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
Commissioner

FINAL DECISION

July 30, 2024 Government Records Council Meeting

Rotimi Owoh, Esq. (o/b/o Delores Simmons, Obafemi Simmons, & Grace Woko)
Complainant
v.
Closter Police Department (Bergen)
Custodian of Record

Complaint No. 2021-126

At the July 30, 2024 public meeting, the Government Records Council ("Council") considered the July 23, 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. The Custodian's June 15, 2021 response was insufficient because he failed to address each request item. N.J.S.A. 47:1A-5(g); see Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008); Lenchitz v. Pittsgrove Twp. (Salem), GRC Complaint No. 2012-265 (Interim Order dated August 27, 2013). However, the Council should decline to order disclosure as the Custodian provided evidence that the omitted record was provided to the Complainant on November 12, 2021 as part of the Statement of Information.

2. The Custodian performed an insufficient search for the portion of the Complainant's OPRA request seeking "agreements" between the Borough of Closter and former police officers. N.J.S.A. 47:1A-6; Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 2013) (citing Schneble v. N.J. Dep't of Envtl. Protection, GRC Complaint No. 2007-220 (April 2008)). Specifically, the Custodian's failure to locate the additional separation agreement until after conducting an additional search following receipt of the Denial of Access Complaint resulted in an insufficient search.
3. The Custodian did not unlawfully deny access to the portion of the Complainant's May 4, 2021 OPRA request seeking court complaints filed against Closter Police Department. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that the Borough of Closter provided all responsive records. See Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010).

4. The Custodian lawfully denied access to the portion of the Complainant's May 4, 2021 OPRA request seeking complaints filed with Closter Police Department or other agencies alleging misconduct. N.J.S.A. 47:1A-6. Specifically, such records are explicitly deemed confidential pursuant to the Internal Affairs Policy & Procedures and

not subject to access under OPRA. See N.J.S.A. 47:1A-9(b); Rivera v. Union Cnty. Prosecutor's Office, 250 N.J. 124, 142-43 (2022); Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (Interim Order dated March 11, 2004).

5. Recognizing that the Custodian's denial of access to the additional separation agreement is no longer lawful pursuant to Libertarians for Transparent Gov't v. Cumberland Cnty., 250 N.J. 46, 56-57 (2022); the denial 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.

6. Although the Custodian lawfully redacted two (2) of the responsive Use of Force Reports ("UFRs"), he unlawfully denied access to the eight (8) remaining UFRs at the time of the request. N.J.S.A. 47:1A-6. Specifically, none of the remaining UFRs contained information pertaining to the individuals' mental or medical health warranting redactions under Executive Order No. 26 (McGreevy, 2002). However, the Council declines to order disclosure of the remaining UFRs since the record demonstrates that the Custodian provided same as part the Statement of Information.

7. 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, the Custodian improperly redacted responsive records at the time of the request. 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(c).**

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 30th Day of July 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: August 1, 2024

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
July 30, 2023 Council Meeting

Rotimi Owoh, Esq. (on behalf of Delores Simmons, Obafemi Simmons, & Grace Woko)[1]
Complainant

GRC Complaint No. 2021-126

v.

Closter Police Department (Bergen)[2]
Custodial Agency

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

1. Complaints that were filed against your police department or police officers for misconduct, harassment, excessive use of force and or discrimination from 2002 to 2017. Request includes complaints that were filed with your police department, filed in courts and or filed in administrative agencies.
2. 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 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.
3. Use of Force reports ("UFR") from 2018 to 2021.[3]

Custodian of Record: Chief John McTigue
Request Received by Custodian: May 4, 2021
Response Made by Custodian: June 15, 2021; June 21, 2021
GRC Complaint Received: June 21, 2021

[1] The Complainant represents Delores Simmons, Obafemi Simmons, & Grace Woko.
[2] Represented by Celia S. Bosco, Esq., Edward Rogan & Associates, LLC (Hackensack, NJ).
[3] The Complainant sought additional records that are not at issue in this complaint.

Background[4]

Request and Response:

On May 4, 2021, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On May 23, 2021, the Custodian extended the time to respond to until June 15, 2021. On June 15, 2021, Sergeant Joseph Baldomero responded on the Custodian's behalf in writing providing records responsive to item Nos. 1 and 2. Sgt. Baldomero also stated he provided records responsive to item No. 3 with redactions.

Denial of Access Complaint:

On June 21, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that the Custodian only provided partial responses to item Nos. 1 and 2. The Complainant also asserted that the provided records for item No. 2 did not provide names, date of hire, date of separation, or reason for separation. The Complainant also argued that the Custodian improperly redacted a portion of the UFR reports responsive to item No. 3. Lastly, the Complainant asserted that because of the above allegations of a partial or incomplete response to item Nos. 1 & 2, he questions whether other request items were fully provided.

The Complainant requested the GRC compel the Custodian to comply with the OPRA request and to award counsel fees.

Statement of Information:

On November 12, 2021, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on May 4, 2021. The Custodian certified that his search included inquiries made to the Borough of Closter ("Borough") Attorney's office and the Finance Department for complaints and settlement agreements. The Custodian also certified that he searched CPD's CAD/Enforsys system to locate responsive UFRs. The Custodian certified that Sgt. Baldomero responded in writing on June 15, 2021, providing responsive records.

Regarding item No. 1, the Custodian argued that a copy of a civil complaint was provided but denied access to "complaints" submitted to CPD pursuant to the Attorney General's Internal Affairs Policy & Procedures ("IAPP"). The Custodian argued it was well-settled that internal affairs complaints against law enforcement officers were not subject to disclosure under OPRA.

Regarding item No. 2, for the portion seeking agreements between the Borough and separated officers, the Custodian argued that two (2) separation agreements were provided. The Custodian further acknowledged that he inadvertently omitted the list containing the Section 10 personnel information. The Custodian stated that said information was included as part of the SOI and in response to a separate OPRA request seeking the same records.

[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.

The Custodian also asserted that an additional separation agreement was located after the complaint was filed but was withheld from disclosure under Section 10. The Custodian asserted that OPRA did not require the release of any additional information explaining the circumstances surrounding an employee's retirement or resignation. See 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 Custodian asserted this issue was directly addressed by the Appellate Division in Libertarians for Transparent Gov't v. Cumberland Cnty., 465 N.J. Super. 11 (App. Div. 2020). The Custodian also noted that the agreement had a confidentiality provision which prohibited disclosure of the terms of the agreement.

Regarding item No. 3, the Custodian stated that ten (10) UFRs were provided with redactions made to protect certain medical or psychological information of third parties. See Executive Order No. 26 (McGreevy, 2002) ("EO 26"). The Custodian asserted that in Rivera v. Office of the Cnty. Prosecutor, 2012 N.J. Super. Unpub. LEXIS 1921 (August 8, 2012), the trial court held that redactions made to UFRs containing an individual's medical or psychological history were valid even if the UFR did not contain a medical diagnosis. Rivera, slip op at *19. The Custodian added that redacting the names adequately protects the individual's privacy without the need to redact other markers that would be of interest to the requestor, such as the individual's age, race, or sex. Rivera, slip op. at *20.

The Custodian next stated that notwithstanding the arguments above, eight (8) of the ten (10) UFRs were being provided without redactions as part of the SOI. The Custodian asserted that upon further review, he believed those UFRs did not disclose any significant medical information to warrant protection. The Custodian contended that the remaining redacted records contained additional clarity to demonstrate the basis for the redactions. The Custodian asserted that one record described the individual's mental state, and the other record involved the use of force to "prevent suicide." The Custodian therefore argued the disclosure of their names and related personal information would violate EO 26 as recognized by the court in Rivera.

Regarding the Complainant's request for attorney fees, the Custodian argued that the Complainant was not a prevailing party because he was not unlawfully denied access to any government records. The Custodian asserted that the omission of Section 10 information was an unintentional oversight and has since been provided. The Custodian also noted that despite exchanging subsequent communications, the Complainant made no attempt to inquire about the missing information. The Custodian noted that in Grieco v. Borough of Haddon Heights, 449 N.J. Super. 513 (Law Div. 2015), the court declined to award the plaintiff attorney's fees when the records were not provided due to human error and the plaintiff refused to cooperate with the custodian. The Custodian contended that the fee-shifting provision should not be used as a tool to punish Custodians for an innocent mistake, or a good faith judgement call to withhold information to protect third parties.

Additional Submissions:

On November 12, 2021, the Complainant submitted a brief in response to the Complainant's SOI. The Complainant initially noted that the Custodian has since provided some of the UFRs without redactions, which was an issue warranting the complaint filing. The Complainant therefore asserted he was a prevailing party. The Complainant also stated in his

complaint he was unsure if items relating to settlements, invoices, and cancelled checks were accurate and proper, and the burden was on the Custodian to demonstrate full compliance. The Complainant next stated that although the remainder of his brief focused on item No. 2, he suggested the GRC order an *in-camera* review to determine if withheld settlement agreements were precluded from disclosure.

Regarding item No. 2, the Complainant 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. at 15. 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 that the Borough 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 two (2) 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 that the GRC declare the Complainant a prevailing party and award counsel fees.[5]

On November 17, 2021, Custodian's Counsel submitted a sur-reply to the Complainant's response. Counsel initially rejected the claim that the Custodian's OPRA response was incomplete

[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.

because it did not provide the "real reasons" for the officers' separations. Counsel argued that the Custodian was not obligated to elaborate on the circumstances for their separation, and this specific claim was addressed in Libertarians, 2018 N.J. Super. slip op. at *5. Counsel asserted that the court held that OPRA did not require the Custodian to release any additional information explaining the circumstances surrounding an employee's retirement or resignation.

Counsel further argued that the Complainant's request for the additional information was not initially requested, and the request itself is overly broad and would require the Custodian to engage in research. Counsel also noted that for item No. 2, agreements were provided to the Complainant at the time of the request, apart from one (1) which contained a confidentiality provision.

Counsel next argued that the disclosure of eight (8) UFRs without redactions should not automatically hold the Complainant as a prevailing party, relying on Geico, 449 N.J. Super. at 519-25. Counsel argued that the Custodian and agencies should not be punished for rectifying a good faith mistake. Counsel also maintained that the redactions to the last two (2) UFRs were valid under EO 26, as well as withholding the remaining separation agreement due to its confidentiality provision.

Lastly, Counsel asserted that the Custodian adequately responded to the request items pertaining to settlements, invoices, and cancelled checks. Counsel further contended that in any event those request items were not the subject of the instant complaint and the Custodian was not obligated to respond further because of the Complainant's unclear concern over the accuracy of those responses.

Analysis

Sufficiency of Response

Request Item No. 2 – Personnel Information

OPRA provides that if a "custodian is unable to comply with a request for access, the custodian *shall indicate the specific basis therefor . . .* on the request form and promptly return it to the requestor." N.J.S.A. 47:1A-5(g) (emphasis added). In Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008), the Council held that ". . . [t]he Custodian's response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5(g)." See also Lenchitz v. Pittsgrove Twp. (Salem), GRC Complaint No. 2012-265 (Interim Order dated August 27, 2013).

Upon review, the GRC is satisfied that the Custodian provided an insufficient response. Here, the Custodian responded to the Complainant's OPRA request providing several records. However, the Complainant argued that no records were provided in response to the request item seeking disclosable personnel information of officers who have separated from the Borough. In the SOI, the Custodian acknowledged that the responsive record was inadvertently not included in his response, and a copy of the record was provided as part of the SOI. The Custodian also stated that a copy was provided in response to a separate OPRA request seeking the same records.

Therefore, the Custodian's June 15, 2021 response was insufficient because he failed to address each request item. N.J.S.A. 47:1A-5(g); see Paff, GRC 2007-272; Lenchitz, GRC 2012-265. However, the Council should decline to order disclosure as the Custodian provided evidence that the omitted record was provided to the Complainant on November 12, 2021 as part of the SOI.

Sufficiency of Search

Request Item No. 2 – Agreements

It is the custodian's responsibility to perform a complete search for the requested records before responding to an OPRA request, as doing so will l help ensure that the custodian's response is accurate and has an appropriate basis in law. In Schneble v. N.J. Dep't of Envtl. Protection, GRC Complaint No. 2007-220 (April 2008), the custodian initially stated that no records responsive to the complainant's OPRA request existed. The custodian certified that after receipt of the complainant's denial of access complaint, which contained e-mails responsive to the complainant's request, the custodian conducted a second search and found records responsive to the complainant's request. The GRC held that the custodian had performed an inadequate search and thus unlawfully denied access to the responsive records. See also Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (January 2011).

Moreover, in Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 2013), the custodian initially responded to the complainant's request, producing four (4) responsive records and stating that no other records existed. However, after receiving the denial of access complaint, the custodian performed another search and discovered several other records. Id. In accordance with Schneble, the Council held that the custodian failed to perform an adequate initial search and unlawfully denied access to those additional records. Id.

In the instant matter, the Custodian asserted that at the time of the response, two (2) separation agreements were located and provided to the Complainant. After receiving the instant complaint, the Custodian thereafter located one additional separation agreement, but asserted it was exempt from disclosure. The facts here are on point with those in Weiner, GRC 2013-52, and follows that an insufficient search occurred.

Accordingly, the Custodian performed an insufficient search for the portion of the Complainant's OPRA request seeking "agreements" between the Borough and former police officers. N.J.S.A. 47:1A-6; Weiner, GRC 2013-52 (citing Schneble, GRC 2007-220). Specifically, the Custodian's failure to locate the additional separation agreement until after conducting an additional search following receipt of the Denial of Access Complaint resulted in an insufficient search.

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.

Request Item No. 1 – Complaints Filed w/ Courts

In Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010), the Council found that the custodian did not unlawfully deny access to the requested records based on the custodian's certification that all such records were provided to the complainant. The Council held that the custodian's certification, in addition to the lack of refuting evidence from the complainant, was sufficient to meet the custodian's burden of proof. See also Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005); Holland v. Rowan Univ., GRC Complaint No. 2014-63, *et seq.* (March 2015).

In the instant matter, the Complainant's OPRA request item No. 1 sought in part sought access to "complaints" filed with the courts against CPD officers pertaining to misconduct, harassment, excessive use of force, or discrimination over a seven (7) year period. On June 15, 2021, the Custodian responded in writing providing a responsive civil complaint filed with the Superior Court. In the SOI, the Custodian certified that the complaint was the only one in the Borough's possession. Further, the Complainant failed to present any evidence that the Borough possessed additional court complaints at the time of the request.

Accordingly, the Custodian did not unlawfully deny access to the portion of the Complainant's May 4, 2021 OPRA request seeking court complaints filed against CPD. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that the Borough provided all responsive records. See Danis, GRC 2009-156, *et seq.*

Request Item No. 1 – Complaints Filed w/ CPD or Administrative Agencies

OPRA provides that:

> Notwithstanding the provisions [OPRA] or any other law to the contrary, the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access . . .
>
> [N.J.S.A. 47:1A-10.]

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

> [A]n individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of any pension received shall be government record;
>
> [P]ersonnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and

> [D]ata contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.
>
> [Id.]

The Council has addressed whether personnel records not specifically identified in OPRA were subject to disclosure. For instance, the Council has determined that records involving employee discipline or investigations into employee misconduct are properly classified as personnel records exempt from disclosure under N.J.S.A. 47:1A-10. In Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (Interim Order dated March 11, 2004), the Council found that records of complaints or internal reprimands against a municipal police officer were properly classified as personnel records encompassed within the provisions of N.J.S.A. 47:1A-10. For this reason, the Council concluded that ". . . records of complaints filed against [the police officer] and/or reprimands [the officer] received are not subject to public access." Id.; See also Wares v. Twp. of West Milford (Passaic), GRC Complaint No. 2014-274 (May 2015).

Further, the Appellate Division has held that Attorney General Guidelines have the force of law for police entities. See O'Shea v. Twp. of West Milford, 410 N.J. Super. 371, 382 (App. Div. 2009). In particular, the IAPP is bound upon all law enforcement agencies in New Jersey pursuant to statute. See N.J.S.A. 40A:14-181. Further, the IAPP explicitly provides that "[t]he nature and source of internal allegations, the progress of internal affairs investigations, and the resulting materials are confidential information." IAPP at 9.6.1 (August 2020). Consistent with the IAPP, the Council held in Wares v. Passaic Cnty. Prosecutor's Office, GRC Complaint No. 2014-330 (June 2015) that internal affairs records are not subject to access under OPRA (citing N.J.S.A. 47:1A-9). See also Rivera v. Union Cnty. Prosecutor's Office, 250 N.J. 124 (2022) (holding that internal affairs reports are exempt from disclosure under OPRA); Camarata v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2014-127 (June 2015), Rivera v. Borough of Keansburg Police Dep't (Monmouth), GRC Complaint No. 2007-222 (June 2010).

Here, the Complainant's OPRA request item No. 1 in part sought access to "complaints" filed with CPD or other "administrative agencies" pertaining to misconduct, harassment, excessive use of force, or discrimination over a seven (7) year period. Upon review, the case law is clear that these "complaints" sought by the Complainant were exempt under N.J.S.A. 47:1A-10 as they pertain to allegations of misconduct by one or more police officers employed by CPD. Merino, GRC 2003-110; Wares, GRC 2014-330. For these reasons, the GRC is satisfied that the Custodian lawfully denied access to this portion of the Complainant's OPRA request.

Therefore, the Custodian lawfully denied access to the portion of the Complainant's May 4, 2021 OPRA request seeking complaints filed with CPD or other agencies alleging misconduct. N.J.S.A. 47:1A-6. Specifically, such records are explicitly deemed confidential pursuant to the IAPP and not subject to access under OPRA. See N.J.S.A. 47:1A-9(b); Rivera, 250 N.J. at 142-43; Merino, GRC 2003-110.

Request Item No. 2 - 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).

Here, in addition to the requested personnel information, the Complainant sought any "agreement" between the Borough and any separated officer containing the "reason for separation." In the SOI, the Custodian certified that an additional separation agreement was located after the complaint was filed but asserted that same was not subject to disclosure pursuant to Libertarians, 465 N.J. Super. 11.

At the time of the Complainant's OPRA request and the Borough's June 15, 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 for Transparent Gov't v. Cumberland Cnty., 250 N.J. 46 (2022). The Court found that under OPRA, custodians were required to disclose agreements 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 Borough was not obligated to provide the Complainant with disciplinary settlement agreements which contained the "reasons" for separation. See Libertarians, 465 N.J. Super. 11; Moore, GRC 2009-144.

Therefore, recognizing that the Custodian's denial of access to the additional separation agreement is no longer lawful pursuant to Libertarians, 250 N.J. at 56-57; the denial 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.

Request Item No. 3 - UFRs

OPRA also provides that its provisions:

> [S]hall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; *Executive Order of the Governor*; Rules of Court; any federal law; *federal regulation*; or federal order.
>
> [N.J.S.A. 47:1A-9(a) (emphasis added).]

EO 26 states in part that, "[i]nformation relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation" are not government records subject to access under OPRA. Furthermore, HIPAA regulations are intended to prevent the disclosure of personal health information except when necessary. See 45 C.F.R. 164.501 and 160.103.

OPRA also provides that, "if an arrest has been made, information as to the defendant's name, age, residence, occupation, marital status and similar background information and, the identity of the complaining party" must be released "unless the release of such information is contrary to existing law or court rule[.]" N.J.S.A. 47:1A-3(b).

In the current matter, the Custodian provided sixty-five (65) pages of UFRs in response to the Complainant's OPRA request. The Custodian redacted the names of subjects within the UFRs where the incident pertained to suicide, mental illness, or other medical health situation. The Complainant contended that the names of the subjects should have been disclosed, and that the portions of the UFRs discussing the medical/mental health information should have been redacted instead.

Although unpublished, the GRC finds the Rivera decision persuasive. In that case, the plaintiff sought UFRs without redactions to the names of the subjects upon whom the application of force was used. Rivera, slip op. at *7. The court initially found that while UFRs do not contain a medical diagnosis, they still contained "information relating to the psychiatric or psychological history of the subject of force." Rivera, slip op. at *19. The court thus held that the names of subjects in UFRs which include an indication of "suicidal," "emotionally disturbed person," "EDP," or similar notation can be redacted under EO 26. Id.

The court also analyzed the issue using the privacy balancing test and held that when the subject of the UFR was arrested for the sole purpose of "facilitat[ing] psychological treatment," they retain their privacy interest under OPRA, and their names were lawfully redacted. Rivera, slip op. at *32. The court noted that, "just as the rest of a subject's psychological history appears to be protected, a subject's name should also be protected, and the court declines to create a backdoor through which a creative researcher would be able to uncover of a patient's psychological history by obtaining a UFR under OPRA." Rivera, slip op. at *31-32. However, the court also held that no privacy interest exists for subjects of UFRs who were charged with a criminal offense, "as biographical information about this class of subjects is already a matter of public record under OPRA." Rivera, slip op. at *34-36; N.J.S.A. 47:1A-3(b).

Here, the Custodian initially provided ten (10) UFRs with redactions to the individuals' names pursuant to EO 26. After receiving the instant complaint, the Custodian elected to provide eight (8) of the UFRs unredacted based upon further review and provided same as part of the SOI. The Custodian then argued that the remaining two (2) UFRs were properly redacted because they contained information pertaining to one individual's mental state and another's potential suicide.

Upon review, the GRC finds that the redactions to the two (2) previously mentioned UFRs were proper. In one, the condition of the individual was described as "emotionally disturbed schizophrenic" which clearly falls within the protections under EO 26. In the second UFR, the actions of the individual were described as "attempt suicide by cop", which also pertains to the individual's mental health. Furthermore, in both UFRs no criminal charges were filed against the individuals, thus the individuals' privacy interests remained protected under Rivera.

However, the GRC finds that the eight (8) remaining UFRs were unlawfully redacted at the time of the Custodian's response. Upon reviewing the unredacted UFRs, none of contained substantive medical or psychological treatment, evaluation, history, or diagnosis to warrant a redaction pursuant to EO 26. Furthermore, apart from one the remaining UFRs denote that criminal charges were filed in association with the incident. Thus, in accordance with Rivera, the individuals therein lose their privacy interest even if the UFRs contained information protected under EO 26.

Accordingly, although the Custodian lawfully redacted two (2) of the responsive UFRs, he unlawfully denied access to the eight (8) remaining UFRs at the time of the request. N.J.S.A. 47:1A-6. Specifically, none of the remaining UFRs contained information pertaining to the individuals' mental or medical health warranting redactions under EO 26. However, the Council declines to order disclosure of the remaining UFRs since the record demonstrates that the Custodian provided same as part the SOI.

Prevailing Party Attorney's Fees

OPRA provides that:

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

> . A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.
>
> [N.J.S.A. 47:1A-6.]

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

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

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

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

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

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

The Court in Mason, further held that:

> [R]equestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) "a factual causal nexus between plaintiff's litigation and the relief ultimately achieved"; and (2) "that the relief ultimately secured by plaintiffs had a basis in law." Singer v. State, 95 N.J. 487, 495, cert. denied, New Jersey v. Singer, 469 U.S. 832 (1984).
>
> [Id. at 76.]

Here, the Complainant sought in part the "[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." The Custodian responded by providing responsive records, including ten (10) UFRs with redactions. The Complainant then filed the instant complaint on May 4, 2021, arguing in part that the redactions to the UFRs were improper.

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 redacted all ten (10) of the responsive UFRs in accordance with EO 26. However, after the instant complaint was filed, the Custodian elected to provide eight (8) of the UFRs without redactions. Upon review, the redactions were found to be improper resulting in an unlawful denial at the time of the request. 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.[6]

Therefore, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. at 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 76. Specifically, the Custodian improperly redacted responsive records at the time of the request. 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(c).**

[6] 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).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's June 15, 2021 response was insufficient because he failed to address each request item. N.J.S.A. 47:1A-5(g); see Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008); Lenchitz v. Pittsgrove Twp. (Salem), GRC Complaint No. 2012-265 (Interim Order dated August 27, 2013). However, the Council should decline to order disclosure as the Custodian provided evidence that the omitted record was provided to the Complainant on November 12, 2021 as part of the Statement of Information.

2. The Custodian performed an insufficient search for the portion of the Complainant's OPRA request seeking "agreements" between the Borough of Closter and former police officers. N.J.S.A. 47:1A-6; Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 2013) (citing Schneble v. N.J. Dep't of Envtl. Protection, GRC Complaint No. 2007-220 (April 2008)). Specifically, the Custodian's failure to locate the additional separation agreement until after conducting an additional search following receipt of the Denial of Access Complaint resulted in an insufficient search.
3. The Custodian did not unlawfully deny access to the portion of the Complainant's May 4, 2021 OPRA request seeking court complaints filed against Closter Police Department. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that the Borough of Closter provided all responsive records. See Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010).

4. The Custodian lawfully denied access to the portion of the Complainant's May 4, 2021 OPRA request seeking complaints filed with Closter Police Department or other agencies alleging misconduct. N.J.S.A. 47:1A-6. Specifically, such records are explicitly deemed confidential pursuant to the Internal Affairs Policy & Procedures and not subject to access under OPRA. See N.J.S.A. 47:1A-9(b); Rivera v. Union Cnty. Prosecutor's Office, 250 N.J. 124, 142-43 (2022); Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (Interim Order dated March 11, 2004).

5. Recognizing that the Custodian's denial of access to the additional separation agreement is no longer lawful pursuant to Libertarians for Transparent Gov't v. Cumberland Cnty., 250 N.J. 46, 56-57 (2022); the denial 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.

6. Although the Custodian lawfully redacted two (2) of the responsive Use of Force Reports ("UFRs"), he unlawfully denied access to the eight (8) remaining UFRs at the time of the request. N.J.S.A. 47:1A-6. Specifically, none of the remaining UFRs contained information pertaining to the individuals' mental or medical health

warranting redactions under Executive Order No. 26 (McGreevy, 2002). However, the Council declines to order disclosure of the remaining UFRs since the record demonstrates that the Custodian provided same as part the Statement of Information.

7. 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, the Custodian improperly redacted responsive records at the time of the request. 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(c).**

Prepared By: Samuel A. Rosado
Staff Attorney

July 23, 2024