

OSC Review: Has the Government Records Council Decided Public Records Complaints as Expeditiously as Possible?

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I. Introduction

An Office of the State Comptroller (OSC) review of the Government Records Council (GRC), an office within the Department of Community Affairs (DCA) responsible for resolving disputes over the public’s access to governmental records, has found that GRC has not processed complaints alleging an improper denial of access to such records in a timely manner and has accordingly failed to consistently accomplish one of the most important goals of the Open Public Records Act (OPRA).¹ GRC was created by OPRA to “receive, hear, review and adjudicate” disputes over access to public records as “expeditiously as possible.”² The timely processing of complaints over access to public records is critical to maintaining the transparency OPRA was designed to provide. GRC’s failure to expeditiously adjudicate these disputes hinders the public’s access to government records.

For fiscal year 2012 through 2020, the average complaint took GRC twenty-one months to process from receipt to adjudication, meaning that a matter filed in January would not be resolved until September of the following year. OSC also found that GRC regularly maintains a backlog of 300 to 500 open complaints. For the past nine years, GRC received an average of 322 complaints annually and adjudicated or dismissed an average of 319 complaints annually.

OSC found that GRC performs poorly compared to the state judiciary—the other venue in which disputes over access to government records are resolved. Data obtained from the Superior Court shows that the judiciary closed OPRA-related complaints, on average, in seven months for the time period from 2017 to 2021. For that same time period, GRC took two to three times longer than the courts to close OPRA complaints. GRC was designed to be an easy and efficient alternative to resolving complaints in the courts. Its performance, however, suggests that GRC is not effectively serving in that role; it is providing unequal access to government records and hindering transparency for people who cannot afford an attorney and a filing fee or who prefer to avoid litigation.

GRC advised that the delays in resolving matters have resulted from inefficient processes that prolong dispute resolution. GRC has acknowledged that it could amend its rules to improve its processes. Until recently, however, it has not initiated such action.

GRC’s small staff and staffing structure have also impacted its ability to process disputes expeditiously. GRC currently has one attorney and three other staff members—its lowest staff total in its history. Since 2006, GRC’s budget has decreased approximately 37 percent—from \$771,000 in 2006 to \$489,000 in 2022. GRC’s staffing level has steadily reduced from as many as ten employees in 2007 to a current staff of four employees.

¹ N.J.S.A. 47:1A-1, *et seq.*

² N.J.S.A. 47:1A-7(b) & (e).

GRC was designed to provide members of the public with a cost-effective means to resolve disputes with government entities over access to public documents. GRC's current staffing, practices, and procedures have obstructed that purpose, which undermines the public's access to government documents as contemplated by OPRA. OSC makes four recommendations that, if implemented, will help ensure that GRC decides public records disputes expeditiously and thus achieves the goals of OPRA.

II. Background

A. The Open Public Records Act

In 2002, the Legislature enacted OPRA to expand the public's right to access government records.³ OPRA, among other things, broadened the scope of accessible government records while protecting certain specified government records from disclosure; imposed new responsibilities on the custodians of government records; created GRC to mediate and adjudicate complaints regarding denials of access to government records; and increased the penalties imposed upon persons who unreasonably deny access to a government record.⁴

The Legislature intended for prompt access to government records and, in the event of a denial of access, for disputes to be resolved quickly. OPRA generally requires a public agency to respond to a request for a government record "as soon as possible, but not later than seven business days after receiving the request."⁵ Similarly, GRC must conduct proceedings "as expeditiously as possible."⁶

OPRA requires that government records "be readily accessible for inspection, copying or examination" by individuals, subject to enumerated exemptions. That directive is based on "the bedrock principle that our government works best when its activities are well-known to the public it serves. With broad public access to information about how state and local governments operate, citizens and the media can play a watchful role in curbing wasteful government spending and guarding against corruption and misconduct."⁷

³ Statement, General Assembly No. 1309 (Mar. 6, 2000).

⁴ Statement, General Assembly No. 1309 (May 3, 2001), https://www.njleg.state.nj.us/Bills/2000/A1500/1309_S4.pdf.

⁵ N.J.S.A. 47:1A-5(i).

⁶ N.J.S.A. 47:1A-7(e).

⁷ *Burnett v. Cty. Of Bergen*, 198 N.J. 408, 414 (2009).

B. The Government Records Council

To further the principles of transparency and accountability underlying OPRA, the Legislature created GRC to serve as a cost-effective and efficient alternative to resolving disputes over access to government records in state courts.⁸ In particular, the Legislature expressed an intent to “improve people’s direct access . . . to the documents that they are more than entitled to” and to avoid a system in which an “ordinary citizen” who has been denied access to records is required to file a “sophisticated complaint . . . [and] pay [a] filing fee . . . to serve the local government with a lawsuit.”⁹

Pursuant to OPRA, GRC was designed to be comprised of five council members: the Commissioner of DCA or the commissioner’s designee, the Commissioner of the Department of Education or the commissioner’s designee, and three public members appointed by the Governor.¹⁰ The public members of the Council do not receive a salary for their service.

GRC’s Council must have three members present to exercise its powers. The Council has had at least one vacancy since 2008, and only had three members from January 2009 through January 2012. For the period during which the Council had only three members, Council members’ respective recusals forced the Council to delay resolution of 17 complaints until an additional member was appointed. The Council currently has four members, however, and over the past five years, only one meeting has been canceled due to a lack of quorum.

OPRA also empowered GRC to “employ an executive director and such professional and clerical staff as it deems necessary.”¹¹ GRC has a current staff of four: an executive director, mediator,¹² staff attorney, and secretary. The current Executive Director, who has been employed with GRC since 2007, accepted the role of Acting Executive Director in January 2019 and Executive Director in August 2019.

⁸ *Issues Dealing with Public Access to Governmental Records*, Public Hearing on Senate Bill Nos. 161, 351, 573, and 866 before the Senate Judiciary Comm., Legislative Session 2000-2001 (Mar. 9, 2000).

⁹ *Ibid.*

¹⁰ N.J.S.A. 47:1A-7(a).

¹¹ N.J.S.A. 47:1A-7(a).

¹² GRC’s mediator is an employee of the New Jersey Housing and Mortgage Finance Agency (HMFA). According to GRC’s Executive Director, when GRC was created, there was an agreement between DCA and HMFA in which HMFA would fund one staff position within GRC.

OPRA requires GRC, among other things, to:

- establish an informal mediation program designed to facilitate the resolution of disputes regarding access to government records;
- receive, hear, review, and adjudicate formal complaints filed by any person concerning a denial of access to a government record by a records custodian;
- respond to written and telephonic inquiries about OPRA and GRC's processes; and
- provide training about the accessibility of governmental records to custodians and their employees.¹³

C. An Overview of the Process for Challenging a Public Agency's Decision to Deny Access to a Government Record

OPRA permits an individual ("Requestor") who has sought and been denied access to a government record by a public agency's records custodian ("Custodian") to challenge the denial of access by filing a complaint with either the Superior Court or GRC. The right to institute a proceeding belongs solely to the Requestor, and the burden rests with the public agency to establish that the denial was appropriate.¹⁴ OPRA also requires proceedings in both venues to "proceed in a summary or expedited manner."¹⁵

Upon receipt of a complaint, a GRC staff member "will first determine whether any portion of the complaint is outside its jurisdiction, frivolous, or without factual basis."¹⁶ If GRC, through its staff, determines that the complaint is within its jurisdiction and is neither frivolous nor without factual basis, it provides the parties with the option to participate in mediation or to proceed directly through the adjudication process.¹⁷ If mediation is accepted and resolves the dispute, the matter will be closed.¹⁸

¹³ N.J.S.A. 47:1A-7(b).

¹⁴ N.J.S.A. 47:1A-6.

¹⁵ *Ibid.*

¹⁶ N.J.A.C. 5:105-2.1(d).

¹⁷ N.J.A.C. 5:105-2.1(d), 2.5(a).

¹⁸ N.J.A.C. 5:105-2.5(k).

If the parties reject mediation or the matter fails to resolve through that process, the complaint will proceed through GRC's formal adjudication process. Pursuant to this process, GRC staff will provide a copy of the complaint to the Custodian of the entity from which the documentation was requested, request that the Custodian submit a formal response to the complaint, and communicate with the parties regarding the complaint. GRC staff will then review all documentation provided by the parties; investigate the Requestor's claims; consult prior decisions for guidance and consistency; and draft findings and recommendations to be presented to the Council for a final decision.¹⁹ Certain disputes also require a staff member to conduct an *in camera* inspection—that is, a private examination of the records by GRC staff—to determine if they must be released.²⁰ The Council issues its final determination at its monthly public meetings.

GRC often refers its more complicated and novel disputes to the Office of Administrative Law (OAL) for fact-finding by an administrative law judge. The Council does not issue a final decision on these matters until it has received and reviewed the judge's findings and recommendations.

OPRA requires GRC to complete its adjudication process "as expeditiously as possible."²¹ GRC seeks to adjudicate complaints within six months from the date of filing, and prioritizes complaints for review and presentation to the Council in the order in which they are received.

A party that loses before GRC may appeal to the Appellate Division of the Superior Court.²² "[A] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee."²³

D. New Jersey Department of Community Affairs

GRC was established in DCA. As such, DCA primarily oversees budget and staffing for GRC. Any increase in GRC's staffing must be approved by DCA. OPRA directs DCA to include in its annual budget sufficient funding for GRC to effectuate the purposes of that law.²⁴

¹⁹ N.J.A.C. 5:105-2.3-4, 2.6.

²⁰ N.J.A.C. 5:105-2.8.

²¹ N.J.S.A. 47:1A-7(e).

²² *Ibid.*

²³ N.J.S.A. 47:1A-7(f).

²⁴ N.J.S.A. 47:1A-13.

The Executive Director reports directly to DCA's Chief of Staff. The Executive Director provides the Chief of Staff with weekly reports regarding the status of GRC disputes and operations and participates in weekly status calls with DCA.

III. Methodology

OSC initiated this review to determine the causes of GRC's ongoing backlog of denial of access complaints. OSC is authorized to conduct assessments of the performance and management of programs of the Executive branch of State government and the extent to which they are achieving their goals and objectives.²⁵ To perform this review, OSC conducted interviews with two representatives of GRC and a representative of DCA. OSC also reviewed governing statutes, regulations, case law, a sampling of GRC complaint files, and various GRC internal reports. OSC also attended multiple monthly GRC meetings and examined a GRC database that tracks the current status of all complaints received from July 1, 2011 until December 31, 2021.

OSC sent discussion drafts of this Report to DCA, GRC, and OAL to provide them with an opportunity to comment on the facts and issues identified during this review. In preparing this Report, OSC considered the responses received and incorporated them where appropriate.

IV. Findings

A. GRC Has Not Met Its Obligation of Resolving Matters Expediently

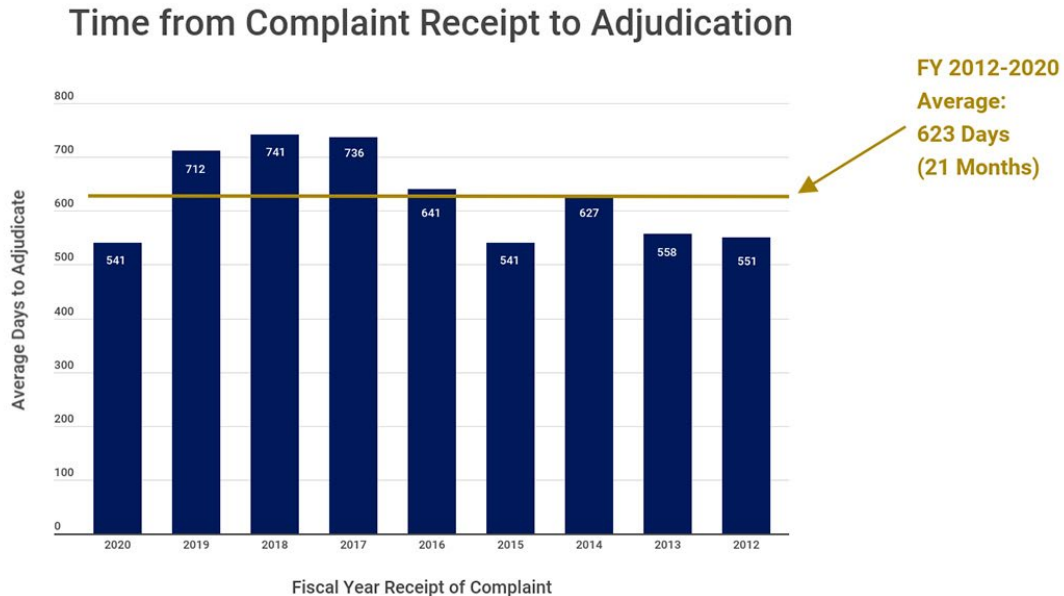
The Legislature required public agencies to disclose public records as soon as possible, and usually not later than seven days, to ensure the public received prompt access to the government records to which it is entitled. The goal of prompt access is extended to GRC through its duty to expediently resolve the disputes that come before it.²⁶ The Legislature did not impose specific deadlines on GRC, but the statutory requirement that Custodians usually decide to grant or deny access within seven days suggests the Legislature intended that there be a quick decision and did not intend for GRC's efforts at being expedient to be measured in years.

²⁵ N.J.S.A. 52:15C-5(a).

²⁶ N.J.S.A. 47:1A-7(e).

1. GRC Takes, on Average, 21 Months to Adjudicate a Dispute

GRC has historically struggled to meet its statutory mandate. From fiscal year 2012 through 2020, GRC took nearly 21 months on average to adjudicate a complaint, which involves considering the parties' positions and deciding which one is correct under the law.²⁷ Figure 1 below provides a breakdown by year of the average number of days from a substantive complaint's receipt to its adjudication.



Some matters take considerably longer than the average of 21 months. Certain complaints involving complex issues have taken GRC over six years to resolve. For example, OSC reviewed documentation from a December 2015 complaint that received a final decision in January 2022.²⁸ Although the dispute required GRC to determine whether hundreds of records requested by the complainant—including tax documentation, financial information, loan documentation, and pricing information—were covered by exceptions to production that “would give an advantage to competitors” or

²⁷ OSC omitted from this calculation matters that were filed, but administratively disposed of as frivolous, without factual basis, or determined to be outside of GRC’s jurisdiction as well as matters that were settled or withdrawn. OSC also omitted complaints filed in fiscal year 2021, which currently average 333 days to adjudicate as of March 2, 2022. That number is artificially low, since complaints filed in fiscal year 2021 are more likely to still be open.

²⁸ *Taylor Esq. v. N.J. Dept. of Treasury, Division of Purchase and Property*, No. 2015-395 (Jan. 25, 2022).

reveal “trade secrets and proprietary commercial or financial information,”²⁹ OSC’s review of this file revealed inexplicable delays, including a thirty-three month gap between the filing of the complaint and the issuance of a GRC order requesting the public agency to provide an accounting of the withheld records and a twelve month lag between GRC’s receipt of the accounting and a second interim order requesting production of the documents for an *in camera* review by the Executive Director. OSC also identified a twenty-seven month gap between GRC’s receipt of the documentation and the issuance of its final decision.³⁰ OSC recognizes that this matter involved complex legal issues and the review of voluminous documentation. These gaps, however, demonstrate that GRC did not resolve this matter expeditiously.

Similarly, OSC found that certain matters referred to OAL for fact-finding have taken longer than 21 months to resolve. For the time period of FY 2017 through FY 2021, OAL returned complaints referred by GRC, on average, within 10 months of receipt. Those matters, however, remained open for a total of 51 months before receiving a final disposition because of the time these matters remained pending at GRC both before and after OAL’s involvement. OSC also found that the open complaints currently pending before OAL have been active for an average of 72 months (*i.e.*, six years).

OSC notes that GRC, for its part, has decreased the total number of complaints it has referred to OAL over the past five years. For the time period of FY 2012 to FY 2021, GRC sent an average of 17 complaints per year. GRC sent the highest number of matters—52—in FY 2013. GRC sent 40 complaints to OAL in FY 2012. In contrast, GRC referred 8 matters in FY 2020 and 3 matters in FY 2021. In total, GRC referred five percent—or 172—of its complaints to OAL for this time period.

GRC resolved 42 percent of its complaints through administrative disposition (*i.e.*, a summary dismissal of complaints that were frivolous, without factual basis, or outside of GRC’s jurisdiction, as well as complaints that were settled or withdrawn).³¹ GRC resolved these types of matters, on average, in approximately six months. If complaints disposed of by way of administrative disposition are considered in determining the average length of time it takes for GRC to resolve matters, the average age of a complaint from fiscal year 2012 to 2020 at the time of closure was 15 months.

2. GRC Usually Has a Caseload of 300-500 Unresolved Complaints

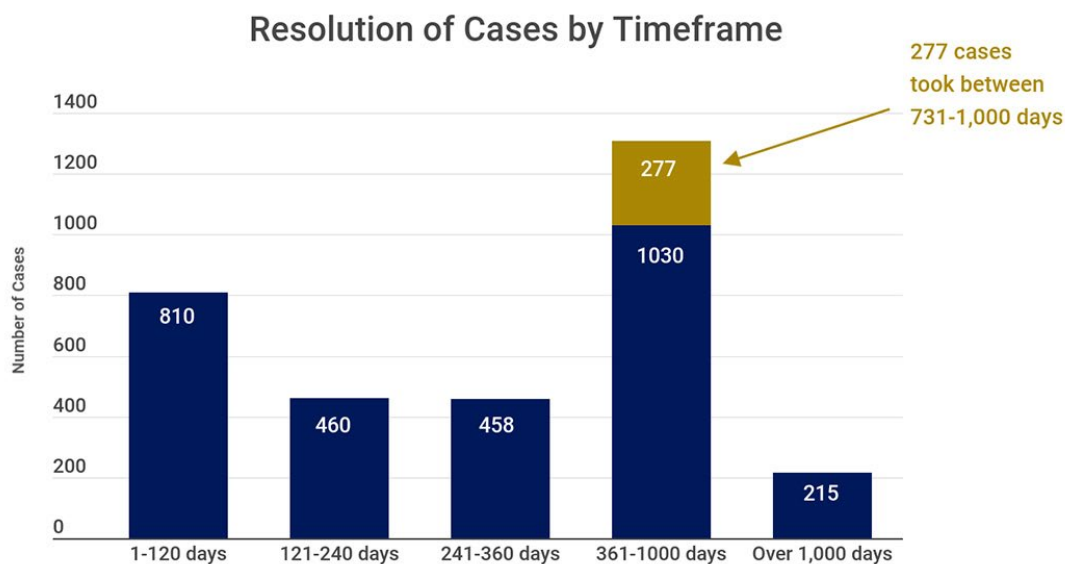
For the time period of 2013 through 2021, GRC received an annual average of 322 complaints. For that same time period, GRC closed an annual average of 319 complaints. And on average, GRC still has 416 complaints remaining unresolved at the end of each

²⁹ N.J.S.A. 47:1A-1.1.

³⁰ This gap occurred during the COVID-19 pandemic.

³¹ N.J.A.C. 5:105-2.1(d).

fiscal year. Figure 2 below shows the number of complaints GRC resolved within specific timeframes.



GRC’s caseload involves records requests submitted to a variety of public agencies throughout the state. From FY 2012 to FY 2021, complaints against municipalities comprised 41 percent of the caseload, with an additional 5 percent involving police departments. K-12 schools comprised 10 percent. Complaints against counties comprised 15 percent. Complaints against universities and colleges comprised 5 percent. An additional 24 percent of the caseload involved requests submitted to state agencies.

3. GRC’s Explanation of Delays

In addition to noting that they had inadequate staffing levels, GRC’s Executive Director pointed to two specific flaws in its current process.³²

First, GRC’s current process for ordering a party to engage in a specific action—such as seeking documentation from Custodians for an *in camera* review—is inefficient. GRC’s interpretation of its current regulations requires the Council to command these specific actions through the issuance of “interim orders.” In order to receive approval from the Council for the issuance of an interim order, GRC staff members must effectively conduct a complete examination of the matter—review all filings, interact with the parties, and draft findings and recommendations for review by the Council—before receiving approval from the Council to issue the interim order. These steps are required even if the staff member’s initial review of the complaint indicates that a party will have to engage in a

³² GRC’s staffing levels are discussed in detail in Section IV(C).

specific action before GRC can complete its adjudication. A staff member is required to complete this process for each interim order sought and when seeking a final determination. Complex matters often require the issuance of multiple interim orders.

Second, GRC's current regulations do not limit the number of filings a party can submit for a single complaint, effectively permitting a party to file additional submissions until the complaint is adjudicated by the Council. GRC's Executive Director informed OSC that this has prolonged the resolution of certain matters because staff members are required to review each new filing, consider the merits of the supplemental arguments, compare those arguments against established precedent, and update the findings and recommendations based on the additional filings so long as the dispute has not received a final adjudication by the Council.

GRC's current process was established in regulations promulgated on May 5, 2008, but those regulations have not been updated since their adoption.³³ During the course of this review, however, GRC initiated the process of amending its regulations in an effort to improve its processes.³⁴

B. GRC Performs Poorly Compared to the Judiciary

OPRA permits an individual who was denied access to government records to challenge that denial through the state's court system or GRC, and imposed a requirement that proceedings in both venues be handled "in a summary or expedited manner."³⁵ GRC was intended to be a venue in which the public could avoid the costs and complexity of litigation while still obtaining expedited review like those who proceed in the courts. GRC's performance suggests that it is not operating as intended by the Legislature.

Data obtained from the Administrative Office of the Courts showed that the trial courts closed all OPRA-related complaints, on average, in seven months for the time period from 2017 to 2021. For that same time period, GRC took approximately 14.5 months on average to close all complaints, including those closed relatively quickly through

³³ *N.J.S.A. 52:14B-5.1(b)* states that rules, such as those promulgated by GRC, "shall expire seven years following the effective date of the rule unless a sooner expiration date has been established for the rule."

³⁴ GRC, via DCA, provided notice of its intent to amend its regulations to OAL on April 5, 2022. Pursuant to *N.J.S.A. 52:14B-5.1(c)*, the expiration date of its current regulations was extended to October 2, 2022. GRC's proposed regulations were published in the New Jersey Register on May 16, 2022 for public comment. The comment period closed on July 15, 2022. 54 *N.J.R.* 809(a).

³⁵ *N.J.S.A. 47:1A-6*.

administrative dismissals.³⁶ When excluding administrative dismissals, GRC took an average of 21 months to adjudicate complaints. Thus, an individual with the means to retain an attorney and incur costs associated with court filing fees will usually receive a final resolution in one-third to one-half of the time it would take if the individual chose to proceed through GRC.

This is in part because the processes established by the courts and GRC are significantly different. Disputes arising under OPRA in the judiciary ordinarily proceed through a process that involves the early entry of an order tailored to the specific facts of the matter, often followed by written submissions and a summary hearing.³⁷ Under this process, the Court, usually in an initial order entered soon after the receipt of the complaint, will schedule a hearing date to determine whether the requested records were lawfully withheld. The court is required to attempt to resolve the dispute at that hearing or shortly after it.³⁸ The proceeding is intended to be “short, concise, and immediate” and is “designed to accomplish the salutary purpose of swiftly and effectively disposing of matters which lend themselves to summary treatment.”³⁹

OPRA requires complaints filed in trial court by Requestors to be “heard in the vicinage where it is filed by a Superior Court Judge who has been designated to hear such cases because of that judge’s knowledge and expertise in matters relating to access to government records.”⁴⁰

GRC’s current adjudication process does not provide it with the flexibility exercised by the Court. The judiciary allows for members of the public to initiate their dispute through a summary process that provides the judge with the discretion to issue an instant decision at a hearing or seek additional briefing by the parties if the complaint presents complex issues. GRC’s process, on the other hand, requires a single staff member to review all relevant materials, including the potential for unlimited filings by either party, consult prior decisions for guidance and consistency, and draft findings and recommendations to be presented to the Council for its final decision at a monthly meeting. GRC’s staff members are not empowered to make final decisions, even on the simplest matters; only the Council can exercise that authority.

GRC’s ability to meet its statutory obligation of resolving matters “expeditiously” could be improved by empowering its staff to issue final decisions that could be appealed to the

³⁶ This figure includes all complaints resolved by GRC, including those dismissed as frivolous, without factual basis, or outside of its jurisdiction, as well as matters that were settled or withdrawn.

³⁷ *N.J. Ct. R.* 4:67.

³⁸ *MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control*, 375 N.J. Super. 534, 550-53 (App. Div. 2005).

³⁹ *Ibid.* (quoting *Depos v. Depos*, 307 N.J. Super. 396, 399 (Ch. Div. 1997)).

⁴⁰ *N.J.S.A.* 47:1A-6.

Council by either party to the dispute. Such an approach would require legislative amendments to OPRA.

In its response to the discussion draft, DCA asserted that “the comparison of the GRC to the judiciary and its process for addressing OPRA complaints does not appear to present an appropriate comparison” because the judiciary may have more personnel and greater resources than GRC.

OSC maintains that the comparison is appropriate. GRC and the judiciary are the only two entities permitted by OPRA to resolve disputes involving access to government records and the duties placed on each by OPRA are similar. And while the judiciary may have more staff and resources, unlike GRC, its duties include adjudicating many kinds of disputes, not just OPRA matters. The judiciary’s record shows that expedited decisions are possible.

C. GRC’s Staffing Structure Impacts Its Ability to Resolve Disputes in an Expeditious Manner

Since 2006, GRC’s budget has decreased approximately 37 percent—from \$771,000 in 2006 to \$489,000 in 2022. During this same period, GRC’s staffing level has been steadily reduced. In the past, there were eight to ten employees. There are currently four employees.⁴¹

Under its current staffing structure, three GRC staff members are responsible for handling and, if necessary, adjudicating all of the complaints that come before the Council. One is an attorney and is the only employee entirely dedicated to adjudicating complaints. The other two individuals who adjudicate complaints—the Executive Director and mediator—are also required to perform additional duties unique to their positions. Against this backdrop, GRC receives, on average, 322 new complaints and 1,895 inquiries annually.

GRC’s Executive Director and staff attorney handle the large majority of the caseload, while the mediator manages a smaller number of complaints in addition to his mediation duties. The case management duties are apportioned among GRC’s staff as follows: (1) staff attorney – 51%; (2) Executive Director – 32%, and (3) mediator – 17%. If the average number of complaints are distributed among the staff members according to the percentages above, the staff attorney would be responsible for 165 of the new complaints, while the Executive Director and mediator would be responsible for 102 cases and 55 complaints, respectively.

⁴¹ On March 15, 2022, DCA posted a vacancy notice for one of the two open GRC case manager positions.

OSC asked but was unable to learn why GRC maintained a substantial backlog of complaints while not filling the two additional authorized positions. The closest OSC got to an answer was a statement that a request for additional staff was not submitted through the proper channels. Documentation reviewed by OSC, however, revealed that the Executive Director has frequently requested permission to hire more staff. Weekly reports sent from the Executive Director to the DCA Chief of Staff since July 10, 2018 have emphasized the need for additional staff to address the backlog. The Executive Director also highlighted the need for additional employees in annual reports submitted in 2019 and 2020. One report from the Executive Director stated that “GRC is now entering its 20th month at below critical staffing levels . . . GRC is in significant need of additional case managers/staff attorneys to address the massive backlog currently plaguing the agency.”

In view of these statements, GRC’s and DCA’s failure to hire two additional staff allocated to it and funded by the Legislature through the budget is surprising. Relying on just three staff to handle complaints when it could have five such staff has had a substantial and negative impact on GRC’s adjudication of complaints and exacerbated the delays. Two more attorneys dedicated entirely to adjudicating complaints could significantly reduce the time period for adjudications.

It is important to also consider that GRC’s duties extend beyond handling complaints. With additional staff, GRC could dedicate more time to its other mandatory duties. OPRA requires GRC, among other things, to “issue advisory opinions, on its own initiative, as to whether a particular type of record is a government record which is accessible to the public; prepare guidelines and an informational pamphlet for use by records custodians in complying with the law governing access to public records; . . . [and] make training opportunities available for records custodians and other public officers and employees which explain the law governing access to public records.”⁴² GRC’s website includes helpful information, but it is noteworthy that the section of the website where advisory opinions would appear says, “[t]here are currently no Advisory Opinions of the Council.”⁴³

In keeping with OPRA’s requirement to use “forms of modern communication,”⁴⁴ GRC should consider creating on-demand trainings and posting them on its website.

GRC may also be able to better ensure it is accessible and convenient to members of the public, including Requestors. All GRC functions are required to be done, “to the maximum

⁴² N.J.S.A. 47:1A-7(b).

⁴³ *Advisory Opinions*, State of New Jersey, Government Records Council, <https://www.nj.gov/grc/laws/opinions/> (last visited July 18, 2022).

⁴⁴ N.J.S.A. 47:1A-7(b).

extent possible, at the convenience of the parties.”⁴⁵ The Legislature also noted that “when in-person meetings are necessary,” GRC shall “send representatives to meet with the parties at a location convenient to the parties.”⁴⁶ With more staff, GRC may be able to do more to carry out the vision of great customer service and accessibility expressed in OPRA. Additional staff may also allow GRC to dedicate a staff member to respond to the numerous inquiries it receives and to proactively engage Requestors and Custodians in developing an understanding and appreciation for New Jersey’s transparency laws.

V. Recommendations

A. Recommendations to DCA and GRC

OSC makes the following three recommendations in order to assist DCA and GRC in effectuating the purposes of OPRA:

1. *GRC should establish by rule what it considers expeditious and should, on its website, advise the public whether it is meeting that standard and if not, how long it is taking to adjudicate complaints. The important and lofty goals of OPRA are undermined by delay. GRC should commit itself to not delaying and should take all reasonable steps necessary to satisfy the standard it sets.*

DCA declined to accept this recommendation and asserted that “arbitrarily defining the term ‘expeditious’ and holding current and future staff to that standard would be detrimental to the [office] due to the unpredictable fluctuations in complaint filings, inquiry submissions, and other day-to-day operational requirements.”

OSC maintains its recommendation that DCA establish by rule a specific timeframe within which to resolve matters and publish its performance metrics on its website. This review established that GRC’s historical performance is inconsistent with its statutory requirements to expeditiously resolve matters and impairs the public’s right to access government records in an expedited manner.

OSC urges DCA to prioritize its statutory duty to provide the public with timely access to government records and to establish processes and hire sufficient staff to ensure that standard is met. With a clear standard and transparency regarding whether it is being met, GRC is less likely to maintain a substantial backlog and take nearly two years to resolve complaints.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

To address DCA's concern that fluctuations in the number of complaints filed and inquiries submitted may affect GRC's ability to meet its standard, DCA should consider drafting the rule in a manner that permits GRC to temporarily depart from that standard if the number of complaints filed and inquiries received significantly increase or if complaints posed are especially complex issues.

- 2. In order for GRC to meet the goals of OPRA by expeditiously resolving complaints, OSC recommends that GRC, in consultation with DCA, hire additional attorneys to exclusively handle complaints. GRC at minimum should hire as many staff members as its current budget allocation permits. If additional staff are needed in order to meet the Legislature's goal of expeditiously handling complaints, the Legislature should be advised. GRC's budget requests should take into account whether it has sufficient resources to meet the statutory requirement to adjudicate complaints expeditiously. A cost-benefit analysis that links the number of staff to the speed with which matters are adjudicated should be prepared.*

DCA agreed to implement this recommendation.

- 3. GRC should adopt a process that permits the Council to conduct its own fact-finding using staff attorneys as hearing officers.*

DCA declined to accept this recommendation. In its response to the discussion draft, DCA noted that "conducting said hearings would negatively impact the GRC's day-to-day operations" because it "has twice conducted hearings at great time and cost to the agency and its Council."

OSC maintains its recommendation that GRC adopt a process that permits the Council to conduct its own fact-finding using staff attorneys as hearing officers. That GRC has only conducted two hearings in its history is not a reason to avoid adopting such a model for future purposes. The comparison to the judiciary suggests that a hearing model may help improve the rate at which disputes involving access to government records are resolved. OSC acknowledges there are other approaches to fact-finding and adjudication that may result in more expeditious processes and accordingly suggests that DCA conduct an analysis to determine what GRC staffing levels and fact-finding procedures would reduce delays.

B. Recommendation to the Legislature

OSC further recommends that the Legislature evaluate whether amendments to OPRA are appropriate. OPRA currently requires GRC "by a majority vote of its members" to decide whether a record that is the subject of a complaint "is a government record which must be made available for public access." This appears to require the Council alone to

make final decisions regarding access to public records. This requirement could be lifted by legislation that would allow staff attorneys to issue decisions and make the Council responsible for appeals. Decisions could be issued orally and recorded or issued using a form. In the event the complaint raises novel or complex issues, the Council could decide the complaint as it currently does.