



**State of New Jersey**  
**GOVERNMENT RECORDS COUNCIL**

101 SOUTH BROAD STREET  
PO Box 819  
TRENTON, NJ 08625-0819

Toll Free: 866-850-0511  
Fax: 609-633-6337  
E-mail: [grc@dca.state.nj.us](mailto:grc@dca.state.nj.us)  
Web Address:  
[www.nj.gov/grc](http://www.nj.gov/grc)

ROBIN BERG TABAKIN, Chair  
COMMISSIONER JOSEPH V. DORIA, JR.  
COMMISSIONER LUCILLE DAVY  
DAVID FLEISHER  
CATHERINE STARGHILL Esq., Executive Director

**FINAL DECISION**

**February 25, 2009 Government Records Council Meeting**

Ali S. Morgano  
Complainant

Complaint No. 2007-156

v.

Essex County Prosecutor's Office  
Custodian of Record

At the February 25, 2009 public meeting, the Government Records Council ("Council") considered the February 18, 2009 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that the Custodian has complied with the Council's October 29, 2008 Interim Order by redacting and disclosing the records to the Complainant as directed in Paragraphs #2 and #4 of the Interim Order and subsequently providing a certification to the GRC within five (5) business days as ordered by the Council.

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 25<sup>th</sup> Day of February, 2009

Robin Berg Tabakin, Chair  
Government Records Council

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



David Fleisher, Secretary  
Government Records Council

**Decision Distribution Date: March 9, 2009**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
February 25, 2009 Council Meeting**

**Ali S. Morgano<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-156**

v.

**Essex County Prosecutor's Office  
Custodian of Records**

**Records Relevant to Complaint:<sup>2</sup>**

- 1) Case files number 88005354 and 88006784 in their entirety
- 2) Newark Police Department Continuation Reports
- 3) Newark Police Department Arrest Report
- 4) Essex County Appeal Update Sheet
- 5) Report of Court Action Sheet
- 6) Intake Screening Printout Sheet
- 7) Criminal Case History Printout
- 8) Criminal Action Ex Parte Order
- 9) Newark Pre-Complaint Internal Report
- 10) Newark Police Department Incident Reports
- 11) Pre-Indictment Appeal Forms
- 12) Administrative Dismissal Reports Document
- 13) Polygraph Examiner Test Results

**Request Made:** May 24, 2007<sup>3</sup>

**Response Made:** June 8, 2007

**Custodian:** Executive Assistant Prosecutor Hilary L. Brunell

**GRC Complaint Filed:** July 9, 2007

**Background**

**October 29, 2008**

At the October 29, 2008 public meeting, the Government Records Council ("Council") considered the October 22, 2008 Reconsideration Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> All of the requested records are concerning Cheryl Johnson under indictment numbers 89-2-0442 and 88-10-3278.

<sup>3</sup> The Custodian certifies the request was not received until May 29, 2007.

1. Because the Custodian failed to provide a document or redaction index asserting the lawful basis for denial in accord with the Council's February 27, 2008 Interim Order, the Custodian has failed to comply with said Order.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the *In Camera* Table below within five (5) business days from receipt of this Order and provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**
3. Based upon the evidence of record, on reconsideration the Custodian has failed to meet her burden of proof pursuant to N.J.S.A. 47:1A-6 that the Complainant should be denied access to the Newark Police Department Arrest Reports and therefore the Custodian must comply with Paragraph 5 of the Council's February 27, 2008 Interim Order by (a) redacting everything in said reports except the information statutorily required to be disclosed pursuant to N.J.S.A. 47:1A-3.b., including, but not limited to the arrested person's name, age, residence, occupation, marital status, time and place of arrest, charges, arresting agency, and such other specific information detailed in said statute, and (b) disclosing the redacted arrest reports to the Complainant.
4. **The Custodian shall comply with item #3 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
5. Because the Custodian failed to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business day period, which resulted in a "deemed" denial, and because the Custodian further failed to comply with the Council's February 27, 2008 Interim Order by not providing the correct records for *in camera* examination along with a document or redaction index asserting the lawful basis for denial, the Custodian has violated the provisions of OPRA. But because the Custodian responded in writing on the eighth (8<sup>th</sup>) business day following receipt of such request denying access, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful "deemed" denial of access and her failure to comply with the Council's Interim Order appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

<b>Record or Redaction Number</b>	<b>Record Name/Date</b>	<b>Description of Record or Redaction</b>	<b>Custodian's Explanation/ Citation for Non-disclosure or Redactions</b>	<b>Findings of the <i>In Camera</i> Examination</b>
1	Request to Recommend Disposition for Cheryl Johnson under file number 88005354 dated March 17, 1989.	Record contains the type of plea agreed to by a criminal defendant and makes recommendations concerning the nature of the sentence which should be imposed upon said defendant.	The Custodian did not provide the GRC with a document index containing the Custodian's explanation and citation for non-disclosure of this record.	Everything above the "REASON FOR REQUEST" shall be disclosed pursuant to the provisions of <u>N.J.S.A. 47:1A-3.b</u> . The balance of the record contains advice and recommendations and constitutes ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
2	Plea Form for Cheryl Johnson AKA Cheryl Harris under file number 88005354 dated August 1, 1989.	Record contains the type of plea agreed to by a criminal defendant and makes recommendations concerning the nature of the sentence which should be imposed upon said defendant. This record is substantially the same as the Request to Recommend Disposition	The Custodian did not provide the GRC with a document index containing the Custodian's explanation and citation for non-disclosure of this record.	Everything above the "REASON FOR REQUEST" shall be disclosed pursuant to the provisions of <u>N.J.S.A. 47:1A-3.b</u> . The balance of the record contains advice and recommendations and constitutes ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> .

		form.		
3	Request to Recommend Disposition for Cheryl Harris AKA Cheryl Johnson under file number 88006784 dated March 23, 1989.	Record contains the type of plea agreed to by a criminal defendant and makes recommendations concerning the nature of the sentence which should be imposed upon said defendant.	The Custodian did not provide the GRC with a document index containing the Custodian's explanation and citation for non-disclosure of this record.	Everything above the "REASON FOR REQUEST" shall be disclosed pursuant to the provisions of <u>N.J.S.A. 47:1A-3.b.</u> The balance of the record contains advice and recommendations and constitutes ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u>
4	Request to Recommend Disposition for Cheryl Harris under file number 88006784 dated May 18, 1989.	Record contains the type of plea agreed to by a criminal defendant and makes recommendations concerning the nature of the sentence which should be imposed upon said defendant.	The Custodian did not provide the GRC with a document index containing the Custodian's explanation and citation for non-disclosure of this record.	Everything above the "REASON FOR REQUEST" shall be disclosed pursuant to the provisions of <u>N.J.S.A. 47:1A-3.b.</u> The balance of the record contains advice and recommendations and constitutes ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u>
5	Request to Recommend Disposition for Cheryl Harris under file number 88006784 incomplete and	Record contains the type of plea agreed to by a criminal defendant and makes recommenda-	The Custodian did not provide the GRC with a document index containing the Custodian's explanation and citation for	Disclose: The only entries made on this form contain information that must be disclosed pursuant to the provisions of

	undated.	tions concerning the nature of the sentence which should be imposed upon said defendant.	non-disclosure of this record.	<u>N.J.S.A. 47:1A-3.b.</u>
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**October 30, 2008**

Interim Decision sent to both parties.

**October 31, 2008**

Telephone call from the Custodian to the GRC. The Custodian wants to make sure she is taking the proper steps in order to fully comply with the Council’s October 29, 2008 Interim Order. The Custodian also informs the GRC that she disagrees with Paragraph #5 of the Order.

**November 2, 2008**

Letter from the Complainant to the GRC. The Complainant acknowledges receipt of the Council’s October 29, 2008 Interim Order and requests copies of the records that he is entitled to receive pursuant to that Order. The Complainant also requests a copy of the Custodian’s certification in response to the Order.

**November 3, 2008**

Custodian’s certification in response to the Council’s Interim Order. The Custodian certifies that she received the Council’s October 29, 2008 Interim Order on October 31, 2008 and redacted the records pursuant to Council’s Findings of the *In Camera* examination set forth in the *In Camera* Table. The Custodian also certifies that she redacted the Newark Police Department Arrest Reports to remove all information with the exception of that which must be disclosed under N.J.S.A. 47:1A-3. The Custodian further certifies that she provided copies of the redacted records to the Complainant on November 3, 2008.

**November 3, 2008**

Facsimile from the GRC to the Custodian. The GRC advises the Custodian what she must do to comply with the terms of the Order.

**Analysis**

**Whether the Custodian complied with the Council’s October 29, 2008 Interim Order?**

The Custodian certifies that she redacted the requested records pursuant to Paragraphs #2 and #4 of the Council’s October 29, 2008 Interim Order and sent copies of the redacted records to the Complainant on November 3, 2008, which is one (1) business day after receipt of the Council’s Interim Order. Therefore, the Custodian has complied with the Council’s Interim Order by redacting and disclosing the records to the Complainant as directed in Paragraphs #2 and #4 of the Interim Order and subsequently providing a certification to the GRC within five (5) business days as ordered by the GRC.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the Custodian has complied with the Council's October 29, 2008 Interim Order by redacting and disclosing the records to the Complainant as directed in Paragraphs #2 and #4 of the Interim Order and subsequently providing a certification to the GRC within five (5) business days as ordered by the Council.

Prepared By: John E. Stewart  
Case Manager/*In Camera* Attorney

Approved By: Catherine Starghill, Esq.  
Executive Director

February 18, 2009





State of New Jersey  
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
PO Box 819  
TRENTON, NJ 08625-0819

Toll Free: 866-850-0511  
Fax: 609-633-6337  
E-mail: [grc@dca.state.nj.us](mailto:grc@dca.state.nj.us)  
Web Address:  
[www.nj.gov/grc](http://www.nj.gov/grc)

ROBIN BERG TABAKIN, Chair  
COMMISSIONER JOSEPH V. DORIA, JR.  
COMMISSIONER LUCILLE DAVY  
DAVID FLEISHER  
CATHERINE STARGHILL Esq., Executive Director

INTERIM ORDER

October 29, 2008 Government Records Council Meeting

Ali S. Morgano  
Complainant

Complaint No. 2007-156

v.

Essex County Prosecutor's Office  
Custodian of Record

At the October 29, 2008 public meeting, the Government Records Council ("Council") considered the October 22, 2008 *Reconsideration* Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian failed to provide a document or redaction index asserting the lawful basis for denial in accord with the Council's February 27, 2008 Interim Order, the Custodian has failed to comply with said Order.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the *In Camera* Table below within five (5) business days from receipt of this Order and provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**
3. Based upon the evidence of record, on reconsideration the Custodian has failed to meet her burden of proof pursuant to N.J.S.A. 47:1A-6 that the Complainant should be denied access to the Newark Police Department Arrest Reports and therefore the Custodian must comply with Paragraph 5 of the Council's February 27, 2008 Interim Order by (a) redacting everything in said reports except the information statutorily required to be disclosed pursuant to N.J.S.A. 47:1A-3.b., including, but not limited to the arrested person's name, age, residence, occupation, marital status, time and place of arrest, charges, arresting agency, and such other specific information detailed in said statute, and (b) disclosing the redacted arrest reports to the Complainant.



4. **The Custodian shall comply with item #3 above within five (5) business days from receipt of the Council’s Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
5. Because the Custodian failed to provide a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business day period, which resulted in a “deemed” denial, and because the Custodian further failed to comply with the Council’s February 27, 2008 Interim Order by not providing the correct records for *in camera* examination along with a document or redaction index asserting the lawful basis for denial, the Custodian has violated the provisions of OPRA. But because the Custodian responded in writing on the eighth (8<sup>th</sup>) business day following receipt of such request denying access, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian’s unlawful “deemed” denial of access and her failure to comply with the Council’s Interim Order appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

<b>Record or Redaction Number</b>	<b>Record Name/Date</b>	<b>Description of Record or Redaction</b>	<b>Custodian’s Explanation/ Citation for Non-disclosure or Redactions</b>	<b>Findings of the <i>In Camera</i> Examination</b>
1	Request to Recommend Disposition for Cheryl Johnson under file number 88005354 dated March 17, 1989.	Record contains the type of plea agreed to by a criminal defendant and makes recommendations concerning the nature of the sentence which should be imposed upon said defendant.	The Custodian did not provide the GRC with a document index containing the Custodian’s explanation and citation for non-disclosure of this record.	Everything above the “REASON FOR REQUEST” shall be disclosed pursuant to the provisions of <u>N.J.S.A. 47:1A-3.b</u> . The balance of the record contains advice and recommendations and constitutes ACD material exempt from disclosure pursuant to

				<u>N.J.S.A. 47:1A-1.1.</u>
2	Plea Form for Cheryl Johnson AKA Cheryl Harris under file number 88005354 dated August 1, 1989.	Record contains the type of plea agreed to by a criminal defendant and makes recommendations concerning the nature of the sentence which should be imposed upon said defendant. This record is substantially the same as the Request to Recommend Disposition form.	The Custodian did not provide the GRC with a document index containing the Custodian's explanation and citation for non-disclosure of this record.	Everything above the "REASON FOR REQUEST" shall be disclosed pursuant to the provisions of <u>N.J.S.A. 47:1A-3.b.</u> The balance of the record contains advice and recommendations and constitutes ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u>
3	Request to Recommend Disposition for Cheryl Harris AKA Cheryl Johnson under file number 88006784 dated March 23, 1989.	Record contains the type of plea agreed to by a criminal defendant and makes recommendations concerning the nature of the sentence which should be imposed upon said defendant.	The Custodian did not provide the GRC with a document index containing the Custodian's explanation and citation for non-disclosure of this record.	Everything above the "REASON FOR REQUEST" shall be disclosed pursuant to the provisions of <u>N.J.S.A. 47:1A-3.b.</u> The balance of the record contains advice and recommendations and constitutes ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u>
4	Request to Recommend Disposition for	Record contains the type of plea	The Custodian did not provide the GRC with a	Everything above the "REASON FOR REQUEST"

	Cheryl Harris under file number 88006784 dated May 18, 1989.	agreed to by a criminal defendant and makes recommendations concerning the nature of the sentence which should be imposed upon said defendant.	document index containing the Custodian's explanation and citation for non-disclosure of this record.	shall be disclosed pursuant to the provisions of <u>N.J.S.A. 47:1A-3.b</u> . The balance of the record contains advice and recommendations and constitutes ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
5	Request to Recommend Disposition for Cheryl Harris under file number 88006784 incomplete and undated.	Record contains the type of plea agreed to by a criminal defendant and makes recommendations concerning the nature of the sentence which should be imposed upon said defendant.	The Custodian did not provide the GRC with a document index containing the Custodian's explanation and citation for non-disclosure of this record.	Disclose: The only entries made on this form contain information that must be disclosed pursuant to the provisions of <u>N.J.S.A. 47:1A-3.b</u> .

Interim Order Rendered by the  
Government Records Council  
On The 29<sup>th</sup> Day of October, 2008

Robin Berg Tabakin, Chair  
Government Records Council

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

David Fleisher, Secretary  
Government Records Council

**Decision Distribution Date: October 30, 2008**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***Reconsideration to Settle the Record***  
**Supplemental Findings and Recommendations of the Executive Director**  
**October 29, 2008 Council Meeting**

**Ali S. Morgano<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2007-156**

**v.**

**Essex County Prosecutor's Office**  
**Custodian of Records**

**Records Relevant to Complaint:<sup>2</sup>**

- 1) Case files number 88005354 and 88006784 in their entirety
- 2) Newark Police Department Continuation Reports
- 3) Newark Police Department Arrest Report
- 4) Essex County Appeal Update Sheet
- 5) Report of Court Action Sheet
- 6) Intake Screening Printout Sheet
- 7) Criminal Case History Printout
- 8) Criminal Action Ex Parte Order
- 9) Newark Pre-Complaint Internal Report
- 10) Newark Police Department Incident Reports
- 11) Pre-Indictment Appeal Forms
- 12) Administrative Dismissal Reports Document
- 13) Polygraph Examiner Test Results

**Request Made:** May 24, 2007<sup>3</sup>

**Response Made:** June 8, 2007

**Custodian:** Executive Assistant Prosecutor Hilary L. Brunell

**GRC Complaint Filed:** July 9, 2007

**Background**

**February 27, 2008**

At the February 27, 2008 public meeting, the Government Records Council ("Council") considered the February 20, 2008 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 found that:

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> All of the requested records are concerning Cheryl Johnson under indictment numbers 89-2-0442 and 88-10-3278.

<sup>3</sup> The Custodian certifies the request was not received until May 29, 2007.

1. Because the Custodian failed to respond in writing to the Complainant's OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. resulting in a "deemed" denial of the Complainant's OPRA requests as consistent with the Council's decision in Tucker Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the records request in item #1 comprising two entire prosecutor's office files is overbroad and of the nature of a blanket request for a class of various documents rather than a request for a specific government record, and because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian has met the Custodian's burden of proof that access to these records was not unlawfully denied pursuant to the Superior Court decisions in MAG Entertainment v. Div. of ABC, 375 N.J.Super. 534 (App.Div. 2005), Bent v. Township of Stafford, 381 N.J.Super. 30 (App.Div. 2005) and the Council's decision in Asarnow v. Department of Labor and Workforce Development, GRC Complaint No. 2006-24 (May 2006).
3. Because the Custodian certified that there are no records responsive to the OPRA request that exist for items numbered 4, 5, 6, 8, 9, 11, and 13, there was no unlawful denial of access pursuant to N.J.S.A. 47:1A-1.1. See Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. The record requested in item #3, a police arrest report, is required to be maintained or kept on file by the Division of Archives and Records Management, therefore it is a government record subject to disclosure pursuant to N.J.S.A. 47:1A-1.1. Further, this record contains certain information such as the arrested person's name, age, residence, occupation, marital status, time and place of arrest, charges, arresting agency, and other information which must be disclosed pursuant to N.J.S.A. 47:1A-3.b. Accordingly, this record must be released with appropriate redactions. Because the Council had previously held that an arrest report was a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1., and therefore was not disclosable, the Custodian did not act improperly by failing to disclose this record at this time.
5. **The Custodian shall comply with item #4 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
6. *N.J.A.C. 13:59-1.6(c)*, applicable to OPRA pursuant to N.J.S.A. 47:1A-9.a., prohibits public servants from permitting any other person to access criminal history record information. Therefore, the Custodian lawfully denied the Complainant access to item #7, a criminal history report.

7. Because it is unclear what, if any, OPRA exemption(s) may apply to item #12, an administrative dismissal document, the GRC must conduct an *in camera* review to decide whether or not the Custodian has lawfully denied access to this record.
8. **The Custodian must deliver<sup>4</sup> to the Council in a sealed envelope six copies of the requested unredacted document (see #7 above), a document or redaction index<sup>5</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the document provided is the document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
9. Because the records requested in items numbered 2 and 10, police department continuation reports and incident reports respectively, are criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1., the Superior Court's decision in Daily Journal v. Police Department of the City of Vineland, 351 N.J. Super. 110 (App.Div. 2002) and the Council's decisions in Nance v. Scotch Plains Township Police Department, GRC Complaint No. 2003-125 (January 2005) and Janezko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004), these records are exempt from disclosure. Thus, the Custodian did not unlawfully deny access to these records.
10. The Council defers a decision regarding whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances pending compliance with the Council's Interim Order.

### **March 3, 2008**

Interim Decision requiring *in camera* documents sent to both parties.

### **March 5, 2008**

Letter from the Custodian to the GRC. The Custodian requests a Stay for reconsideration of the Council's Interim Order dated February 27, 2008 ("Order"). The Custodian states that the Order requires her to supply documents in response to Items #3 and #12 as requested by the Complainant, which the Custodian identifies as Cheryl Johnson's Newark Police Department Arrest Report and Administrative Dismissal Report, respectively. The Custodian asserts a Stay is justified on the grounds that:

- The Complainant is not entitled to a specific arrest report because arrest reports are confidential records.
- Even though there is an overlap of information between the arrest report and the information specified for disclosure in N.J.S.A. 47:1A-3.b.,

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<sup>4</sup> The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

<sup>5</sup> The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.



recasting a request in order to achieve disclosure is not required under OPRA.

- A request for an arrest report should not obligate a custodian to cull the report for non-privileged information.
- There is no longer a retention requirement for the arrest report because a final disposition has been rendered in the matter.
- There are compelling reasons which warrant reconsideration of the Order.

The Custodian contends the Order concludes that an arrest report contains information similar to that specified in N.J.S.A. 47:1A-3.b.; however, the Custodian asserts that the Complainant did not seek the information disclosable under that provision. Rather, the Custodian contends, the Complainant requested a specific arrest report for Cheryl Johnson, to which, the Custodian argues, the Complainant is not entitled. The Custodian states that even if there is some overlap of information between the arrest report and the information specified for disclosure in N.J.S.A. 47:1A-3.b., recasting a request in order to achieve disclosure is not required under OPRA. The Custodian cites MAG Entertainment v. Div. of ABC, 375 N.J. Super. 534 (App.Div. 2005) to support her assertion that a request for an arrest report should not obligate a custodian to cull the report for non-privileged information.

The Custodian asserts that the GRC states a police arrest report “is included as item number 0007-0000 for agency retention” by the New Jersey Division of Archives and Records Management (“DARM”). The Custodian further asserts that item number 0007-0000 pertains to arrest files in the Local Police Department Retention Schedule, not the County Prosecutor’s Office Retention Schedule. The Custodian contends the Local Police Department Retention Schedule is not relevant to retention of local police department arrest reports maintained by the Essex County Prosecutor’s Office, and that even if it was, there is no longer a retention requirement because there has been a final case disposition.

The Custodian also asserts that there are compelling reasons which warrant reconsideration of the Order. First, the Custodian expresses the need to preserve the confidentiality of criminal investigatory reports. In support of her assertion, the Custodian cites River Edge Savings and Loan Ass’n v. Hyland, 165 N.J. Super. 540 (App. Div. 1979), Greenspan v. State, 174 N.J. Super. 332 (App. Div. 1980), and Daily Journal, supra. The Custodian also states that the Council should consider that the Complainant is a convicted murderer who is requesting information about a key State’s witness and the need for confidentiality under these circumstances is compelling. The Custodian further contends that disclosure will irreparably harm the public’s interest in maintaining the integrity of the Prosecutor’s files. The Custodian asserts that the Complainant has not indicated his request is time-sensitive and therefore the Complainant will not be adversely affected by any delay stemming from a reconsideration.

The Custodian also states that she received a voicemail message from the GRC regarding Item #12 on September 24, 2007. The Custodian states that when she returned the call from an out-of-state location on September 24, 2007, she was informed by the GRC that the issue could await her return. The Custodian requests the chronology contained in the Order be amended to reflect that she responded in a timely manner to the GRC.

**March 6, 2008**

Custodian's Certification. The Custodian certifies that she has requested a Stay for reconsideration of the Council's Order with regard to arrest reports. The Custodian also certifies that there are no documents in the Prosecutor's Office file which bear the exact label "Administrative Dismissal." For this reason, the Custodian certifies that she will provide for *in camera* inspection several documents entitled "Request to Recommend Disposition" and "Plea Form" which contain sections providing for the dismissal of charges.

**March 7, 2008**

Telephone call from the Custodian to the GRC. The Custodian informs the GRC that she faxed a Request for a Stay to the GRC on March 6, 2008 and needs to know whether it will be granted because she wants to make sure she complies with the provisions of the Order. The GRC informs the Custodian that the GRC reply to her Request for a Stay may not be immediately forthcoming. The Custodian states she will submit to the GRC the records for *in camera* examination by overnight delivery service to be held in abeyance by the GRC pending a decision on the Stay request. The Custodian states that she is taking these measures to ensure she will be in compliance with Paragraph 5 of the Order.

**March 7, 2008**

Facsimile transmission from the GRC to the Custodian. The GRC confirms the telephone conversation between the Custodian and the GRC this date.

**March 7, 2008**

Letter from the Complainant to the GRC. The Complainant acknowledges receipt of the Order requiring an *in camera* examination of records by the GRC. The Complainant requests that the GRC conduct the *in camera* examination pursuant to the New Jersey Court Rules, R. 3:13-3 (a), (b), (c).

**March 7, 2008**

Certification of the Custodian with six (6) copies each of the following unredacted documents:<sup>6</sup>

- Request to Recommend Disposition for Cheryl Johnson under file number 88005354 dated March 17, 1989
- Plea Form for Cheryl Johnson AKA Cheryl Harris under file number 88005354 dated August 1, 1989
- Request to Recommend Disposition for Cheryl Harris AKA Cheryl Johnson under file number 88006784 dated March 23, 1989
- Request to Recommend Disposition for Cheryl Harris under file number 88006784 dated May 18, 1989
- Request to Recommend Disposition for Cheryl Harris under file number 88006784 incomplete and undated

The Custodian sends the original copies of her letter to the GRC dated March 5, 2008 and her certification dated March 6, 2008 wherein the Custodian certifies that there are no documents in the Prosecutor's Office file labeled "Administrative Dismissal." The

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<sup>6</sup>The certification is incorrectly identified as GRC No. 2007-157. It should be GRC No. 2007-156. Ali S. Morgano v. Essex County Prosecutor's Office, 2007-156 – Supplemental Findings and Recommendations of the Executive Director

Custodian certifies that she is therefore substituting for *in camera* inspection several documents entitled “Request to Recommend Disposition” and “Plea Form.” The Custodian did not provide the GRC with a document index.

### **March 7, 2008**

Certification of the Custodian with the following attachments:

- A copy of an unredacted arrest report responsive to the Complainant’s request dated June 7, 1988
- A copy of an unredacted arrest report responsive to the Complainant’s request dated July 24, 1988
- A copy of an unredacted arrest report responsive to the Complainant’s request dated July 24, 1988
- A copy of a redacted arrest report responsive to the Complainant’s request dated June 7, 1988
- A copy of a redacted arrest report responsive to the Complainant’s request dated July 24, 1988
- A copy of a redacted arrest report responsive to the Complainant’s request dated July 24, 1988

The Custodian certifies that she received the Order on March 4, 2008. The Custodian also certifies that she filed a Request for a Stay with the GRC by facsimile transmission on March 6, 2008, wherein she objected to the disclosure of arrest reports. The Custodian further certifies that she is providing redacted and unredacted copies of the arrest reports to the GRC pending a decision on her Request for a Stay. The Custodian certifies she redacted the arrestee’s home address, date of birth and social security number in accord with N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-1.1.

### **March 17, 2008**

Letter from the Complainant to the GRC. The Complainant acknowledges receipt of the Custodian’s Request for a Stay dated March 5, 2008. The Complainant objects to a Stay because the Complainant states he already has Cheryl Johnson’s personal information and for that reason the Custodian’s assertion that disclosure of the arrest reports will harm the public’s interest in maintaining the integrity of the Prosecutor’s files is a moot issue. The Complainant attaches a copy of Cheryl Johnson’s Presentence Report to verify his assertions.

### **April 17, 2008**

Letter from the GRC to the Custodian. The GRC grants the Custodian’s Request for a Stay so that the GRC may reconsider the instant complaint.

### **August 15, 2008**

Telephone call from the GRC to the Custodian. Because the Custodian did not contend as grounds for denial of access that the Complainant was a convicted murderer requesting information about a key State’s witness until the Custodian submitted her letter dated March 5, 2008 requesting a stay, the GRC asks the Custodian to cite legal authority in support of her contention. The Custodian states that she does not know of any statute or case

law that can be cited as authority to deny access of witness records to a convict. The Custodian states that her office relies upon protective orders in such matters. The GRC asks the Custodian if there was a protective order entered in the underlying criminal matter. The Custodian states she does not know if there was a protective order entered in that matter. The Custodian did not want to submit any additional certification(s), although the GRC invited her to do so.

#### **August 15, 2008**

Letter from the GRC to the Custodian. The GRC confirms its telephone conversation with the Custodian earlier this date.

#### **August 21, 2008**

Letter from the Custodian to the GRC. The Custodian emphasizes that her letter dated March 5, 2008, was intended only to express security concerns relating solely to addresses or phone numbers of witnesses that might appear on arrest reports. The Custodian states that she has no information regarding threats made to any witness in the instant matter or any knowledge of protective orders in the matter. The Custodian further states that her security concerns were assuaged when the GRC informed her that they would release the arrest report with the addresses and phone numbers redacted. The Custodian states that, although she believes a certification from her is unnecessary, she will provide one upon request.

#### **August 22, 2008**

Letter from the GRC to the Custodian. The GRC acknowledges receipt of the Custodian's letter dated August 21, 2008, and advises the Custodian that the GRC does not redact and/or disclose records. The GRC advises the Custodian that custodians must redact and/or disclose records.

#### **August 25, 2008**

Letter from the Custodian to the GRC. The Custodian acknowledges receipt of the GRC's letter dated August 22, 2008. The Custodian refers the GRC to her March 7, 2008 certification which, the Custodian informs the GRC, indicates she already provided redacted copies of the arrest report.

#### **August 25, 2008**

Letter from the GRC to the Custodian. The GRC advises the Custodian that her March 7, 2008 certification does not make clear that the Custodian will disclose the record to the Complainant. The GRC emphasizes that the Custodian must redact and disclose the record if subsequently ordered to do so by the Council.

### **Analysis**

#### **Whether the Custodian complied with the Council's February 27, 2008 Interim Order by providing the Council with all records set forth in Paragraph 8 within five (5) business days of receiving the Council's Order?**

The Council ordered an *in camera* examination of Item #12 identified as "Administrative Dismissal Forms" because the Custodian was unclear about the description

of the records, therefore the GRC was uncertain the Complainant was lawfully denied access to them.

The Custodian sent a letter to the GRC dated August 13, 2007 supplementing her Statement of Information (“SOI”) wherein she listed in narrative form the items that comprised the Complainant’s OPRA request along with the Custodian’s reason for denying access to each of the records. With respect to Administrative Dismissal Forms listed as Item #12 of the Complainant’s OPRA request, the Custodian stated, “[t]here are no identifiable Dismissal Forms in the requested files.” The GRC understood this to mean that for Item #12, no records responsive to the request existed. The GRC by letter dated August 28, 2007 requested the Custodian, among other things, to resubmit the information in document index table format and under certification as directed in the GRC’s request for the SOI.

The Custodian forwarded a letter to the GRC dated August 30, 2007 in which she stated that for four (4) of the requested records, no record existed responsive to the Complainant’s request; however, the Custodian changed the status of the Administrative Dismissal Forms, now stating they were exempt from disclosure because they were criminal investigatory records and also exempt as advisory, consultative or deliberative material (“ACD”). Because the Custodian again failed to provide a certification and submit the information in document index table format, the GRC directed that she do so by letter dated September 7, 2007.

The Custodian submitted a certification dated September 17, 2007 wherein she certified Item #12 as being Administrative Dismissal Forms exempt from disclosure because they are criminal investigatory records and constitute ACD material pursuant to N.J.S.A. 47:1A-1.1. The Custodian further added that the Administrative Dismissal Forms were internal documents created for administrative purposes.

Because the GRC was still unclear concerning the precise nature of the Administrative Dismissal Form records, the GRC telephoned the Custodian to obtain a more detailed description of Item #12. The Custodian advised the GRC that Item #12 was part of the investigative file but also contained assistant prosecutor work product and was in the nature of a recommendation.<sup>7</sup> Because the Custodian stated that she could not adequately clarify the record further with another certification, the GRC deemed it necessary to conduct an *in camera* examination of the Administrative Dismissal Form records.

Subsequently, the Custodian in her March 6, 2008 certification in response to the Council’s Order, certifies that there are no documents in the Prosecutor’s file labeled Administrative Dismissal. The Custodian therefore certifies she found it necessary to

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<sup>7</sup> The Custodian in her Request for a Stay states that she wants the Council’s Order amended to reflect that she received the GRC phone message on September 24, 2007, and when she checked her messages that same date she returned the phone call to the GRC. The Custodian states she is concerned that the Order reflect that she returned the call to the GRC in a timely manner. The GRC recorded the date of the phone call during which a message was left for the Custodian as September 25, 2007 and the date the Custodian returned the phone call to the GRC as October 1, 2007. The GRC did not, however, direct the Custodian to return the phone call within any specified time frame. Further, the GRC in its Findings and Recommendations dated February 20, 2008 did not find the Custodian was less than timely by returning the phone call on October 1, 2007; therefore, this is not an issue that needs to be addressed in this Reconsideration.

substitute other documents for the Administrative Dismissal records ordered by the Council for the *in camera* examination, to wit, documents titled “Request to Recommend Disposition” and “Plea Form.” If the Custodian was not sure what precise record the Complainant was attempting to attain when he requested the “Administrative Dismissal Reports Document”, the Custodian should have asked the Complainant to clarify his request for this record. The GRC has long recognized a custodian’s need to seek clarification of an OPRA request when necessary. See Karen Leibel v. Manalapan Board of Education, GRC Complaint No. 2004-51 (September 2004). The Custodian, however, submitted the forms titled “Request to Recommend Disposition” and “Plea Form” for *in camera* examination without a document or redaction index.

Because the Custodian failed to provide a document or redaction index asserting the lawful basis for denial in accord with the Council’s February 27, 2008 Interim Order, the Custodian has failed to comply with said Order.

An *in camera* examination was performed on the submitted records. The results of this examination are set forth in the following *In Camera* Table:

<b>Record or Redaction Number</b>	<b>Record Name/Date</b>	<b>Description of Record or Redaction</b>	<b>Custodian’s Explanation/ Citation for Non-disclosure or Redactions</b>	<b>Findings of the <i>In Camera</i> Examination</b>
1	Request to Recommend Disposition for Cheryl Johnson under file number 88005354 dated March 17, 1989.	Record contains the type of plea agreed to by a criminal defendant and makes recommendations concerning the nature of the sentence which should be imposed upon said defendant.	The Custodian did not provide the GRC with a document index containing the Custodian’s explanation and citation for non-disclosure of this record.	Everything above the “REASON FOR REQUEST” shall be disclosed pursuant to the provisions of <u>N.J.S.A. 47:1A-3.b</u> . The balance of the record contains advice and recommendations and constitutes ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
2	Plea Form for Cheryl Johnson AKA Cheryl	Record contains the type of plea	The Custodian did not provide the GRC with a	Everything above the “REASON FOR REQUEST”

	Harris under file number 88005354 dated August 1, 1989.	agreed to by a criminal defendant and makes recommendations concerning the nature of the sentence which should be imposed upon said defendant. This record is substantially the same as the Request to Recommend Disposition form.	document index containing the Custodian's explanation and citation for non-disclosure of this record.	shall be disclosed pursuant to the provisions of <u>N.J.S.A. 47:1A-3.b</u> . The balance of the record contains advice and recommendations and constitutes ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
3	Request to Recommend Disposition for Cheryl Harris AKA Cheryl Johnson under file number 88006784 dated March 23, 1989.	Record contains the type of plea agreed to by a criminal defendant and makes recommendations concerning the nature of the sentence which should be imposed upon said defendant.	The Custodian did not provide the GRC with a document index containing the Custodian's explanation and citation for non-disclosure of this record.	Everything above the "REASON FOR REQUEST" shall be disclosed pursuant to the provisions of <u>N.J.S.A. 47:1A-3.b</u> . The balance of the record contains advice and recommendations and constitutes ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
4	Request to Recommend Disposition for Cheryl Harris under file number 88006784 dated May 18, 1989.	Record contains the type of plea agreed to by a criminal defendant and makes recommendations concerning the	The Custodian did not provide the GRC with a document index containing the Custodian's explanation and citation for non-disclosure of this record.	Everything above the "REASON FOR REQUEST" shall be disclosed pursuant to the provisions of <u>N.J.S.A. 47:1A-3.b</u> . The balance of the record contains advice

		nature of the sentence which should be imposed upon said defendant.		and recommendations and constitutes ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u>
5	Request to Recommend Disposition for Cheryl Harris under file number 88006784 incomplete and undated.	Record contains the type of plea agreed to by a criminal defendant and makes recommendations concerning the nature of the sentence which should be imposed upon said defendant.	The Custodian did not provide the GRC with a document index containing the Custodian's explanation and citation for non-disclosure of this record.	Disclose: The only entries made on this form contain information that must be disclosed pursuant to the provisions of <u>N.J.S.A. 47:1A-3.b.</u>

**Whether, upon reconsideration, the Custodian must comply with the Council's February 27, 2008 Interim Order by disclosing the lawfully redacted arrest reports as set forth in Paragraph 5 of the Council's Interim Order?**

The Custodian has released redacted and unredacted copies of the arrest reports to the GRC, rather than the Complainant, within the ordered time frame as a showing of good faith pending a decision on her Request for a Stay. The Custodian certifies she redacted the arrestee's home address, date of birth and social security number in accord with N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-1.1. and the redacted copies of the arrest reports the Custodian provided to the GRC reflect said redactions.

The Custodian contends the Order "concludes that an arrest report contains information similar to that covered by N.J.S.A. 47:1A-3.b." The Custodian has misread the Order. The Order states that an arrest report contains certain information which *must be disclosed* pursuant to N.J.S.A. 47:1A-3.b. and goes on to list some of that information (emphasis added). The arrest report does not contain similar information as that required to be disclosed under N.J.S.A. 47:1A-3.b., it contains identical information. This is the reason portions of the arrest report must be disclosed. Once an arrest report containing information required to be disclosed under N.J.S.A. 47:1A-3.b. is requested, a custodian cannot deny access without violating OPRA. By acknowledging there is some overlap of information in the arrest report and the material mandated for disclosure pursuant to N.J.S.A. 47:1A-3.b., the Custodian makes the Council's case for release of the redacted arrest report.



The GRC agrees with the Custodian that, pursuant to the court's decision in MAG Entertainment v. Div. of ABC, 375 N.J.Super. 534 (App.Div. 2005), the Custodian is not required to identify and siphon useful information from government records for requesting parties. MAG, however, is not relevant to the Custodian's argument that she was not obligated to cull non-privileged information from an arrest report, because in this matter she was *legally obligated* to do so pursuant to the provisions of N.J.S.A. 47:1A-3.b. Because much of the information specifically required to be disclosed pursuant to N.J.S.A. 47:1A-3.b is contained in an arrest report, when the Complainant sought disclosure of the arrest report, he necessarily sought disclosure of information which must be released by law. And because a custodian is under no duty to extract and synthesize such information from government records in order to comply with the provisions of OPRA, *see MAG, supra*, this information must be disclosed in the form of a government record.

Although the Custodian asserts that the Local Police Department Retention Schedule is not applicable to retention of a local police department arrest report maintained by the Essex County Prosecutor's Office, DARM maintains that the schedule does apply to the Prosecutor's Office and supplements the County Prosecutor's Office Retention Schedule with respect to its performance of law enforcement functions. But even under the County Prosecutor's Office Retention Schedule, the arrest report is a record that is required to be maintained once it is made a part of the case file, because there is a retention requirement for the case file pursuant to Series 0018-0000, et seq. The Custodian states, however, that even if the arrest report is required to be retained there is no longer a retention requirement because there has been a final case disposition. The Custodian is arguing the wrong issue; she is confusing the definition of a criminal investigatory record with the definition of a government record. The former is a record which is "...not required by law to be made, maintained, or kept on file...". N.J.S.A. 47:1A-1.1. Thus, the DARM retention requirement militates against an arrest report being a criminal investigatory record. The latter "...means any [document/data]...that has been made, maintained or kept on file in the course of [an agency's] official business...". N.J.S.A. 47:1A-1.1. The fact that there may no longer be a retention requirement is immaterial. If the record responsive to the Complainant's request is *maintained or kept on file* by the agency, the record must be disclosed unless there is a lawful reason to deny access.

The Custodian further contends that the Complainant is not entitled to a police arrest report because police reports are confidential records. The Custodian cites The Daily Journal v. Police Department of the City of Vineland, et al., 351 N.J. Super. 110 (App. Div. 2002) in support of her contention. The Daily Journal court, however, was careful to specify that a *criminal investigatory report* is excepted from the definition of a public record. (Emphasis added). The court did not address whether police reports, other than those containing work product of an investigation, are exempt from disclosure. An arrest report recites facts; it is not an investigatory report. Further, if investigatory information is contained on an arrest report it should be redacted prior to disclosure.

The Custodian finally asserts that there are compelling reasons which warrant reconsideration of the Order. The Custodian (a) expresses the need to preserve the confidentiality of criminal investigatory reports, (b) contends that disclosure will irreparably harm the public's interest in maintaining the integrity of the Prosecutor's files and (c) asserts that the Council should consider that the Complainant is a convicted murderer who is

requesting information about a key State's witness and the need for confidentiality under such circumstances is compelling.

OPRA expressly provides for confidentiality of criminal investigatory reports by removing such reports from the definition of a government record. The Council has not here ordered disclosure of a criminal investigatory report. Lawful disclosure of properly redacted records will not harm the public's interest in maintaining the integrity of the agency's files. Conversely, lawful disclosure of government records will likely strengthen the public interest in maintaining the integrity of the agency. This is the very purpose of OPRA.

The Custodian also asserted as a reason for denying access that the Complainant is a convicted murderer who is requesting information about a key State's witness. Subsequently, in an August 15, 2008 telephone conversation with the GRC, the Custodian more specifically stated that it is her belief that Cheryl Johnson, aka Cheryl Harris, is or was a witness against the Complainant in a criminal prosecution.

The GRC requested the Custodian cite legal authority in support of her assertion that the Complainant should be denied access to witness records because he is a convicted murderer. The Custodian informed the GRC that she does not know of any statute or case law that can be cited as authority to deny the Complainant access to the witness records. The GRC conducted legal research to determine if there was a statute or case law that could be cited as authority to deny access of witness records to a convict. The GRC could not find any such authority, but conversely, the GRC did find legal authority that specifically permits post-indictment discovery of witness names and addresses.

The NJ Rules of Criminal Procedure provide:

“...[t]he prosecutor shall permit defendant to inspect and copy or photograph the following relevant material if not given as part of the discovery package...names, *addresses*, and birthdates of any persons whom the prosecutor knows to have relevant evidence or information including a designation by the prosecutor as to which of those persons may be called as witnesses...” (Emphasis added.) R. 3:13-3(c)(6).

The NJ Rules of Criminal Procedure provide for protective orders pursuant to R. 3:13-3(f), where “...[u]pon motion and for good cause shown the court may at any time order that the discovery or inspection sought pursuant to this rule be denied...” The GRC asked the Custodian if a protective order was entered in the underlying criminal matter. The Custodian stated that she did not know if there was a protective order entered in that matter.

Because the GRC could not find any legal authority denying a convict or defendant access to witness records except when a protective order has been entered, and because the Custodian stated she was unaware of any legal authority supporting her position that the Complainant should be denied access to witness records because he is a convict, the Custodian has failed to bear her burden of proof that the denial of access to the requested records for this reason is authorized by law. N.J.S.A. 47:1A-6.

The Custodian proposes to make three (3) redactions on the arrest report to exclude information expressly exempt under OPRA. In disclosing an arrest report, however, only specific information must be disclosed. The GRC previously decided that N.J.S.A. 47:1A-3.b. delineates specific information contained on an arrest report which must be disclosed to the public. See Bart v. City of Passaic (Passaic), GRC Complaint No. 2007-162 (February 2008). Accordingly, the Council does not require disclosure of any information appearing on an arrest report except for the information which must be disclosed pursuant to N.J.S.A. 47:1A-3.b.

Based upon the evidence of record, on reconsideration the Custodian has failed to meet her burden of proof pursuant to N.J.S.A. 47:1A-6 that the Complainant should be denied access to the Newark Police Department Arrest Reports and therefore the Custodian must comply with Paragraph 5 of the Council's February 27, 2008 Interim Order by (a) redacting everything in said reports except the information statutorily required to be disclosed pursuant to N.J.S.A. 47:1A-3.b., including, but not limited to the arrested person's name, age, residence, occupation, marital status, time and place of arrest, charges, arresting agency, and such other specific information detailed in said statute, and (b) disclosing the redacted arrest reports to the Complainant.

**Whether the Custodian's deemed denial rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

OPRA states that:

"[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ..." N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

"... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]..." N.J.S.A. 47:1A-7.e.

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170 at 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the

Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86, 107 (App. Div. 1996)).

In this matter, the Custodian received the Complainant's OPRA request on May 29, 2007. Thereafter, on June 8, 2007, the eighth (8th) business day following receipt of such request, the Custodian responded in writing to the Complainant's OPRA request denying access to the records. The Council found that the Custodian's failure to respond in writing to the Complainant's OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. resulted in a "deemed" denial of the Complainant's OPRA requests. See Tucker Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Because the Custodian failed to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business day period, which resulted in a "deemed" denial, and because the Custodian further failed to comply with the Council's February 27, 2008 Interim Order by not providing the correct records for *in camera* examination along with a document or redaction index asserting the lawful basis for denial, the Custodian has violated the provisions of OPRA. But because the Custodian responded in writing on the eighth (8<sup>th</sup>) business day following receipt of such request denying access, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful "deemed" denial of access and her failure to comply with the Council's Interim Order appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends that the Council find that:

1. Because the Custodian failed to provide a document or redaction index asserting the lawful basis for denial in accord with the Council's February 27, 2008 Interim Order, the Custodian has failed to comply with said Order.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the *In Camera* Table within five (5) business days from receipt of this Order and provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**
3. Based upon the evidence of record, on reconsideration the Custodian has failed to meet her burden of proof pursuant to N.J.S.A. 47:1A-6 that the Complainant should be denied access to the Newark Police Department Arrest Reports and therefore the Custodian must comply with Paragraph 5 of the Council's February 27, 2008 Interim Order by (a) redacting everything in said reports except the information statutorily required to be disclosed pursuant to N.J.S.A. 47:1A-3.b., including, but not limited to

the arrested person's name, age, residence, occupation, marital status, time and place of arrest, charges, arresting agency, and such other specific information detailed in said statute, and (b) disclosing the redacted arrest reports to the Complainant.

4. **The Custodian shall comply with item #3 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
5. Because the Custodian failed to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business day period, which resulted in a "deemed" denial, and because the Custodian further failed to comply with the Council's February 27, 2008 Interim Order by not providing the correct records for *in camera* examination along with a document or redaction index asserting the lawful basis for denial, the Custodian has violated the provisions of OPRA. But because the Custodian responded in writing on the eighth (8<sup>th</sup>) business day following receipt of such request denying access, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful "deemed" denial of access and her failure to comply with the Council's Interim Order appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By: John E. Stewart  
Case Manager/*In Camera* Attorney

Approved By: Catherine Starghill, Esq.  
Executive Director

October 22, 2008



## State of New Jersey

### GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
PO Box 819  
TRENTON, NJ 08625-0819

Toll Free: 866-850-0511  
Fax: 609-633-6337  
E-mail: [grc@dca.state.nj.us](mailto:grc@dca.state.nj.us)  
Web Address:  
[www.nj.gov/grc](http://www.nj.gov/grc)

COMMISSIONER JOSEPH V. DORIA, JR.  
COMMISSIONER LUCILLE DAVY  
ROBIN BERG TABAKIN  
DAVID FLEISHER  
CATHERINE STARGHILL Esq., Executive Director

### INTERIM ORDER

#### February 27, 2008 Government Records Council Meeting

Ali S. Morgano  
Complainant

Complaint No. 2007-156

v.

Essex County Prosecutor's Office  
Custodian of Record

At the February 27, 2008 public meeting, the Government Records Council ("Council") considered the February 20, 2008 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. Because the Custodian failed to respond in writing to the Complainant's OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. resulting in a "deemed" denial of the Complainant's OPRA requests as consistent with the Council's decision in Tucker Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the records request in item #1 comprising two entire prosecutor's office files is overbroad and of the nature of a blanket request for a class of various documents rather than a request for a specific government record, and because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian has met the Custodian's burden of proof that access to these records was not unlawfully denied pursuant to the Superior Court decisions in MAG Entertainment v. Div. of ABC, 375 N.J.Super. 534 (App.Div. 2005), Bent v. Township of Stafford, 381 N.J.Super. 30 (App.Div. 2005) and the Council's decision in Asarnow v. Department of Labor and Workforce Development, GRC Complaint No. 2006-24 (May 2006).
3. Because the Custodian certified that there are no records responsive to the OPRA request that exist for items numbered 4, 5, 6, 8, 9, 11, and 13 there was



no unlawful denial of access pursuant to N.J.S.A. 47:1A-1.1. See Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005).

4. The record requested in item #3, a police arrest report, is required to be maintained or kept on file by the Division of Archives and Records Management, therefore it is a government record subject to disclosure pursuant to N.J.S.A. 47:1A-1.1. Further, this record contains certain information such as the arrested person's name, age, residence, occupation, marital status, time and place of arrest, charges, arresting agency, and other information which must be disclosed pursuant to N.J.S.A. 47:1A-3.b. Accordingly, this record must be released with appropriate redactions. Because the Council had previously held that an arrest report was a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1., and therefore was not disclosable, the Custodian did not act improperly by failing to disclose this record at this time.
5. **The Custodian shall comply with item #4 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
6. *N.J.A.C. 13:59-1.6(c)*, applicable to OPRA pursuant to N.J.S.A. 47:1A-9.a., prohibits public servants from permitting any other person to access criminal history record information. Therefore, the Custodian lawfully denied the Complainant access to item #7, a criminal history report.
7. Because it is unclear what, if any, OPRA exemption(s) may apply to item #12, an administrative dismissal document, the GRC must conduct an *in camera* review to decide whether or not the Custodian has lawfully denied access to this record.
8. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope six copies of the requested unredacted document (see #7 above), a document or redaction index<sup>2</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the document provided is the document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

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<sup>1</sup> The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

<sup>2</sup> The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

9. Because the records requested in items numbered 2 and 10, police department continuation reports and incident reports respectively, are criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1., the Superior Court's decision in Daily Journal v. Police Department of the City of Vineland, 351 N.J. Super. 110 (App.Div. 2002) and the Council's decisions in Nance v. Scotch Plains Township Police Department, GRC Complaint No. 2003-125 (January 2005) and Janecko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004), these records are exempt from disclosure. Thus, the Custodian did not unlawfully deny access to these records.
10. The Council defers a decision regarding whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances pending compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 27<sup>th</sup> Day of February, 2008

Robin Berg Tabakin, Vice Chairman  
Government Records Council

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

Government Records Council

**Decision Distribution Date: March 3, 2008**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
February 27, 2008 Council Meeting**

**Ali S. Morgano<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-156**

v.

**Essex County Prosecutor's Office  
Custodian of Records**

**Records Relevant to Complaint:<sup>2</sup>**

- 1) Case files number 88005354 and 88006784 in their entirety
- 2) Newark Police Department Continuation Reports
- 3) Newark Police Department Arrest Report
- 4) Essex County Appeal Update Sheet
- 5) Report of Court Action Sheet
- 6) Intake Screening Printout Sheet
- 7) Criminal Case History Printout
- 8) Criminal Action Ex Parte Order
- 9) Newark Pre-Complaint Internal Report
- 10) Newark Police Department Incident Reports
- 11) Pre-Indictment Appeal Forms
- 12) Administrative Dismissal Reports Document
- 13) Polygraph Examiner Test Results

**Request Made:** May 24, 2007<sup>3</sup>

**Response Made:** June 8, 2007

**Custodian:** Executive Assistant Prosecutor Hilary L. Brunell

**GRC Complaint Filed:** July 9, 2007

**Background**

**May 8, 2007**

Letter from the Custodian to the Complainant. The Custodian forwarded a blank OPRA request form to the Complainant.<sup>4</sup>

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> All of the requested records are concerning Cheryl Johnson under indictment numbers 89-2-0442 and 88-10-3278.

<sup>3</sup> The Custodian certifies the request was not received until May 29, 2007.

<sup>4</sup> This letter was in reply to a referenced letter dated May 1, 2007 from the Complainant to the Custodian wherein the Complainant apparently requested an OPRA request form. A copy of the Complainant's letter was not provided to the GRC.

**May 24, 2007**

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

**June 8, 2007**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the eighth (8th) business day following receipt of such request. The Custodian states that the requested records are denied because the records sought are criminal investigatory records.

**July 9, 2007**

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- Letter from the Custodian to the Complainant dated May 8, 2007
- Complainant's OPRA request dated May 24, 2007
- The Custodian's response to the Complainant's OPRA request dated June 8, 2007

The Complainant alleges that pursuant to R. 1:32-2 (a), (b), (c), the requested records are meant to be kept on file or in storage by the records custodian and are therefore disclosable pursuant to N.J.S.A. 47:1A-2, which the Complainant asserts provides as follows: "a document filed with any board, which can reasonably be expected to be 'kept on file' as a record of the public board's business, constitutes a 'public record'."<sup>5</sup> The Complainant also cites to Williams v. Board of Education, 329 N.J. Super. 308 (App. Div. 2000) in further support of his contention. The Complainant does not explain how the decision rendered by the court in Williams allegedly relates to the denial of his OPRA request.

**July 16, 2007**

Offer of Mediation sent to both parties.

**July 24, 2007**

Neither party responded to the offer of mediation by the required date and the request for the Statement of Information was sent to the Custodian.

**July 31, 2007**

An executed Agreement to Mediate was returned to the GRC from both the Complainant and the Custodian.

**July 31, 2007**

Facsimile transmittal from the Custodian to the GRC. The Custodian forwarded a certification to the GRC which averred that the Custodian received and denied the

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<sup>5</sup> N.J.S.A. 47:1A-2 was repealed by P.L. 2001, c. 404 § 17, effective July 7, 2002. This section of the Right to Know Law (L. 1963, c.73, § 1, et seq.) was titled "[p]ublic records; right of inspection; copies; fees." It should be noted that even when this provision was still in effect it did not contain language as alleged by the Complainant.

Complainant's OPRA request because the records sought by the Complainant were criminal investigatory records. The Custodian attached to the certification the Complainant's May 24, 2007 OPRA request and the Custodian's June 8, 2007 response to the request.

**July 31, 2007**

Telephone call from the GRC to the Custodian. The GRC inquired regarding the conflicting submissions received from the Custodian because the Custodian forwarded both an executed Agreement to Mediate and a certification denying Complainant's OPRA request on the grounds that the records sought by the Complainant were criminal investigatory records.

**July 31, 2007**

Custodian's Statement of Information ("SOI") without attachments. The Custodian referred to the Custodian's certification faxed earlier this date in lieu of the document index table required as Item 9 of the SOI. The Custodian certifies that the Complainant was denied access to all of the records sought because they are criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1.

**July 31, 2007**

Letter from the Custodian to the GRC. The Custodian requested a five (5) day extension of time to reconsider mediating the complaint.

**July 31, 2007**

Facsimile transmittal from the GRC to the Custodian. The GRC grants the Custodian a five (5) business day extension of time to reconsider mediating the complaint.

**August 7, 2007**

Facsimile transmittal from the GRC to the Custodian. The GRC informs the Custodian that this date is the last day for reconsidering mediation.

**August 7, 2007**

Telephone call from the Custodian to the GRC. The Custodian informs the GRC that the Custodian declines to mediate this complaint.

**August 7, 2007**

Letter from the GRC to the Custodian. The GRC informs the Custodian that a document index as depicted in the SOI will be necessary.

**August 12, 2007**

Letter from the Complainant to the GRC. The Complainant informs the GRC the Complainant received a copy of the GRC's August 7, 2007 letter to the Custodian and the Complainant understands this matter will not be mediated.

**August 13, 2007**

Letter from the Custodian to the GRC. The Custodian submitted a document index in reply to the GRC's August 7, 2007 request; however same was in narrative rather than table format.

**August 21, 2007**

Letter from the GRC to the Complainant. The GRC forwarded a copy of the Custodian's SOI to the Complainant because it was unclear whether same was forwarded to the Complainant by the Custodian.

**August 28, 2007**

Letter from the GRC to the Custodian. The GRC requested the Custodian indicate in table format if each record to which the Complainant was denied access under the criminal investigatory record exemption was required by law to be made, maintained or kept on file.

**August 29, 2007**

Letter from the Complainant to the GRC. The Complainant requests that the GRC conduct an *in camera* examination of the records the Complainant requested to determine the legal sufficiency of evidence therein.

**August 30, 2007**

Letter from the Custodian to the GRC. The Custodian replied to the GRC's August 28, 2007 letter by itemizing the contents of each of the two case files which constitute item #1 of the Complainant's OPRA request; however, the Custodian did not indicate in table format if each record to which the Complainant was denied access under the criminal investigatory record exemption was required by law to be made, maintained or kept on file.

**August 30, 2007**

Letter from the Complainant to the GRC. The Complainant makes a request substantially similar to the request contained within his August 29, 2007 letter to the GRC wherein he requested the GRC conduct an *in camera* examination of the records the Complainant requested to determine the legal sufficiency of evidence therein.

**September 7, 2007**

Letter from the GRC to the Custodian. The GRC requested the Custodian indicate in table format if each record to which the Complainant was denied access under the criminal investigatory record exemption was required by law to be made, maintained or kept on file.

**September 10, 2007**

Telephone call from the Custodian to the GRC. The Custodian advised the GRC that a responsive reply as requested by the GRC in its September 7, 2007 correspondence was being prepared and would be submitted to the GRC upon completion.

**September 12, 2007**

Letter from the GRC to the Complainant. The GRC replied to the Complainant's August 30, 2007 letter informing the Complainant that the GRC will only conduct an *in camera* examination if deemed necessary by the Council and that the GRC does not dispense advice regarding the legal sufficiency of evidence.

**September 13, 2007**

Letter from the GRC to the Complainant. The GRC replied to the Complainant's August 29, 2007 letter referring the Complainant to the information provided in the GRC's September 12, 2007 correspondence.

**September 17, 2007**

Letter from the Custodian to the GRC. The Custodian forwarded a certification to the GRC in reply to the GRC's September 7, 2007 letter. The Custodian did not prepare a document index in table format, but the Custodian did list each of the thirteen (13) records which were determined to be responsive to the Complainant's request and provided a legal explanation and statutory citation for the denial of access for each record. The Custodian also certified whether the records identified as criminal investigatory records were required by law to be made, maintained or kept on file.

The Custodian identified the records responsive to item #1 of the OPRA request to be two (2) entire criminal prosecutor's files, both pertaining to Cheryl Harris. The Custodian certifies that OPRA does not require a public agency to respond to a general request for information, citing Bent v. Township of Stafford, 381 N.J.Super. 30 (App.Div. 2005), wherein the court referenced its decision in MAG Entertainment v. Div. of ABC, 375 N.J.Super. 534, 546-49 (App.Div. 2005). The Custodian also asserts that the request is in the nature of a blanket request for a class of various documents in contravention of the Council's decision in Asarnow v. Department of Labor and Workforce Development, GRC Complaint No. 2006-24 (May 2006).

The Custodian certifies that the Custodian examined the files at the Essex County Prosecutor's Office and found that there are no records responsive to the Complainant's request for item #4 (Essex County Appeal Update Sheet), item #5 (Report of Court Action Sheet), item #6 (Intake Screening Printout Sheet), item #8 (Criminal Action Ex Parte Order), item #9 (Newark Pre-Complaint Internal Report), item #11 (Pre-Indictment Appeal Forms) and item #13 (Polygraph Examiner Test Results).

The Custodian certifies that the Complainant was denied access to item #2 (Newark Police Department Continuation Reports), item #3 (Newark Police Department Arrest Report), item #7 (Criminal Case History Printout), item #10 (Newark Police Department Incident Reports) and item #12 (Administrative Dismissal Reports Document) because these reports are not required by law to be made and are not part of the public record and constitute criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1. In addition, the Custodian certifies item #7 is also exempt from disclosure pursuant to N.J.A.C. 13:59-1.1, et seq., which the Custodian asserts has a requirement that a criminal history report can only be made through the State Police. The Custodian further certifies item #12 is also exempt from disclosure because it is an internal

document and contains attorney work product and attorney evaluations and constitutes advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1.

**September 21, 2007**

Letter from the GRC to the Complainant. The GRC forwarded a copy of the Custodian's September 17, 2007 certification to the Complainant because it was unclear whether same was forwarded to the Complainant by the Custodian.

**September 25, 2007**

Telephone call from the GRC to the Custodian. The GRC left a message for the Custodian advising her that the GRC needed a more detailed description of item #12, the administrative dismissal document, which was addressed in the Custodian's September 17, 2007 certification. In that certification, the Custodian stated the record was withheld from disclosure because it fell under the criminal investigatory records exemption, contained advisory, consultative or deliberative material and was attorney work product.

**September 27, 2007**

Letter from the Complainant to the GRC. The Complainant acknowledged receipt of the Custodian's September 17, 2007 certification, stated it was a farce, and demanded an *in camera* examination of the Custodian's entire file.

**October 1, 2007**

Telephone call from the Custodian to the GRC. The Custodian returned the GRC's September 25, 2007 phone call and advised the GRC that item #12 of her September 17, 2007 certification was part of the investigative file but also contained assistant prosecutor work product and was in the nature of a recommendation. The Custodian felt the Custodian could not adequately clarify it further with another certification.

**October 4, 2007**

Letter from the GRC to the Complainant. The GRC replied to the Complainant's September 27, 2007 letter and granted the Complainant a five (5) day extension of time to prepare and forward to the GRC a responsive submission to the Custodian's September 17, 2007 certification should the Complainant desire to do so.

**December 31, 2007**

Letter from the Complainant to the GRC. The Complainant requests the GRC send him a copy of the final determination in this matter. The Complainant stated that if his request is denied he will file a complaint in Superior Court.

**January 9, 2008**

Letter from the GRC to the Complainant. The Complainant was informed the final decision has not yet been rendered, but that he will receive a copy of any Council decision rendered in this matter. The Complainant was further advised that the Council's decision may or may not be a final decision and that if he desires to file his Denial of Access Complaint in Superior Court he should withdraw his complaint with the GRC forthwith.

**January 16, 2008**

Letter from the Complainant to the GRC. The Complainant states he does not wish to withdraw his complaint with the GRC and that he will wait for the Council's final decision in this matter.

### Analysis

#### **Whether the Custodian responded to Complainant's OPRA request within the statutorily mandated seven (7) business days?**

OPRA provides that:

“[i]f the 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. The custodian shall sign and date the form and provide the requestor with a copy therefor ...” N.J.S.A. 47:1A-5.g.

Additionally, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* provided that the record is currently available and not in storage or archived. In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request ... If the government record is in storage or archived, the requestor shall be so advised within seven business days after the custodian receives the request. The requestor shall be advised by the custodian when the record can be made available.* If the record is not made available by that time, access shall be deemed denied.” (Emphasis added.) N.J.S.A. 47:1A-5.i.

The Custodian certifies that the Complainant's OPRA request was received by the Essex County Prosecutor's Office on May 29, 2007. The Custodian further certifies that a response was provided on June 8, 2007 denying the Complainant access to the records. The Custodian therefore responded in writing to the OPRA request eight (8) business days after receiving the request.

Although the Custodian exceeded the seven (7) business day response deadline by only one (1) day, if the Custodian required additional time beyond the seven (7) day period required by OPRA to satisfy the Complainant's request, the Custodian should have obtained a written agreement from the Complainant. In Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006), the custodian knew he needed additional time in order to respond to the complainant's request, but failed to obtain a written agreement from the complainant extending the seven (7) business day time frame required under OPRA for a response. The Council held that the custodian

violated OPRA by failing to obtain a written agreement extending the seven (7) business day time period.

The Custodian's failure to respond in writing to the Complainant's OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. resulting in a "deemed" denial of the Complainant's OPRA requests. See Tucker Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

### **Whether the Custodian unlawfully denied access to the requested records?**

OPRA provides that:

".....government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*" (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA defines a government record as:

" ... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ..." (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA defines a criminal investigatory record as:

" ... a record which is not required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding..." N.J.S.A. 47:1A-1.1.

OPRA also provides:

"[i]f an arrest has been made [the following information shall be made available to the public] the defendant's name, age, residence, occupation, marital status and similar background information and the identity of the complaining party...the text of any charges...the identity of the investigating and arresting personnel and agency...the time and place of arrest...and information as to circumstances surrounding bail, whether it was posted and the amount thereof." N.J.S.A. 47:1A-3.b.

OPRA further provides:

"[t]he provisions of this act...shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant



to...regulation promulgated under the authority of any statute..." N.J.S.A. 47:1A-9.a.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

"...[t]he public agency shall have the burden of proving that the denial of access is authorized by law..." N.J.S.A. 47:1A-6.

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. 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. A custodian must also release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1.

Item #1 of Records Request – Prosecutor’s Office Case Files #88005354 and #88006784

Item #1 of the Complainant’s OPRA request consists of two (2) complete Prosecutor’s Office files. File #88005354 contains twenty (20) separate records comprising fifty-one (51) pages; file #88006784 contains twenty-one (21) separate records comprising one hundred thirty-seven (137) pages.

The New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records "readily accessible for inspection, copying, or examination."* N.J.S.A. 47:1A-1." (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (March 2005). In MAG, the court found that a request that does not identify the particular records sought by name, date, type of record or some other specific identifying characteristic may be found to be invalid. The court held that "[u]nder OPRA, *agencies are required to disclose only "identifiable" government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files.*" (Emphasis added.) *Id.* at 549.

In Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (October 2005), the Superior Court found that a five-part request for the "entire file" of Appellant’s criminal investigation is not a proper request for public records under OPRA, and the information it seeks is beyond the statutory reach of OPRA. Bent references MAG wherein the court held that a requestor must specifically describe the document sought because OPRA operates to make *identifiable* government records "accessible." (Emphasis added) "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired..."

In Asarnow v. Department of Labor and Workforce Development, GRC Complaint No. 2006-24 (May 2006), where the Complainant requested "all delinquent

report notices” compiled over a thirteen month period, the GRC found that the Custodian properly denied access to records because the Complainant’s request “does not meet the standard for a proper OPRA request in that the documents the Complainant is requesting are not readily identifiable and his request is of the nature of a blanket request for a class of various documents.”

Because the records request in item #1 comprising two entire prosecutor’s office files is overbroad and of the nature of a blanket request for a class of various documents rather than a request for a specific government record, and because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian has met the burden of proof that access to these records was not unlawfully denied pursuant to the Superior Court decisions in MAG and Bent, and the Council’s decision in Asarnow.

Items numbered 4, 5, 6, 8, 9, 11, and 13 of the Records Request – Essex County Appeal Update Sheet, Report of Court Action Sheet, Intake Screening Printout Sheet, Criminal Action Ex Parte Order, Newark Pre-Complaint Internal Report, Pre-Indictment Appeal Forms, and Polygraph Examiner Test Results.

The Complainant has requested copies of each of the above-referenced records; however, the Custodian certifies that there are no records responsive to the request. Pursuant to N.J.S.A. 47:1A-1.1, a government record is only responsive to an OPRA request if it has “been made, maintained or kept on file...or has been received in the course of [the public agency’s] official business ...”. In accordance with the provisions of OPRA, therefore, the Custodian did not unlawfully deny the Complainant access to items numbered 4, 5, 6, 8, 9, 11, and 13 of the Complainant’s OPRA request. See Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005).

Items numbered 2, 3, 7, 10 and 12 of Records Request – Newark Police Department Continuation Reports, Newark Police Department Arrest Report, Criminal Case History Printout, Newark Police Department Incident Reports and Administrative Dismissal Reports Document.

Item #3 is a police arrest report. Although the Council has previously found that police arrest reports are criminal investigatory records that are not disclosable under OPRA, See Vercammen v. City of Plainfield, GRC Complaint No. 2002-109 (March 2004) and Lanosga v. Borough of Princeton, GRC Complaint No. 2004-37 (June 2004), the GRC now revisits the applicability of OPRA to police arrest reports and recommends they be released pursuant to N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-3.b.

The purpose of OPRA is to make government records readily accessible to the public subject to certain exceptions provided for in the law. One such exception pertains to criminal investigatory records, which are deemed to be confidential pursuant to N.J.S.A. 47:1A-1.1. Notwithstanding this exception, however, certain information with respect to a crime must be disclosed pursuant to N.J.S.A. 47:1A-3.b. Of relevance to the instant complaint is the information this subsection requires to be disclosed after a criminal arrest has been made.

Although specific arrest information must be disclosed, the Custodian is under no duty to extract and synthesize such information from government records in order to comply with the provisions of OPRA. The Superior Court made this clear in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, by noting “[OPRA] is not intended as a research tool...to force government officials to identify and siphon useful information.” *Id* at 546. Accordingly, pursuant to OPRA, this information must be disclosed in the form of a *government record* (emphasis added). The most comprehensive government record containing information subject to disclosure pursuant to N.J.S.A. 47:1A-3.b is the police arrest report, alternatively referred to as a uniform arrest report.

A police arrest report is included as item number 0007-0000 for agency retention by the New Jersey Department of State, Division of Archives and Records Management, and until the expiration of its retention period has continuing value to the State of New Jersey. Because the arrest report *is required by law to be maintained or kept on file* (emphasis added), it is a government record pursuant to N.J.S.A. 47:1A-1.1., and is subject to disclosure with appropriate redactions pursuant to any lawful exemption under OPRA. Further, arrest reports typically contain the arrestee’s (defendant’s) name, age, residence, occupation, marital status, time and place of arrest, text of the charges, arresting agency, identity of the arresting personnel, amount of bail and whether it was posted. This is the same information that is mandated for disclosure pursuant to N.J.S.A. 47:1A-3.b. Accordingly, item #3 of the Complainant’s OPRA request should be disclosed with appropriate redactions.

Item #7 is a criminal history report. Although this report is not required by law to be made, maintained or kept on file, the GRC is not convinced that it contains content which “pertains to any criminal investigation” pursuant to N.J.S.A. 47:1A-1.1. Rather, it would contain profile information related to a person’s *prior* criminal arrests and/or convictions. For this reason, the GRC does not agree that it may be withheld from disclosure under the criminal investigatory record exemption. The Custodian, however, stated that it was also exempt from disclosure pursuant to the proscriptions contained within *N.J.A.C. 13:59-1.1 et seq.* With respect to the use of criminal history record information for non-criminal justice purposes, *N.J.A.C. 13:59-1.6(c)* provides that “no public servant shall...permit any other person to access...criminal history record information.” This provision is applicable to OPRA by operation of N.J.S.A. 47:1A-9a. Accordingly, the Custodian lawfully denied the Complainant access to this record.

Item #12 is an administrative dismissal document. The Custodian certifies that this document is exempt from disclosure because it is a criminal investigatory record and is not required by law to be made pursuant to N.J.S.A. 47:1A-1.1. The Custodian further certifies it is also exempt from disclosure because it constitutes attorney work product and is advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. Because it is unclear what, if any, OPRA exemption(s) may apply to this record, and because the Custodian could not adequately clarify the nature of the record, the GRC must conduct an *in camera* review to decide whether or not the Custodian has lawfully denied access to this record.

Remaining items #2 and #10 are police department continuation reports and incident reports, respectively. In Nance v. Scotch Plains Township Police Department, GRC Complaint No. 2003-125 (January 2005), the Council determined that *police continuation reports* and *police incident reports* are criminal investigatory records exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. (Emphasis added.) The status of records purported to fall under the criminal investigatory records exemption pursuant to N.J.S.A. 47:1A-1.1 was examined by the GRC in Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004), affirmed in an unpublished opinion of the Appellate Division of the New Jersey Superior Court in May 2004. The Council found that under OPRA, “criminal investigatory records include records involving all manner of crimes, resolved or unresolved, and includes information that is part and parcel of an investigation, confirmed and unconfirmed”.

In the instant complaint, since the records sought were part of a 1989 investigation, it is important to note that the criminal investigatory records exemption continues to survive the conclusion of the investigation. As the Council pointed out in Janeczko, supra:

“[the criminal investigatory records exemption] does not permit access to investigatory records once the investigation is complete. The exemption applies to records that conform to the statutory description, without reference to the status of the investigation and the Council does not have a basis to withhold from access only currently active investigations and release those where the matter is resolved or closed.”

Because the analysis indicates police department continuation reports and incident reports are criminal investigatory records, they are not government records as defined under OPRA. Only government records are subject to public access; therefore, the records are not subject to public access. Thus, the Custodian did not unlawfully deny access to these records.

The Complainant disagrees with the Custodian’s denial of his request for government records, but the Complainant’s reliance on R. 1:32-2 subsections (a), (b), and (c) is misplaced. These court rules address recordkeeping with respect to reports prepared and submitted by court personnel to the Administrative Director of the Courts. The court rules do not mandate recordkeeping concerning records maintained by county prosecutor’s offices. N.J.S.A. 47:1A-2, cited by the Complainant as grounds for disclosure, was repealed effective July 7, 2002. See P.L. 2001, c. 404 § 17. Accordingly, this provision no longer has OPRA applicability. The Complainant also misconstrues the Superior Court’s decision in Williams, supra. In Williams, the court held that tenure charge documents of a school superintendent filed with the [school] board’s secretary are statutorily public records and therefore accessible under the Right-to-Know-Law. The decision has very narrow applicability, confining disclosure to specific filed records.

OPRA places the responsibility on the Custodian to prove that a denial of access is lawful. N.J.S.A. 47:1A-6. In this complaint, the evidence reveals the Custodian has met that burden with respect to items numbered 1, 2, 4, 5, 6, 7, 8, 9, 10, 11 and 13. The

Custodian did not meet the burden of proving that the denial of access to item #3 was authorized by law. This item is a police arrest report required to be maintained or kept on file by the Division of Archives and Records Management, therefore it is a government record subject to disclosure. Further, this record contains information which must be disclosed pursuant to N.J.S.A. 47:1A-3.b. Because the Council had previously held that an arrest report was a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1., and therefore was not disclosable, the Custodian did not act improperly by failing to disclose this record at this time. It will be necessary for the GRC to conduct an *in camera* examination to decide whether or not the Custodian has lawfully denied access to item #12.

**Whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

The Council defers a decision regarding whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances pending compliance with the Council's Interim Order.

**Conclusions and Recommendations**

The Executive Director respectfully recommends that the Council find that:

1. Because the Custodian failed to respond in writing to the Complainant's OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. resulting in a "deemed" denial of the Complainant's OPRA requests as consistent with the Council's decision in Tucker Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the records request in item #1 comprising two entire prosecutor's office files is overbroad and of the nature of a blanket request for a class of various documents rather than a request for a specific government record, and because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian has met the Custodian's burden of proof that access to these records was not unlawfully denied pursuant to the Superior Court decisions in MAG Entertainment v. Div. of ABC, 375 N.J.Super. 534 (App.Div. 2005), Bent v. Township of Stafford, 381 N.J.Super. 30 (App.Div. 2005) and the Council's decision in Asarnow v. Department of Labor and Workforce Development, GRC Complaint No. 2006-24 (May 2006).
3. Because the Custodian certified that there are no records responsive to the OPRA request that exist for items numbered 4, 5, 6, 8, 9, 11, and 13 there was no unlawful denial of access pursuant to N.J.S.A. 47:1A-1.1. See Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005).

4. The record requested in item #3, a police arrest report, is required to be maintained or kept on file by the Division of Archives and Records Management, therefore it is a government record subject to disclosure pursuant to N.J.S.A. 47:1A-1.1. Further, this record contains certain information such as the arrested person's name, age, residence, occupation, marital status, time and place of arrest, charges, arresting agency, and other information which must be disclosed pursuant to N.J.S.A. 47:1A-3.b. Accordingly, this record must be released with appropriate redactions. Because the Council had previously held that an arrest report was a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1, and therefore was not disclosable, the Custodian did not act improperly by failing to disclose this record at this time.
5. **The Custodian shall comply with item #4 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
6. *N.J.A.C. 13:59-1.6(c)*, applicable to OPRA pursuant to N.J.S.A. 47:1A-9.a., prohibits public servants from permitting any other person to access criminal history record information. Therefore, the Custodian lawfully denied the Complainant access to item #7, a criminal history report.
7. Because it is unclear what, if any, OPRA exemption(s) may apply to item #12, an administrative dismissal document, the GRC must conduct an *in camera* review to decide whether or not the Custodian has lawfully denied access to this record.
8. **The Custodian must deliver<sup>6</sup> to the Council in a sealed envelope six copies of the requested unredacted document (see #7 above), a document or redaction index<sup>7</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the document provided is the document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
9. Because the records requested in items numbered 2 and 10, police department continuation reports and incident reports respectively, are criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1, the Superior Court's decision in Daily Journal v. Police Department of the City of Vineland, 351 N.J. Super. 110 (App.Div. 2002) and the Council's decisions in Nance v.

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<sup>6</sup> The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

<sup>7</sup> The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

Scotch Plains Township Police Department, GRC Complaint No. 2003-125 (January 2005) and Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004), these records are exempt from disclosure. Thus, the Custodian did not unlawfully deny access to these records.

10. The Council defers a decision regarding whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances pending compliance with the Council's Interim Order.

Prepared By:

John E. Stewart  
Case Manager/*In Camera* Attorney

Approved By:

Catherine Starghill, Esq.  
Executive Director

February 20, 2008