



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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COMMISSIONER LUCILLE DAVY
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

July 30, 2008 Government Records Council Meeting

Cynthia Feiler-Jampel
Complainant

Complaint No. 2007-190

v.

Somerset County Prosecutor's Office
Custodian of Record

At the July 30, 2008 public meeting, the Government Records Council ("Council") considered the July 23, 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 March 26, 2008 Interim Order by providing the Council with all records set forth in Paragraph 7 of the Order within five (5) business days of receiving the Council's Order.
2. The *In Camera* Examination set forth in the table below reveals the Custodian has lawfully denied access to, or lawfully redacted portions of, the records listed in the document index pursuant to N.J.S.A. 47:1A-6.
3. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business day period resulted in a "deemed" denial, because the Custodian verbally responded to the Complainant's request on the sixth (6th) business day following receipt of such request informing the Complainant that the records responsive to her request would be available by the end of the week, 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.¹ However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

¹ The Office Manager, on behalf of the Custodian, actually spoke with the Complainant.



Record Number	Record Name/Date	Description of Record	Custodian's Explanation/ Citation for Non-disclosure or Redaction	Findings of the <i>In Camera</i> Examination
3	Three (3) page "SCPO Closeout Memorandum" dated February 7, 2007.	Sets forth facts and reasoning for not pursuing a criminal investigation or prosecution and includes opinions, recommendations and advice.	Deliberative Process Privilege pursuant to <u>N.J.S.A.</u> 47:1A-1.1.	Contains opinions, recommendations and advice and constitutes intra-agency advisory, consultative or deliberative ("ACD") material exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1. This record was incorporated by reference into Record Number 5, <i>infra</i> , and is therefore also exempt from disclosure as a criminal investigatory record pursuant to <u>N.J.S.A.</u> 47:1A-1.1.
4	Two (2) page "SCPO Report of Criminal Investigation" dated February 6, 2007.	Data page for a criminal investigation report.	Deliberative Process Privilege pursuant to <u>N.J.S.A.</u> 47:1A-1.1. Also exempt from disclosure as a criminal investigatory record pursuant to <u>N.J.S.A.</u> 47:1A-1.1.	Recites facts, not opinions, recommendations and advice; therefore, it is not ACD material. Record is, however, exempt from disclosure as a criminal investigatory record pursuant to <u>N.J.S.A.</u> 47:1A-1.1.

5	Two (2) page "SCPO Report of Criminal Investigation" dated February 13, 2007.	Data page for a criminal investigation report.	Deliberative Process Privilege pursuant to <u>N.J.S.A.</u> 47:1A-1.1. Also exempt from disclosure as a criminal investigatory record pursuant to <u>N.J.S.A.</u> 47:1A-1.1.	Recites facts, not opinions, recommendations and advice; therefore, it is not ACD material. Record is, however, exempt from disclosure as a criminal investigatory record pursuant to <u>N.J.S.A.</u> 47:1A-1.1.
6	One (1) page "SCPO Special Investigations Case Review Form."	Check list for a case file concerning a criminal investigation or non-criminal matter. Here, a suspect is named; therefore, it is acknowledged to be for a criminal investigation. There is a section for comments, but no comments appear on the report.	Deliberative Process Privilege pursuant to <u>N.J.S.A.</u> 47:1A-1.1. Also exempt from disclosure as a criminal investigatory record pursuant to <u>N.J.S.A.</u> 47:1A-1.1.	Does not contain opinions, recommendations, or advice about agency policies; therefore, it is not ACD material. Record is, however, exempt from disclosure as a criminal investigatory record pursuant to <u>N.J.S.A.</u> 47:1A-1.1.

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 1, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Cynthia Feiler-Jampel¹
Complainant**

GRC Complaint No. 2007-190

v.

**Somerset County Prosecutor's Office²
Custodian of Records**

.Records Relevant to Complaint: Any and all documents and evidence relating to the investigation of Judge Frank Gasiorowski in the Somerset County Prosecutor's Office case file # 0702-0335.

Request Made: August 3, 2007

Response Made: August 13, 2007

Custodian: Daniel J. Livak³

GRC Complaint Filed: September 4, 2007

Background

March 26, 2008

At the March 26, 2008 public meeting, the Government Records Council ("Council") considered the March 19, 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 amended findings and recommendations. The Council, therefore, finds that:

1. The Custodian's failure to respond to the Complainant's request in writing by granting access, denying access, requesting an extension of the statutory response time, or asking for clarification of the request within the statutorily mandated seven (7) business days of receiving Complainant's OPRA request in violation of N.J.S.A. 47:1A-5.i and N.J.S.A. 47:1A-5.g has resulted in a "deemed" denial. See Tucker Kelley v. Township of Rockaway, GRC Complaint No. 2006-176 (March 2007).
2. Because the records requested comprise an entire SCPO file, the request 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

¹ No legal representation listed on record.

² Represented by Assistant Prosecutor Tom Chirichella and Assistant Prosecutor Frank Kolodzieski, Somerset County Prosecutor's Office (Somerville, NJ).

³ Mary Ann Triaco is listed on the Denial of Access Complaint as a co-custodian; however, her title is Office Manager of the Somerset County Prosecutor's Office.

require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to research the SCPO files to locate records potentially responsive to the Complainant's request pursuant to the Superior Court's decisions in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), and the Council's decisions in Asarnow v. Department of Labor and Workforce Development, GRC Complaint No. 2006-24 (May 2006) and Morgano v. Essex County Prosecutor's Office, GRC Complaint No. 2007-190 (February 2008).

3. The Custodian properly redacted personal identifier information from one hundred sixty-two (162) records disclosed to the Complainant in accord with the Legislature's declaration set forth in N.J.S.A. 47:1A-1, N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-5.a. and the Council's decision in Shain v. Township of Lakewood, GRC Complaint No. 2002-112 (February 2004).
4. Because 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, the Custodian lawfully denied the Complainant access to the criminal history record database.
5. Because Executive Order 26 (McGreevey) excludes information relating to medical history, diagnosis, treatment or evaluation from the definition of a government record as provided in OPRA, and because this Executive Order is applicable to OPRA by operation of N.J.S.A. 47:1A-9a, the Custodian lawfully denied the Complainant access to this record.
6. Because the Custodian did not adequately clarify the nature of the four (4) records described as SCPO Investigation Reports, the GRC must conduct an *in camera* review to decide whether or not the Custodian has lawfully denied access to these records.
7. **The Custodian must deliver⁴ to the Council in a sealed envelope nine copies of the requested unredacted document (see #6 above), a document or redaction index⁵, 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.**
8. Because handwritten notes do not constitute a government record according to the Superior Court's decision in O'Shea v. West Milford Board of Education, 391 N.J. Super. 534 (App. Div. 2007), they are exempt from disclosure pursuant to N.J.S.A.

⁴ 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.

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

47:1A-1, which provides that "...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State..." Therefore, the Custodian lawfully denied the Complainant access to this record.

9. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

March 27, 2008

Interim Decision and *in camera* letter requesting documents sent to both parties.

March 28, 2008

Certification of the Custodian in nine (9) copies with nine (9) copies each of the following attachments:⁶

- Document/Redaction Index detailing the lawful basis for denial of each document and/or each redaction asserted dated March 27, 2008
- Three (3) page unredacted record identified in the Custodian's SOI as a "SCPO Closeout Memorandum" and dated February 7, 2007 (marked as Item #3)
- Two (2) page unredacted record identified in the Custodian's SOI as a "SCPO Report of Criminal Investigation" and dated February 6, 2007 (marked as Item #4)
- Two (2) page unredacted record identified in the Custodian's SOI as a "SCPO Report of Criminal Investigation" and dated February 13, 2007 (marked as Item #5)
- One (1) page unredacted record identified in the Custodian's SOI as a "SCPO Special Investigations Case Review Form" and undated (marked as Item #6)

Analysis

Whether the Custodian has lawfully denied access to the records submitted to the GRC for *in camera* examination pursuant to the Council's March 26, 2008 Interim Order?

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

⁶ Nine (9) copies of each requested unredacted document were all that were required pursuant to the GRC's March 27, 2008 *in camera* letter.
Cynthia Feiler-Jampel v. Somerset County Prosecutor's Office, 2007-190 – *In Camera* Findings and Recommendations of the Executive Director

Record Number	Record Name/Date	Description of Record	Custodian's Explanation/ Citation for Non-disclosure or Redaction	Findings of the <i>In Camera</i> Examination
3	Three (3) page "SCPO Closeout Memorandum" dated February 7, 2007.	Sets forth facts and reasoning for not pursuing a criminal investigation or prosecution and includes opinions, recommendations and advice.	Deliberative Process Privilege pursuant to <u>N.J.S.A.</u> 47:1A-1.1.	Contains opinions, recommendations and advice and constitutes intra-agency advisory, consultative or deliberative ("ACD") material exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1. This record was incorporated by reference into Record Number 5, <i>infra</i> , and is therefore also exempt from disclosure as a criminal investigatory record pursuant to <u>N.J.S.A.</u> 47:1A-1.1.
4	Two (2) page "SCPO Report of Criminal Investigation" dated February 6, 2007.	Data page for a criminal investigation report.	Deliberative Process Privilege pursuant to <u>N.J.S.A.</u> 47:1A-1.1. Also exempt from disclosure as a criminal investigatory record pursuant to <u>N.J.S.A.</u> 47:1A-1.1.	Recites facts, not opinions, recommendations and advice; therefore, it is not ACD material. Record is, however, exempt from disclosure as a criminal investigatory record pursuant to <u>N.J.S.A.</u> 47:1A-1.1.
5	Two (2) page "SCPO Report	Data page for a criminal	Deliberative Process	Recites facts, not opinions,

	of Criminal Investigation” dated February 13, 2007.	investigation report.	Privilege pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Also exempt from disclosure as a criminal investigatory record pursuant to <u>N.J.S.A. 47:1A-1.1</u> .	recommendations and advice; therefore, it is not ACD material. Record is, however, exempt from disclosure as a criminal investigatory record pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
6	One (1) page “SCPO Special Investigations Case Review Form.”	Check list for a case file concerning a criminal investigation or non-criminal matter. Here, a suspect is named; therefore, it is acknowledged to be for a criminal investigation. There is a section for comments, but no comments appear on the report.	Deliberative Process Privilege pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Also exempt from disclosure as a criminal investigatory record pursuant to <u>N.J.S.A. 47:1A-1.1</u> .	Does not contain opinions, recommendations, or advice about agency policies; therefore, it is not ACD material. Record is, however, exempt from disclosure as a criminal investigatory record pursuant to <u>N.J.S.A. 47:1A-1.1</u> .

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)).

The Custodian received the Complainant’s OPRA request on August 3, 2007. Thereafter, on August 13, 2007 the Complainant visited the Custodian’s office and the Custodian’s Office Manager responded to the Complainant’s request by verbally informing the Complainant that the requested records would be available by the end of that week.

Accordingly, the Custodian’s failure to provide a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business day period resulted in a “deemed” denial, because the Custodian verbally responded to the Complainant’s request on the sixth (6th) business day following receipt of such request informing the Complainant that the records responsive to her request would be available by the end of the week, 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 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 that the Council find that:

1. The Custodian has complied with the Council’s March 26, 2008 Interim Order by providing the Council with all records set forth in Paragraph 7 of the Order within five (5) business days of receiving the Council’s Order.
2. The *In Camera* Examination set forth in the above table reveals the Custodian has lawfully denied access to, or lawfully redacted portions of, the records listed in the document index pursuant to N.J.S.A. 47:1A-6.

3. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business day period resulted in a "deemed" denial, because the Custodian verbally responded to the Complainant's request on the sixth (6th) business day following receipt of such request informing the Complainant that the records responsive to her request would be available by the end of the week, 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.⁷ However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since he 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

July 23, 2008

⁷ The Office Manager, on behalf of the Custodian, actually spoke with the Complainant.
Cynthia Feiler-Jampel v. Somerset County Prosecutor's Office, 2007-190 – *In Camera* Findings and Recommendations of the Executive Director



State of New Jersey

GOVERNMENT RECORDS COUNCIL

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

INTERIM ORDER

March 26, 2008 Government Records Council Meeting

Cynthia Feiler-Jampel
Complainant

Complaint No. 2007-190

v.

Somerset County Prosecutor's Office
Custodian of Record

At the March 26, 2008 public meeting, the Government Records Council ("Council") considered the March 19, 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 amended findings and recommendations. The Council, therefore, finds that:

1. The Custodian's failure to respond to the Complainant's request in writing by granting access, denying access, requesting an extension of the statutory response time, or asking for clarification of the request within the statutorily mandated seven (7) business days of receiving Complainant's OPRA request in violation of N.J.S.A. 47:1A-5.i and N.J.S.A. 47:1A-5.g has resulted in a "deemed" denial. See Tucker Kelley v. Township of Rockaway, GRC Complaint No. 2006-176 (March 2007).
2. Because the records requested comprise an entire SCPO file, the request 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 had no legal duty to research the SCPO files to locate records potentially responsive to the Complainant's request pursuant to the Superior Court's decisions in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), and the Council's decisions in Asarnow v. Department of Labor and Workforce Development, GRC Complaint No. 2006-24 (May 2006) and Morgano v. Essex County Prosecutor's Office, GRC Complaint No. 2007-190 (February 2008).
3. The Custodian properly redacted personal identifier information from one hundred sixty-two (162) records disclosed to the Complainant in accord with the Legislature's declaration set forth in N.J.S.A. 47:1A-1, N.J.S.A. 47:1A-1.1,



N.J.S.A. 47:1A-5.a. and the Council's decision in Shain v. Township of Lakewood, GRC Complaint No. 2002-112 (February 2004).

4. Because *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, the Custodian lawfully denied the Complainant access to the criminal history record database.
5. Because Executive Order 26 (McGreevey) excludes information relating to medical history, diagnosis, treatment or evaluation from the definition of a government record as provided in OPRA, and because this Executive Order is applicable to OPRA by operation of N.J.S.A. 47:1A-9a, the Custodian lawfully denied the Complainant access to this record.
6. Because the Custodian did not adequately clarify the nature of the four (4) records described as SCPO Investigation Reports, the GRC must conduct an *in camera* review to decide whether or not the Custodian has lawfully denied access to these records.
7. **The Custodian must deliver¹ to the Council in a sealed envelope nine copies of the requested unredacted document (see #6 above), a document or redaction index², 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.**
8. Because handwritten notes do not constitute a government record according to the Superior Court's decision in O'Shea v. West Milford Board of Education, 391 N.J. Super. 534 (App. Div. 2007), they are exempt from disclosure pursuant to N.J.S.A. 47:1A-1, which provides that "...*government records* shall be readily accessible for inspection, copying, or examination by the citizens of this State..." Therefore, the Custodian lawfully denied the Complainant access to this record.
9. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

¹ 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.

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

Interim Order Rendered by the
Government Records Council
On The 26th Day of March, 2008

Robin Berg Tabakin, Vice Chairman
Government Records Council

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

Janice Kovach
Government Records Council

Decision Distribution Date: March 27, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 26, 2008 Council Meeting**

**Cynthia Feiler-Jampel¹
Complainant**

GRC Complaint No. 2007-190

v.

**Somerset County Prosecutor's Office²
Custodian of Records**

Records Relevant to Complaint: Any and all documents and evidence relating to the investigation of Judge Frank Gasiorowski in the Somerset County Prosecutor's Office case file # 0702-0335.

Request Made: August 3, 2007

Response Made: August 13, 2007

Custodian: Daniel J. Livak³

GRC Complaint Filed: September 4, 2007

Background

August 3, 2007

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

August 8, 2007

Conversation between the Complainant and Mary Ann Triaco. The Complainant visits the Somerset County Prosecutor's Office ("SCPO") on a different matter and inquires about the status of her OPRA request. The Complainant asserts that Ms. Triaco acknowledges that the SCPO is in receipt of the Complainant's OPRA request.

August 13, 2007

Custodian's Response to the OPRA request. The Custodian asserts responding to the Complainant's OPRA request on the sixth (6th) business day following receipt of such request by meeting with, and verbally informing, the Complainant that the records responsive to the request would be available by the end of the week.⁴

¹ No legal representation listed on record.

² Represented by Assistant Prosecutor Tom Chirichella and Assistant Prosecutor Frank Kolodzieski, Somerset County Prosecutor's Office (Somerville, NJ).

³ Mary Ann Triaco is listed on the Denial of Access Complaint as a co-custodian; however, her title is Office Manager of the Somerset County Prosecutor's Office.

⁴ The Office Manager, on behalf of the Custodian, actually spoke with the Complainant.

September 4, 2007

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

- Facsimile transmission verification report dated June 4, 2007
- Complainant’s OPRA request dated August 3, 2007

The Complainant attached the facsimile transmission verification report to indicate her request dated August 3, 2007 was transmitted via facsimile to the SCPO; however, the transmittal forwarding her August 3, 2007 OPRA request was dated June 4, 2007.⁵ The Complainant states that on August 8, 2007, she was told by the Office Manager that her OPRA request had been received. The Complainant alleges that the Custodian has taken no action to address her complaint.

September 5, 2007

Offer of Mediation sent to both parties.

September 12, 2007

The Custodian agrees to mediate this complaint.

September 13, 2007

The Complainant declines mediation and requests that the GRC begin a full investigation of this complaint.

September 13, 2007

Request for the Statement of Information sent to the Custodian.

September 21, 2007

Letter from GRC to the Custodian. The GRC informs the Custodian that the GRC provided the Custodian with a request for a Statement of Information on September 13, 2007 and to date has not received a response. Further, the GRC states that if the Statement of Information is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

September 26, 2007

Telephone call from the Custodian to the GRC. The Custodian calls seeking clarification regarding information the GRC deems necessary in order to properly and thoroughly complete the Statement of Information.

September 26, 2007

⁵ The Complainant made a notation on the transmission verification report indicating the transmittal date was incorrect.

Letter from the Custodian to the GRC. The Custodian faxes a letter in the form of a certification to the GRC indicating the Complainant was not denied access to the records she had requested.

September 28, 2007

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

- Complainant's OPRA request dated August 3, 2007
- Letter from the GRC to the Custodian dated September 21, 2007
- Letter from the Custodian to the GRC dated September 28, 2007⁶

The Custodian fails to detail the search undertaken for the requested records; however, the Custodian does certify that he located one hundred seventy (170) records responsive to the Complainant's request.

The Custodian also certifies that the records responsive to the request may be destroyed five (5) years after the date the case is closed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM").

The Custodian certifies that he received the Complainant's OPRA request on August 3, 2007. The Custodian further certifies that on August 13, 2007 the Complainant personally appeared at the SCPO. The Custodian certifies that the Office Manager, in the presence of Secretary Danielle Savarese, responded to the Complainant's request by personally informing the Complainant that the requested records would be available by the end of the week. The Custodian certifies that his office was not contacted again by the Complainant until he received the Complainant's Denial of Access Complaint on September 13, 2007.

In the document index, the Custodian lists the one hundred seventy (170) records he determined to be responsive to the Complainant's request. The Custodian certifies he provided the Complainant with one hundred sixty-two (162) of these records with personal information redacted pursuant to N.J.S.A. 47:1A-1.1. The Custodian further certifies the remaining eight (8) records were not disclosed to the Complainant pursuant to N.J.S.A. 47:1A-1.1 and 47:1A-9.

September 28, 2007

E-mail from the GRC to the Custodian. The GRC advises the Custodian that the SOI was deficient because he certified to certain facts of which he had no first-hand knowledge, he did not provide a general description of the redacted content in the records that were disclosed to the Complainant and he did not identify the exemption relied upon in N.J.S.A. 47:1A-1.1 to deny the Complainant access to eight (8) of the requested records.

October 1, 2007

⁶ This letter is similar in substance to the Custodian's September 26, 2007 letter to the GRC. Cynthia Feiler-Jampel v. Somerset County Prosecutor's Office, 2007-190 – Findings and Recommendations of the Executive Director

E-mail from the Custodian to the GRC. The Custodian forwards certifications from the Office Manager and Secretary Danielle Savarese, wherein they provide an account of the August 13, 2007 meeting with the Complainant at the SCPO which substantiates the version provided by the Custodian as detailed in the SOI. The Custodian also forwards a revised document index in which he provided a general description of the redacted content in the records that were provided to the Complainant and he identified the particular exemptions relied upon in N.J.S.A. 47:1A-1.1 to withhold disclosure of some of the documents. The Custodian modifies the document index to indicate that only one (1) record was not disclosed pursuant to N.J.S.A. 47:1A-9. The Custodian also revises the document index to indicate that he provided the Complainant with one hundred sixty-three (163) records with personal information redacted and denied the Complainant access to seven (7) records.

October 2, 2007

E-mail from the GRC to the Custodian. The GRC requests that the Custodian provide a more detailed description of some of the exceptions relied upon by the Custodian in denying the Complainant access to some of the records responsive to the Complainant's request. The GRC advises the Custodian that by doing so, the scope of any subsequent *in camera* examination conducted by the GRC would be significantly narrowed.

October 3, 2007

E-mail from the Custodian to the GRC. The Custodian replies to the GRC's October 2, 2007 correspondence by stating the SCPO will cooperate in any *in camera* examination conducted by the GRC.

October 9, 2007⁷

The Complainant's Response to the Custodian's SOI. The Complainant alleges that the Office Manager's certification is not truthful. The Complainant states that Secretary Savarese's certification is truthful to the extent that it avers the Complainant requested the Office Manager send her an e-mail when the records she requested were ready. The Complainant does not dispute the date upon which the Custodian stated that he responded to her request; however, the Complainant contends that the response should have been in writing.

Analysis

Whether the Custodian's response to the OPRA request was timely?

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

⁷ Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.

form and provide the requestor with a copy thereof ...” (Emphasis added.) 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 ...* 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 ...*” (Emphasis added.) N.J.S.A. 47:1A-5.i.

The Custodian certifies receiving the Complainant’s OPRA request on August 3, 2007. The Custodian further certifies that on August 13, 2007 the Complainant visited the SCPO and his Office Manager responded to the Complainant’s request by personally informing the Complainant that the requested records would be available by the end of that week. The Custodian produced a certification from his Office Manager and a certification from Secretary Danielle Savarese which confirmed they both met with the Complainant on August 13, 2007 and the Office Manager verbally informed the Complainant of the status of her OPRA request. Accordingly, the Custodian responded to the Complainant on the sixth (6th) business day following receipt of the request; however, the Custodian failed to do so *in writing*.

The GRC has consistently held that the Custodian has a duty to respond in writing to every request, whether access to the requested record is being granted, denied, clarification is being sought or an extension of time is being requested.

In Beth Burns v. Borough of Collingswood, GRC Complaint No. 2004-217 (April 2005), as in the instant complaint, the Custodian provided a verbal response to the Complainant’s OPRA request within the statutorily mandated seven (7) business day time period. The Council found that the Custodian violated N.J.S.A. 47:1A-5.g by not responding to the Complainant’s request in writing.

More recently, in Michael DeLuca v. Town of Guttenberg, GRC Complaint No. 2006-126 (February 2007), on facts similar to those in the instant complaint, the Custodian verbally advised the Complainant within the seven (7) business day time frame that she would not be able to provide the requested records within said time period. The Council held that:

“[w]hile the Custodian may have verbally contacted the Complainant within the statutorily mandated seven (7) business day time frame required to respond to OPRA requests, she failed to do so in writing, therefore creating a ‘deemed’ denial of the request pursuant to N.J.S.A. 47:1A-5.g, N.J.S.A. 47:1A-5.i and the Council’s decision in John Paff v. Bergen County Prosecutor’s Office, GRC Complaint No. 2005-115 (March 2006).”

In Tucker Kelley v. Township of Rockaway, GRC Complaint No. 2006-176 (March 2007), the Council not only considered the issue of timeliness when a custodian responds to an OPRA request granting or denying access pursuant to N.J.S.A. 47:1A-5.g and N.J.S.A. 47:1A-5.i, but also the action a custodian must take when clarification of a request or an extension of time to prepare a response is necessary. The Council determined that “the Custodian violated N.J.S.A. 47:1A-5.i and N.J.S.A. 47:1A-5.g by failing to provide the Complainant with a written response granting access, denying access, seeking clarification or requesting an extension within the statutorily mandated seven (7) business days.”

Accordingly, 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, as required by N.J.S.A. 47:1A-5.g and N.J.S.A. 47:1A-5.i, results in a “deemed” denial of the Complainant’s OPRA request. See Tucker Kelley, supra.

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.

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 ...*[t]he terms shall not include inter-agency or intra-agency advisory, consultative or deliberative material.*” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA makes it clear that:

“...[a] government record shall not include the following information which is deemed to be confidential...the social security number, credit card number, unlisted telephone number...of any person...” N.J.S.A. 47:1A-1.1.

Moreover, OPRA orders removal of certain personal information from government records by providing that:

“...[p]rior to allowing access to any government record, *the custodian thereof shall redact* from that record...*the social security number, credit*

card number, unlisted telephone number...of any person...” (Emphasis added.) N.J.S.A. 47:1A-5.a.

OPRA also 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 or Executive Order of the Governor; Executive Order of the Governor ...” 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. N.J.S.A. 47:1A-1.1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1.

The Complainant is seeking “any and all documents and evidence” relating to an investigation being conducted by the SCPO in connection with a particular individual and file number. Although a typical prosecutor’s office file contains numerous individual records, the Complainant’s request failed to identify the specific records sought by name, date, type of record or some other specific identifying characteristic.

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 (App. Div. 2005). The Court further 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.

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005)⁸, the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records “accessible.” “As such, a proper request under OPRA must identify

⁸ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).
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with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents.”⁹

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.”

Recently, in Morgano v. Essex County Prosecutor’s Office, GRC Complaint No. 2007-190 (February 2008), the Complainant filed an OPRA request for two entire prosecutor’s office files. The Council relied upon MAG, Bent and Asarnow, each cited *supra*, in determining that the request was overbroad and of the nature of a blanket request for a class of various documents rather than a request for a specific government record. As such, the Council found that the Custodian met her burden of proof in denying the Complainant access to the records.

Here, because the records requested comprise an entire SCPO file, the request is overbroad and of the nature of a blanket request for a class of various documents rather than a request for specific government records. Because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to research the SCPO files to locate records potentially responsive to the Complainant’s request pursuant to the Superior Court’s decisions in MAG, *supra* and Bent, *supra* and the Council’s decisions in Asarnow, *supra* and Morgano, *supra*.

However, despite the fact the Custodian had a lawful reason to deny the Complainant access to the records; the Custodian proceeded to locate one hundred seventy (170) records responsive to the Complainant’s request. Of these records, the Custodian certified that he disclosed one hundred sixty-two (162) to the Complainant with the following personal identifiers redacted: addresses, dates of birth, social security numbers, phone numbers and financial identifiers. The Custodian certified that the information was redacted pursuant to N.J.S.A. 47:1A-1.1.

N.J.S.A. 47:1A-1 contains the Legislature’s declaration that “a public agency has a responsibility and an obligation to safeguard from public access a citizen’s personal information...” More specifically, N.J.S.A. 47:1A-1.1 provides that social security numbers, unlisted telephone numbers and credit card numbers are not government records. Furthermore, N.J.S.A. 47:1A-5.a. imposes an affirmative duty on the Custodian to redact this particular information from government records prior to disclosure.

Not only must the Custodian redact credit card numbers pursuant to N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-5.a., but he also has a duty to safeguard certain other personal financial information pursuant to Executive Order 26 (McGreevey) and the

⁹ As stated in Bent.

Council’s decision in Shain v. Township of Lakewood, GRC Complaint No. 2002-112 (February 2004). In Shain, the Council determined that financial information should not be disclosed by a Custodian pursuant to Executive Order 26 (McGreevey). This Executive Order in § 4b.1 provides:

“[t]he following records shall not be considered to be government records subject to public access pursuant to N.J.S.A. 47:1A-1 et seq., as amended and supplemented...information describing a natural person's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness, except as otherwise required by law to be disclosed.”

The Council found that a “redaction...to protect the disclosure of financial information included in the requested documents was proper under Executive Order #26 and the provisions of N.J.S.A. 47:1A-9.” *Id.*

Accordingly, the Custodian properly redacted personal identifier information from one hundred sixty-two (162) records disclosed to the Complainant in accord with the Legislature’s declaration set forth in N.J.S.A. 47:1A-1, N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-5.a. and the Council’s decision in Shain, *supra*.

The Custodian denied the Complainant access to the seven (7) remaining records determined to be responsive to the Complainant’s request which he certified were lawfully exempt from disclosure. These records are enumerated as follows:

Item Number	Record Responsive to Complainant’s Request	General Nature Description of Record Denied	Legal Explanation and Statutory Citation for Denial
Item #1	Five (5) page Automated Case Management System printout	Criminal History Record Database	GRC 2004-152, <u>N.J.S.A.</u> 47:1A-9(9), <u>N.J.A.C.</u> 13:5-1.1
Item #2	One (1) page Elizabeth General Medical Admitting Form	Medical Records	Exec. Order 26
Item #3	Three (3) page SCPO Closeout Memorandum	SCPO Investigation Report	<u>N.J.S.A.</u> 47:1A-1.1 Deliberative Process Privilege
Item #4	Two (2) page SCPO Report of Criminal Investigation	SCPO Investigation Report	<u>N.J.S.A.</u> 47:1A-1.1 Deliberative Process Privilege
Item #5	Two (2) page SCPO Report of Criminal Investigation	SCPO Investigation Report	<u>N.J.S.A.</u> 47:1A-1.1 Deliberative Process Privilege
Item #6	One (1) page Special	SCPO Investigation Report	<u>N.J.S.A.</u> 47:1A-1.1 Deliberative Process

	Investigations Case Review Form		Privilege
Item #7	Seven (7) pages of Handwritten Notes	Handwritten Notes	N.J.S.A. 47:1A-1.1 Deliberative Process Privilege

The Custodian certifies that Item #1 set forth in the above table is a criminal history record database and is exempt from disclosure pursuant to the proscriptions contained within *N.J.A.C.* 13:5-1.1. Although the regulation cited by the Custodian is not applicable, *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-9.a.

Accordingly, because *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, the Custodian lawfully denied the Complainant access to the criminal history record database.

The Custodian also certifies that Item #2 set forth in the above table is a medical record and is exempt from disclosure pursuant to Executive Order 26. Executive Order 26 (McGreevey) in § 4b.3 provides:

“[t]he following records shall not be considered to be government records subject to public access pursuant to N.J.S.A. 47:1A-1 et seq., as amended and supplemented... information relating to medical...history, diagnosis, treatment or evaluation”

Because Executive Order 26 (McGreevey) excludes information relating to medical history, diagnosis, treatment or evaluation from the definition of a government record as provided in OPRA, and because this Executive Order is applicable to OPRA by operation of N.J.S.A. 47:1A-9.a., the Custodian lawfully denied the Complainant access to this record.

The Custodian further certifies that Items numbered 3 through 6 set forth in the above table are SCPO Investigation Reports and that Item #7 is a record containing seven (7) pages of handwritten notes. The Custodian certifies that these records are exempt from disclosure because they constitute material subject to the deliberative process privilege pursuant to N.J.S.A. 47:1A-1.1.

OPRA places the burden on the Custodian to prove that a denial of access to government records is lawful pursuant to N.J.S.A. 47:1A-6; however, N.J.S.A. 47:1A-1.1 excludes advisory, consultative or deliberative (“ACD”) materials from the definition of a government record. It is evident that this phrase is intended to exclude from the definition of a government record those documents that are the subject of the “deliberative process privilege.”

In O’Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006), the Council stated that “neither the statute nor the courts have defined the
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terms... ‘advisory, consultative, or deliberative’ in the context of the public records law. The Council looks to an analogous concept, the deliberative process privilege, for guidance in the implementation of OPRA’s ACD exemption. Both the ACD exemption and the deliberative process privilege enable a governmental entity to shield from disclosure material that is pre-decisional and deliberative in nature. Deliberative material contains opinions, recommendations, or advice about agency policies. Strictly factual segments of an otherwise deliberative document are not exempted from disclosure. In Re the Liquidation of Integrity Insurance Company, 165 N.J. 75, 88 (2000); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J.149, (App. Div. 2004).

The deliberative process privilege is a doctrine that permits government agencies to withhold documents that reflect advisory opinions, recommendations and deliberations submitted as part of a process by which governmental decisions and policies are formulated. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, 95 S. Ct. 1504, 1516, 44 L. Ed. 2d 29, 47 (1975). This long-recognized privilege is rooted in the concept that the sovereign has an interest in protecting the integrity of its deliberations. The earliest federal case adopting the privilege is Kaiser Alum. & Chem. Corp. v. United States, 157 F. Supp. 939 (1958). The privilege and its rationale were subsequently adopted by the federal district courts and circuit courts of appeal. United States v. Farley, 11 F.3d 1385, 1389 (7th Cir.1993).

The deliberative process privilege was discussed at length in In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000). There, the court addressed the question of whether the Commissioner of Insurance, acting in the capacity of Liquidator of a regulated entity, could protect certain records from disclosure which she claimed contained opinions, recommendations or advice regarding agency policy. *Id.* at 81. The court adopted a qualified deliberative process privilege based upon the holding of McClain v. College Hospital, 99 N.J. 346 (1985), Liquidation of Integrity, *supra*, 165 N.J. at 88. In doing so, the court noted that:

“[a] document must meet two requirements for the deliberative process privilege to apply. First, it must have been generated before the adoption of an agency's policy or decision. In other words, it must be pre-decisional. ... Second, the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies. ... Purely factual material that does not reflect deliberative processes is not protected. ... Once the government demonstrates that the subject materials meet those threshold requirements, the privilege comes into play. In such circumstances, the government's interest in candor is the "preponderating policy" and, prior to considering specific questions of application, the balance is said to have been struck in favor of non-disclosure.” (Citations omitted.) *Id.* at 84-85.

The court further set out procedural guidelines based upon those discussed in McClain:

“[t]he initial burden falls on the state agency to show that the documents it seeks to shield are pre-decisional and deliberative in nature (containing opinions, recommendations, or advice about agency policies). Once the deliberative nature of the documents is established, there is a presumption against disclosure. The burden then falls on the party seeking discovery to show that his or her compelling or substantial need for the materials overrides the government's interest in non-disclosure. Among the considerations are the importance of the evidence to the movant, its availability from other sources, and the effect of disclosure on frank and independent discussion of contemplated government policies.” In Re Liquidation of Integrity, *supra*, 165 N.J. at 88, citing McClain, *supra*, 99 N.J. at 361-62, 492 A.2d 991.

It cannot be determined from the Custodian's very brief description of denied records numbered 3 through 6 whether the records were lawfully denied as ACD material pursuant to OPRA. Accordingly, because the Custodian did not adequately clarify the nature of the four (4) records described as SCPO Investigation Reports the GRC must conduct an *in camera* review to decide whether or not the Custodian has lawfully denied access to these records.

Item #7 set forth in the above table is described by the Custodian as a record consisting of handwritten notes. Although the Custodian does not provide a more detailed description of the record, the Superior Court has recently determined that handwritten notes are not government records within the meaning of OPRA. See O'Shea v. West Milford Board of Education, 391 N.J. Super. 534 (App. Div. 2007).

Because handwritten notes do not constitute a government record according to the Superior Court's decision in O'Shea, *supra*, they are exempt from disclosure pursuant to N.J.S.A. 47:1A-1, which provides that “...*government records* shall be readily accessible for inspection, copying, or examination by the citizens of this State...” Accordingly, the Custodian lawfully denied the Complainant access to this record.

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 whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends that the Council find that:

1. The Custodian's failure to respond to the Complainant's request in writing by granting access, denying access, requesting an extension of the statutory response time, or asking for clarification of the request within the statutorily mandated seven (7) business days of receiving Complainant's OPRA request in violation of N.J.S.A. 47:1A-5.i and N.J.S.A. 47:1A-5.g has resulted in a

“deemed” denial. See Tucker Kelley v. Township of Rockaway, GRC Complaint No. 2006-176 (March 2007).

2. Because the records requested comprise an entire SCPO file, the request 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 had no legal duty to research the SCPO files to locate records potentially responsive to the Complainant’s request pursuant to the Superior Court’s decisions in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), and the Council’s decisions in Asarnow v. Department of Labor and Workforce Development, GRC Complaint No. 2006-24 (May 2006) and Morgano v. Essex County Prosecutor’s Office, GRC Complaint No. 2007-190 (February 2008).
3. The Custodian properly redacted personal identifier information from one hundred sixty-two (162) records disclosed to the Complainant in accord with the Legislature’s declaration set forth in N.J.S.A. 47:1A-1, N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-5.a. and the Council’s decision in Shain v. Township of Lakewood, GRC Complaint No. 2002-112 (February 2004).
4. Because *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, the Custodian lawfully denied the Complainant access to the criminal history record database.
5. Because Executive Order 26 (McGreevey) excludes information relating to medical history, diagnosis, treatment or evaluation from the definition of a government record as provided in OPRA, and because this Executive Order is applicable to OPRA by operation of N.J.S.A. 47:1A-9a, the Custodian lawfully denied the Complainant access to this record.
6. Because the Custodian did not adequately clarify the nature of the four (4) records described as SCPO Investigation Reports, the GRC must conduct an *in camera* review to decide whether or not the Custodian has lawfully denied access to these records.
7. **The Custodian must deliver¹⁰ to the Council in a sealed envelope nine copies of the requested unredacted document (see #6 above), a document or redaction index¹¹, 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**

¹⁰ 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.

¹¹ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.

8. Because handwritten notes do not constitute a government record according to the Superior Court's decision in O'Shea v. West Milford Board of Education, 391 N.J. Super. 534 (App. Div. 2007), they are exempt from disclosure pursuant to N.J.S.A. 47:1A-1, which provides that "...*government records* shall be readily accessible for inspection, copying, or examination by the citizens of this State..." Therefore, the Custodian lawfully denied the Complainant access to this record.
9. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By:

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

Approved By:

Catherine Starghill, Esq.
Executive Director

March 19, 2008