



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
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JON S. CORZINE
Governor

JOSEPH V. DORIA, JR.
Commissioner

FINAL DECISION

June 11, 2009 Government Records Council Meeting

Emory M. Ghana
Complainant

Complaint No. 2008-154

v.

New Jersey Department of Corrections
Custodian of Record

At the June 11, 2009 public meeting, the Government Records Council (“Council”) considered the May 20, 2009 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days of when the New Jersey State Prison OPRA Liaison would respond to the Complainant’s February 25, 2008, OPRA request, the Custodian’s written response to the Complainant’s request is inadequate under OPRA pursuant to Hardwick v. New Jersey Department of Transportation, GRC Complaint No. 2007-164 (February 2008), and the Complainant’s February 25, 2008 OPRA request is “deemed” denied pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Custodian failed to immediately respond in writing to the Complainant’s request Items No. 3, No. 4, No. 5 and No. 8 granting access, stating that no records responsive exist, seeking clarification or requesting additional time to respond to the Complainant’s request items, the Custodian has violated N.J.S.A. 47:1A-5.e. pursuant to David Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007).
3. Pursuant to N.J.S.A. 47:1A-6, the Custodian has borne her burden of proving a lawful denial of access to the job responsibilities of Social Worker M. Wood requested in the Complainant’s June 10, 2008 request Item No. 2 because no record responsive exists. See Driscoll v. School District of the Chathams (Morris), GRC Complaint No. 2007-303 (June 2008).



4. Because *N.J.A.C. 10A:1-11* and *N.J.A.C. 10A:1-2.2* prohibits an inmate from possessing unauthorized electronic peripherals like CD-ROM's, the Custodian's response providing the requested records responsive to the Complainant's June 10, 2008 request Item No. 3 in another meaning medium was proper.
5. Because the Custodian properly responded within the statutorily mandated seven (7) business days seeking clarification of the Complainant's June 10, 2008 OPRA request Item No. 5, there was no unlawful denial of access pursuant to *Cody v. Middletown Township Public Schools*, GRC Complaint No. 2005-98 (December 2005).
6. The Custodian failed to respond immediately in writing to the Complainant's June 10, 2008 OPRA request Items No. 4 and No. 8 for budgets and receipts thus violating *N.J.S.A. 47:1A-5.e.* However, the Custodian responded to the Complainant on March 10, 2009, stating that no records responsive existed, subsequently certified that no records exist which are responsive to the request relevant to this complaint and there is no credible evidence in the record to refute the Custodian's certifications. Therefore, while the Custodian violated *N.J.S.A. 47:1A-5.e.*, there was no unlawful denial of access pursuant to *Pusterhofer v. New Jersey Department of Education*, GRC Complaint No. 2005-49 (July 2005).
7. Because the Custodian would have to research all files and evaluate all records contained therein to determine whether any records existed which related to the subject matter set forth in the Complainant's June 10, 2008 OPRA request Items No. 1, No. 6 and No. 7, the Complainant's request items are invalid as overly broad pursuant to *MAG Entertainment, LLC v. Division of Alcoholic Beverage Control*, 375 *N.J. Super.* 534, 546 (App. Div. 2005) and *Bent v. Stafford Police Department*, 381 *N.J. Super.* 30, 37 (App. Div. 2005). Further, the Custodian has borne her burden of proving that the denial of access to Items No. 1, No. 6 and No. 7 of the Complainant's June 10, 2008 OPRA requests was authorized by law pursuant to *N.J.S.A. 47:1A-6.*
8. Although the Custodian's failure to provide a date on which the New Jersey State Prison OPRA Liaison would respond by resulted in an inadequate response to the Complainant's February 25, 2008 OPRA request pursuant to *N.J.S.A. 47:1A-5.g.* and *N.J.S.A. 47:1A-5.i.* and failure to respond immediately to the Complainant's June 10, 2008 request for billing records, receipts and contracts resulted in a violation of *N.J.S.A. 47:1A-5.e.* the Custodian did respond in writing stating that no records responsive exist to the Complainant's June 10, 2008 request Items No. 2, No. 3, No. 4, No. 5 and No. 8 on the sixth (6th) business day following the date of the Complainant's request and subsequently certified in the Statement of Information that no records responsive exist and bore her burden of proving that Complainant's June 10, 2008 request Items No. 1, No. 6 and No. 7 were broad and unclear.

Therefore, 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 she 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 11th Day of June, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Janice L. Kovach
Government Records Council

Decision Distribution Date: June 16, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 11, 2009 Council Meeting**

**Emory M. Ghana¹
Complainant**

GRC Complaint No. 2008-154

v.

**New Jersey Department of Corrections²
Custodian of Records**

Records Relevant to Complaint:

February 25, 2008 OPRA request: Most recent water quality test results at New Jersey State Prison in Trenton, New Jersey.³

June 10, 2008 OPRA request:

1. A copy of the report Mr. George Hayman used to justify segregating recreation.
2. Job responsibilities of Recreation Department employee Craig Haywood and Psychologist/ Social Worker M. Wood.
3. CD-ROM copy of the current Global Tech Telephone contract and the current contract with the medical service providers as of July 2008.
4. The most recent purchase order or receipt for an RCA portable television obtained by Central Purchasing, at the Central Office of the Department of Corrections.
5. Copies of the 2008 billing records for ventilation, heating and air conditioning maintenance and repairs.
6. Copy of the report that designates the nature of 2C and requirements for its designation.
7. Copy of the 2008 budget allotment for religious exercise maintenance and materials.
8. Copy of the orthopedic footwear expenditure report for fiscal year 2007 from Central Purchasing, Department of Corrections.

Request Made: February 25, 2008; June 10, 2008

Response Made: March 10, 2008; July 1, 2008

Custodian: Michelle Hammel

GRC Complaint Filed: July 18, 2008⁴

¹ No legal representation listed on record.

² Represented by DAG Ellen M. Hale, on behalf of the NJ Attorney General.

³ Complainant also requested other records which are not at issue in this complaint.

⁴ The GRC received the Denial of Access Complaint on said date.

Background

February 25, 2008

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

March 10, 2008

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the sixth (6th) business day following receipt of such request. The Custodian states that an OPRA liaison will notify the Complainant if any available records subject to disclosure exist. The Custodian states that should any records exist, the Complainant will be provided with such records upon payment of copying costs.

March 19, 2008

Letter from Mr. Frank Bruno ("Mr. Bruno"), OPRA Liaison for the New Jersey State Prison ("NJSP") to the Complainant. Mr. Bruno states that the Complainant's request for the most recent water quality test results cannot be fulfilled because the Department of Corrections ("DOC") does not make or maintain the requested record. Mr. Bruno suggests that the Complainant contact the Trenton Water Utility and provides the address.

June 10, 2008

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

July 1, 2008

Custodian's response to the OPRA request attaching a payment notification and authorization form. The Custodian responds in writing to the Complainant's OPRA request on the seventh (7th) business day following receipt of such request.

June 10, 2008 Request Item No. 1

The Custodian states that this request is overly broad and unclear and does not identify specific government records. The Custodian states that OPRA only requires a response to a request for specific records and not for information, and does not require a custodian to create documents in order to comply with an OPRA request. The Custodian states that according to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), a request is invalid where it requires a custodian to conduct research and correlate data from various records. The Custodian states that if the Complainant wishes to request a specific record(s), he must clearly identify the record(s) and provide a description.

June 10, 2008 Request Item No. 2

The Custodian states that the job responsibilities of Recreation Department employee Craig Haywood will be provided for a cost of \$3.00. The Custodian states that the job responsibilities of Social Worker M. Woods are not maintained on file because M. Woods is an employee of the University of Medicine and Dentistry of New Jersey (“UMDNJ”); therefore, the DOC does not make, maintain or keep on file the requested record.

June 10, 2008 Request Item No. 3

The Custodian states that the records responsive to this request item will be provided upon payment of the copy cost of \$619.00. The Custodian states that these records are not available to the Complainant in CD-ROM form.

June 10, 2008 Request Item No. 4

The Custodian states that no recent purchases have been made for RCA color portable televisions by Central Purchasing; therefore, no records responsive exist.

June 10, 2008 Request Item No. 5

The Custodian requests that the Complainant identify a facility or facilities for which the Complainant is seeking 2008 heating, ventilation, and air conditioning (“HVAC”) maintenance and repair records.

June 10, 2008 Request Item No. 6

The Custodian states that this request is overly broad and unclear and does not identify specific government records. The Custodian states that OPRA only requires a response to a request for specific records and not for information, and does not require a custodian to create documents in order to comply with an OPRA request. The Custodian states that according to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), a request is invalid where it requires a custodian to conduct research and correlate data from various records. The Custodian states that if the Complainant wishes to request a specific record(s), he must clearly identify the record(s) and provide a description.

June 10, 2008 Request Item No. 7

The Custodian states that this request is overly broad and unclear and does not identify specific government records. The Custodian states that OPRA only requires a response to a request for specific records and not for information, and does not require a custodian to create documents in order to comply with an OPRA request. The Custodian states that according to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), a request is invalid where it requires a custodian to conduct research and correlate data from various records. The Custodian

states that if the Complainant wishes to request a specific record(s), he must clearly identify the record(s) and provide a description.

June 10, 2008 Request Item No. 8

The Custodian states that access to the requested orthopedic footwear expenditure report for fiscal year 2007 is denied because the DOC does not make, maintain or keep on file a report regarding this expenditure.

July 18, 2008

Denial of Access Complaint filed with the Government Records Council (“GRC”) with no attachments.

The Complainant states that he submitted two (2) OPRA requests to the Custodian on February 25, 2008 and June 10, 2008 respectively. The Complainant states that he received responses from the Custodian on March 10, 2008 and July 1, 2008.

The Complainant expresses disbelief that no records responsive exist for all but two (2) of the records he requested in both OPRA requests. The Complainant also questions why the records of Social Worker M. Woods are not subject to disclosure pursuant to OPRA.

The Complainant also takes issue with the amount being charged for copies of the records requested in Item No. 3 of the June 10, 2008, OPRA request. The Complainant contends that the amount of money charged to provide the records responsive is impeding the Complainant’s right to access of government records.

The Complainant did not agree to mediate this complaint.

July 31, 2008

Request for the Statement of Information sent to the Custodian.

August 7, 2008

E-mail from the Custodian’s Counsel to the GRC. Counsel requests a five (5) day extension of the deadline to submit the Statement of Information.

August 7, 2008

E-mail from the GRC to the Custodian’s Counsel. The GRC grants an extension of time until August 14, 2008.

August 14, 2008

Custodian’s Statement of Information (“SOI”) with the following attachments:

- Complainant’s OPRA request dated February 25, 2008.
- Letter from the Custodian to the Complainant dated March 10, 2008.
- Complainant’s OPRA request dated June 10, 2008.

- Letter from the Custodian to the Complainant dated July 1, 2008, attaching a payment notification and authorization form.

The Custodian certifies that her search for the requested records included searching for the requested records and forwarding the requests to various departments and the NJSP. Further, the Custodian certifies that she made inquiries with the Office of Financial Management.

Complainant's February 25, 2008 OPRA request

The Custodian certifies that she received the Complainant's OPRA request on February 29, 2008. The Custodian certifies that she responded in writing on March 10, 2008, stating that the OPRA liaison from NJSP would advise the Complainant as to whether the requested water quality tests exist. The Custodian states that Mr. Bruno responded in writing on March 19, 2008, stating that no records responsive exist and that the Complainant should contact the Trenton Water Utility.

The Custodian argues that the Complainant's February 25, 2008, OPRA request was properly handled because no records responsive existed and Mr. Bruno attempted to help the Complainant contact the proper agency to obtain the requested water quality test.

Complainant's June 10, 2008 OPRA request

The Custodian certifies that she received the Complainant's OPRA request on June 20, 2008. The Custodian certifies that she responded in writing on the seventh (7th) business day after receipt of the Complainant's request stating that request Items No. 1, No. 6 and No. 7 are overly broad and unclear and access to these records is denied pursuant to MAG, supra. The Custodian contends that public agencies are only required to provide access to "identifiable" government records pursuant to MAG, supra. The Custodian avers that although she denied access to the Complainant's request Items No. 1, No. 6 and No. 7, the Custodian gave the Complainant an opportunity to specify which records were being requested.

Additionally, the Custodian certifies that records responsive to request Items No. 1, No. 6 and No. 7 do not exist. The Custodian asserts that if such a report as requested in request Item No. 1 existed, it would be exempt from disclosure as advisory, consultative and deliberative ("ACD") material pursuant to N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-9.a and Executive Order No. 26 (McGreevey 2002)

The Custodian certifies that she granted access to the job responsibilities of Recreation Department Employee Craig Haywood requested in request Item No. 2 at a copy cost of \$3.00. However, the Custodian certifies that she denied access to the job responsibilities of Social Worker M. Wood, also requested in request Item No. 2, because M. Wood is an employee of UMDNJ; therefore, no records are made, maintained or kept on file by the DOC.

The Custodian certifies that she granted access to copies of the two (2) contracts requested in Item No. 3 at a copying cost of \$619.00 for 2,490 pages of records and

informed the Complainant that the records were not available on a CD-ROM, as requested by the Complainant. The Custodian states that the Complainant has not paid the copy fees.

The Custodian further certifies that she denied access to request Item No. 4 because no RCA portable color televisions were purchased; therefore, no records responsive exist.

The Custodian certifies that she requested clarification in response to request Item No. 5. The Custodian states that the Complainant did not specifically identify a facility for the HVAC billing, and failed to provide clarification after being notified to do so by the Custodian.

The Custodian certifies that she denied access to request Item No. 8 because the DOC does not make, maintain or keep on file a report regarding orthopedic expenditures. The Custodian contends that although the DOC purchases orthopedic footwear, there is no report regarding this expenditure. The Custodian contends that she is not required to research or collate information in order to respond to an OPRA request pursuant to MAG, *supra*. Further the Custodian argues that information requested was not contained in a specific record; therefore, the Custodian would have had to exert a substantial effort to search for and compile information from numerous records to create a document satisfying request Item No. 8.

Finally, the Custodian contends that this complaint should be dismissed because the DOC made available to the Complainant all records subject to disclosure and properly denied access to all remaining requests because they were not subject to disclosure as government records pursuant to OPRA.

March 12, 2009

E-mail from the GRC to the Custodian attaching a letter dated March 12, 2009. The GRC requests that the Custodian provide a certification responding to the following:

1. Whether there is a specific lawful basis for denying the Complainant access to a CD-ROM copy of the current Global Tech Telephone contract requested in the Complainant's June 10, 2008 OPRA request Item No. 3?
2. What was the date of the last purchase of an RCA color portable television and does a receipt for that purchase still exist?
3. Whether the New Jersey Department of Corrections itemizes its budget to identify materials that may be used in religious activities?

The GRC requests that the Custodian provide this certification by close of business on March 17, 2009.

March 23, 2009

E-mail from the GRC to the Custodian's Counsel. The GRC states that a certification was due on March 17, 2009 but has not been received. The GRC requests that Counsel advise as to the status of the Custodian's certification.

March 23, 2009

E-mail from the Custodian’s Counsel to the GRC. Counsel states that she believed that the Custodian had provided the requested certification via facsimile the week prior but that this e-mail serves as notice to the Custodian to re-send the certification to the GRC.

March 23, 2009

Custodian’s certification to the GRC.

The Custodian certifies that DOC does not maintain a copy of the contract responsive to request Item No. 3 on CD-ROM. The Custodian further certifies that even if the DOC were able to provide the contract in the medium requested, the Complainant is prohibited from possessing such materials. The Custodian states that *N.J.A.C. 10A:1-11* prohibits an inmate from possessing property that is not specifically authorized by the DOC. The Custodian states that the DOC’s regulations define “contraband” as:

“[a]ny item, *article or material found in possession* of, or under the control of, an inmate *which is not authorized for retention or receipt....any article* that may be harmful or presents a threat to the security and orderly operation of the correctional facility shall be considered contraband. Items...*shall include but not be limited to...electronic communication devices.*” (Emphasis added.) *N.J.A.C. 10A:1-2.2.*

The Custodian states that *N.J.A.C. 10A:1-2.2* defines electronic communication devices as “a device or related equipment or peripheral that is capable of electronically receiving, transmitting or storing a message, image or data.” The Custodian certifies that all inmates are provided with a handbook that expressly prohibits the possession of a CD-ROM.

The Custodian certifies that no purchases of RCA color portable televisions were made by Central Purchasing; therefore, no records responsive exist.

Finally, the Custodian certifies that the budget for the NJSP does not contain line items for religious services and supplies.

Analysis

Whether the Custodian provided an inadequate response to Complainant’s February 25, 2008 OPRA request?

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 ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g.

OPRA further 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.

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

Complainant’s February 25, 2008 OPRA request

The Custodian responded in writing to the Complainant’s February 25, 2008, OPRA request on the sixth (6th) business day after receipt of the Complainant’s request, stating that the NJSP OPRA liaison would notify the Complainant of an estimated copying cost for any records responsive to the Complainant’s OPRA request that may exist. Mr. Bruno responded in writing on March 19, 2008, stating that no records

responsive exist and that the Complainant should try obtaining the requested records from the Trenton Water Utility.

In Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), the Custodian provided the Complainant with a written response to his request on the seventh (7th) business day following receipt of such request in which the Custodian requested an extension of time to fulfill said request but failed to notify the Complainant of when the requested records would be provided. The Council held that:

“...because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days of when the requested records would be made available pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s written response to the Complainant dated June 20, 2007 and the request for an extension of time dated June 29, 2007 are inadequate under OPRA and the Complainant’s request is “deemed” denied pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007)].”

The facts of this complaint are similar to those in Hardwick, *supra*. Specifically, the Custodian in the instant matter provided a written response to the Complainant’s February 25, 2008, OPRA request within the statutorily mandated seven (7) business days. In such written response the Custodian stated that a NJSP OPRA liaison would advise the Complainant whether any records responsive exist and the copying cost for such records but failed to provide an anticipated deadline date as to when that would occur. Thus, the Council’s ruling in Hardwick, *supra*, applies to this complaint.

Therefore, because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days of when the NJSP OPRA liaison would respond to the Complainant’s February 25, 2008, OPRA request, the Custodian’s written response to the Complainant’s request is inadequate under OPRA pursuant to Hardwick, *supra*, and the Complainant’s February 25, 2008 OPRA request is “deemed” denied pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley, *supra*.

Whether the Custodian unlawfully denied access to the records requested in the Complainant’s June 10, 2008, request Items No. 2, No. 3, No. 4, No. 5 and No. 8?

OPRA also states that:

“*[i]mmediate access* ordinarily shall be granted to budgets, *bills*, vouchers, *contracts*, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.” (Emphasis added.) N.J.S.A. 47:1A-5.e.

OPRA also provides 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.

Executive Order No. 26 states that:

“[t]he following records shall not be considered to be government records subject to public access pursuant to [OPRA]... Records of a department or agency in the possession of another department or agency when those records are made confidential by a regulation of that department or agency adopted pursuant to N.J.S.A. 47:1A-1 et seq. and Executive Order No. 9 (Hughes 1963), or pursuant to another law authorizing the department or agency to make records confidential or exempt from disclosure.” Executive Order No. 26 (McGreevey 2002).

The New Jersey Department of Corrections’ regulations define “contraband” as:

“[a]ny item, *article or material found in possession* of, or under the control of, an inmate *which is not authorized for retention or receipt*....*any article* that may be harmful or presents a threat to the security and orderly operation of the correctional facility shall be considered contraband. Items...*shall include but not be limited to*...*electronic communication devices*...*related equipment or peripheral* that is capable of electronically receiving, transmitting or *storing* a message, image or *data*.” (Emphasis added.) *N.J.A.C.* 10A:1-2.2.

Complainant’s June 10, 2008 OPRA request: Item No. 2

The Custodian responded on the seventh (7th) business day after receipt of the Complainant’s requests, stating that the job responsibilities of Craig Haywood would be provided at a cost of \$3.00 and that the job responsibilities of Social Worker M. Woods were not maintained on file because M. Woods is an employee of UMDNJ. The Custodian later certified in the SOI that no record responsive to the Complainant’s request for the job responsibilities of M. Woods exists because she is employed by UMDNJ.

Complainant’s June 10, 2008 OPRA request: Item No. 3

The Custodian responded on the seventh (7th) business day, stating that the Complainant could not obtain the records on a CD-ROM but can obtain copies of the two (2) contracts for a cost of \$619.00. The Custodian further stated that the Complainant was sent a payment authorization form on July 1, 2008, and has failed to pay the copy costs to date. The Custodian later certified that N.J.A.C. 10A:1-11, which is provided to all inmates in a handbook, categorizes CD-ROM’s as contraband that is not authorized to be possessed by an inmate.

Complainant's June 10, 2008 OPRA request: Items No. 4

The Custodian responded on the seventh (7th) business day, stating that no purchase orders or receipts responsive exist because no RCA portable color televisions were purchased lately. The Custodian later certified in both the SOI and a subsequent certification that Central Purchasing has never purchased RCA portable color televisions; therefore, no records responsive exist.

Complainant's June 10, 2008 OPRA request: Items No. 5

The Custodian responded on the seventh (7th) business day, requesting that the Complainant identify the facility or facilities from which the Complainant is seeking the 2008 HVAC billing records. The Custodian certified in the SOI that the Complainant never provided said clarification.

Complainant's June 10, 2008 OPRA request: Items No. 8

The Custodian responded on the seventh (7th) business day, stating that the DOC does not make, maintain or keep on file a report regarding orthopedic footwear. The Custodian certified in the SOI that although the DOC does purchase orthopedic footwear, there is no report regarding this expenditure and the Custodian is not required to create such a report pursuant to MAG.

The billing records, budget reports, contracts and receipts contained within the Complainant's June 10, 2008 OPRA request Items No. 3, No. 4, No. 5 and No. 8 are specifically classified as "immediate access" records pursuant to N.J.S.A. 47:1A-5.e. In David Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 28, 2007), the GRC held that "immediate access language of OPRA (N.J.S.A. 47:1A-5.e) suggests that the Custodian was still obligated to immediately notify the Complainant..." Inasmuch as OPRA requires a custodian to respond within a statutorily required time frame, when immediate access records are requested, a custodian should respond to the request for those records immediately, granting or denying access, requesting additional time to respond or requesting clarification of the request.

In this complaint, the Custodian did not respond in writing to the Complainant's June 10, 2008 OPRA request Items No. 3, No. 4, No. 5 and No. 8, which contain records subject to immediate access such as billing records and contracts, until the seventh (7th) business day after receipt of the request.

Therefore, because the Custodian failed to immediately respond in writing to the Complainant's request Items No. 3, No. 4, No. 5 and No. 8 granting access, stating that no records responsive exist, seeking clarification or requesting additional time to respond to the Complainant's request items, the Custodian has violated N.J.S.A. 47:1A-5.e pursuant to Herron, supra.

In her March 10, 2008 response to the Complainant, the Custodian stated that no job responsibilities for Social Worker M. Wood were maintained by DOC because M. Wood was an employee of UNDMJ. The Custodian later certified in the SOI that no

record responsive to request Item No. 2 is made, maintained or kept on file. Therefore, pursuant to N.J.S.A. 47:1A-6, the Custodian has borne her burden of proving a lawful denial of access to the job responsibilities of Social Worker M. Wood requested in the Complainant's June 10, 2008 request Item No. 2 because no record responsive exists. See Driscoll v. School District of the Chathams (Morris), GRC Complaint No. 2007-303 (June 2008).

Additionally, the Custodian provided paper copies of the current contracts requested in Item No. 3 of the Complainant's OPRA request pending payment of copying cost. The Custodian certified that N.J.A.C. 10A:1-11 prohibits an inmate's possession of contraband, which is defined in N.J.A.C. 10A:1-2.2 and includes electronic devices, equipment or peripherals that store data. The Custodian certified that inmates are provided with a handbook explicitly stating that inmates are prohibited from possessing CD-ROM's.

Therefore, because N.J.A.C. 10A:1-11 and N.J.A.C. 10A:1-2.2 prohibit an inmate from possessing unauthorized electronic peripherals like CD-ROM's, the Custodian's response providing the requested records responsive to the Complainant's June 10, 2008 request Item No. 3 in another meaning medium was proper.

Further, the Custodian sought clarification to Complainant's June 10, 2008 request Item No. 5 and received no response from the Complainant. In Cody v. Middletown Township Public Schools, GRC Complaint No. 2005-98 (December 2005), the Custodian notified the Complainant via letter on August 31, 2004 that certain portions of the request required clarification and further established what needed to be clarified by the Complainant in a letter dated September 7, 2004. The GRC held that:

“[i]n the case of the records that needed clarification, there is no denial of access to records because the Custodian did properly respond to those requests in writing within the statutorily required seven (7) business days, indicating to the Complainant that clarification was necessary but did not receive a response in return from the Complainant.”

The GRC's holding in Cody, supra, is applicable in the instant complaint. The Custodian responded on the seventh (7th) business day after receipt of the Complainant's OPRA request seeking clarification to request Item No. 5. Therefore, because the Custodian properly responded within the statutorily mandated seven (7) business days seeking clarification of the Complainant's June 10, 2008, OPRA request Item No. 5, there was no unlawful denial of access pursuant to Cody, supra.

Moreover, in Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The Custodian responded stating that there was no record of any telephone calls made to the Complainant. The Custodian subsequently certified that no records responsive to the Complainant's request existed. The GRC determined that although the Custodian failed to respond to the OPRA request in a timely manner, the Custodian did not unlawfully

deny access to the requested records because the Custodian certified that no records responsive to the request existed.

In this complaint, the Custodian failed to respond immediately in writing to the Complainant's June 10, 2008 OPRA request Items No. 4 and No. 8 for budgets and receipts thus violating N.J.S.A. 47:1A-5.e. However, the Custodian responded to the Complainant on March 10, 2009, stating that no records responsive existed, subsequently certified that no records exist which are responsive to the request relevant to this complaint and there is no credible evidence in the record to refute the Custodian's certifications. Therefore, while the Custodian violated N.J.S.A. 47:1A-5.e., there was no unlawful denial of access pursuant to Pusterhofer, *supra*.

Whether Items No. 1, No. 6 and No. 7 of the Complainant's June 10, 2008, OPRA request are valid requests pursuant to OPRA?

The Custodian responded to request Items No. 1, No. 6 and No. 7 on the seventh (7th) business day after receipt of the Complainant's OPRA request, stating these request items were overly broad and unclear and do not request a specific record. The Custodian further stated, that according to MAG, *supra*, OPRA requests are invalid where they require a custodian to research and correlate data from various records.

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),⁵ 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 with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."⁶

Additionally, in New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) the court cited MAG by stating that "...when a request is 'complex' because it fails to specifically identify the documents sought, then that request is not 'encompassed' by OPRA..." The court also quoted N.J.S.A. 47:1A-5.g in that "[i]f a request for access to a government record

⁵ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁶ As stated in Bent, *supra*.

would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.” The court further stated that “...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency’s need to...generate new records...” *Id.*

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008) the Council held that “[b]ecause the Complainant’s OPRA requests No. 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to 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).”

In the complaint now before the Council, Items No. 1, No. 6 and No. 7 of the Complainant’s June 10, 2008, OPRA request sought reports used to justify segregating activities, requirements for being placed in a particular portion of the NJSP and a budget allotment for religious exercise and materials. These items are not requests for specific identifiable government records. Because the Custodian would have to research all files and evaluate all records contained therein to determine whether any records existed which related to the subject matter set forth in the Complainant’s June 10, 2008 OPRA request Items No. 1, No. 6 and No. 7, the Complainant’s request items are invalid as overly broad pursuant to MAG, *supra* and Bent, *supra*. Further, the Custodian has borne her burden of proving that the denial of access to Items No. 1, No. 6 and No. 7 of the Complainant’s June 10, 2008 OPRA requests was authorized by law pursuant to N.J.S.A. 47:1A-6.

Further, because request Item No. 1 of the Complainant’s June 10, 2008 OPRA request is invalid as it is overly broad, the issue of whether any records responsive to the request are exempt from disclosure as ACD is irrelevant.

Whether the Custodian’s inadequate response and delay in responding to requests for immediate access records 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, 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).

Although the Custodian’s failure to provide a date on which the NJSP OPRA Liaison would respond resulted in an inadequate response to the Complainant’s February 25, 2008, OPRA request pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. and the failure to respond immediately to the Complainant’s June 10, 2008, request for billing records, receipts and contracts resulted in a violation of N.J.S.A. 47:1A-5.e., the Custodian did respond in writing stating that no records responsive exist to the Complainant’s June 10, 2008, request Items No. 2, No. 3, No. 4, No. 5 and No. 8 on the sixth (6th) business day following the date of the Complainant’s request and subsequently certified in the SOI that no records responsive exist and bore her burden of proving that Complainant’s June 10, 2008, request Items No. 1, No. 6 and No. 7 were broad and unclear. Therefore, 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 she is vested with the legal responsibility of granting and denying access in accordance with the law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days of when the New Jersey State Prison OPRA Liaison would respond to the Complainant’s February 25, 2008, OPRA request, the Custodian’s written response to the Complainant’s request is inadequate under OPRA pursuant to Hardwick v. New Jersey Department of Transportation, GRC Complaint No. 2007-164 (February 2008), and the Complainant’s February 25, 2008 OPRA request is “deemed” denied pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

2. Because the Custodian failed to immediately respond in writing to the Complainant's request Items No. 3, No. 4, No. 5 and No. 8 granting access, stating that no records responsive exist, seeking clarification or requesting additional time to respond to the Complainant's request items, the Custodian has violated N.J.S.A. 47:1A-5.e. pursuant to David Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007).
3. Pursuant to N.J.S.A. 47:1A-6, the Custodian has borne her burden of proving a lawful denial of access to the job responsibilities of Social Worker M. Wood requested in the Complainant's June 10, 2008 request Item No. 2 because no record responsive exists. *See* Driscoll v. School District of the Chathams (Morris), GRC Complaint No. 2007-303 (June 2008).
4. Because N.J.A.C. 10A:1-11 and N.J.A.C. 10A:1-2.2 prohibits an inmate from possessing unauthorized electronic peripherals like CD-ROM's, the Custodian's response providing the requested records responsive to the Complainant's June 10, 2008 request Item No. 3 in another meaning medium was proper.
5. Because the Custodian properly responded within the statutorily mandated seven (7) business days seeking clarification of the Complainant's June 10, 2008 OPRA request Item No. 5, there was no unlawful denial of access pursuant to Cody v. Middletown Township Public Schools, GRC Complaint No. 2005-98 (December 2005).
6. The Custodian failed to respond immediately in writing to the Complainant's June 10, 2008 OPRA request Items No. 4 and No. 8 for budgets and receipts thus violating N.J.S.A. 47:1A-5.e. However, the Custodian responded to the Complainant on March 10, 2009, stating that no records responsive existed, subsequently certified that no records exist which are responsive to the request relevant to this complaint and there is no credible evidence in the record to refute the Custodian's certifications. Therefore, while the Custodian violated N.J.S.A. 47:1A-5.e., there was no unlawful denial of access pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
7. Because the Custodian would have to research all files and evaluate all records contained therein to determine whether any records existed which related to the subject matter set forth in the Complainant's June 10, 2008 OPRA request Items No. 1, No. 6 and No. 7, the Complainant's request items are invalid as overly broad pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005). Further, the Custodian has borne her burden of proving that the denial of access to Items No. 1, No. 6 and No. 7 of the Complainant's June 10, 2008 OPRA requests was authorized by law pursuant to N.J.S.A. 47:1A-6.

8. Although the Custodian's failure to provide a date on which the New Jersey State Prison OPRA Liaison would respond by resulted in an inadequate response to the Complainant's February 25, 2008 OPRA request pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. and failure to respond immediately to the Complainant's June 10, 2008 request for billing records, receipts and contracts resulted in a violation of N.J.S.A. 47:1A-5.e, the Custodian did respond in writing stating that no records responsive exist to the Complainant's June 10, 2008 request Items No. 2, No. 3, No. 4, No. 5 and No. 8 on the sixth (6th) business day following the date of the Complainant's request and subsequently certified in the Statement of Information that no records responsive exist and bore her burden of proving that Complainant's June 10, 2008 request Items No. 1, No. 6 and No. 7 were broad and unclear. Therefore, 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 she is vested with the legal responsibility of granting and denying access in accordance with the law.

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Executive Director

May 20, 2009