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

February 29, 2024 Government Records Council Meeting

Rotimi Owoh, Esq. (o/b/o African American Data & Research Institute)
Complainant
v.
Hackensack Police Department (Bergen)
Custodian of Record

Complaint No. 2021-283

At the February 29, 2024 public meeting, the Government Records Council ("Council") considered the February 20, 2024 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. Therefore, recognizing that the Custodian's October 16, 2021 response to the Complainant's August 24, 2021 OPRA request seeking agreements between the City of Hackensack and separated police officers is no longer a lawful denial pursuant to Libertarians for Transparent Gov't v. Cumberland Cnty., 250 N.J. 46, 56-57 (2022); 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 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.

2. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, no 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, the evidence of record supports that the Custodian's response was lawful at the time. Therefore, the Complainant is not 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.

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 29th Day of February 2024

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: March 4, 2024

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
February 27, 2024 Council Meeting

Rotimi Owoh, Esq. (on Behalf of African American Data & Research Institute)[1] **Complainant**	**GRC Complaint No. 2021-283**

v.

Hackensack Police Department (Bergen)[2]
Custodial Agency

Records Relevant to Complaint: Electronic copies via e-mail of: Names, date of hire, date of separation and reason for separation, salary at the time of separation who either resigned or retired or terminated or otherwise separated from 2008 to the present. 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.[3]

Custodian of Record: Deborah Karlsson
Request Received by Custodian: August 24, 2021
Response Made by Custodian: October 16, 2021
GRC Complaint Received: November 10, 2021

Background[4]

Request and Response:

On August 24, 2021, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On October 16, 2021, Custodian's Counsel responded in writing, providing a payroll list containing the requested personnel information.

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[1] The Complainant represents the African American Data & Research Institute.
[2] Represented by Steven W. Kleinman, Esq., of Cleary, Giacobbe, Alfieri & Jacobs, LLC (Oakland, 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.

Denial of Access Complaint:

On November 10, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that the 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 ("Section 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 responsive records from a municipality separate from the City of Hackensack ("City").

Statement of Information:

On December 17, 2021, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on August 24, 2021. The Custodian certified that her search included consulting with the Hackensack Police Department. The Custodian certified that Custodian's Counsel responded in writing on October 16, 2021, providing the responsive record.

The Custodian asserted that all responsive records were provided on October 16, 2021, and that no other responsive records were located. The Custodian noted that the provided record identified the reasons for separation for each officer and believed that no further explanation was needed since the Complainant did not follow up after receipt. The Custodian also asserted that no police officers were separated from the City due to a plea deal, criminal convictions or charges, sentences, court proceedings, or internal affairs investigations.

The Custodian further argued that the request was invalid as it did not seek a specific record, but information which may contain the reason for separation. The Custodian 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); N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (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 pursuant to Libertarians for Transparent Gov't v. Cumberland Cnty., 465 N.J. Super. 11 (App. Div. 2020).

Additional Submissions:

On January 13, 2022, the Complainant submitted a brief in response to the Complainant's SOI. The Complainant asserted that the Custodian failed to provide the "real reasons" for separation in response to his OPRA request.

The Complainant initially argued that the terms "terminated", "retired", or "resigned," did not sufficiently provide the "reason for separation" because they were merely types of employment

separations and did not adequately describe the underlying basis thereof. The Complainant argued that the "reason" for separation was likely located within a separate document constituting a government record, and the Custodian was obligated to retrieve that record, rather than create a spreadsheet or list containing the words "terminated", "retired", or "resigned."

The Complainant next asserted that in many instances where a police officer is charged for crimes, they may enter a plea agreement which may require them to leave the police department or be removed from employment because of a conviction. The Complainant argued that it was insufficient for the Custodian to merely state the terms "retired", "resigned", or "terminated" as the reason for separation if the "real reason" was that the officer was compelled to separate as part of a plea agreement or sentence. The Complainant thus argued that the Custodian violated OPRA by not providing the "real reasons" for any of the separations listed.

The Complainant asserted that a guilty plea agreement between an officer and prosecutor is akin to a settlement agreement normally entered into in civil proceedings. Libertarians, 465 N.J. Super. 11. The Complainant argued that civil settlement agreements are subject to OPRA, and therefore guilty plea agreements should also be subject to OPRA in accordance with Libertarians.

The Complainant contended the City did not want to provide the "real reasons" for separation due to the pervasive culture and predisposition to protect officers convicted of misconduct. The Complainant argued that providing single word descriptions was only partially truthful and did not promote OPRA's goal of transparency.

The Complainant asserted that as an example of police departments' culture, he noted that in response to a similar OPRA request, Millville Police Department stated that two (2) officers "resigned" from the department. The Complainant asserted that in fact the officers pleaded guilty to criminal charges and as part of the agreement and sentencing they were required to be separated from the department.

The Complainant requested that the GRC compel the Custodian to comply fully and truthfully with the OPRA request. The Complainant also requested the GRC declare the Complainant a prevailing party and award counsel fees.[5]

On November 23, 2021, Custodian's Counsel e-mailed the GRC. Counsel first asserted that the Complainant's response was unsolicited from the GRC. Counsel next asserted that notwithstanding, the response failed to bring up any fact, allegation, or legal citation that the Complainant could not have raised in his complaint. Counsel argued that the Complainant's submission therefore be stricken from consideration.

On August 30, 2023, the GRC submitted a request for additional information from the Custodian. Specifically, the GRC inquired whether the Custodian searched for and provided any

[5] The Complainant further noted that access to the records should have been granted under the "common law 'right to access public records'." However, the GRC does not have the authority to address a requestor's common law right to access records. N.J.S.A. 47:1A-7(b); Rowan, Jr. v. Warren Hills Reg'l Sch. Dist. (Warren), GRC Complaint No. 2011-347 (January 2013); Kelly v. N.J. Dep't of Transp., GRC Complaint No. 2010-215 (November 2011). Thus, the GRC cannot address any common law right of access to the requested records.

"agreement" the City entered with any separated police officers, and that if no search was conducted, to perform same. On September 6, 2023, Custodian's Counsel requested an extension of time to respond, which the GRC granted until September 14, 2023.

On September 14, 2023, the Custodian responded to the GRC's request for additional information. The Custodian certified that the Complainant failed to define "any agreement" in the OPRA request, rendering that portion of the request invalid under OPRA. The Custodian also certified that at the time of the request, non-litigation settlement agreements were not subject to disclosure under OPRA, citing Libertarians, 465 N.J. Super. 11. The Custodian next certified that while Libertarians was overturned by the New Jersey Supreme Court in Libertarians for Transparent Gov't v. Cumberland Cnty., 250 N.J. 46, 56-57 (2022), at the time of the request the City was not authorized to provide those agreements. The Custodian noted that in Libertarians, the requestor sought an agreement from a single, identified employee, whereas in the instant matter the Complainant sought agreements *en masse* from a category of employees.

The Custodian next certified that notwithstanding the City's objections to the request item's validity, the City's Personnel Director searched the personnel files of 97 separated officers to determine whether any such agreements exist. The Custodian certified that separation agreements resulting from state or federal litigation were located but stated they were already provided to the Complainant in response to a previous OPRA request. The Custodian then certified that four (4) additional agreements referencing employee separations were located, but stated they primarily dealt with procedural and timing aspects of the separations and did not recite with any specificity the "reasons" why the employee separated from the City. The Custodian also certified that the agreements did not appear to be entered into for the purpose of resolving any disciplinary proceeding, in contrast with the agreement at issue in Libertarians.

The Custodian argued that the four (4) agreements were not public records under N.J.S.A. 47:1A-10 and clarified under Libertarians. The Custodian nevertheless stated that the City would provide the agreements for *in camera* review if requested by the GRC to determine if same could be released with redactions.

Unlawful Denial of Access

Initially, the GRC notes that the Custodian argued in the SOI that the portion of the request seeking "any agreement" between the City and separated officers was invalid. Nevertheless, the Custodian certified that she located four (4) such agreements in her response to the GRC's additional information request. In Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012), the court held that the defendant "performed a search and was able to locate records responsive . . ." which ". . . belied any assertion that the request was lacking in specificity or was overbroad." Id. at 177. See also Gannett v. Cnty. of Middlesex, 379 N.J. Super. 205 (App. Div. 2005) (holding that "[s]uch a voluntary disclosure of most of the documents sought . . . constituted a waiver of whatever right the County may have had to deny Gannett's entire OPRA request on the ground that it was improper." Id. at 213).

Generally, in situations where a request was overly broad on its face but the custodian was able to locate records, the Council has followed Burke, 429 N.J. Super. 169 in determining that

the request contained sufficient information for record identification. See Bond v. Borough of Washington (Warren), GRC Complaint No. 2009-324 (Interim Order dated March 29, 2011); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2010-302 (Interim Order dated January 31, 2012). Here, it is possible that the portion of the request seeking agreements was invalid. However, Burke applies here because the Custodian certified to searching and locating four (4) agreements. Thus, the GRC will proceed without conducting analysis on the validity of the subject OPRA request.

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.

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).

Here, in addition to the requested personnel information, the Complainant sought any "agreement" between the City and any separated officer containing the "reason for separation," and included examples of such agreements within subparts (a) and (b) of the request. On October 16, 2021, the Custodian responded to the Complainant denying access to any agreements that may exist, citing Libertarians, 465 N.J. Super. 11. In response to the GRC's additional information request, the Custodian certified that four (4) agreements were located but maintained that the denial was lawful at the time of the request.

At the time of the Complainant's OPRA request and the City's October 16, 2021 response, Libertarians, 465 N.J. Super. 11 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 ("Section 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 Court's Libertarians decision, the GRC must determine the applicable law at the time of the response. See Moore, GRC 2009-144. Here, the Custodian argued that her denial was lawful at the time of the request pursuant to existing precedent and was not obligated to provide the personnel and disciplinary records containing the reasons for separation. Since the Custodian responded prior to the Supreme Court's decision, the City 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 October 16, 2021 response to the Complainant's August 24, 2021 OPRA request seeking agreements between the City and separated police officers 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

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.
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> [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.
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> [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).
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> [Id. at 76.]

Here, the Complainant sought the "[n]ames, date of hire, date of separation and reason for separation, salary at the time of separation who either resigned or retired or terminated or otherwise separated from 2008 to the present," as well as any "agreement[s]" providing the "reason for separation." The Custodian provided a list containing the requested personnel information and denied access to the portion of the request seeking "agreement[s]". The Complainant then filed the instant complaint on November 10, 2021, asserting the Custodian failed to provide the "real reason" for the officers' separations. On March 7, 2022, the Court overturned the Appellate Division in Libertarians, 250 N.J. 46. However, because the Custodian's denial of access was proper at the time of the response, the Complainant has not achieved the desired result and is not a prevailing party in this complaint.

Therefore, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters, 387 N.J. Super. at 432. Additionally, no 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 evidence of record supports that the Custodian's response was lawful at the time. Therefore, the Complainant is not 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Therefore, recognizing that the Custodian's October 16, 2021 response to the Complainant's August 24, 2021 OPRA request seeking agreements between the City of Hackensack and separated police officers is no longer a lawful denial pursuant to Libertarians for Transparent Gov't v. Cumberland Cnty., 250 N.J. 46, 56-57 (2022); 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 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.

2. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, no 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, the evidence of record supports that the Custodian's response was lawful at the time. Therefore, the Complainant is not 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.

Prepared By: Samuel A. Rosado
Staff Attorney

February 20, 2024