



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

FINAL DECISION

July 30, 2008 Government Records Council Meeting

Jerald Albrecht
Complainant

Complaint No. 2006-191

v.

NJ Department of Treasury
Custodian of Record

At the July 30, 2008 public meeting, the Government Records Council (“Council”) considered the July 23, 2008 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 provided the Complainant with redacted copies and a privilege log of the Department of Corrections time reports for the month of July 1, 2004 and the week of July 4, 2004 as outlined in the Council’s Interim Order, as well as provided a copy of the Chest Pain Assessment in its entirety, and because the Custodian provided certified confirmation of compliance to the Executive Director within the time period as ordered by the Council and extended by the GRC, the Custodian has complied with the Council’s May 28, 2008 Interim Order.
2. Although the Custodian unlawfully denied access to the Chest Pain Assessment and failed to provide said record to the Complainant as ordered by the Council on July 25, 2007 until June 16, 2008, after disclosure was again ordered by the Council on May 28, 2008, because the Custodian lawfully denied access to the requested financial statements and lawfully denied access to portions of the Department of Corrections time reports, as well as because the Custodian complied with the Council’s May 28, 2008 Interim Order, 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 failure to comply with the Council’s July 25, 2007 Interim Order by not releasing the Chest Pain Assessment until June 16, 2008 appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.



This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 30th Day of July, 2008

Robin Berg Tabakin, Chairman
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: August 4, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
July 30, 2008 Council Meeting**

**Jerald Albrecht¹
Complainant**

GRC Complaint No. 2006-191

v.

**NJ Department of Treasury²
Custodian of Records**

Records Relevant to Complaint:

1. Vendor information
2. All information supplied by vendor
3. Full Request for Proposal (“RFP”) text
4. Addendum 1 - clarification of bid opening date
5. Addendum 2 - answer to questions and additions, deletions, clarifications, and modifications to the RFP
6. Addendum 3 - answer to questions and revised Appendix 3
7. Addendum 4 - additions, deletions, clarifications, and modifications to the RFP
8. Addendum 5 - correction of Addendum #4
9. Addendum 6 – answer to questions
10. Addendum 7 – answers to questions
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12. Addendum 9 – answers to questions, additions, deletions, clarifications, and modifications to the RFP, and two attachments
13. Addendum 10 – revised bid opening date and additional materials available in the Document Review Room
14. Addendum 11 – revised bid opening date
15. Addendum 12 – amendment to the RFP
16. Contract award and contract #61235
17. CMS financial statements covering previous service period under contract A-74663 (from February 1, 1996 to December 31, 2004) including all Income and Expense Statements, Balance Sheets, and Ledger Accounts
18. Litigation disclosure reports covering the period from February 1, 1996 to December 31, 2004
19. All memorandums of agreements to amend contract from award date to present
20. All NJ Department of Corrections medical audits covering contract #61235

¹ No legal representation listed on record.

² Represented by DAG Kimberly A. Sked, on behalf of the NJ Attorney General.

Request Made: February 16, 2006³

Responses Made: March 21, 2006, May 1, 2006, July 21, 2006, July 31, 2006, August 14, 2006 and August 22, 2006.

Custodian: Garry Dales

GRC Complaint Filed: October 20, 2006

Background

May 28, 2008

Government Records Council's ("Council") Interim Order. At its May 28, 2008 public meeting, the Council considered the May 21, 2008 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian has complied with the Council's July 25, 2007 Interim Order, in part, by providing the Council with all records set forth in Paragraph 1 of the Order within five (5) business days of receiving the Council's 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 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.**

Record or Redaction Number	Record Name/Date	Description of Document And/or Redaction	Custodian's Explanation/ Citation for Non-disclosure	Findings of the <i>In Camera</i> Examination
1	Correctional Medical Services (CMS) – Bid Proposal to Solicitation 05-X-37119 – Medical Services for DOC Inmate Healthcares Services – Appendix A – DOC Time Report – All Hours by Shift dated August 17,	The redacted information includes shift change and staffing information that if released could cause security breaches in the prison. (See <u>Essex</u>	In addition to the risk of security breaches in the prison, and as more fully set forth in the documents previously provided to the GRC, including (a) the Affidavit of	The category "Contracted Hours" is information that is of a proprietary nature because it is based on prior staffing experience gained by CMS. Such proprietary information, if disclosed, would give an advantage to competitors or bidders. Accordingly, the data included under "Contracted Hours" should be redacted pursuant to <u>N.J.S.A. 47:1A-</u>

³ Custodian received request on March 10, 2006.

	<p>2004.</p> <p>Two (2) page CMS DOC Time Report – All Hours by Shift, for the NJ Training School for Boys – Week of July 4, 2004.</p> <p>DOCUMENT MARKED CONFIDENTIAL.</p>	<p><u>County Jail Annex Inmates v. Treffinger</u>, 18 F. Supp. 2d 418 (D.N.J. 1998).</p>	<p>David Meeker, dated Dec. 14, 2006, (b) the letter brief of CMS’ legal counsel, Kerri E. Chewning, Esq., dated Aug. 6, 2007, the redactions are for confidential and proprietary trade secrets and business information, which would give an unfair advantage to competitors or bidders if disclosed.</p>	<p>1.1. Leaving the data under the “Variance” category unredacted, however, will allow for “Contracted Hours” to be calculated vis-à-vis “Provided Hours”; therefore, the data under the category “Variance” should also be redacted to defeat the potential for such a calculation. The remaining information on the form should not be redacted pursuant to <u>N.J.S.A. 47:1A-1.1</u>. Further, the GRC is not convinced that releasing such remaining information can result in a security breach, because the brief glimpse of medical personnel staffing revealed in this record does not correlate with the scope of security issues articulated in <u>Essex County Jail Annex Inmates v. Treffinger</u>, 18 F. Supp. 2d 418 (D.N.J. 1998), cited by the Custodian.</p>
<p>2</p>	<p>Correctional Medical Services (CMS) – Bid Proposal to Solicitation 05-X-37119 – Medical Services for DOC Inmate Healthcares Services – Appendix A – DOC Time Report – All Hours by Shift dated August 17, 2004.</p> <p>Three (3) page CMS DOC Time Report – All Hours by Shift, for the NJ Training School for</p>	<p>The redacted information includes shift change and staffing information that if released could cause security breaches in the prison. (See <u>Essex County Jail Annex Inmates v. Treffinger</u>, 18 F. Supp. 2d 418 (D.N.J. 1998).</p>	<p>In addition to the risk of security breaches in the prison, and as more fully set forth in the documents previously provided to the GRC, including (a) the Affidavit of David Meeker, dated Dec. 14, 2006, (b) the letter brief of CMS’ legal counsel, Kerri E. Chewning,</p>	<p>The category “Contracted Hours” is information that is of a proprietary nature because it is based on prior staffing experience gained by CMS. Such proprietary information, if disclosed, would give an advantage to competitors or bidders. Accordingly, the data included under “Contracted Hours” should be redacted pursuant to <u>N.J.S.A. 47:1A-1.1</u>. Leaving the data under the “Variance” category unredacted, however, will allow for “Contracted Hours” to be calculated vis-à-vis “Provided Hours”; therefore, the data under the category</p>

	Boys – Month of July 1, 2004. DOCUMENT MARKED CONFIDENTIAL		Esq., dated Aug. 6, 2007, the redactions are for confidential and proprietary trade secrets and business information, which would give an unfair advantage to competitors or bidders if disclosed.	“Variance” should also be redacted to defeat the potential for such a calculation. The remaining information on the form should not be redacted pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Further, the GRC is not convinced that releasing such remaining information can result in a security breach, because the brief glimpse of medical personnel staffing revealed in this record does not correlate with the scope of security issues articulated in <u>Essex County Jail Annex Inmates v. Treffinger</u> , 18 F. Supp. 2d 418 (D.N.J. 1998), cited by the Custodian.
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3. **The Custodian shall comply with Paragraph 2 of the Council’s July 25, 2007 Interim Order by disclosing the requested Chest Pain Assessment with appropriate redactions, if any, and a legal justification and statutory citation for each redacted part thereof 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.**

June 3, 2008

Council’s Interim Order distributed to the parties.

June 5, 2008

Letter from Custodian’s Counsel to GRC. Counsel states that she has taken over this complaint in the absence of Deputy Attorney General David Balaban. Counsel requests a five (5) business day extension of time to respond to the Council’s Interim Order.

June 5, 2008

E-mail from GRC to Custodian’s Counsel. The GRC grants the Custodian’s five (5) business day extension of time to respond to the Council’s Interim Order.

June 16, 2008

Letter from Custodian to Complainant. The Custodian states that pursuant to the Council’s May 28, 2008 Interim Order he has enclosed the Department of Corrections (“DOC”) time reports for the month of July 1, 2004 and the week of July 4, 2004 with redactions as set forth in the Interim Order to redact columns entitled “Contracted Hours” and “Variance.” The Custodian states that a privilege log is attached. The Custodian

also states that enclosed is the “Correctional Medical Services, Inc., Chest Pain Assessment, Clinical Pathway T-796.50, Version 5.3.” The Custodian states that he is providing this record in its entirety.

June 17, 2008

Custodian’s response to the Council’s Interim Order. The Custodian certifies that on June 16, 2008 via UPS Express Mail he provided the Complainant with “Correctional Medical Services DOC Time Report” for the month of July 1, 2004 and the week of July 4, 2004 with the “Contracted Hours” and “Variance” columns redacted as per the Council’s Interim Order. The Custodian certifies that he provided a privilege log to the Complainant along with said records. Additionally, the Custodian certifies that he provided the Complainant with a copy of “Correctional Medical Services, Inc., Chest Pain Assessment, Clinical Pathway T-796.50, Version 5.3” in its entirety. The Custodian encloses a copy of his June 16, 2008 letter to the Complainant and attachments.

Analysis

Whether the Custodian complied with the Council’s May 28, 2008 Interim Order?

The GRC granted the Custodian a five (5) business day extension of time to respond to the Council’s Interim Order via e-mail dated June 5, 2008. The Custodian provided a certification to the GRC dated June 17, 2008 in which the Custodian certified that via letter dated June 16, 2008 he provided the Complainant copies of the DOC time reports for the month of July 1, 2004 and the week of July 4, 2004 with the “Contracted Hours” and “Variance” columns redacted as per the Council’s Interim Order, along with a privilege log. The Custodian also certified that that he provided the Complainant with a copy of the requested Chest Pain Assessment in its entirety.

Therefore, because the Custodian provided the Complainant with redacted copies and a privilege log of the DOC time reports for the month of July 1, 2004 and the week of July 4, 2004 as outlined in the Council’s Interim Order, as well as provided a copy of the Chest Pain Assessment in its entirety, and because the Custodian provided certified confirmation of compliance to the Executive Director within the time period as ordered by the Council and extended by the GRC, the Custodian has complied with the Council’s May 28, 2008 Interim Order.

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?

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.

The Custodian in this matter carried his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6 to the requested financial statements because said statements constitute proprietary commercial or financial information obtained from any source which is not a government record pursuant to N.J.S.A. 47:1A-1.1 and ACS State Healthcare v. State of New Jersey, No. MER-L-1187-058 (Law Div. 2005). However, the Custodian failed to bear his burden of proving a lawful denial of access to the requested Chest Pain Assessment and the Council ordered the Custodian to disclose said record to the Complainant in its July 25, 2007 Interim Order. Also in said order, the Council ordered an *in camera* review of the DOC time reports to determine if the Custodian’s basis for a denial of access, proprietary information and information which, if disclosed, would provide an advantage to competitors, was lawful pursuant to OPRA.

After receiving the Council’s July 25, 2007 Interim Order, the Custodian requested either a reconsideration of the Council’s findings or a stay of the Interim Order. The GRC denied the Custodian’s request for reconsideration, but granted the Custodian’s request for a stay so that the Custodian could file an appeal of the Council’s Order in Superior Court. However, the GRC did not receive a Notice of Appeal and thus proceeded with the *in camera* review.

Following the GRC’s *in camera* review, the Council upheld the Custodian’s denial of access to the DOC time reports, in part. Specifically, the Council found that portions of said reports should be redacted because said portions constitute proprietary information which, if disclosed, would give an advantage to competitors or bidders pursuant to N.J.S.A. 47:1A-1.1. The Council held that the remaining portions of said records should be released to the Complainant. Additionally, the Council reordered the Custodian to release the Chest Pain Assessment. The Custodian complied with the Council’s May 28, 2008 Interim Order by providing the Complainant with all records as ordered by the Council and providing certified confirmation of compliance to the Executive Director within the time frame as ordered by the Council and extended by the GRC.

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 (App. Div. 1996) at 107).

Therefore, although the Custodian unlawfully denied access to the Chest Pain Assessment and failed to provide said record to the Complainant as ordered by the Council on July 25, 2007 until June 16, 2008, after disclosure was again ordered by the Council on May 28, 2008, because the Custodian lawfully denied access to the requested financial statements and lawfully denied access to portions of the DOC time reports, as well as because the Custodian complied with the Council's May 28, 2008 Interim Order, 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 failure to comply with the Council's July 25, 2007 Interim Order by not releasing the Chest Pain Assessment until June 16, 2008 appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian provided the Complainant with redacted copies and a privilege log of the Department of Corrections time reports for the month of July 1, 2004 and the week of July 4, 2004 as outlined in the Council's Interim Order, as well as provided a copy of the Chest Pain Assessment in its entirety, and because the Custodian provided certified confirmation of compliance to the Executive Director within the time period as ordered by the Council and extended by the GRC, the Custodian has complied with the Council's May 28, 2008 Interim Order.
2. Although the Custodian unlawfully denied access to the Chest Pain Assessment and failed to provide said record to the Complainant as ordered by the Council on July 25, 2007 until June 16, 2008, after disclosure was again ordered by the Council on May 28, 2008, because the Custodian lawfully denied access to the requested financial statements and lawfully denied access to portions of the Department of Corrections time reports, as well as because the Custodian complied with the Council's May 28, 2008 Interim Order, 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 failure to comply with the Council's July 25, 2007 Interim Order by not releasing the Chest Pain Assessment until June 16, 2008 appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

July 23, 2008



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CATHERINE STARGHILL Esq., Executive Director

INTERIM ORDER

May 28, 2008 Government Records Council Meeting

Jerald Albrecht
Complainant

Complaint No. 2006-191

v.

NJ Department of Treasury
Custodian of Record

At the May 28, 2008 public meeting, the Government Records Council (“Council”) considered the May 21, 2008 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian has complied with the Council’s July 25, 2007 Interim Order, in part, by providing the Council with all records set forth in Paragraph 1 of the Order within five (5) business days of receiving the Council’s 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 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.**

Record or Redaction Number	Record Name/Date	Description of Document And/or Redaction	Custodian’s Explanation/ Citation for Non-disclosure	Findings of the <i>In Camera</i> Examination
1	Correctional Medical Services (CMS) – Bid Proposal to Solicitation 05-X-	The redacted information includes shift change and staffing	In addition to the risk of security breaches in the prison, and as	The category “Contracted Hours” is information that is of a proprietary nature because it is based on prior staffing experience gained by



	<p>37119 – Medical Services for DOC Inmate Healthcares Services – Appendix A – DOC Time Report – All Hours by Shift dated August 17, 2004.</p> <p>Two (2) page CMS DOC Time Report – All Hours by Shift, for the NJ Training School for Boys – Week of July 4, 2004. DOCUMENT MARKED CONFIDENTIAL.</p>	<p>information that if released could cause security breaches in the prison. (See <u>Essex County Jail Annex Inmates v. Treffinger</u>, 18 F. Supp. 2d 418 (D.N.J. 1998).</p>	<p>more fully set forth in the documents previously provided to the GRC, including (a) the Affidavit of David Meeker, dated Dec. 14, 2006, (b) the letter brief of CMS’ legal counsel, Kerri E. Chewing, Esq., dated Aug. 6, 2007, the redactions are for confidential and proprietary trade secrets and business information, which would give an unfair advantage to competitors or bidders if disclosed.</p>	<p>CMS. Such proprietary information, if disclosed, would give an advantage to competitors or bidders. Accordingly, the data included under “Contracted Hours” should be redacted pursuant to <u>N.J.S.A. 47:1A-1.1</u>. Leaving the data under the “Variance” category unredacted, however, will allow for “Contracted Hours” to be calculated vis-à-vis “Provided Hours”; therefore, the data under the category “Variance” should also be redacted to defeat the potential for such a calculation. The remaining information on the form should not be redacted pursuant to <u>N.J.S.A. 47:1A-1.1</u>. Further, the GRC is not convinced that releasing such remaining information can result in a security breach, because the brief glimpse of medical personnel staffing revealed in this record does not correlate with the scope of security issues articulated in <u>Essex County Jail Annex Inmates v. Treffinger</u>, 18 F. Supp. 2d 418 (D.N.J. 1998), cited by the Custodian.</p>
2	<p>Correctional Medical Services (CMS) – Bid Proposal to Solicitation 05-X-37119 – Medical Services for DOC Inmate Healthcares Services – Appendix A – DOC</p>	<p>The redacted information includes shift change and staffing information that if released could cause security</p>	<p>In addition to the risk of security breaches in the prison, and as more fully set forth in the documents previously provided to the</p>	<p>The category “Contracted Hours” is information that is of a proprietary nature because it is based on prior staffing experience gained by CMS. Such proprietary information, if disclosed, would give an advantage to competitors or bidders. Accordingly, the data</p>

	<p>Time Report – All Hours by Shift dated August 17, 2004.</p> <p>Three (3) page CMS DOC Time Report – All Hours by Shift, for the NJ Training School for Boys – Month of July 1, 2004.</p> <p>DOCUMENT MARKED CONFIDENTIAL</p>	<p>breaches in the prison. (See <u>Essex County Jail Annex Inmates v. Treffinger</u>, 18 F. Supp. 2d 418 (D.N.J. 1998).</p>	<p>GRC, including (a) the Affidavit of David Meeker, dated Dec. 14, 2006, (b) the letter brief of CMS’ legal counsel, Kerri E. Chewning, Esq., dated Aug. 6, 2007, the redactions are for confidential and proprietary trade secrets and business information, which would give an unfair advantage to competitors or bidders if disclosed.</p>	<p>included under “Contracted Hours” should be redacted pursuant to <u>N.J.S.A. 47:1A-1.1</u>. Leaving the data under the “Variance” category unredacted, however, will allow for “Contracted Hours” to be calculated vis-à-vis “Provided Hours”; therefore, the data under the category “Variance” should also be redacted to defeat the potential for such a calculation. The remaining information on the form should not be redacted pursuant to <u>N.J.S.A. 47:1A-1.1</u>. Further, the GRC is not convinced that releasing such remaining information can result in a security breach, because the brief glimpse of medical personnel staffing revealed in this record does not correlate with the scope of security issues articulated in <u>Essex County Jail Annex Inmates v. Treffinger</u>, 18 F. Supp. 2d 418 (D.N.J. 1998), cited by the Custodian.</p>
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3. **The Custodian shall comply with Paragraph 2 of the Council’s July 25, 2007 Interim Order by disclosing the requested Chest Pain Assessment with appropriate redactions, if any, and a legal justification and statutory citation for each redacted part thereof 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.**

Interim Order Rendered by the
Government Records Council
On The 28th Day of May, 2008

Robin Berg Tabakin, Chairman
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: June 3, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
May 28, 2008 Council Meeting**

**Jerald Albrecht¹
Complainant**

GRC Complaint No. 2006-191

v.

**NJ Department of Treasury²
Custodian of Records**

Records Relevant to Complaint:

1. Vendor information
2. All information supplied by vendor
3. Full Request for Proposal (“RFP”) text
4. Addendum 1 - clarification of bid opening date
5. Addendum 2 - answer to questions and additions, deletions, clarifications, and modifications to the RFP
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12. Addendum 9 – answers to questions, additions, deletions, clarifications, and modifications to the RFP, and two attachments
13. Addendum 10 – revised bid opening date and additional materials available in the Document Review Room
14. Addendum 11 – revised bid opening date
15. Addendum 12 – amendment to the RFP
16. Contract award and contract #61235
17. CMS financial statements covering previous service period under contract A-74663 (from February 1, 1996 to December 31, 2004) including all Income and Expense Statements, Balance Sheets, and Ledger Accounts
18. Litigation disclosure reports covering the period from February 1, 1996 to December 31, 2004
19. All memorandums of agreements to amend contract from award date to present
20. All NJ Department of Corrections medical audits covering contract #61235

Request Made: February 16, 2006³

¹ No legal representation listed on record.

² Represented by DAG David A. Balaban, on behalf of the NJ Attorney General.

Responses Made: March 21, 2006, May 1, 2006, July 21, 2006, July 31, 2006, August 14, 2006 and August 22, 2006.

Custodian: Garry Dales

GRC Complaint Filed: October 20, 2006

Background

July 25, 2007

Interim Order of the Government Records Council. At the July 25, 2007 public meeting, the Government Records Council (“Council”) considered the July 18, 2007 Executive Director’s Findings and Recommendations and all related documents submitted by the parties. The Council voted to adopt the entirety of said findings and recommendations. Therefore, the Council found that:

1. As in Beth Burns v. Borough of Collingswood, GRC Complaint No. 2004-169 (September 2005), and Phillip Boggia v. Borough of Oakland, GRC Complaint No. 2005-36 (April 2006), the Custodian’s basis for redacting information from the requested DOC time report in this instant matter is compelling. However, the Council must determine whether the legal conclusions asserted by the Custodian are properly applied to the redactions pursuant to Burns, Boggia, and Paff v. Department of Labor, 379 N.J. Super. 346, 354-355 (App. Div. 2005). Therefore, the Council must conduct an *in camera* inspection of the requested report to determine whether the document is exempt from disclosure, in whole or in part, because it is proprietary information and/or information which, if disclosed, would give an advantage to competitors or bidders pursuant to N.J.S.A. 47:1A-1.1.
2. Based on the court’s decision in Board of Chosen Freeholders of the County of Burlington v. Tombs, 2006 U.S. App. LEXIS 31234 (December 18, 2006), the Custodian failed to prove a lawful denial of access to the requested Chest Pain Assessment pursuant to N.J.S.A. 47:1A-6. As such, the Custodian should release the requested record to the Complainant with appropriate redactions, if any, and a legal justification and statutory citation for each redacted part thereof.
3. **The Custodian shall comply with # 2 above within five (5) business days from receipt of the Council’s Interim Order and simultaneously provide certified confirmation of compliance pursuant to *N.J. Court Rules, 1969 R. 1:4-4 (2005)* to the Executive Director.**
4. The Custodian has borne his burden of proving a lawful denial of access to the requested financial statements pursuant to N.J.S.A. 47:1A-6 because the requested financial statements constitute proprietary commercial or financial information obtained from any source which is not a government record pursuant to N.J.S.A. 47:1A-1.1 and ACS State Healthcare v. State of New Jersey, No. MER-L-1187-058 (Law Div. 2005).

³ Custodian received request on March 10, 2006.

5. The GRC has no authority to adjudicate the Complainant's common law right to access records pursuant to Donna Janeczko v. NJ Department of Law and Public Safety, GRC Complaint Nos. 2002-79 and 2002-80 (August 2003).
6. The Council defers analysis of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances pending the outcome of the *in camera* review of the DOC time report.

July 30, 2007

Interim Decision sent to both parties.

August 6, 2007

Letter from the Custodian's Counsel to the GRC. The Custodian's Counsel requests a stay and reconsideration of the GRS's July 25, 2007 Interim Order.

August 7, 2007

Letter from the Custodian's Counsel to the GRC. The Custodian's Counsel forwards one (1) copy of the unredacted record for *in camera* examination.

August 22, 2007

Letter from the GRC to the Custodian's Counsel. The GRC denies the Custodian's request for reconsideration and grants the Custodian's request for a stay of the Interim Order in order for the Custodian to appeal same.

August 24, 2007

Letter from the Custodian's Counsel to the GRC. The Custodian's Counsel states that he is confirming the stay will remain in effect until the GRC renders a final decision.

September 21, 2007

Letter from the Complainant to the GRC. The Complainant contends the stay granted to the Custodian has expired because the Custodian failed to file a timely Notice of Appeal.

October 3, 2007

Letter from the Custodian's Counsel to the GRC. The Custodian's Counsel acknowledges receipt of a copy of the Complainant's September 21, 2007 letter, and restates the content of his August 24, 2007 letter to the GRC.

October 11, 2007

Letter from the GRC to the Custodian's Counsel. The GRC informs the Custodian's Counsel that since the GRC never received a Notice of Appeal of the Council's July 25, 2007 Interim Order, the GRC will proceed with the *in camera* examination provided for in the Order.

October 16, 2007

In camera letter requesting documents sent to the Custodian.

October 22, 2007

Certification of the Custodian with the following attachments:

- Letter from the Custodian’s Counsel to the GRC dated August 7, 2007
- Six (6) unredacted copies each of the DOC time report
- Six (6) copies of the document index

The Custodian certifies that the documents requested by the GRC for an *in camera* examination are the documents being provided by the Custodian.

November 28, 2007

Letter from the GRC to the Custodian. The GRC informs the Custodian that the GRC needs to examine the 2004 Request for Proposals (“RFP”) for medical services for DOC inmate healthcare. A request is made that the Custodian deliver a copy of the RFP to the GRC.

November 30, 2007

The DOC hand carries a copy of the 2004 RFP for medical services for DOC inmate healthcare to the GRC in compact disk format.

Analysis

An *in camera* inspection was performed on the submitted records. The results of the *in camera* inspection are set forth in the following table:

Record or Redaction Number	Record Name/Date	Description of Document And/or Redaction	Custodian’s Explanation/ Citation for Non-disclosure	Findings of the <i>In Camera</i> Examination
1	Correctional Medical Services (CMS) – Bid Proposal to Solicitation 05-X-37119 – Medical Services for DOC Inmate Healthcare Services – Appendix A – DOC Time Report – All Hours by Shift dated August 17, 2004. Two (2) page CMS	The redacted information includes shift change and staffing information that if released could cause security breaches in the prison. (See <u>Essex County Jail Annex Inmates v.</u>	In addition to the risk of security breaches in the prison, and as more fully set forth in the documents previously provided to the GRC, including (a) the Affidavit of David Meeker, dated Dec. 14, 2006, (b) the	The category “Contracted Hours” is information that is of a proprietary nature because it is based on prior staffing experience gained by CMS. Such proprietary information, if disclosed, would give an advantage to competitors or bidders. Accordingly, the data included under “Contracted Hours” should be redacted pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Leaving the data under the “Variance” category unredacted, however, will

	<p>DOC Time Report – All Hours by Shift, for the NJ Training School for Boys – Week of July 4, 2004. DOCUMENT MARKED CONFIDENTIAL.</p>	<p><u>Treffinger</u>, 18 F. Supp. 2d 418 (D.N.J. 1998).</p>	<p>letter brief of CMS’ legal counsel, Kerri E. Chewning, Esq., dated Aug. 6, 2007, the redactions are for confidential and proprietary trade secrets and business information, which would give an unfair advantage to competitors or bidders if disclosed.</p>	<p>allow for “Contracted Hours” to be calculated vis-à-vis “Provided Hours”; therefore, the data under the category “Variance” should also be redacted to defeat the potential for such a calculation. The remaining information on the form should not be redacted pursuant to <u>N.J.S.A. 47:1A-1.1</u>. Further, the GRC is not convinced that releasing such remaining information can result in a security breach, because the brief glimpse of medical personnel staffing revealed in this record does not correlate with the scope of security issues articulated in <u>Essex County Jail Annex Inmates v. Treffinger</u>, 18 F. Supp. 2d 418 (D.N.J. 1998), cited by the Custodian.</p>
2	<p>Correctional Medical Services (CMS) – Bid Proposal to Solicitation 05-X-37119 – Medical Services for DOC Inmate Healthcares Services – Appendix A – DOC Time Report – All Hours by Shift dated August 17, 2004.</p> <p>Three (3) page CMS DOC Time Report – All Hours by Shift, for the NJ Training School for Boys – Month of July 1, 2004. DOCUMENT</p>	<p>The redacted information includes shift change and staffing information that if released could cause security breaches in the prison. (See <u>Essex County Jail Annex Inmates v. Treffinger</u>, 18 F. Supp. 2d 418 (D.N.J. 1998).</p>	<p>In addition to the risk of security breaches in the prison, and as more fully set forth in the documents previously provided to the GRC, including (a) the Affidavit of David Meeker, dated Dec. 14, 2006, (b) the letter brief of CMS’ legal counsel, Kerri E. Chewning, Esq., dated Aug. 6, 2007, the redactions</p>	<p>The category “Contracted Hours” is information that is of a proprietary nature because it is based on prior staffing experience gained by CMS. Such proprietary information, if disclosed, would give an advantage to competitors or bidders. Accordingly, the data included under “Contracted Hours” should be redacted pursuant to <u>N.J.S.A. 47:1A-1.1</u>. Leaving the data under the “Variance” category unredacted, however, will allow for “Contracted Hours” to be calculated vis-à-vis “Provided Hours”; therefore, the data under the category “Variance” should also be redacted to defeat the potential for such a</p>

	MARKED CONFIDENTIAL		are for confidential and proprietary trade secrets and business information, which would give an unfair advantage to competitors or bidders if disclosed.	calculation. The remaining information on the form should not be redacted pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Further, the GRC is not convinced that releasing such remaining information can result in a security breach, because the brief glimpse of medical personnel staffing revealed in this record does not correlate with the scope of security issues articulated in <u>Essex County Jail Annex Inmates v. Treffinger</u> , 18 F. Supp. 2d 418 (D.N.J. 1998), cited by the Custodian.
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Conclusions and Recommendations

The Executive Director respectfully recommends that the Council find that:

1. The Custodian has complied with the Council’s July 25, 2007 Interim Order, in part, by providing the Council with all records set forth in Paragraph 1 of the Order within five (5) business days of receiving the Council’s 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 above 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. **The Custodian shall comply with Paragraph 2 of the Council’s July 25, 2007 Interim Order by disclosing the requested Chest Pain Assessment with appropriate redactions, if any, and a legal justification and statutory citation for each redacted part thereof 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.**

Prepared By:

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

Approved By:

Catherine Starghill

Executive Director

May 21, 2008



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
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INTERIM ORDER

July 25, 2007 Government Records Council Meeting

Jerald Albrecht
Complainant

Complaint No. 2006-191

v.

NJ Department of Treasury
Custodian of Record

At the July 25, 2007 public meeting, the Government Records Council (“Council”) considered the July 18, 2007 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. As in Beth Burns v. Borough of Collingswood, GRC Complaint No. 2004-169 (September 2005), and Phillip Boggia v. Borough of Oakland, GRC Complaint No. 2005-36 (April 2006), the Custodian’s basis for redacting information from the requested DOC time report in this instant matter is compelling. However, the Council must determine whether the legal conclusions asserted by the Custodian are properly applied to the redactions pursuant to Burns, Boggia, and Paff v. Department of Labor, 379 N.J. Super. 346, 354-355 (App. Div. 2005). Therefore, the Council must conduct an *in camera* inspection of the requested report to determine whether the document is exempt from disclosure, in whole or in part, because it is proprietary information and/or information which, if disclosed, would give an advantage to competitors or bidders pursuant to N.J.S.A. 47:1A-1.1.
2. Based on the court’s decision in Board of Chosen Freeholders of the County of Burlington v. Tombs 2006 U.S. App. LEXIS 31234 (December 18, 2006), the Custodian failed to prove a lawful denial of access to the requested Chest Pain Assessment pursuant to N.J.S.A. 47:1A-6. As such, the Custodian should release the requested record to the Complainant with appropriate redactions, if any, and a legal justification and statutory citation for each redacted part thereof.



3. **The Custodian shall comply with # 2 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance pursuant to *N.J. Court Rules, 1969 R. 1:4-4 (2005)* to the Executive Director.**
4. The Custodian has borne his burden of proving a lawful denial of access to the requested financial statements pursuant to N.J.S.A. 47:1A-6 because the requested financial statements constitute proprietary commercial or financial information obtained from any source which is not a government record pursuant to N.J.S.A. 47:1A-1.1 and ACS State Healthcare v. State of New Jersey, No. MER-L-1187-058 (Law Div. 2005).
5. The GRC has no authority to adjudicate the Complainant's common law right to access records pursuant to Donna Janeczko v. NJ Department of Law and Public Safety, GRC Complaint Nos. 2002-79 and 2002-80 (August 2003).
6. The Council defers analysis of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances pending the outcome of the *in camera* review of the DOC time report.

Interim Order Rendered by the
Government Records Council
On The 25th Day of July, 2007

Robin Berg Tabakin, Vice Chairman
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: July 30, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 25, 2007 Council Meeting**

**Jerald Albrecht¹
Complainant**

GRC Complaint No. 2006-191

v.

**NJ Department of Treasury²
Custodian of Records**

Records Relevant to Complaint:

1. Vendor information
2. All information supplied by vendor
3. Full Request for Proposal (“RFP”) text
4. Addendum 1 - clarification of bid opening date
5. Addendum 2 - answer to questions and additions, deletions, clarifications, and modifications to the RFP
6. Addendum 3 - answer to questions and revised Appendix 3
7. Addendum 4 - additions, deletions, clarifications, and modifications to the RFP
8. Addendum 5 - correction of Addendum #4
9. Addendum 6 – answer to questions
10. Addendum 7 – answers to questions
11. Addendum 8 – answers to questions and an attachment
12. Addendum 9 – answers to questions, additions, deletions, clarifications, and modifications to the RFP, and two attachments
13. Addendum 10 – revised bid opening date and additional materials available in the Document Review Room
14. Addendum 11 – revised bid opening date
15. Addendum 12 – amendment to the RFP
16. Contract award and contract #61235
17. CMS financial statements covering previous service period under contract A-74663 (from February 1, 1996 to December 31, 2004) including all Income and Expense Statements, Balance Sheets, and Ledger Accounts
18. Litigation disclosure reports covering the period from February 1, 1996 to December 31, 2004
19. All memorandums of agreements to amend contract from award date to present
20. All NJ Department of Corrections medical audits covering contract #61235

¹ No legal representation listed on record.

² DAG David A. Balaban, on behalf of the NJ Attorney General.

Request Made: February 16, 2006³

Responses Made: March 21, 2006, May 1, 2006, July 21, 2006, July 31, 2006, August 14, 2006 and August 22, 2006

Custodian: Garry Dales

GRC Complaint Filed: October 20, 2006

Background

February 16, 2006

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

March 10, 2006

Custodian receives Complainant's OPRA request dated February 16, 2006.

March 21, 2006

Custodian's response to the OPRA request. The Custodian responded to the Complainant's OPRA request on the seventh (7th) business day following receipt of such request. The Custodian states that items # 3-15 of the Complainant's request dealing with bid solicitation 05-X-37119 (medical services for the Department of Corrections) can be located online at www.state.nj.us/treasury/purchase/noa/contracts/t2296.shtml. The Custodian also states that items # 17-19 of the Complainant's request can be scanned and provided on CD-ROM for a cost of \$15.44 and that the process will commence once payment is received.

Additionally, the Custodian states that once payment is received and the process begins, the requested documents will require a thorough review for redactions. The Custodian estimates the time frame for this review will be approximately thirty (30) days after receipt of payment. During said review, the Custodian states that if records appear to be confidential, they will require legal review. Upon such review, if the records are deemed to be exempt from disclosure, the Custodian states that she will notify the Complainant of the legal basis for non-disclosure.

Further, the Custodian states that regarding item # 20 of the Complainant's request, the Department of Treasury does not maintain documentation regarding the Department of Corrections medical audits covering contract # 61235. The Custodian advises the Complainant to forward this portion of his request to the Department of Corrections.

March 28, 2006

Letter from Complainant to Custodian. The Complainant states that as a prisoner, he does not have access to websites or CDs and is therefore requesting paper copies of the requested documents and cites N.J.S.A. 47:1A-5.d. The Complainant also states that the Custodian did not respond to items # 1-2 of his request regarding vendor information and information supplied by the vendor. The Complainant asserts that this information is required to be made, maintained, or kept on file pursuant to HIP of New Jersey, Inc. v.

³ Custodian received request on March 10, 2006.

New Jersey Dept. of Banking and Ins., 309 N.J. Super. 538 (App. Div. 1998.) Additionally, the Complainant states that the Custodian failed to respond to item # 16 of his request regarding the bid award and contract for # 61235. The Complainant asserts that his family will provide payment once he receives an estimate for the cost of photocopies.

May 1, 2006

Letter from Custodian to Complainant. The Custodian asserts that there are two thousand, two hundred and seven (2,207) pages of documentation responsive to the Complainant's request, which represent the bid proposal and the professional contract. The Custodian states that the documents available on the internet (RFP, Addendum, Amendments, and the Notice of Award), were previously mailed to the Complainant at no charge. To copy the remaining two thousand, two hundred and seven (2,207) pages, the Custodian states the cost amounts to \$564.25. Upon receipt of payment, the Custodian states it will take thirty (30) business days to review said documents for any redactions. The Custodian also states that if any documents or portions therein are found to be exempt from disclosure, she will notify the Complainant of the legal basis for non-disclosure and refund any overpayment.

May 2, 2006

Letter from Complainant to Custodian. The Complainant thanks the Custodian for sending documents free of charge and states that he will be sending his payment of \$564.25 shortly.

May 26, 2006

Letter from Complainant's Counsel to Custodian. Counsel states she has enclosed an Attorney Trust Fund check in the amount of \$564.25 for documents requested by the Complainant. Counsel states that the records should be send directly to the Complainant; however, any refunds for overpayment should be made out to Jean Ross Attorney Trust Fund and forwarded to her office.

June 20, 2006

Letter from Complainant to Custodian. The Complainant asserts that his father's attorney forwarded payment in the amount of \$564.25 for the requested records; however, the Complainant claims that he has not yet received any records. The Complainant requests that the Custodian advise him of the status of his request.

July 21, 2006

Letter from Custodian to Complainant. The Custodian requests an additional thirty (30) business days to complete the Complainant's OPRA request. The Custodian claims that this time is necessary due to unanticipated delays of gathering, reviewing, and redacting the large volume of records associated with this request. The Custodian states that the new deadline is September 1, 2006. The Custodian requests that the Complainant send a reply if he objects to the additional time, and asserts that failure to respond will be regarded as acceptance of the time extension.

July 31, 2006

Letter from Custodian to Complainant. The Custodian states that she has received

notification from the Division of Purchase and Property (“Division”) that it has reprioritized its OPRA workload. As such, the Custodian states that the Division has identified seven (7) documents totaling sixty (60) pages which require legal review for redactions relating to trade secrets, proprietary commercial or financial information pursuant to N.J.S.A. 47:1A-1.⁴ The Custodian states that the remaining records will be electronically redacted and converted to paper copies. The Custodian states that the Division estimates completion of such by August 14, 2006, and therefore requests a ten (10) business day extension. The Custodian states that failure to respond to this letter will be acknowledged as an agreement to said extension of time. Additionally, the Custodian states that when the paper copies are released, the Custodian will advise as to the status of the sixty (60) pages undergoing legal review.

August 14, 2006

Letter from Custodian to Complainant. The Custodian states that enclosed are two thousand, three hundred and ninety four (2,394) pages of records responsive to the Complainant’s request. The Custodian states that the sixty (60) pages undergoing legal review are detailed as follows:

1. CMS Bid Proposal – Ownership Disclosure – seven (7) pages marked “confidential”
2. CMS Appendices
 - a. Chest Pain Assessment – seven (7) pages copyrighted
 - b. Cooper Health System, Div. of Infectious Diseases Resumes – fourteen (14) pages marked confidential
 - c. FedEx Kinko’s, Executive Profiles – four (4) pages marked confidential
 - d. Valitas Health Services Financials – twenty two (22) pages marked confidential
 - e. Mercer County MRI Consortium W9 – one (1) page
 - f. CMS Variance Reports – five (5) pages marked confidential

The Custodian asserts that the Division estimates ten (10) business days to complete the legal review of the above records, and therefore requests an extension until August 28, 2006. The Custodian requests that the Complainant reply to the Custodian should he object to the extension of time. Additionally, the Custodian requests that the Complainant sign the attached form entitled Certification Pursuant to OPRA for Purposes of Determining Victim of Crimes.

August 22, 2006

Letter from Custodian to Complainant. The Custodian states that the legal review of the remaining requested records has been completed. The Custodian states that enclosed are the releasable records and the privilege log identifying all records withheld or redacted. Additionally, the Custodian asserts that the chest pain assessment, documents # 6-12 of the privilege log, are not available for copying, but only for inspection. The Custodian states that if the Complainant would like to designate someone to inspect these records, he may contact the Acting Custodian of Records, Garry Dales, to set up an appointment.

⁴ Actual citation is N.J.S.A. 47:1A-1.1.

August 31, 2006

Letter from Complainant to GRC. The Complainant asserts that he is challenging the Department of Treasury's decision to withhold or redact certain information from disclosure. The Complainant states that he submitted his OPRA request on February 16, 2006 (the Custodian received said request on March 10, 2006) and that the Custodian released the final installment of responsive documents on August 22, 2006. The Complainant indicates that the Custodian provided him with a Vaughn index listing each redaction and non-disclosed item. The Complainant states that he is challenging the following items:

1. redactions to the Department of Corrections ("DOC") time report
2. limiting Chest Pain Assessment to inspection but not copying
3. non-disclosure of financial statements

The Complainant contends that records which are required by law to be made, maintained, or kept on file include documents which are required by law to be submitted to a government agency by a private party and cites HIP of NJ v. Dept. of Banking & Ins., 309 N.J. Super. 538, 552 (App. Div. 1998). Regarding this complaint, the Complainant asserts that the RFP for Inmate Healthcare Services required Correctional Medical Services (CMS) to submit particular records in support of its bid proposal. The Complainant also contends that the RFP explained that any documents submitted as part of any proposal would become part of the contract and be subject to disclosure.

In regards to the DOC time reports, the Complainant asserts that Section 3.1.1 of the RFP requires CMS to submit staff schedules. The Complainant claims that the DOC released time reports which were heavily redacted on the basis that the information was proprietary commercial or financial information, as well as information which would give an advantage to competitors or bidders. The Complainant states that the redactions cover the site, cost center, staffing by shift, the number of hours allocated for vacation, benefits, sick time, holidays, and allocations for total benefit hours, provided hours, contracted hours, and variances. The Complainant claims that CMS requested that the DOC redact said information only after the Complainant requested such information. The Complainant again cites HIP regarding information identified as trade secrets, or proprietary information in the field of public health. Specifically,

[t]he changing landscape of the medical profession and medical industry requires that the public, more than ever, has available to it those facts and information which will bear directly on their well-being and ultimately on the delivery of medical services. Included within the public's right and need to know is the element of cost, a critical and complex element in this ever-growing industry...The dramatic shift of assets from a non-profit medical provider to a profit making entity requires close scrutiny by not only the Department but by the public as well. HIP, 309 NJ Super. at 556.⁵

The Complainant states that in the aforementioned case, the court ruled in favor of disclosing information similar to the information subject of this complaint and noted that

⁵ As stated in the Complainant's letter to the GRC dated August 31, 2006.

information contained within time schedules are matters in which the public should have access.

Regarding the requested Chest Pain Assessment, the Complainant states that the Custodian is limiting his accessibility of said record by indicating that it is only available for inspection and not for copying on the basis that it is a copyrighted publication. The Complainant cites N.J.S.A. 47:1A-1 for the proposition that government records shall be available for inspection, copying, or examination. Additionally, the Complainant asserts that as a prisoner, he is unable to leave the prison in order to inspect records.

In addition, the Complainant states that the Custodian is withholding the requested CMS financial statements. The Complainant asserts that these records are subject to public access as they are required to be submitted as stated in Section 4.4.3.7 of the RFP.

Further, the Complainant contends that, besides the requirements of OPRA, the requested records should be released under common law.

September 13, 2006

GRC sends Denial of Access Complaint Form to Complainant.

October 20, 2006

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

- Complainant’s OPRA request dated February 16, 2006
- Letter from Custodian to Complainant dated March 21, 2006
- Letter from Complainant to Custodian dated March 28, 2006
- Letter from Custodian to Complainant dated May 1, 2006
- Letter from Complainant to Custodian dated May 2, 2006
- Letter from Jean Ross, Esq. to Custodian dated May 26, 2006
- Letter from Complainant to Custodian dated June 20, 2006
- Letter from Custodian to Complainant dated July 21, 2006
- Letter from Custodian to Complainant dated July 31, 2006
- Letter from Custodian to Complainant dated August 14, 2006
- Letter from Custodian to Complainant dated August 22, 2006
- Government Records Request Receipt dated August 22, 2006

The Complainant states that his arguments were addressed in his letter to the GRC dated August 31, 2006.

October 19, 2006

Offer of Mediation sent to both parties.

November 6, 2006

Complainant’s signed Agreement to Mediate. The Custodian did not agree to mediate this complaint.

November 15, 2006

Request for Statement of Information sent to the Custodian.

November 21, 2006

Custodian's Statement of Information ("SOI") with the following attachments:

- Open Government Records Access Unit (GRAU) Report for Complainant's OPRA request dated March 10, 2006
- Vaughn Index for Complainant's March 10, 2006 OPRA request
- Letter from Custodian to Complainant dated March 21, 2006
- Letter from Complainant to Custodian dated March 28, 2006
- Letter from Custodian to Complainant dated April 28, 2006
- Letter from Custodian to Complainant dated May 1, 2006
- Letter from Complainant to Custodian dated June 20, 2006
- Letter from Custodian to Complainant dated July 21, 2006
- Letter from Complainant to Custodian dated July 28, 2006
- Letter from Custodian to Complainant dated July 31, 2006
- Letter from Custodian to William P. Mazur, M.D., of the Cooper Health System dated August 4, 2006
- Letter from Custodian to Awny Farajallah, M.D., of the Cooper Health System dated August 4, 2006
- Letter from Custodian to Dr. Pola de la Torre of the Cooper Health System dated August 4, 2006
- Letter from Custodian to Shelly Riedmann, Major Account Manager of FedEx Kinko's, dated August 4, 2006
- Letter from Custodian to Richard Carter, Executive Vice President of Correctional Medical Services, dated August 4, 2006
- Envelope addressed to Custodian from Complainant date stamped August 14, 2006
- Letter from Custodian to Complainant dated August 14, 2006
- Certification pursuant to OPRA for purposes of determining victim of crimes signed by the Complainant on August 19, 2006
- Letter from Custodian to Complainant dated August 22, 2006
- Facsimile from David Balaban, DAG, to Custodian dated August 28, 2006
- Letter from Custodian to Complainant dated November 21, 2006
- Printout of Offender Details from the Department of Corrections' website regarding the Complainant

The Custodian certifies receiving the Complainant's OPRA request on March 10, 2006. The table below summarizes the Complainant's requests and the Custodian's responses to the records subject of this complaint.

Records Responsive to Complainant's Request	Custodian's Response and Legal Citation
Correctional Medical Services DOC Time Report	Content redacted pursuant to <u>N.J.S.A. 47:1A-1.1</u> – proprietary, commercial, or financial information; information which would give an advantage to competitors or bidders
Chest Pain Assessment T-786.50	Document not available for copying, inspection only pursuant to <u>N.J.S.A. 47:1A-1.1</u> – proprietary, commercial or financial information (copyrighted publication.)
Consolidated Financial Statements	Not disclosable pursuant to <u>N.J.S.A. 47:1A-1.1</u> – proprietary, commercial, or financial information

The Custodian states that the Deputy Attorney General representing the Department will be submitting supplemental legal arguments.

November 22, 2006

Letter of representation from Custodian's Counsel.

December 14, 2006⁶

Supplemental response to the Custodian's SOI from Custodian's Counsel with the following attachments:

- Itemized list of records requested by the Complainant
- Vaughn Index
- Affidavit of Correctional Medical Services
- ACS State Healthcare v. State of New Jersey, No. MER-L 1187-058 (Sup. Ct. August 30)
- Custodian's certification dated December 7, 2006
- Letter brief of Correctional Medical Services dated December 15, 2006

The Custodian's Counsel states that the Complainant's Denial of Access Complaint involves only thirty four (34) pages of the two thousand four hundred twenty two (2,422) pages which were released to the Complainant. Counsel states that the records in question are as follows:

1. Correctional Medical Services DOC Time Report – marked “confidential” and redacted pursuant to N.J.S.A. 47:1A-1.1 regarding information which if disclosed,

⁶ Additional documents were submitted by the parties. However, they are not relevant to this complaint. Jerald Albrecht v. NJ Department of Treasury, 2006-191 – Findings and Recommendations of the Executive Director

- would give an advantage to competitors or bidders, and these records shall not include trade secrets.
2. Chest Pain Assessment – available for inspection but not copying as it bears the following copyright notice pursuant to U.S.C. 401, “Copyright © 2003 Correctional Medical Services, Inc. All Rights Reserved.”
 3. Consolidated Financial Statements – withheld pursuant to N.J.S.A. 47:1A-1.1 regarding proprietary financial records obtained from any source.

Counsel states that the Custodian received the Complainant’s OPRA request, dated February 16, 2006, on March 10, 2006. Following months of correspondence between the Complainant and the Custodian, Counsel states that the Custodian provided the Complainant with the requested records on August 22, 2006 including a Vaughn Index for any redactions or documents that were withheld (specifically, the three (3) documents enumerated above). Additionally, Counsel states that on December 14, 2006, CMS provided the following documents in support of the Custodian’s request to dismiss this GRC Complaint:

1. Affidavit of CMS certifying that the documents redacted or withheld are proprietary and trade secrets of CMS which would provide an unfair advantage to competitors if disclosed.
2. Letter Brief including legal arguments of CMS against unfair disclosure.

Counsel asserts that CMS is the real party in interest in this complaint as its proprietary financial and commercial records and trade secrets are at issue. Further, Counsel states that this submission to the GRC is made on behalf of the Custodian and requests dismissal of the complaint for the following reasons:

1. The records subject of this complaint are expressly exempt from disclosure under OPRA
2. The Complainant’s reliance on pre-OPRA policy is misplaced
3. The GRC does not have jurisdiction over the Complainant’s common law claims
4. Federal copyright law protects the Chest Pain Assessment.

The Records Subject of This Complaint Are Exempt from Disclosure under OPRA

Counsel contends that the requested Correctional Medical Services DOC Time Report constitutes trade secrets of CMS and is proprietary information because the report is generated from a proprietary software system of CMS and sets forth particular staffing patterns. Counsel asserts that the report form itself was created to distinguish CMS from competitors, and that disclosure would give competitors an unfair advantage.

Regarding the requested Chest Pain Assessment, Counsel contends that because CMS conducted research and investment to create this unique document, unauthorized copying of such would release the trade secrets contained therein and would give an unfair advantage to CMS’ competitors. As such, said record was made available for inspection only.

Additionally, Counsel asserts that the requested Consolidated Financial Statements constitute proprietary financial information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

Complainant's Reliance on Pre-OPRA Policy is Misplaced

Counsel asserts that the Complainant mistakenly relies on the language of the NJ Department of Treasury's policy of disclosure as set forth in the Request for Proposal. Counsel contends that the statutory language of OPRA supersedes that of the RFP and cites the unpublished opinion in ACS State Healthcare v. State of New Jersey, No. MER-L-1187-058 (Law Div. 2005). Counsel states that in said case, the Judge found that:

"...the policy of the State that bid proposals are public records, at times, is in conflict with the exceptions included as part of OPRA...OPRA expressly excludes from disclosure: (1) trade secrets and proprietary commercial or financial information obtained from any source; and (2) information, which, if disclosed, would give an advantage to competitors or bidders. N.J.S.A. 47:1A-1.1. As such, a records custodian has the discretion to withhold a contract which contains, for example, trade secrets." *Id.* at ___.

GRC Does Not Have Jurisdiction over the Complainant's Common Law Claims

Counsel states that in the past the GRC has taken the position that it does not have jurisdiction over common law claims and cites Donna Janeczko v. NJ Department of Law and Public Safety, GRC Complaint Nos. 2002-79 and 2002-80 (August 2003). For this reason, Counsel requests that the GRC dismiss the Complainant's common law arguments for lack of jurisdiction.

Federal Copyright Law Protects the Chest Pain Assessment

Counsel states that the Custodian provided the requested Chest Pain Assessment to the Complainant for inspection only as said record is protected by federal copyright law, which does not prohibit inspection. Counsel states that pursuant to N.J.S.A. 47:1A-9.a.,⁷ federal law is an exception to OPRA. Additionally, Counsel contends that pursuant to 17 U.S.C. 401, whenever a document is protected under this provision, a notice of copyright may be placed on publicly distributed copies. Counsel states that at the bottom of every page of the requested Chest Pain Assessment, the following language appears: "Copyright © 2003 Correctional Medical Services, Inc. All Rights Reserved. Chest pain Assessment (Nov. 2003).

Analysis

Whether the Custodian unlawfully denied access to the requested records at issue - Correctional Medical Services' DOC Time Report, Chest Pain Assessment, and Consolidated Financial Statements?

⁷ Actually cited as N.J.S.A. 47:1A-9.

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.

Additionally, 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 ...*A government record shall not include the following information which is deemed to be confidential...trade secrets and proprietary commercial or financial information obtained from any source...information which, if disclosed, would give an advantage to competitors or bidders...*” (Emphasis added.) N.J.S.A. 47:1A-1.1.

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 also states that:

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

The Copyright Law of the United States of America provides that:

(a) General Provisions. — Whenever a work protected under this title is published in the United States or elsewhere by authority of the copyright owner, a notice of copyright as provided by this section may be placed on publicly distributed copies from which the work can be visually perceived, either directly or with the aid of a machine or device.

(b) Form of Notice. — If a notice appears on the copies, it shall consist of the following three elements:

(1) the symbol © (the letter C in a circle), or the word “Copyright”, or the abbreviation “Copr.”; and

(2) the year of first publication of the work; in the case of compilations or derivative works incorporating previously published material, the

year date of first publication of the compilation or derivative work is sufficient. The year date may be omitted where a pictorial, graphic, or sculptural work, with accompanying text matter, if any, is reproduced in or on greeting cards, postcards, stationery, jewelry, dolls, toys, or any useful articles; and

(3) the name of the owner of copyright in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner. 17 U.S.C. 401.

The Local Public Contracts Law provides that:

“...At such time and place the contracting agent of the contracting unit shall publicly receive the bids, and thereupon immediately proceed to unseal them and publicly announce the contents, which announcement shall be made in the presence of any parties bidding or their agents, who are then and there present, and shall also make proper record of the prices and terms, upon the minutes of the governing body, if the award is to be made by the governing body of the contracting unit, or in a book kept for that purpose, if the award is to be made by other than the governing body, and in such latter case it shall be reported to the governing body of the contracting unit for its action thereon, when such action thereon is required. N.J.S.A. 40A:11-23.b.

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.

DOC Time Report

The Custodian’s Counsel contends that the requested Correctional Medical Services DOC Time Report constitutes trade secrets of CMS and is proprietary information pursuant to N.J.S.A. 47:1A-1.1. Additionally, Counsel asserts that the report form itself was created to distinguish CMS from competitors, and that disclosure would give competitors an unfair advantage.

In Beth Burns v. Borough of Collingswood, GRC Complaint No. 2004-169 (September 2005), the Complainant requested a marketing study. The Custodian’s Counsel asserted that the Borough “considers the marketing and sale techniques in developing and marketing the [residential and commercial] properties for sale to be *proprietary in nature* and *the Borough is sensitive to the potential competitive disadvantage* the redeveloper would be placed against other redevelopers involved in other local redevelopment projects.” In this complaint the GRC found that

“...while the Custodian’s arguments and legal conclusions are persuasive, it can not be determined whether the Custodian has met the burden of proving that the requested document(s) are exempt from disclosure without actually reviewing the document(s) to confirm the Custodian’s

legal conclusions. Therefore, it is recommended that the Council conduct an *in camera* inspection of all the marketing studies to determine whether the document is exempt from disclosure, in whole or in part, because it is “information which, if disclosed, would give an advantage to competitors or bidders” pursuant to N.J.S.A. 47:1A-1.1.”

Additionally, in Phillip Boggia v. Borough of Oakland, GRC Complaint No. 2005-36 (April 2006), the Custodian asserted that the information redacted from the requested record would, if disclosed, give an advantage to competitors or bidders. The GRC held that “[w]hile the custodian has provided facts in support of the legal conclusions asserted, the Council must determine whether the legal conclusions asserted by the Custodian (that the information which, if disclosed, would give an advantage to competitors or bidders) are properly applied to the redactions. Therefore, the Council must conduct an *in camera* inspection of the redacted Morris Land Conservancy reports.”

Like in Burns and Boggia, the Custodian’s basis for redacting information from the requested DOC time report in this instant matter is compelling. However, the Council must determine whether the legal conclusions asserted by the Custodian are properly applied to the redactions pursuant to Beth Burns v. Borough of Collingswood, GRC Complaint No. 2004-169 (September 2005), Phillip Boggia v. Borough of Oakland, GRC Complaint No. 2005-36 (April 2006), and Paff v. Department of Labor, 379 N.J. Super. 346, 354-355 (App. Div. 2005). Therefore, the Council must conduct an *in camera* inspection of the requested report to determine whether the document is exempt from disclosure, in whole or in part, because it is proprietary information and/or information which, if disclosed, would give an advantage to competitors or bidders pursuant to N.J.S.A. 47:1A-1.1.

Chest Pain Assessment

The Custodian’s Counsel states that the Custodian provided the said record to the Complainant for inspection only as said record is protected by Federal copyright law, which does not prohibit inspection. Additionally, Counsel contends that as CMS conducted research and investment to create this unique document, unauthorized copying of such would release the trade secrets contained therein and would give an unfair advantage to CMS’ competitors. As such, said record was made available for inspection only.

In Board of Chosen Freeholders of the County of Burlington v. Tombs 2006 U.S. App. LEXIS 31234 (December 18, 2006), the Appellant “filed a complaint asking the District Court to declare that federal copyright law preempts Tombs’ OPRA request.” The Court held that:

“[f]ederal copyright law does not create an exclusive course of action for access to public records and does not set forth procedures and remedies governing such actions. Simply stated, federal copyright law does not wholly displace state statutory or common law rights to public records, and therefore cannot be said to completely preempt Tombs’ threatened claim.” *Id.* at ___.

Based on the court's decision in Board of Chosen Freeholders, copyright law does not prohibit access to a government record which is otherwise available under OPRA. The Custodian therefore failed to lawfully deny access to the requested Chest Pain Assessment pursuant to N.J.S.A. 47:1A-6. As such, the Custodian should release the requested record to the Complainant.

Financial Statement

OPRA provides that proprietary commercial or financial information obtained from any source is not a government record. N.J.S.A. 47:1A-1.1.

The Local Public Contracts Law, N.J.S.A. 40A:11-1 et seq., requires that bids are opened publicly by a governing body on the bid deadline date.

In ACS State Healthcare v. State of New Jersey, No. MER-L-1187-058 (Law Div. 2005), the court held that:

“...the policy of the State that bid proposals are public records, at times, is in conflict with the exceptions included as part of OPRA...OPRA expressly excludes from disclosure: (1) trade secrets and proprietary commercial or financial information obtained from any source; and (2) information, which, if disclosed, would give an advantage to competitors or bidders. N.J.S.A. 47:1A-1.1. As such, a records custodian has the discretion to withhold a contract which contains, for example, trade secrets.”

OPRA is specifically designed for public records request. OPRA's provisions state that proprietary commercial or financial information obtained from any source is not a government record. N.J.S.A. 47:1A-1.1. Thus, the Custodian has borne his burden of proving a lawful denial of access to the requested financial statements pursuant to N.J.S.A. 47:1A-6 because the requested financial statements constitute proprietary commercial or financial information obtained from any source which are not government records pursuant to N.J.S.A. 47:1A-1.1 and ACS State Healthcare.

Whether the Government Records Council has authority over a requestor's common law right to access records?

The Complainant contends that besides the requirements of OPRA, the requested records should be released under common law.

The Custodian's Counsel states that in the past the GRC has taken the position that it does not have jurisdiction over common law claims and cites Donna Janeczko v. NJ Department of Law and Public Safety, GRC Complaint Nos. 2002-79 and 2002-80 (August 2003). For this reason, Counsel requests that the GRC dismiss the Complainant's common law arguments for lack of jurisdiction.

In Donna Janeczko, the GRC held that “[w]hen enacting OPRA, the Legislature made it clear that the "common law" principle of public access to records remains in

effect. Under the common law, despite a statutory prohibition against access, a requestor can petition the courts for access to records and request that their need for access outweighs the government interest in preventing access.”

Therefore, the GRC has no authority to adjudicate the Complainant’s common law right to access records pursuant to the GRC’s decision in the Janeczko case.

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 analysis of this issue pending the outcome of the *in camera* review of the DOC time report.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. As in Beth Burns v. Borough of Collingswood, GRC Complaint No. 2004-169 (September 2005), and Phillip Boggia v. Borough of Oakland, GRC Complaint No. 2005-36 (April 2006), the Custodian’s basis for redacting information from the requested DOC time report in this instant matter is compelling. However, the Council must determine whether the legal conclusions asserted by the Custodian are properly applied to the redactions pursuant to Burns, Boggia, and Paff v. Department of Labor, 379 N.J. Super. 346, 354-355 (App. Div. 2005). Therefore, the Council must conduct an *in camera* inspection of the requested report to determine whether the document is exempt from disclosure, in whole or in part, because it is proprietary information and/or information which, if disclosed, would give an advantage to competitors or bidders pursuant to N.J.S.A. 47:1A-1.1.
2. Based on the court’s decision in Board of Chosen Freeholders of the County of Burlington v. Tombs 2006 U.S. App. LEXIS 31234 (December 18, 2006), the Custodian failed to prove a lawful denial of access to the requested Chest Pain Assessment pursuant to N.J.S.A. 47:1A-6. As such, the Custodian should release the requested record to the Complainant with appropriate redactions, if any, and a legal justification and statutory citation for each redacted part thereof.
3. **The Custodian shall comply with # 2 above within five (5) business days from receipt of the Council’s Interim Order and simultaneously provide certified confirmation of compliance pursuant to *N.J. Court Rules, 1969 R. 1:4-4 (2005)* to the Executive Director.**
4. The Custodian has borne his burden of proving a lawful denial of access to the requested financial statements pursuant to N.J.S.A. 47:1A-6 because the requested financial statements constitute proprietary commercial or financial information obtained from any source which is not a government record pursuant to N.J.S.A. 47:1A-1.1 and ACS State Healthcare v. State of New Jersey, No. MER-L-1187-058 (Law Div. 2005).

5. The GRC has no authority to adjudicate the Complainant's common law right to access records pursuant to Donna Janeczko v. NJ Department of Law and Public Safety, GRC Complaint Nos. 2002-79 and 2002-80 (August 2003).
6. The Council defers analysis of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances pending the outcome of the *in camera* review of the DOC time report.

Prepared By:

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Approved By:

Catherine Starghill, Esq.
Executive Director

July 18, 2007