



## State of New Jersey

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

PHILIP D. MURPHY  
*Governor*

TAHESHA L. WAY  
*Lieutenant Governor*

JACQUELYN A. SUÁREZ  
*Acting Commissioner*

### FINAL DECISION

#### October 3, 2023 Government Records Council Meeting

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

Complaint No. 2021-273

v.

North Arlington Borough Police Department (Bergen)  
Custodian of Record

At the October 3, 2023 public meeting, the Government Records Council (“Council”) considered the September 26, 2023 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 August 29, 2023 Interim Order because she responded in the prescribed time frame providing records, and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Pursuant to the Council’s August 29, 2023 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, 76 (2008). Specifically, Custodian located and provided responsive records in compliance with the Council’s Interim Order. 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.**

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 3<sup>rd</sup> Day of October 2023

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: October 10, 2023**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
October 3, 2023 Council Meeting**

**Rotimi Owoh, Esq. (on behalf of African American  
Data & Research Institute)<sup>1</sup>  
Complainant**

**GRC Complaint No. 2021-273**

v.

**North Arlington Borough Police Department (Bergen)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of: Names, date of hire, date of separation and reason for separation, salary, payroll record, amount and type of pension of individuals who either resigned or retired or terminated or otherwise separated from 2002 to 2017. N.J.S.A. 47:1A-10. This request includes any agreement entered with each one of the separated police officer(s).

- a. When stating the reason for separation, please note that some police officers separate due to plea deal, criminal convictions, criminal charges, sentences, and or other court agreement or court proceedings that require officers to be separated from your police department and or law enforcement jobs.
- b. Some police officers separate due to internal affairs investigations within the police departments.<sup>3</sup>

**Custodian of Record:** Kathleen Moore

**Request Received by Custodian:** May 6, 2021

**Response Made by Custodian:** November 3, 2021

**GRC Complaint Received:** November 8, 2021

**Background**

August 29, 2023 Council Meeting:

At its August 29, 2023 public meeting, the Council considered the August 22, 2023 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 has not borne her burden of proving she lawfully denied access to the Complainant's OPRA request for the "[n]ames, date of hire, date of separation and

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<sup>1</sup> The Complainant represents the African American Data & Research Institute.

<sup>2</sup> Represented by Gregory A. Randazzo, Esq., of Pearce Law, LLC (Hackensack, NJ).

<sup>3</sup> The Complainant sought additional records that are not at issue in this complaint.

reason for separation, salary, payroll record, amount and type of pension” of police officers who separated from North Arlington Borough between 2002 and 2017. N.J.S.A. 47:1A-6; Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated June 29, 2010); Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2011-64 (Interim Order dated August 28, 2012); Matthews v. City of Atlantic City (Atlantic), GRC Complaint No. 2008-123 (February 2009). The Custodian shall identify, locate, and produce the requested personnel information. N.J.S.A. 47:1A-10. If no responsive information could be located, the Custodian shall certify to same.

2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver<sup>4</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>5</sup> to the Executive Director.<sup>6</sup>**
3. Recognizing that the Custodian’s November 3, 2021 response to the Complainant’s May 6, 2021 OPRA request seeking settlements is no longer a lawful denial pursuant to Libertarians for Transparent Gov’t v. Cumberland Cnty., 250 N.J. 46, 56-57 (2022); his response was nonetheless lawful at that time because it was consistent with the prevailing case law prior to the Court’s ruling. N.J.S.A. 47:1A-6; Libertarians for Transparent Gov’t v. Cumberland Cnty., 465 N.J. Super. 11 (App. Div. 2020); Moore v. N.J. Dep’t of Corr., GRC Complaint No. 2009-144 (Interim Order dated October 26, 2010). Thus, the Council declines to order disclosure here.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s Interim Order.

#### Procedural History:

On September 5, 2023, the Council distributed its Interim Order to all parties. On September 11, 2023, the Custodian responded to the Council’s Interim Order. The Custodian certified that she reviewed records from various departments within the Borough of North Arlington (“Borough”) and located 109 pages of records. The Custodian certified that she redacted officers’ addresses and social security numbers pursuant to N.J.S.A. 47:1A-5(a) and provided the Complainant with same on September 11, 2023. The Custodian also certified that she provided certified confirmation of compliance to the Executive Director.

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<sup>4</sup> 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.

<sup>5</sup> "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."

<sup>6</sup> 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.

## Analysis

### Compliance

At its August 29, 2023 meeting, the Council ordered the Custodian to provide the disclosable personnel information of police officers separated with the Borough. The Council also required the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On September 5, 2023, 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 September 12, 2023.

On September 11, 2023, the fourth (4<sup>th</sup>) business day after receipt of the Council's Order, the Custodian responded in writing providing the Complainant responsive records, with redactions made to certain personal information pursuant to N.J.S.A. 47:1A-5(a). The Custodian also provided certified confirmation of compliance to the Executive Director.

Therefore, the Custodian complied with the Council's August 29, 2023 Interim Order because she responded in the prescribed time frame providing records, and simultaneously provided certified confirmation of compliance to the Executive Director.

### 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 stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7<sup>th</sup> 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.

[Mason 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 the “[n]ames, date of hire, date of separation and reason for separation, salary, payroll record, amount and type of pension of individuals who either resigned or retired or terminated or otherwise separated from 2002 to 2017,” as well as any “agreements” providing the “reason for separation” from the Borough. The Custodian responded to the

Complainant stating that no records exist and that responding to the request required research. The Complainant then filed the instant complaint on November 8, 2021, asserting the Custodian failed to provide the “real reason” for the officers’ separations.

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. The Custodian initially denied the Complainant’s request, stating that no responsive records exist regarding the request for personnel information, and thereafter asserting that the request was invalid. However, the Council held that the request was valid, and the Custodian located and provided responsive records in response to the Council’s Interim Order. 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.<sup>7</sup>

Therefore, pursuant to the Council’s August 29, 2023 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. 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. 51. Specifically, Custodian located and provided responsive records in compliance with the Council’s Interim Order. 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. 432, and Mason, 196 N.J. 51. **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 Custodian complied with the Council’s August 29, 2023 Interim Order because she responded in the prescribed time frame providing records, and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Pursuant to the Council’s August 29, 2023 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

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<sup>7</sup> 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).

achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 76 (2008). Specifically, Custodian located and provided responsive records in compliance with the Council's Interim Order. 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.**

Prepared By: Samuel A. Rosado  
Staff Attorney

September 26, 2023





## State of New Jersey

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

PHILIP D. MURPHY  
Governor

SHEILA Y. OLIVER  
Lieutenant Governor

KIMBERLY K. HOLMES  
Acting Commissioner

### INTERIM ORDER

#### August 29, 2023 Government Records Council Meeting

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

Complaint No. 2021-273

v.

North Arlington Borough Police Department (Bergen)  
Custodian of Record

At the August 29, 2023 public meeting, the Government Records Council (“Council”) considered the August 22, 2023 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 has not borne her burden of proving she lawfully denied access to the Complainant’s OPRA request for the “[n]ames, date of hire, date of separation and reason for separation, salary, payroll record, amount and type of pension” of police officers who separated from North Arlington Borough between 2002 and 2017. N.J.S.A. 47:1A-6; Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated June 29, 2010); Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2011-64 (Interim Order dated August 28, 2012); Matthews v. City of Atlantic City (Atlantic), GRC Complaint No. 2008-123 (February 2009). The Custodian shall identify, locate, and produce the requested personnel information. N.J.S.A. 47:1A-10. If no responsive information could be located, the Custodian shall certify to same.
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver<sup>1</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>2</sup> to the Executive Director.<sup>3</sup>**

<sup>1</sup> 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.

<sup>2</sup> "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."

<sup>3</sup> 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

3. Recognizing that the Custodian's November 3, 2021 response to the Complainant's May 6, 2021 OPRA request seeking settlements is no longer a lawful denial pursuant to Libertarians for Transparent Gov't v. Cumberland Cnty., 250 N.J. 46, 56-57 (2022); his response was nonetheless lawful at that time because it was consistent with the prevailing case law prior to the Court's ruling. N.J.S.A. 47:1A-6; Libertarians for Transparent Gov't v. Cumberland Cnty., 465 N.J. Super. 11 (App. Div. 2020); Moore v. N.J. Dep't of Corr., GRC Complaint No. 2009-144 (Interim Order dated October 26, 2010). Thus, the Council declines to order disclosure here.
4. The Council defers analysis of whether the Complainant 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 29<sup>th</sup> Day of August 2023

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: August 29, 2023**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
August 29, 2023 Council Meeting**

**Rotimi Owoh, Esq. (on behalf of African American  
Data & Research Institute)<sup>1</sup>  
Complainant**

**GRC Complaint No. 2021-273**

**v.**

**North Arlington Borough Police Department (Bergen)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of: Names, date of hire, date of separation and reason for separation, salary, payroll record, amount and type of pension of individuals who either resigned or retired or terminated or otherwise separated from 2002 to 2017. N.J.S.A. 47:1A-10. This request includes any agreement entered with each one of the separated police officer(s).

- a. When stating the reason for separation, please note that some police officers separate due to plea deal, criminal convictions, criminal charges, sentences, and or other court agreement or court proceedings that require officers to be separated from your police department and or law enforcement jobs.
- b. Some police officers separate due to internal affairs investigations within the police departments.<sup>3</sup>

**Custodian of Record:** Kathleen Moore

**Request Received by Custodian:** May 6, 2021

**Response Made by Custodian:** November 3, 2021

**GRC Complaint Received:** November 8, 2021

**Background<sup>4</sup>**

**Request and Response:**

On May 6, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 3, 2021, the Custodian responded in writing stating that no responsive records exist.

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<sup>1</sup> The Complainant represents the African American Data & Research Institute.

<sup>2</sup> Represented by Gregory A. Randazzo, Esq., of Pearce Law, LLC (Hackensack, NJ).

<sup>3</sup> The Complainant sought additional records that are not at issue in this complaint.

<sup>4</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the 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. North Arlington Borough Police Department (Bergen), 2021-273 – Findings and Recommendations of the Executive Director

### Denial of Access Complaint:

On November 8, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the provided records did not provide the reasons for separation. The Complainant contended that simply stating “terminated”, “resigned”, or “retired,” was insufficient under N.J.S.A. 47:1A-10.

The Complainant requested that the GRC compel the Custodian to comply fully with the OPRA request and award counsel fees. The Complainant also included a list of police officers, but from Logan Township, and not from the North Arlington Borough Police Department.

### Statement of Information:

On November 22, 2021, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on May 6, 2021. The Custodian certified she responded in writing on November 3, 2021, stating that no responsive records exist.

Initially, the Custodian contended that the Denial of Access Complaint itself contained numerous errors and failed to comply with GRC regulations. The Custodian contended that the Complainant failed to include a Records Denied List, a copy of the OPRA request, and a summary of the facts and interactions between the Complainant and the North Arlington Borough (“Borough”). The Custodian noted that the document attached to the complaint was from a separate municipality. The Custodian added that the complaint misidentifies the relevant portion of the OPRA request at issue here. The Custodian then stated that the statements from the Complainant were not related to the instant matter, as no responsive records were provided in the first instance.

The Custodian next contended that the Borough did not possess a record containing all the requested information in a single location. The Custodian asserted that the requested information would be within fragments of many documents and files which the Borough may not possess. The Custodian therefore argued that the Borough would have had to conduct research throughout multiple files in various locations to create a new document containing the compiled information, which they are not obligated to perform under OPRA, citing Sussex Commons Assocs., LLC v. Rutgers Univ., 210 N.J. 531 (2012). The Custodian also contended that the request was impermissibly vague and did not seek an identifiable government record. MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 549 (App. Div. 2005).

The Custodian next argued that even if the request was valid, the Complainant was not entitled to the information requested in the complaint. The Custodian asserted that in Libertarians for Transparent Gov’t v. Ocean Cnty. Prosecutor’s Office, 2018 N.J. Super. Unpub. LEXIS 25 (App. Div.), cert. denied, 235 N.J. 407 (2018), the Appellate Division held that public entities were not required to ascertain and provide the reasons why an employee separated from the agency. The Custodian thus argued that the Complainant’s request for the “reasons for separation” under N.J.S.A. 47:1A-10 was baseless and without legal support.

## 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, 375 N.J. Super. at 546 (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. (emphasis added). Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005);<sup>5</sup> 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).

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.*) and requires a custodian to conduct research. MAG, 375 N.J. Super. at 534; Donato v. Twp. of Union, GRC Complaint No. 2005-182 (January 2007). 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).

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<sup>5</sup> Affirmed on appeal from Bent v. Stafford Police Dep’t, GRC Complaint No. 2004-78 (October 2004). Rotimi Owoh, Esq. (on behalf of African American Data & Research Institute) v. North Arlington Borough Police Department (Bergen), 2021-273 – Findings and Recommendations of the Executive Director

Names, Date of Hire, Date of Separation and Reason for Separation, Salary, Payroll Record, Amount and Type of Pension

Regarding requests seeking information or asking questions, there are instances in OPRA specifically identifies pieces of information as a “government record” under OPRA. By way of example, 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” was information specifically considered to be a “government record” under N.J.S.A. 47:1A-10 (“Section 10”). 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).

Here, the Complainant requested in part Section 10 information on separated police officers from 2002 to 2017. The Custodian responded to the Complainant stating that no records exist. In the SOI, the Custodian argued that responding to the request required conducting research, which she was not obligated to perform under OPRA.

Upon review, the evidence is clear that the Custodian improperly determined that this portion of the request was invalid. In accordance with Danis, the Complainant’s request for Section 10 information constituted a “government record” under N.J.S.A. 47:1A-6. Notwithstanding whether the information was within several records or in an electronic database, the Custodian was obligated to provide the most comprehensive records containing the responsive information. See Valdes, GRC 2011-64 and Matthews, GRC 2008-123.

Therefore, the Custodian has not borne her burden of proving she lawfully denied access to the Complainant’s OPRA request for the “Names, date of hire, date of separation and reason for separation, salary, payroll record, amount and type of pension” of police officers who separated from the Borough between 2002 and 2017. N.J.S.A. 47:1A-6; Danis, GRC 2009-156; Valdes, GRC 2011-64; Matthews, GRC 2008-123. The Custodian shall identify, locate, and produce the requested personnel information. N.J.S.A. 47:1A-10. If no responsive information could be located, the Custodian shall certify to same.

**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.

### Agreements

Generally, the GRC does not retroactively apply court decisions to complaints pursuant to Gibbons v. Gibbons, 86 N.J. 515 (1981). There the Court held that “it is a fundamental principle of jurisprudence that retroactive application of new laws involves a high risk of being unfair.” Id. at 522. In Moore v. N.J. Dep’t of Corr., GRC Complaint No. 2009-144 (Interim Order dated October 26, 2010), the custodian denied access to responsive records in 2009 based upon a then existing Executive Order, the custodial agency’s proposed regulations, and prior Council decisions relying on same. During the pendency of the complaint, the Appellate Division in 2010 reversed a separate Council decision relying on the Executive Order and proposed regulations. The Council held that while the custodian’s basis for denial was no longer valid, the denial was not unlawful since at the time the request was consistent with prior GRC case law. See also Biss v. Borough of New Providence Police Dep’t (Union), GRC Complaint No. 2009-21 (February 2010); Sallie v. N.J. Dep’t of Law & Public Safety, Div. of Criminal Justice, GRC Complaint No. 2008-21 (Interim Order dated June 23, 2009).

In the instant matter, the Complainant requested the “[n]ames, date of hire, date of separation and reason for separation, salary, payroll record, amount and type of pension of individuals who either resigned or retired or terminated or otherwise separated from 2002 to 2017” on May 6, 2021. The Complainant also requested any settlement agreements entered between the Borough and any separated officer. On November 3, 2021, the Custodian responded to the Complainant stating no responsive records exist. In the SOI, the Custodian asserted she was not obligated to provide those agreements pursuant to Libertarians, slip op.

At the time of the Complainant’s OPRA request and the Borough’s November 3, 2021 response, Libertarians for Transparent Gov’t v. Cumberland Cnty., 465 N.J. Super. 11 (App. Div. 2020) was the precedential decision on an agency’s obligation to disclose personnel records containing information subject to disclosure under N.J.S.A. 47:1A-10. In that case, the plaintiffs discovered through meeting minutes that a corrections officer was involved in a misconduct investigation along with several other officers. Id. at 13-14. The officer was to be terminated originally but was allowed to “retire in good standing” after cooperating with the investigation in accordance with a settlement agreement. Id. The plaintiffs then submitted an OPRA request seeking the settlement agreement referenced in the minutes, and the officer’s “name, title, position, salary, length of service, date of separation and the reason therefore” in accordance with Section 10. Id. The defendants declined to provide the settlement agreement, claiming it was a personnel record exempt from access. Id.

The plaintiffs challenged the denial of access to the settlement agreement, asserting that the defendants “misrepresent[ed] the ‘reason’ for Ellis’s separation from public employment” and improperly withheld a government record. Id. at 15. The trial court ordered disclosure of the settlement agreement with redactions, and the Appellate Division reversed, finding that the record was exempt as a personnel record under Section 10.

During the pendency of this complaint, the New Jersey Supreme Court reversed the Appellate Division and ordered disclosure of the settlement agreement with redactions. Libertarians, 250 N.J. 46. The Court found that under OPRA, custodians were required to disclose the actual records containing the information required to be disclosed under Section 10. Id. at 56. The Court thus held that because the requested settlement agreement contained Section 10 information, the defendants were obligated to disclose the record with appropriate redactions. Id. at 57.

Since this Denial of Access Complaint was filed before the Libertarians decision, the GRC must determine the applicable law at the time of the response. See Moore, GRC 2009-144. Here, the Custodian argued in the SOI that while the Borough did not possess any “agreements”, such records would not be subject to disclosure in any event. Since the Custodian responded prior to the Supreme Court’s decision, the Borough was not obligated to provide the Complainant with personnel and disciplinary records which contained the “reasons” for separation. See Libertarians, 465 N.J. Super. 11; Moore, GRC 2009-144.

Therefore, recognizing that the Custodian’s November 3, 2021 response to the Complainant’s May 6, 2021 OPRA request seeking settlements is no longer a lawful denial pursuant to Libertarians, 250 N.J. at 56-57; her response was nonetheless lawful at that time because it was consistent with the prevailing case law prior to the Court’s ruling. N.J.S.A. 47:1A-6; Libertarians, 465 N.J. Super. 11; Moore, GRC 2009-144. Thus, the Council declines to order disclosure here.

### **Prevailing Party Attorney’s Fees**

The Council defers analysis of whether the Complainant 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 has not borne her burden of proving she lawfully denied access to the Complainant’s OPRA request for the “[n]ames, date of hire, date of separation and reason for separation, salary, payroll record, amount and type of pension” of police officers who separated from North Arlington Borough between 2002 and 2017. N.J.S.A. 47:1A-6; Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated June 29, 2010); Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2011-64 (Interim Order dated August 28, 2012); Matthews v. City of Atlantic City (Atlantic), GRC Complaint No. 2008-123 (February 2009). The Custodian shall identify, locate, and produce the requested personnel information. N.J.S.A. 47:1A-10. If no responsive information could be located, the Custodian shall certify to same.
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions,**



**including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver<sup>6</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>7</sup> to the Executive Director.<sup>8</sup>**

3. Recognizing that the Custodian's November 3, 2021 response to the Complainant's May 6, 2021 OPRA request seeking settlements is no longer a lawful denial pursuant to Libertarians for Transparent Gov't v. Cumberland Cnty., 250 N.J. 46, 56-57 (2022); his response was nonetheless lawful at that time because it was consistent with the prevailing case law prior to the Court's ruling. N.J.S.A. 47:1A-6; Libertarians for Transparent Gov't v. Cumberland Cnty., 465 N.J. Super. 11 (App. Div. 2020); Moore v. N.J. Dep't of Corr., GRC Complaint No. 2009-144 (Interim Order dated October 26, 2010). Thus, the Council declines to order disclosure here.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado  
Staff Attorney

August 22, 2023

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<sup>6</sup> 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.

<sup>7</sup> "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."

<sup>8</sup> 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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