N.J.A.C. 5:105-2.13." On June 29, 2022, the Council distributed its Interim Order to all parties, providing the parties twenty (20) business days to reach a fee agreement. Thus, the parties were required to notify the GRC of any agreement by July 28, 2022.

On July 19, 2022, Custodian's Counsel requested an additional twenty (20) days for the parties to come to an agreement on counsel fees. The GRC granted the extension until August 25, 2022. On August 25, 2022, Custodian's Counsel submitted an additional twenty (20) business day extension for the parties to notify the GRC of a settlement. The GRC granted the extension until September 23, 2022.

On September 23, 2022, Complainant's Counsel notified the GRC that the parties have settled the issue of attorney's fees and thanked the GRC for providing the extensions.

Accordingly, the Council should dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant's Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Council dismiss

this complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant's Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

Prepared By: Samuel A. Rosado
Staff Attorney

October 27, 2022



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

June 28, 2022 Government Records Council Meeting

Rotimi Owoh, Esq. (o/b/o African American
Data & Research Institute)
Complainant

Complaint No. 2020-80

v.
City of Hoboken (Hudson)
Custodian of Record

At the June 28, 2022 public meeting, the Government Records Council (“Council”) considered the June 21, 2022 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 current Custodian did not fully comply with the Council’s June 29, 2021, Interim Order because although Custodian’s Counsel responded in the extended time frame providing the Complainant with responsive records, the current Custodian failed to timely provide certified confirmation of compliance to the Executive Director.
2. The Custodian did not unlawfully deny access to the Complainant’s OPRA request item No. 1 seeking the “name, rank, and date of hire” of HPD employees with access to eCDR. N.J.S.A. 47:1A-6. Specifically, the Custodian had no legal duty to conduct research to manually generate a list or compile information containing the requested information. MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Lagerkvist v. Office of the Governor, 443 N.J. Super. 230, 236-37 (App. Div. 2015); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint Nos. 2011-147, 2011-157, 2011-172, and 2011-181 (July 2012).
3. The Custodian unlawfully denied access to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Additionally, the current Custodian failed to fully comply with the Council’s June 29, 2021 Interim Order. However, the current Custodian demonstrated that he provided responsive records to the Complainant in accordance with said Order. 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.

4. Pursuant to the Council’s June 29, 2021 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Custodian was ordered to produce the responsive records maintained by Hoboken Police Department. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 71. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney’s fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant’s Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Interim Order Rendered by the
Government Records Council
On The 28th Day of June 2022

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: June 29, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
June 28, 2022 Council Meeting**

**Rotimi Owoh, Esq. (On Behalf of
African American Data & Research Institute)¹
Complainant**

GRC Complaint No. 2020-80

v.

**City of Hoboken (Hudson)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:³

1. Record showing the name, rank, and date of hire of each employee in your Police Department who has access to eCDR. For clarification, we need to know how many members of your Police Department have access to eCDR.
2. Record showing the name, rank, and date of hire of each employee in your Police Department who has access to ATS/ACS. For clarification, we need to know how many members of your Police Department have access to ATS/ACS.
3. The Law Enforcement Manual for eCDR or Standard Operating Procedure (“SOP”) for eCDR or Directive for eCDR that is used by your Police Department.

Custodian of Record: Michael Mastropasqua⁴
Request Received by Custodian: February 22, 2020
Response Made by Custodian: March 4, 2020
GRC Complaint Received: April 22, 2020

Background

June 29, 2021 Council Meeting:

At its June 29, 2021 public meeting, the Council considered the June 22, 2021 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, found that:

1. The Custodian may have unlawfully denied access to the Complainant’s OPRA request item Nos. 1 and 2 seeking the name, rank, and date of hire for each Hoboken Police

¹ The Complainant represents the African American Data & Research Institute.

² Represented by Alyssa Wells, Esq., Assistant Corporation Counsel (Hoboken, NJ).

³ The Complainant sought additional records that are not at issue in this complaint.

⁴ The current Custodian of Record is James J. Farina.

Department employee with access to eCDR and/or ACS/ATS. N.J.S.A. 47:1A-6. Specifically, the Custodian shall confirm whether Hoboken Police Department possesses the ability to electronically extract the identities of personnel with access to the respective databases. See Paff v. Twp. of Galloway, 229 N.J. 340 (2017). If so, the Custodian shall disclose such information to the Complainant, along with the requested information under N.J.S.A. 47:1A-10, with redactions where applicable.

2. The Custodian may have unlawfully denied access to the Complainant's OPRA request item No. 3 seeking a copy of the Hoboken Police Department's ("HPD") eCDR manual, Standard Operating Procedure, or directive that existed at the time of the request. N.J.S.A. 47:1A-6. Thus, the Custodian shall either: 1) locate and disclose the responsive records to the Complainant; or 2) certify that HPD did not keep or maintain copies of the records at the time of the request.
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.
5. The Council defers analysis of whether the Custodian is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On June 30, 2021, the Council distributed its Interim Order to all parties. On July 8, 2021, the fifth (5th) business day after receipt, Custodian's Counsel responded to the Interim Order, providing a certification from Sergeant Alex Gonzalez of the Hoboken Police Department ("HPD"), a copy of the eCDR manual circa 2016, a list of HPD officers with access to ACS/ATS, and a list of all individuals with access to eCDR. Counsel also asked for an additional five (5) business days to provide the rank and date of hire for the list of HPD officers with access to ACS/ATS.

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.

Sgt. Gonzalez certified that the prior OPRA officer with HPD was unaware that the City of Hoboken (“City”) maintained a copy of the record. Sgt. Gonzalez further certified that it was previously unknown that HPD had the ability to obtain a list of officers with access to ATS/ACS but needed additional time to provide the additional requested information. Sgt. Gonzalez then certified that while he was able to obtain a list of users in the City with access to eCDR, the list was not specific to active-duty HPD officers, but included retired officers, Stevens Institute of Technology police officers, and non-law enforcement City employees. Sgt. Gonzalez certified that the City sought additional guidance on how to proceed with this portion of the response, as the list comprised approximately 600 names. On July 15, 2021, Counsel responded to the GRC, providing the additional information requested in conjunction with the list of officers with access to ACS/ATS.

On September 2, 2021, the GRC e-mailed Counsel, inquiring as to whether the records provided on July 15, 2021 comprised the final production of responsive records, and if so to provide a certification confirming same. On September 3, 2021, Counsel responded to the GRC stating that the City was still awaiting guidance on addressing the list of 600 individuals with access to eCDR.

On September 17, 2021, Counsel provided a certification from the current Custodian. The current Custodian certified that there was no way to electronically narrow down the list of individuals with access to eCDR to only active duty HPD officers. The current Custodian also certified that to provide the information, the City would need to dedicate personnel to going through the list and compare the names to a current list of HPD officers. The current Custodian certified that the City would next need to look up each identified officer’s personnel records to obtain their rank and date of hire. The current Custodian certified that doing so would be creating a record, which is not required under OPRA. The current Custodian thus certified that the City was awaiting further guidance from the GRC on how to proceed with the list. Later than same day, the Complainant responded to Counsel and the current Custodian. The Complainant asserted that the New Jersey Supreme Court decision in Simmons v. Mercado, 247 N.J. 24 (2021) supported the contention that the City had an obligation to extract the requested information. The Complainant then proposed that the City could provide a list which highlighted the current or active-duty HPD officers therein.

Analysis

Compliance

At its June 29, 2021 meeting, the Council ordered the Custodian to locate and provide responsive records to the Complainant or certify that none exist. The Council also ordered the Custodian to and to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On June 30, 2021, 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 July 8, 2021, accounting for the Independence Day holiday.

On July 8, 2021, Custodian's Counsel responded in writing, providing a certification from Sgt. Gonzalez. Custodian's Counsel also provided a 2016 eCDR manual, a list of HPD officers with access to ACS/ATS, and a list of all individuals in the City with access to eCDR. Custodian's Counsel further stated that an additional five (5) business days was needed to provide the rank and date of hire for HPD officers with access to the ACS/ATS. Custodian's Counsel also stated that there was no way of electronically narrowing the list of City employees with access to eCDR.

On July 15, 2021, Custodian's Counsel provided the Complainant with an updated list of HPD officers with access to ACS/ATS to include their rank and date of hire. On September 17, 2021, the current Custodian provided a certification to the GRC and the Complainant. The current Custodian certified that the responses provided on July 8 and July 15, 2021, comprised the full response to the Council's Interim Order. The current Custodian further certified that there was no way of narrowing the list of City employees with access to eCDR without creating a record, which he was not obligated to do. However, because the current Custodian did not provide certified confirmation of compliance until September 17, 2021, the current Custodian did not fully comply with the Council's Order due to a timelines issue.

Therefore, the current Custodian did not fully comply with the Council's June 29, 2021, Interim Order because although Custodian's Counsel responded in the extended time frame providing the Complainant with responsive records, the current Custodian failed to timely provide certified confirmation of compliance to the Executive Director.

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.

The New Jersey Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records "readily accessible for inspection, copying, or examination." N.J.S.A. 47:1A-1.

[MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) (emphasis added).]

The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the

agency in the past. Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile, and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

[Id. at 549 (emphasis added).]

The Court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt . . . In short, OPRA does not countenance open-ended searches of an agency's files.” Id. at 549 (emphasis added). Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

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

Additionally, there are instances where a request can be specific enough to induce research, thus rendering it invalid. For instance, in Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint Nos. 2011-147, 2011-157, 2011-172, and 2011-181 (July 2012), the complainant submitted four (4) OPRA requests seeking copies of meeting minutes containing motions to approve other minutes. The Council, citing Taylor v. Cherry Hill Bd. of Educ. (Camden), GRC Complaint No. 2008-258 (August 2009) and Ray v. Freedom Academy Charter Sch. (Camden), GRC Complaint No. 2009-185 (August 2010), determined that the requests were overly broad:

[S]aid requests do not specify the date or time frame of the minutes sought. Rather, the requests seek those minutes at which the UCBOE motioned to approve meeting minutes for four (4) other meetings. Similar to the facts of both Taylor and Ray, the requests herein *seek minutes that refer to a topic and would require the Custodian to research the UCBOE’s meeting minutes in order to locate the particular sets of minutes that are responsive to the Complainant’s requests . . .* because the Complainant’s four (4) requests for minutes “that include a motion made by the Union City Board of Education to approve the minutes” from other meetings fail to identify the specific dates of the minutes sought and would require the Custodian to conduct research in order to locate the responsive records, the Complainant’s requests are invalid under OPRA.

[Valdes, GRC 2011-147, *et seq.* (emphasis added) (citing N.J. Builders Ass’n, 390 N.J. Super. at 180; Bent, 381 N.J. Super. at 37; MAG, 375 N.J. Super. at 546;

Schuler, GRC 2007-151; See also Valdes v. Gov't Records Council, GRC Complaint No. 2013-278 (September 2014).]

In Lagerkvist v. Office of the Governor, 443 N.J. Super. 230, 236-37 (App. Div. 2015), the court's rationale of what amounted to research supports the Council's decision in Valdes. There, the court reasoned that the plaintiff's request:

. . . would have had to make a preliminary determination as to which travel records correlated to the governor and to his senior officials, past and present, over a span of years. The custodian would then have had to attempt to single out those which were third-party funded events. Next, he would have had to collect all documents corresponding to those events and search to ensure he had accumulated everything, including both paper and electronic correspondence. OPRA does not convert a custodian into a researcher.

[Id. at 237. See also Carter v. N.J. Dep't of Cmty. Affairs, Div. of Local Gov't Serv., 2019 N.J. Super. Unpub. LEXIS 2510 (App. Div. Dec. 10, 2019) (affirming Carter, GRC Complaint No. 2016-262 (August 2018)).]

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

Furthermore, in Paff v. Twp. of Galloway, 229 N.J. 340 (2017), the Supreme Court of New Jersey addressed a custodian's obligation to coalesce information stored electronically into a single record. There, the Court accepted plaintiff's appeal from the Appellate Division's decision that the defendant municipality was not required to coalesce basic information into an e-mail log and disclose same. The court reached its conclusion by determining that such an action was akin to creating a record, which OPRA did not require (notwithstanding that the e-mail log would have taken a few key strokes to create). The Supreme Court reversed and remanded, holding that basic e-mail information stored electronically is a "government record" under OPRA, unless an exemption applies to that information. The Court reasoned that:

A document is nothing more than a compilation of information -- discrete facts and data. By OPRA's language, information in electronic form, even if part of a larger

document, is itself a government record. Thus, electronically stored information extracted from an email is not the creation of a new record or new information; it is a government record.

....

With respect to electronically stored information by a municipality or other public entity, we reject the Appellate Division's statement that "OPRA only allows requests for records, not requests for information." Paff, 444 N.J. Super. at 503, (quoting [Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005)]). That position cannot be squared with OPRA's plain language or its objectives in dealing with electronically stored information.

[Id. at 353, 356.]

The Supreme Court's ruling in Paff is on square with the Council's past decisions on the issue of coalescing information from electronic systems. Specifically, in Zahler v. Ocean Cnty. Coll., GRC Complaint No. 2013-266 (Interim Order dated July 29, 2014), the Council addressed the custodian's argument that she was not required to create a record to satisfy an OPRA request for database information pursuant to Morgano v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2007-156 (Interim Order dated February 27, 2008). Therein, the complainant sought access to a list of adjuncts to include certain information. The custodian produced a list that did not include all information sought; however, the evidence of record indicated that she could have produced a fully responsive record. Specifically, evidence existed to support that all information the complainant sought existed within a few different databases.

In the current matter, the Complainant's OPRA request item No. 1 sought "records showing name, rank, and date of hire of each employee in your police department who has access to eCDR." The Custodian initially responded by denying access, stating that no record exists containing that information. However, in response to the Council's Interim Order the current Custodian certified that while a list of City employees with access to eCDR exists, the list included both former and active HPD officers, City employees, and officers of different law enforcement agencies. The Custodian certified that there was no way to electronically narrow down the list to active HPD officers. In response, the Complainant asserted that the request item sought information required to be disclosed under N.J.S.A. 47:1A-10 and Simmons, and other departments have provided records without issue.

In reviewing the subject request, all arguments provided by the parties, and the case law relevant to invalid requests requiring research, the GRC is satisfied that the Custodian lawfully determined that the request was invalid. The GRC first notes that the Complainant sought information identified as a "government record" under OPRA. Danis, GRC 2009-156, *et seq.* Thus, the request is valid to the extent that the Complainant sought identifiable information. However, the presence of identifiable "government records" within the subject request does not end the inquiry.

Rather, the Complainant's request item No. 1 adds an additional qualifier: HPD employees with access to eCDR. While the Custodian was able to locate and provide a list of City employees with access to eCDR, the list included not just active HPD employees, but also former and retired HPD officers, civilian City employees, and officers from other law enforcement agencies. Moreover, unlike the extracted e-mail information in Paff, 229 N.J. 340, the Custodian certified that the list could not be narrowed electronically to list only active HPD employees. Therefore, prior to providing the name, rank, and date of hire as required under N.J.S.A. 47:1A-10, the Custodian would first have to manually cross reference the list of 600 employees with a list of active duty HPD officers, thus creating a new record. Such acts are like the process determined to be research in Lagerkvist, 443 N.J. Super. at 236-37.

Therefore, the Custodian did not unlawfully deny access to the Complainant's OPRA request item No. 1 seeking the "name, rank, and date of hire" of HPD employees with access to eCDR. N.J.S.A. 47:1A-6. Specifically, the Custodian had no legal duty to conduct research to manually generate a list or compile information containing the requested information. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; N.J. Builders, 390 N.J. Super. at 180; Lagerkvist, 443 N.J. Super. at 236-37; Schuler, GRC 2007-151; Valdes, GRC 2011-147, *et seq.*

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, the Custodian unlawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Additionally, the current Custodian failed to fully comply with the Council's June 29, 2021 Interim Order. However, the current Custodian demonstrated that he provided responsive records to the Complainant in accordance with said

Order. 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.

Prevailing Party Attorney's Fees

OPRA provides that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . . ; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

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

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Appellate Division held that a complainant is a "prevailing party" if he achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct. Id. at 432. Additionally, the court held that attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Id.

Additionally, the New Jersey Supreme Court has ruled on the issue of "prevailing party" attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008), the Court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct"(quoting Buckhannon Bd. & Care Home v. West Virginia Dep't of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court held that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." Id. at 603 (quoting Black's Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because "[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties . . ." Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863. Further, the Supreme Court expressed concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

However, the Court noted in Mason that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, citing Teeters, 387 N.J. Super. at 429; see, e.g., Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), certif. denied, 174 N.J. 193 (2002). "But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes." 196 N.J. at 73 (citations omitted).

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6. Under the prior RTKL, “[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$500.00.” N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

[196 N.J. at 73-76.]

The Court in Mason, further held that:

[R]equestors are entitled to attorney’s fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) “a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved”; and (2) “that the relief ultimately secured by plaintiffs had a basis in law.” Singer v. State, 95 N.J. 487, 495, cert. denied, New Jersey v. Singer, 469 U.S. 832 (1984).

[Id. at 76.]

Here, the Complainant sought in part the name, rank, and date of hire of PPD members who have access to the eCDR and/or ACS/ATS as well as an eCDR manual. The Custodian initially denied access by stating no records exist or did not respond to the specific request item. The Complainant filed the instant complaint, argued that the Custodian failed to provide the requested personnel information and other requested records.

In determining whether the Complainant is a prevailing party entitled to attorney’s fees, the GRC is satisfied that the evidence of record supports a conclusion in the affirmative. In accordance with the Council’s June 29, 2021 Interim Order, the Custodian confirmed that HPD was capable of producing the requested eCDR manual and list of active duty HPD officers with access to the ACS/ATS, which was the Complainant’s desired result in filing the instant complaint. Teeters, 387 N.J. Super. at 432. Thus, a causal nexus exists between this complaint and the change in the Custodian’s conduct. Mason, 196 N.J. at 76. Accordingly, the Complainant is a prevailing party entitled to attorney’s fees.⁸

⁸ The Council makes this determination with the understanding that the Complainant acted on behalf of a bona fide client at the time of the request. Although the Complainant’s status as representing an actual client has been previously challenged, the available evidence on the record is insufficient to address that issue herein. See Owoh, Esq. (O.B.O. AADARI) v. Neptune City Police Dep’t (Monmouth), GRC Complaint No. 2018-153 (April 2020) and Owoh, Esq. (O.B.O. AADARI) v. Freehold Twp. Police Dep’t (Monmouth), GRC Complaint No. 2018-155 (Interim Order dated September 29, 2020).

Therefore, pursuant to the Council's June 29, 2021 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. at 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 76. Specifically, the Custodian was ordered to produce the responsive records maintained by HPD. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 76. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The current Custodian did not fully comply with the Council's June 29, 2021, Interim Order because although Custodian's Counsel responded in the extended time frame providing the Complainant with responsive records, the current Custodian failed to timely provide certified confirmation of compliance to the Executive Director.
2. The Custodian did not unlawfully deny access to the Complainant's OPRA request item No. 1 seeking the "name, rank, and date of hire" of HPD employees with access to eCDR. N.J.S.A. 47:1A-6. Specifically, the Custodian had no legal duty to conduct research to manually generate a list or compile information containing the requested information. MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Lagerkvist v. Office of the Governor, 443 N.J. Super. 230, 236-37 (App. Div. 2015); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint Nos. 2011-147, 2011-157, 2011-172, and 2011-181 (July 2012).
3. The Custodian unlawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Additionally, the current Custodian failed to fully comply with the Council's June 29, 2021 Interim Order. However, the current Custodian demonstrated that he provided responsive records to the Complainant in accordance with said Order. 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.

4. Pursuant to the Council’s June 29, 2021 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Custodian was ordered to produce the responsive records maintained by Hoboken Police Department. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 71. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney’s fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant’s Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Prepared By: Samuel A. Rosado
Staff Attorney

June 21, 2022



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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

June 29, 2021 Government Records Council Meeting

Rotimi Owoh, Esq. (o/b/o African
American Data & Research Institute)
Complainant
v.
City of Hoboken
Custodian of Record

Complaint No. 2020-80

At the June 29, 2021 public meeting, the Government Records Council (“Council”) considered the June 22, 2021 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 may have unlawfully denied access to the Complainant’s OPRA request item Nos. 1 and 2 seeking the name, rank, and date of hire for each Hoboken Police Department employee with access to eCDR and/or ACS/ATS. N.J.S.A. 47:1A-6. Specifically, the Custodian shall confirm whether Hoboken Police Department possesses the ability to electronically extract the identities of personnel with access to the respective databases. See Paff v. Twp. of Galloway, 229 N.J. 340 (2017). If so, the Custodian shall disclose such information to the Complainant, along with the requested information under N.J.S.A. 47:1A-10, with redactions where applicable.
2. The Custodian may have unlawfully denied access to the Complainant’s OPRA request item No. 3 seeking a copy of the Hoboken Police Department’s (“HPD”) eCDR manual, Standard Operating Procedure, or directive that existed at the time of the request. N.J.S.A. 47:1A-6. Thus, the Custodian shall either: 1) locate and disclose the responsive records to the Complainant; or 2) certify that HPD did not keep or maintain copies of the records at the time of the request.
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.
5. The Council defers analysis of whether the Custodian is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 29th Day of June 2021

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: June 30, 2021

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
June 29, 2021 Council Meeting**

**Rotimi Owoh, Esq. (On Behalf of
African American Data & Research Institute)¹
Complainant**

GRC Complaint No. 2020-80

v.

**City of Hoboken (Hudson)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:³

1. Record showing the name, rank, and date of hire of each employee in your Police Department who has access to eCDR. For clarification, we need to know how many members of your Police Department have access to eCDR.
2. Record showing the name, rank, and date of hire of each employee in your Police Department who has access to ATS/ACS. For clarification, we need to know how many members of your Police Department have access to ATS/ACS.
3. The Law Enforcement Manual for eCDR or Standard Operating Procedure (“SOP”) for eCDR or Directive for eCDR that is used by your Police Department.

Custodian of Record: Michael Mastropasqua
Request Received by Custodian: February 22, 2020
Response Made by Custodian: March 4, 2020
GRC Complaint Received: April 22, 2020

Background⁴

Request and Response:

On February 22, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 4, 2020, the Custodian responded in writing stating that for item Nos. 1 and 2, the Custodian stated that Hoboken Police Department (“HPD”) did not have a list of employees who have access to eCDR and/or ATS/ACS.

¹ The Complainant represents the African American Research & Data Institute.

² Represented by Alyssa Witsch, Esq., and Justin Halwagy, Esq., Assistant Corporation Counsel (Hoboken, NJ).

³ The Complainant sought additional records that are not at issue in this complaint.

⁴ 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.

Rotimi Owoh, Esq. (On Behalf of African American Data & Research Institute) v. City of Hoboken (Hudson), 2020-80 – Findings and Recommendations of the Executive Director

Regarding item No. 3, the Custodian stated that HPD could not produce responsive records in accordance with N.J. Court Rules, R. 1:38.

Denial of Access Complaint:

On April 22, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that since all police departments were required to file complaints using eCDR, HPD officers must have access to the system.

The Complainant also asserted that he was denied access to the name, rank, and date of hire within item Nos. 1 and 2. The Complainant argued that other police departments had no issues providing records responsive to item Nos. 1 and 2, and both items were valid requests for personnel information under N.J.S.A. 47:1A-10. The Complainant requested that the GRC compel compliance with his OPRA request and to award counsel fees.

Statement of Information:

On May 13, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on February 24, 2020. The Custodian certified that the request was sent to HPD Detective Arturo Gonzalez for review. The Custodian certified that on March 4, 2020, she responded to the Complainant stating that no responsive records exist for item Nos. 1 and 2. The Custodian also stated that HPD could not produce responsive records pursuant to R. 1:38.

The Custodian asserted that eCDR and ATS/ACS were computer systems used to submit information pertaining to criminal matters and maintained by the Judiciary. The Custodian asserted that HPD did not maintain a list of employees having access to either database. The Custodian argued that the City of Hoboken (“City”) was not required to create a record which included said information. See Matthews v. City of Atlantic City (Atlantic), GRC Complaint No. 2008-123 (February 2009); Librizzi v. Twp. of Verona Police Dep’t, GRC Complaint No. 2009-213 (August 2010).

Regarding item No. 3, the Custodian asserted that the City did not have a responsive record. Additionally, the Custodian argued that the City was not the custodian of records for the eCDR manual since the system was maintained by the Judiciary. The Custodian therefore argued that the request should have been made with the Judiciary under R. 1:38.

Additional Submissions:

On May 27, 2020, the Complainant submitted a letter in response to the Custodian’s SOI. Therein, the Complainant contended that eCDR was set up by the Attorney General pursuant to New Jersey’s bail reform law and mandated its use by all police departments in the State. The Complainant argued that HPD officers must have access to the electronic databases in order to prepare summonses and complaints against a defendant. The Complainant argued that HPD did not have to conduct any research or create any new document to comply with his OPRA request

since there would already be a record showing officers who have a username and password to access and file complaints and summonses via eCDR and ACS/ATS. Additionally, the Complainant asserted that HPD would invariably possess the personnel information of those officers having access to the aforementioned databases, and therefore could provide the requested information pursuant to N.J.S.A. 47:1A-10.

On June 15, 2020, Custodian's Counsel submitted a supplemental submission to the GRC regarding the instant matter as well as another complaint before the GRC.⁵ Counsel stated that she was bringing attention to the Appellate Division's ruling in Simmons v. Mercado, 464 N.J. Super. 77 (App. Div.), rev'd, ___ N.J. ___ (2021). Counsel asserted that the case was applicable to the instant matter in that while some HPD officers have access to eCDR and/or ATS/ACS, HPD did not have a record depicting this information. Counsel also argued that the Complainant was asking the City to create a record, which was not required under OPRA. Counsel requested that the GRC dismiss the matter in light of the decision. Later that same day, the Complainant e-mailed the GRC stating that a Notice of Petition for Certification was sent to the New Jersey Supreme Court, and that it would be premature to dismiss the matter because of the Simmons decision.

On April 21, 2021, the GRC submitted a request for additional information from the Custodian. Specifically, the GRC asked the Custodian:

1. Does the [HPD] have the ability to identify employees who have access to the eCDR and/or ATS/ACS systems electronically through the respective systems?
2. Does the [HPD] keep or maintain a copy of the eCDR manual responsive to item No. [3], either physically or electronically?

On April 22, 2021, the Custodian requested an extension to April 28, 2021, stating that Counsel had been out of the office that week. The GRC granted the extension on April 27, 2021. On April 28, 2021, Counsel e-mailed the GRC stating that because he had been away from the office, he was unable to work on providing a response and requested another extension to the following week. That same day, the GRC granted the extension with a new return date of May 5, 2021.

On May 5, 2021, Counsel e-mailed the GRC, stating that he learned that HPD possessed the ability to identify users of eCDR and ACS/ATS within its department. Counsel also stated that HPD possessed a copy of the January 2021 edition of the eCDR manual. Counsel stated that while it was not technically responsive to the Complainant's request, the City was attempting to obtain a copy for review and production. Counsel also requested another extension through May 14, 2021, to provide a certification and provide the requested records and information. On May 17, 2021, the GRC e-mailed Counsel requesting an update on the Custodian's response to the additional information request, noting that the extended deadline had expired.

On May 24, 2021, the GRC e-mailed the Custodian stating that as of that date, the GRC has not received a response to its request for additional information. The GRC then stated that the Custodian had until the end of business on May 28, 2021 to provide a response and advised that

⁵ Owoh, Esq. (O.B.O. AADARI) v. City of Hoboken (Hudson), GRC Complaint No. 2020-51.
Rotimi Owoh, Esq. (On Behalf of African American Data & Research Institute) v. City of Hoboken (Hudson), 2020-80 – Findings and Recommendations of the Executive Director

failure to respond may result in the GRC moving forward with adjudication without a certification. As of June 3, 2021, the Custodian has not provided a response to the GRC.

Analysis

Validity of Request

The New Jersey Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records “readily accessible for inspection, copying, or examination.” N.J.S.A. 47:1A-1.

[MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) (emphasis added).]

The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past. Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile, and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

[Id. at 549 (emphasis added).]

The Court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt . . . In short, OPRA does not countenance open-ended searches of an agency's files.” Id. at 549 (emphasis added). Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

In Donato v. Twp. of Union, GRC Complaint No. 2005-182 (February 2007), the Council held that pursuant to MAG, a custodian is obligated to search his or her files to find identifiable government records listed in a requestor’s OPRA request. The complainant in Donato requested all motor vehicle accident reports from September 5, 2005 to September 15, 2005. The custodian sought clarification of said request on the basis that it was not specific enough. The Council stated that:

Pursuant to [MAG], the Custodian is obligated to search her files to find the identifiable government records listed in the Complainant's OPRA request (all motor vehicle accident reports for the period of September 5, 2005 through September 15, 2005). However, the Custodian is not required to research her files to figure out which records, if any, might be responsive to a broad or unclear OPRA request. The word search is defined as "to go or look through carefully in order to find something missing or lost." The word research, on the other hand, means "a close and careful study to find new facts or information." (Footnotes omitted.)

[Id.]

The validity of an OPRA request typically falls into three (3) categories. The first is a request that is overly broad ("any and all," requests seeking "records" generically, *etc.*) requires a custodian to conduct research. MAG, 375 N.J. Super. 534; Donato, GRC 2005-182. The second is those requests seeking information or asking questions. See *e.g.* Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012). The final category is a request that is either not on an official OPRA request form or does not invoke OPRA. See *e.g.* Naples v. N.J. Motor Vehicle Comm'n, GRC Complaint No. 2008-97 (December 2008).

Regarding requests requiring research, in Lagerkvist v. Office of the Governor, 443 N.J. Super. 230, 236-37 (App. Div. 2015), the court's rationale of what amounted to research supports the Council's decision in Valdes. There, the court reasoned that the plaintiff's request:

[W]ould have had to make a preliminary determination as to which travel records correlated to the governor and to his senior officials, past and present, over a span of years. The custodian would then have had to attempt to single out those which were third-party funded events. Next, he would have had to collect all documents corresponding to those events and search to ensure he had accumulated everything, including both paper and electronic correspondence. OPRA does not convert a custodian into a researcher.

[Id.] at 237. See also Carter v. N.J. Dep't of Cmty. Affairs, Div. of Local Gov't Serv., 2019 N.J. Super. Unpub. LEXIS 2510 (App. Div. Dec. 10, 2019) (affirming Carter v. N.J. Dep't of Cmty. Affairs, Div. of Local Gov't Serv., GRC Complaint No. 2016-262 (August 2018)).]

However, in Paff v. Twp. of Galloway, 229 N.J. 340 (2017), the Supreme Court of New Jersey addressed a custodian's obligation to coalesce information stored electronically into a single record. There, the Court accepted plaintiff's appeal from the Appellate Division's decision that the defendant municipality was not required to coalesce basic information into an e-mail log and disclose same. The court reached its conclusion by determining that such an action was akin to creating a record, which OPRA did not require (notwithstanding that the e-mail log would have taken a few key strokes to create). The Supreme Court reversed and remanded, holding that basic e-mail information stored electronically is a "government record" under OPRA, unless an exemption applies to that information. The Court reasoned that:

A document is nothing more than a compilation of information -- discrete facts and data. By OPRA's language, information in electronic form, even if part of a larger document, is itself a government record. Thus, electronically stored information extracted from an email is not the creation of a new record or new information; it is a government record.

....

With respect to electronically stored information by a municipality or other public entity, we reject the Appellate Division's statement that "OPRA only allows requests for records, not requests for information." Paff, 444 N.J. Super. at 503, (quoting [Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005)]). That position cannot be squared with OPRA's plain language or its objectives in dealing with electronically stored information.

[Id. at 353, 356.]

The Supreme Court's ruling in Paff squares with the Council's past decisions on the issue of coalescing information from electronic systems. Specifically, in Zahler v. Ocean Cnty. Coll., GRC Complaint No. 2013-266 (Interim Order dated July 29, 2014), the Council addressed the custodian's argument that she was not required to create a record to satisfy an OPRA request for database information pursuant to Morgano v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2007-156 (Interim Order dated February 27, 2008). Therein, the complainant sought access to a list of adjuncts to include certain information. The custodian produced a list that did not include all information sought; however, the evidence of record indicated that she could have produced a fully responsive record. Specifically, evidence existed to support that all information the complainant sought existed within a few different databases.

Item Nos. 1 & 2

In the instant matter, the Custodian asserted that no records exist containing a list of HPD personnel having access to the eCDR and/or ATS/ACS database, and were not obligated to create a record depicting same. The Complainant asserted that HPD officers were required to submit summonses and complaints through the databases and therefore would have the ability to identify personnel with login access.

In light of the Court's decision in Paff, the GRC requested additional information from the Custodian, asking whether HPD had the ability to identify personnel with access to eCDR and/or ACS/ATS through the respective systems. However, despite granting several extensions of time, the Custodian failed to provide a certification in response to the GRC's request. Nonetheless, in a May 5, 2021 e-mail, Counsel stated that HPD did have the ability to identify personnel having access to eCDR and ATS/ACS. Still, because the response was not made via certification, the record remains unclear as to whether HPD could provide responsive records to item Nos. 1 and 2.

Accordingly, the Custodian may have unlawfully denied access to the Complainant's OPRA request item Nos. 1 and 2 seeking the name, rank, and date of hire for each HPD employee

with access to eCDR and/or ACS/ATS. N.J.S.A. 47:1A-6. Specifically, the Custodian shall confirm whether HPD possesses the ability to electronically extract the identities of personnel with access to the respective databases. See Paff, 229 N.J. at 353. If so, the Custodian shall disclose such information to the Complainant, along with the requested information under N.J.S.A. 47:1A-10, with redactions where applicable.

Unlawful Denial of Access

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

OPRA also provides that the GRC “shall not have jurisdiction over the Judicial or Legislative Branches of State Government or any agency, officer, or employee of those branches. N.J.S.A. 47:1A-7(g). However, in Pitts v. N.J. Dep’t of Corr., GRC Complaint No. 2013-299 (September 2014), the custodian argued in part that because the requested presentence report was a court record created by the Judiciary, it was not a government record under N.J.S.A. 47:1A-1.1, and not within the GRC’s jurisdiction under N.J.S.A. 47:1A-7(g). The Council disagreed, holding that because the agency received and kept on file a copy of the record, it still met the definition of a government record. N.J.S.A. 47:1A-1.1.

Item No. 3

In the instant matter, the Custodian responded to the Complainant stating that requested record could not be provided in accordance with R. 1:38. In the SOI, the Custodian certified that HPD did not have responsive records, and added that because eCDR was a system maintained by the Judiciary, HPD was not the records custodian for the requested record. The Custodian asserted that a request for the record should be made with the Judiciary via R. 1:38.

In reviewing the Custodian’s responses, the record was unclear as to whether HPD in fact possessed responsive records. In accordance with Pitts, if HPD possessed a manual, SOP, or directive regarding eCDR, the record may be subject to access notwithstanding whether the record pertains to a system under the Judiciary’s control. Thus, the GRC requested additional information from the Custodian, asked the Custodian to certify whether HPD kept or maintained a manual for eCDR, either physically or electronically.

However, as noted above, the Custodian failed to provide a certification in response to the GRC’s request. In the May 5, 2021 correspondence Counsel stating that HPD did possess a copy of the January 2021 version of the eCDR manual. However, Counsel did not indicate whether HPD possessed a version that existed at the time of the request. Thus, the record is unclear as to whether HPD possessed responsive records at the time of the Complainant’s request.

Accordingly, the Custodian may have unlawfully denied access to the Complainant’s OPRA request item No. 3 seeking a copy of the HPD’s eCDR manual, SOP, or directive that

existed at the time of the request. N.J.S.A. 47:1A-6. Thus, the Custodian shall either: 1) locate and disclose the responsive records to the Complainant; or 2) certify that HPD did not keep or maintain copies of the records at the time of the request.

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.

Prevailing Party Attorney's Fees

The Council defers analysis of whether the Custodian is a prevailing party 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 the Complainant's OPRA request item Nos. 1 and 2 seeking the name, rank, and date of hire for each Hoboken Police Department employee with access to eCDR and/or ACS/ATS. N.J.S.A. 47:1A-6. Specifically, the Custodian shall confirm whether Hoboken Police Department possesses the ability to electronically extract the identities of personnel with access to the respective databases. See Paff v. Twp. of Galloway, 229 N.J. 340 (2017). If so, the Custodian shall disclose such information to the Complainant, along with the requested information under N.J.S.A. 47:1A-10, with redactions where applicable.
2. The Custodian may have unlawfully denied access to the Complainant's OPRA request item No. 3 seeking a copy of the Hoboken Police Department's ("HPD") eCDR manual, Standard Operating Procedure, or directive that existed at the time of the request. N.J.S.A. 47:1A-6. Thus, the Custodian shall either: 1) locate and disclose the responsive records to the Complainant; or 2) certify that HPD did not keep or maintain copies of the records at the time of the request.
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 deliver⁶**

⁶ 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.

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certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁷ to the Executive Director.⁸

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.
5. The Council defers analysis of whether the Custodian is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado
Staff Attorney

June 22, 2021

⁷ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁸ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

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