



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

August 11, 2009 Government Records Council Meeting

Alfred M. Sallie, Sr.
Complainant

Complaint No. 2008-21

v.

New Jersey Department of Law & Public Safety,
Division of Criminal Justice
Custodian of Record

At the August 11, 2009 public meeting, the Government Records Council (“Council”) considered the August 4, 2009 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that because the Custodian disclosed all of the records responsive to the Complainant’s request, irrespective of their disclosure in response to any previous OPRA request(s), and because the Custodian provided certified confirmation of compliance, pursuant to N.J. Court Rule 1:4-4, to the Executive Director within five (5) business days of receiving the Council’s June 23, 2009 Interim Order, the Custodian has complied with the terms of said Order.

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 August, 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: August 17, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Alfred M. Sallie, Sr.¹
Complainant**

GRC Complaint No. 2008-21

v.

**NJ Department of Law and Public Safety, Division of Criminal Justice²
Custodian of Records**

Records Relevant to Complaint:

1. Copies of all available records regarding complaint CJ# 2006-1536H filed in June of 2007 and investigated by the Prosecutors Supervision & Coordination Bureau, the Administrative Office of Courts, the Department of Criminal Justice and the Office of Attorney Ethics.
2. Copies of all available records regarding the complaint filed by Alfred M. Sallie, Sr. with the Attorney General's Office concerning the investigation of CJ# 2006-1536H.

Request Made: January 11, 2008

Response Made: January 23, 2008

Custodian: Dale K. Perry

GRC Complaint Filed: January 25, 2008

Background

June 23, 2009

Government Records Council's ("Council") Interim Order. At the June 23, 2009 public meeting, the Government Records Council ("Council") considered the June 16, 2009 *Reconsideration to Settle the Record* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Because the Custodian certified that the records responsive to the request were provided to the Complainant by letter dated January 23, 2008 and there is no evidence in the record to the contrary, and because this date is within the statutorily mandated response time, the Custodian complied with the provisions of N.J.S.A. 47:1A-5.g.

¹ No legal representation listed on record.

² Represented by SDAG E. Robbie Miller, on behalf of the New Jersey Attorney General.

2. Because OPRA does not limit the number of times a requestor may ask for the same record, the Custodian's failure to disclose or make available to the Complainant all of the records responsive to the Complainant's request, including those records previously provided, violates the provisions of N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-6. and the Council's decision in Caggiano v. Borough of Stanhope, GRC No. 2005-211 et al. (January 2006). **Therefore, the Custodian must disclose all of the records responsive to the Complainant's request, irrespective of their disclosure in response to any previous OPRA request(s).**
3. **The Custodian shall comply with item # 2 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, including a detailed redaction index explaining the legal basis for each redacted portion of the requested records to the Executive Director.**
4. Although the Custodian failed to disclose or make available to the Complainant all of the records responsive to the Complainant's request, because the Custodian re-inspected the files and disclosed additional documents to the Complainant, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's failure to comply with the provisions of OPRA appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

June 24, 2009

Council's Interim Order distributed to the parties.

June 27, 2009

E-mail from the Complainant to the GRC. The Complainant expresses displeasure with the Council's June 23, 2009 Interim Order, and directs several allegations against the Custodian and the GRC which lack a factual foundation and have no substance in the evidence of record.

June 30, 2009

Custodian's certification.³ The Custodian certifies she received a copy of the Council's Interim Order dated June 23, 2009 on June 24, 2009. The Custodian further certifies that she mailed all documents responsive to the Complainant's January 11, 2008 OPRA request to the Complainant on June 30, 2009.

³ The GRC did not receive this correspondence until July 7, 2009, which accounts for the e-mail from the GRC to the Complainant dated July 6, 2009 to seemingly be out of chronological order.
Alfred Sallie v. NJ Department of Law and Public Safety, Division of Criminal Justice, 2008-21 – Supplemental Findings and Recommendations of the Executive Director

July 6, 2009

E-mail from the GRC to the Complainant. The GRC asks the Complainant whether he has received the records from the Custodian in compliance with the Council's July 23, 2009 Interim Order.

July 8, 2009

E-mail from the Complainant to the GRC. The Complainant states that he did not receive the records in compliance with the Council's July 23, 2009 Interim Order. The Complainant also contends that Angela LaBelle is the custodian of record in this matter and that the Custodian's Counsel has misrepresented the proper custodian to be Dale Perry. The Complainant demands a full investigation of this situation.

July 8, 2009

E-mail from the GRC to the Custodian's Counsel. The GRC asks Counsel if the Custodian has any proof that the records the Custodian certified that she mailed to the Complainant on June 30, 2009 were received by the Complainant. The GRC also asks Counsel if there was any other person acting on behalf of the Custodian since the time that the Statement of Information was filed on February 25, 2008.

July 17, 2009

E-mail from the Custodian's Counsel to the GRC. Counsel states that the Custodian certified that she mailed the records to the Complainant and that they were probably still in transit at the time of the Complainant's e-mail to the GRC dated July 8, 2009. Counsel further states that there was no other person acting on behalf of the Custodian since the time the Statement of Information was filed on February 25, 2008.

Analysis**Whether the Custodian complied with the Council's June 23, 2009 Interim Order?**

The Complainant filed an OPRA request in September 2007 with the same agency and was provided with one hundred forty-eight (148) pages of records on October 25, 2007. When the Custodian received the request giving rise to the instant complaint, the Custodian realized it was nearly identical to the Complainant's September 2007 request and re-checked the files for any additional records that may have been filed since the Complainant's September 2007 request. Upon re-checking the files, the Custodian located two (2) additional records that were filed since the Complainant's September 2007 request and disclosed those two (2) records to the Complainant; however, the Custodian did not disclose the other one hundred forty-eight (148) pages of records that were responsive to the Complainant's request because those records had already been provided to the Complainant.

Pursuant to Caggiano v. Borough of Stanhope, GRC No. 2005-211 et al. (January 2006), however, OPRA does not limit the number of times a requestor may ask for the same record. Accordingly, the Council's June 23, 2009 Interim Order directed the Custodian to disclose all of the records responsive to the Complainant's request, irrespective of their disclosure in response to any previous OPRA request(s) within five (5) business days from receipt of the Council's Interim Order and simultaneously provide

certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.

The Custodian subsequently certified on June 30, 2009 that he received a copy of the Interim Order on June 24, 2009 and mailed all documents responsive to the Complainant's January 11, 2008 OPRA request to the Complainant on June 30, 2009.

Therefore, because the Custodian disclosed all of the records responsive to the Complainant's request, irrespective of their disclosure in response to any previous OPRA request(s), and because the Custodian provided certified confirmation of compliance, pursuant to N.J. Court Rule 1:4-4, to the Executive Director within five (5) business days of receiving the Council's June 23, 2009 Interim Order, the Custodian has complied with the terms of said Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Custodian disclosed all of the records responsive to the Complainant's request, irrespective of their disclosure in response to any previous OPRA request(s), and because the Custodian provided certified confirmation of compliance, pursuant to N.J. Court Rule 1:4-4, to the Executive Director within five (5) business days of receiving the Council's June 23, 2009 Interim Order, the Custodian has complied with the terms of said Order.

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

Approved By: Catherine Starghill, Esq.
Executive Director

August 4, 2009



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

JON S. CORZINE
Governor

JOSEPH V. DORIA, JR.
Commissioner

INTERIM ORDER

June 23, 2009 Government Records Council Meeting

Alfred M. Sallie, Sr.
Complainant

Complaint No. 2008-21

v.

NJ Department of Law & Public Safety,
Division of Criminal Justice
Custodian of Record

At the June 23, 2009 public meeting, the Government Records Council ("Council") considered the June 16, 2009 *Reconsideration to Settle the Record* 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 certified that the records responsive to the request were provided to the Complainant by letter dated January 23, 2008 and there is no evidence in the record to the contrary, and because this date is within the statutorily mandated response time, the Custodian complied with the provisions of N.J.S.A. 47:1A-5.g.
2. Because OPRA does not limit the number of times a requestor may ask for the same record, the Custodian's failure to disclose or make available to the Complainant all of the records responsive to the Complainant's request, including those records previously provided, violates the provisions of N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-6. and the Council's decision in Caggiano v. Borough of Stanhope, GRC No. 2005-211 et al. (January 2006). **Therefore, the Custodian must disclose all of the records responsive to the Complainant's request, irrespective of their disclosure in response to any previous OPRA request(s).**
3. **The Custodian shall comply with item # 2 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, including a detailed redaction index explaining the legal basis for each redacted portion of the requested records to the Executive Director.**



4. Although the Custodian failed to disclose or make available to the Complainant all of the records responsive to the Complainant's request, because the Custodian re-inspected the files and disclosed additional documents to the Complainant, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's failure to comply with the provisions of OPRA appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Interim Order Rendered by the
Government Records Council
On The 23rd 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.

Kathryn Forsyth
Government Records Council

Decision Distribution Date: June 24, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration to Settle the Record
Findings and Recommendations of the Executive Director
June 23, 2009 Council Meeting

Alfred M. Sallie, Sr.¹
Complainant

GRC Complaint No. 2008-21²

v.

NJ Department of Law and Public Safety, Division of Criminal Justice³
Custodian of Records

Records Relevant to Complaint:

1. Copies of all available records regarding complaint CJ# 2006-1536H filed in June of 2007 and investigated by the Prosecutors Supervision & Coordination Bureau, the Administrative Office of Courts, the Department of Criminal Justice and the Office of Attorney Ethics.
2. Copies of all available records regarding the complaint filed by Alfred M. Sallie, Sr. with the Attorney General's Office concerning the investigation of CJ# 2006-1536H.

Request Made: January 11, 2008

Response Made: January 23, 2008

Custodian: Dale K. Perry

GRC Complaint Filed: January 25, 2008

Background

January 11, 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.

January 23, 2008

Custodian's Response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the seventh (7th) business day following receipt of such request and informs the Complainant that records responsive to the Complainant's request are attached.

¹ No legal representation listed on record.

² This complaint is a reconsideration of Administrative Disposition Alfred M. Sallie, Sr. v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint No. 2008-21 (February 2008).

³ Represented by SDAG E. Robbie Miller, on behalf of the New Jersey Attorney General.

January 23, 2008

Letter from the Custodian's Counsel to the Complainant. Counsel informs the Complainant that numerous records responsive to the Complainant's request had been previously disclosed to him on October 25, 2007 in response to an earlier OPRA request. Counsel states that since the time of the Complainant's earlier request, the Custodian has located two (2) additional records responsive to the Complainant's request: (1) a copy of a letter from the Complainant to the Attorney General with enclosures dated November 12, 2007, and (2) an e-mail from the Complainant to the Department of Law and Public Safety's citizen services website dated November 16, 2007. Counsel advises the Complainant that these are the only other records that are responsive to the Complainant's request that the Custodian has in file CJ# 2006-1536H. Counsel further advises the Complainant that the Custodian will disclose these two (2) additional records to the Complainant and waive the copy costs.

January 25, 2008

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

- Complainant's OPRA request dated January 11, 2008

The Complainant represents that he did not receive a reply to his OPRA request. The Complainant did not agree to mediate this complaint.

February 11, 2008

Request for the Statement of Information sent to the Custodian.

February 19, 2008

Telephone call from the Custodian's Counsel to the GRC. The Custodian's Counsel on behalf of the Custodian requests a five (5) business day extension of time to prepare and submit the Statement of Information to the GRC. The extension of time is approved by the GRC.

February 19, 2008

Facsimile transmission from the GRC to the Custodian. The GRC confirms its telephone conversation with the Custodian's Counsel and approves an extension of time until February 27, 2008 for the Custodian to submit the completed Statement of Information to the GRC.

February 25, 2008

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

- Complainant's OPRA request dated January 11, 2008
- Government Records Request Receipt issued from the Custodian to the Complainant dated January 23, 2008
- Letter from the Custodian's Counsel to the Complainant dated January 23, 2008
- Letter from the Custodian's Counsel to the GRC dated February 25, 2008

The Custodian certifies that the Complainant filed an OPRA request in September 2007 and the Custodian on October 25, 2007 provided the Complainant with all of the documents in Custodian's case file CJ# 2006-1536H, comprised of one hundred forty-eight (148) pages of records. The Custodian certifies that the Complainant's instant request was not for any specific identifiable record; however, the Custodian certifies he realized the request was nearly identical to the Complainant's September 2007 OPRA request and the Custodian certifies that his search for the requested records therefore involved re-inspecting the file to determine if there were any additional documents in the file since his previous request. The Custodian certifies that he located two (2) new documents that were responsive to the Complainant's request.

The Custodian also certifies that the records responsive to the request must be retained for three (3) years following the last active contact in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management.

The Custodian certifies that he determined that two additional (2) new records located in case number CJ# 2006-1536H were responsive to the Complainant's request:

- (1) A letter from the Complainant to Attorney General Anne Milgram dated December 12, 2007
- (2) An e-mail from the Complainant to the Department of Law and Public Safety's citizen services website dated December 16, 2007

The Custodian certifies that copies of these additional new records were disclosed to the Complainant in unredacted form on January 23, 2008 at no cost to the Complainant. The Custodian further certifies that as of January 23, 2008 all records in case file CJ# 2006-1536H had been disclosed to the Complainant.

February 27, 2008

At its February 27, 2008 public meeting, the Government Records Council issued an Administrative Disposition of this complaint on the grounds that all records responsive to the request were provided in a timely manner because "[t]he Custodian certifies that all records responsive to the Complainant's OPRA request have been provided to the Complainant within the statutorily mandated response time." The Administrative Disposition had a January 11, 2008 date of request, a January 23, 2008 date of complaint and was dated with the Council packing date of February 20, 2008.

February 29, 2008

E-mail from the Complainant to the GRC. The Complainant states that he just received a copy of the Custodian's SOI and will respond to it. The Complainant also states he never received a return receipt for the copy of his complaint that was sent to the GRC via certified mail and requests the GRC investigate the matter.

March 3, 2008

E-mail from the GRC to the Complainant. The GRC informs the Complainant that the Council issued an Administrative Disposition of this complaint on February 27, 2008.

The GRC also informs the Complainant that the GRC does not investigate mail delivery matters, but that it will confirm receipt of correspondence.

March 3, 2008

E-mail from the Complainant to the GRC. The Complainant objects to the Council's Administrative Disposition of his complaint. The Complainant states that the date of the Administrative Disposition predates receipt by the GRC of the SOI. The Complainant contends the Custodian and the Custodian's Counsel falsified dates on their submissions to the GRC and that the Custodian could not have responded to the Complainant's OPRA request in a timely manner because the Complainant has mail meter proof to the contrary. The Complainant also contends that the Custodian's assertion that he disclosed to the Complainant two (2) records dated December 12, 2007 and December 16, 2007 is inaccurate.

March 3, 2008

E-mail from the Complainant to the GRC. The Complainant informs the GRC that he filed his complaint on January 25, 2008, not on January 23, 2008 as indicated on the Administrative Disposition.

March 4, 2008

E-mail from the GRC to the Complainant. The GRC informs the Complainant that the GRC understood the date of complaint was January 23, 2008; however, the Complainant was not prejudiced in this matter because the Custodian certified the Complainant's OPRA request was received by the Custodian on January 11, 2008 and all records responsive to the request were provided to the Complainant as of January 23, 2008 within the statutorily mandated time for a response.

March 4, 2008

E-mail from the Complainant to the GRC. The Complainant states that because the Administrative Disposition was dated February 20, 2008, the GRC made its decision prior to receiving the Custodian's SOI. The Complainant also contends the Custodian could not have responded to his OPRA request in a timely manner because he has mail meter proof to the contrary.

March 4, 2008

E-mail from the GRC to the Complainant. The GRC advises the Complainant that if he has proof that the Custodian falsified a certification he should submit it to the GRC.

March 12, 2008

E-mail from the GRC to the Complainant. The GRC advises the Complainant that his complaint was logged in at the GRC on January 28, 2008. The GRC again advises the Complainant to submit to the GRC any proof the Complainant has that the Custodian falsified a certification.

March 27, 2008

E-mail from the GRC to the Complainant. The GRC informs the Complainant that the Administrative Disposition of his complaint will be reconsidered.

June 13, 2008

Facsimile transmission from the GRC to the Custodian. The GRC informs the Custodian that his February 25, 2008 certification indicates the additional two (2) records the Custodian identified as responsive to the Complainant's request are dated December 12, 2007 and December 16, 2007; however, the Custodian's Counsel stated the same records were dated November 12, 2007 and November 16, 2007 in her letter to the Complainant dated January 23, 2008. The GRC requests the Custodian clarify the discrepancy.

June 16, 2008

Facsimile transmission from the Custodian's Counsel to the GRC. The Custodian's Counsel provides the GRC with Custodian's corrected February 25, 2008 certification indicating the records responsive to the Complainant's request are dated November 12, 2007 and November 16, 2007 rather than December 12, 2007 and December 16, 2007.

June 16, 2008

E-mail from the GRC to the Complainant. The GRC provides a copy of the Custodian's corrected certification to the Complainant and advises the Complainant to submit to the GRC within five (5) business days any proof the Complainant has that the Custodian falsified a certification.

June 30, 2008

Telephone call from the GRC to the Custodian's Counsel. The GRC requests a certification from the Custodian averring that all of the records requested by the Complainant in the instant complaint were disclosed or made available to the Complainant, including any records that were disclosed to the Complainant in response to any other previous OPRA request(s).

June 30, 2008

E-mail from the Custodian's Counsel to the GRC. The Custodian's Counsel informs the GRC that before the requested Custodian's certification is prepared she must conduct some research.

July 2, 2008⁴

Letter from the Custodian's Counsel to the GRC. Counsel states that this letter is in reply to the GRC's telephone conversation with her dated June 30, 2008. Counsel addresses the issue of whether the Custodian properly provided the Complainant with all of the records he requested in view of the Council's decision in Caggiano v. Borough of Stanhope, GRC No. 2005-211 et al. (January 2006). Counsel argues that Caggiano is distinguishable from the instant complaint because in the instant complaint, unlike Caggiano, the Complainant was never denied any records. Counsel further contends that the Complainant does not dispute that he received all of the records he requested and that the underlying GRC Administrative Disposition indicates that all records responsive to the Complainant's request were provided.

⁴ Other correspondence was received from the parties which is not relevant to this complaint or restates the facts/assertions already presented to the GRC.
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Counsel further contends that the Complainant has only disputed certain dates on particular documents. Counsel states that the GRC instructed the Complainant that if he wanted the decision reconsidered, he would have to provide the GRC with some proof that the certification contained a misrepresentation of material fact(s). Counsel asserts that the Complainant provided no such proof. Counsel further asserts that the issue raised by the GRC concerning the Custodian's compliance with Caggiano, *supra*, is outside of the scope of the reconsideration.

Analysis

Whether the Custodian responded to the Complainant's January 11, 2008 OPRA request in a timely manner?

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:

"A Custodian shall promptly comply with a request to inspect, examine, copy, or provide a copy of a government record. If 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.

The Complainant states that the letter responding to his OPRA request from the Custodian’s Counsel dated January 23, 2008 was mailed on January 25, 2008. As a result, the Complainant reasons, it was delivered to him “well past the statutory limit.” As proof, the Complainant forwards to the GRC a photograph of a mail meter imprint dated January 25, 2008 on an envelope addressed to the Complainant from the Custodian.

The Complainant misconstrues N.J.S.A. 47:1A-5.g. This section of OPRA requires the Custodian to...“*respond* within seven business days after receiving a request...” (Emphasis added). OPRA does not require a custodian to guarantee delivery within the statutorily prescribed time. A custodian has no control over the delivery process once a package is dispatched.

The Custodian certified in his SOI that he received the Complainant’s OPRA request on January 11, 2008 and responded to the Complainant’s request by providing all records responsive to the request on January 23, 2008, which is the seventh (7th) business day following receipt of such request.

Accordingly, because the Custodian certified that the records responsive to the request were provided to the Complainant by letter dated January 23, 2008 and there is no evidence in the record to the contrary, and because this date is within the statutorily mandated response time, the Custodian complied with the provisions of N.J.S.A. 47:1A-5.g.

Whether the Custodian unlawfully denied access to the requested records?

The Complainant contends the Custodian’s SOI certification was dated on January 25, 2008 and signed on February 25, 2008. The Complainant further contends, “[the Custodian] reports they (sic) provided me copies of documents dated **12/12/07 and 12/16/07, this is incorrect.**” (Emphasis added by the Complainant). The Complainant does not elaborate on precisely what is incorrect; thereby suggesting the Custodian never disclosed these records in contravention of his certification.

A reexamination of the evidence of record reveals the Custodian’s certification was not dated on January 25, 2008 and signed on February 25, 2008 as asserted by the Complainant. Rather, the record reveals the Custodian prepared a separate certification

dated January 25, 2008 as Item #9 appended to the SOI. The SOI itself was dated February 25, 2008.

The Custodian submitted a certification dated June 16, 2008 that avers that the Custodian made a typographical error when preparing the document index.⁵ The Custodian corrected the error by changing the dates of the additional records responsive to the Complainant's request from December 12, 2007 and December 16, 2007 to November 12, 2007 and November 16, 2007.

In the instant complaint, the Complainant requested copies of all available records regarding complaint file number CJ# 2006-1536H filed in June of 2007, as well as copies of all available records regarding a complaint filed by the Complainant with the Attorney General's Office concerning the investigation of said file number.

The Custodian certified in his SOI that the Complainant previously filed an OPRA request in September 2007 and the Custodian on October 25, 2007 provided the Complainant with all of the documents in Custodian's case file number CJ# 2006-1536H, which totaled one hundred forty-eight (148) pages. The Custodian certified that he realized the instant request was nearly identical to the Complainant's September 2007 OPRA request and he stated he re-inspected the case file to determine if there were any records added to the file since the Complainant's September 2007 request. The Custodian certified that he located two (2) additional records that were responsive to the Complainant's request, and these are the records the Custodian disclosed to the Complainant dated November 12, 2007 and November 16, 2007 in response to the Complainant's instant request.

When this complaint was administratively dismissed on February 27, 2008, it was the understanding of the GRC that the Custodian had supplied all of the records responsive to the Complainant's request. Upon reviewing the complaint file for the reconsideration, however, a question arose as to whether the Custodian, in addition to disclosing the two (2) additional records, also disclosed all of the records responsive to the Complainant's instant request regardless of whether or not some of those records had been previously disclosed. Because the GRC was unclear on this issue, the GRC contacted the Custodian's Counsel and requested a certification from the Custodian averring that all of the records requested by the Complainant in the instant complaint were disclosed or made available to the Complainant. The Counsel's reply to the GRC was in the form of an argument militating against the Custodian's need to comply with the Council's decision in Caggiano v. Borough of Stanhope, GRC No. 2005-211 et al. (January 2006). In Caggiano, the Council held that the Custodian's response that the records were previously provided to the Complainant on several occasions was not a lawful basis to deny access to [records requested in subsequent OPRA requests] pursuant to N.J.S.A. 47:1A-6. That no records responsive to the Complainant's request, other than those dated November 12, 2007 and November 16, 2007, were disclosed to the Complainant is implicit in Counsel's argument.

⁵ The averment that the Custodian made a typographical error is supported by the fact that in Counsel's January 23, 2008 letter to the Complainant the same records were listed with the correct dates. Alfred Sallie v. NJ Department of Law and Public Safety, Division of Criminal Justice, 2008-21 – Reconsideration to Settle the Record - Findings and Recommendations of the Executive Director

Counsel states that the GRC instructed the Complainant that if he wanted the decision reconsidered he would have to provide the GRC with some proof that the certification contained a misrepresentation of material fact(s). The Complainant failed to provide the GRC with such proof. For this reason, Counsel contends the decision rendered in the February 27, 2008 Administrative Disposition should stand and that the issue raised by the GRC concerning the Custodian's compliance with the Council's decision in Caggiano, *supra*, is outside of the scope of the reconsideration.

The GRC's instructions to the Complainant were not intended to limit the scope of the reconsideration in any manner. The GRC informed the Complainant that he would have to provide the GRC with some proof that the certification contained a misrepresentation of material fact(s) because the Complainant asserted that the decision was incorrect, in part, because the Custodian falsified the SOI certification. Accordingly, the GRC informed the complainant several times to submit to the GRC any proof he had that the Custodian falsified the certification. If the Complainant provided such proof to the GRC, it would certainly be grounds for the GRC to reconsider the decision; however, the Complainant's failure to provide such proof does not serve to limit the reconsideration in any respect, either form or substance.

The Custodian's Counsel does not argue that the Custodian need not comply with the Council's decision in Caggiano, *supra*; however she does assert that the instant complaint is distinguished from the decision in Caggiano because she asserts that in the instant complaint, unlike Caggiano, the Complainant was never denied any records. However, this assertion is irrelevant. The Council's decision in Caggiano makes clear that:

“OPRA does not limit the number of times a requestor may ask for the same record *even when the record was previously provided*. N.J.S.A. 47:1A-5.g. requires that the Custodian must comply with a request or provide a lawful basis for denying access pursuant to N.J.S.A. 47:1A-6.” (Emphasis added).

Clearly, the Council did not restrict their decision only to complaints in which a requestor was first denied access.

In this matter, the Custodian knew that numerous records responsive to the Complainant's instant request were disclosed to the Complainant in response to a nearly identical earlier request; therefore the Custodian did not disclose or make available those records in response to the Complainant's instant request. Instead, the Custodian decided to only disclose to the Complainant two (2) additional records. The Custodian is required, however, under N.J.S.A. 47:1A-5.g. to comply with a request or provide a lawful basis for denying access pursuant to N.J.S.A. 47:1A-6.

It should be noted that the Council takes cognizance of the Appellate Division's recent decision in Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609 (App. Div. 2008). In Bart, the Appellate Division held that a complainant could not have been denied access to a requested record if he already had in his possession at the time of the OPRA request the document he sought pursuant to OPRA. *Id.* at 617. (“Bart Rule”). The

Appellate Division noted that requiring a custodian to duplicate another copy of the requested record and send it to the complainant does not advance the purpose of OPRA, which is to ensure an informed citizenry. *Id.* (citations omitted).

Bart was decided on November 21, 2008, almost ten (10) months after the complaint was filed in the instant matter. Therefore, for the Bart Rule to be considered in this matter it will have to be retroactively applied.

The New Jersey Supreme Court “has adopted the United States Supreme Court's definition that a ‘ “case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government . . . [or] if the result was not dictated by precedent existing at the time the defendant's conviction became final.”’ State v. Lark, 117 N.J. 331, 339 (1989) (quoting Teague v. Lane, 489 U.S. 288, 301, 109 S. Ct. 1060, 1070, 103 L. Ed.2d 334, 349 reh'g denied, 490 U.S. 1031, 109 S. Ct. 1771, 104 L. Ed.2d 266 (1989)). See also State v. Johnson, 166 N.J. 523, 546-47 (2001); State v. Knight, 145 N.J. 233, 250-51 (1996).” State v. Yanovsky, 340 N.J.Super. 1 (App. Div. 2001).

Although retroactive application of laws is generally disfavored, Gibbons v. Gibbons, 86 N.J. 515, 521 (1981), a clear intention by the Legislature that retroactive application is intended will be given effect. Phillips v. Curiale, 128 N.J. 608, 618 (1992). Courts recognize that retroactive laws enacted pursuant to the police power may impair the rights of individuals, Rothman v. Rothman, 65 N.J. 219, 225-226 (1974), but where the public interest sufficiently outweighs the impaired private right, retroactive application is permissible. State Troopers Fraternal Assoc. v. New Jersey, 149 N.J. 38, 57 (1997).

In determining retroactive application of a new rule, four judicial options are available:

(1) make the new rule of law purely prospective, applying it only to cases whose operative facts arise after the new rule is announced; (2) apply the new rule to future cases and to the parties in the case announcing the new rule, while applying the old rule to all other pending and past litigation; (3) grant the new rule limited retroactivity, applying it to cases in (1) and (2) as well as to pending cases where the parties have not yet exhausted all avenues of direct review [pipeline retroactivity]; and, finally, (4) give the new rule complete retroactive effect, applying it to all cases, even those where final judgments have been entered and all avenues of direct review exhausted. State v. Nash, 64 N.J. 464, 468-70 (1974). State v. Knight, 145 N.J. 233, 249 (1996).

The determination of retroactive application is generally guided by three factors: "(1) the purpose of the rule and whether it would be furthered by a retroactive application, (2) the degree of reliance placed on the old rule by those who administered it, and (3) the effect a retroactive application would have on the administration of justice." *Id.* at 251 (citation and internal quotations omitted).

In Knight, the Court granted pipeline retroactivity to the rule previously announced in State v. Sanchez, 129 N.J. 261 (1992), that "post-indictment interrogation of defendant violated his right to counsel under Article 1, paragraph 10 of the New Jersey Constitution" requiring suppression of his confession, *Id.* at 279, because the purpose of that exclusionary rule was also to enhance the reliability of confessions. Knight supra, 145 N.J. at 256-58.

Although the Knight Court was addressing the retroactive application of a new rule in a criminal setting, the New Jersey Supreme Court has applied similar reasoning in the civil setting. In Olds v. Donnelly, 150 N.J. 424, 442 (1997), the Court abrogated its decision in Circle Chevrolet Co. v. Giordano, Halleran & Ciesla, 142 N.J. 280 (1995) and exempted attorney malpractice actions from the entire controversy doctrine. In addressing whether the decision should be applied retroactively or prospectively, the Court recognized that "[o]rdinarily, judicial decisions apply retroactively. Crespo v. Stapf, 128 N.J. 351, 367 (1992)... [but] [p]olicy considerations may justify giving a decision limited retroactive effect." *Ibid.* The Court then examined the considerations articulated in Knight and concluded that the Olds decision should be given limited "pipeline" retroactivity because such application "adequately protect existing relationships[,] and because the application of pipeline retroactivity to pending cases "serves the interests of justice by permitting resolution of their claims on the merits." *Id.* at 450. Perhaps most importantly, the Court recognized that complete retroactive application potentially exposes the judicial system to the undue burden of revisiting numerous matters already concluded. *Id.* See, e.g., Constantino v. Borough of Berlin, 348 N.J. Super. 327 (App. Div. 2002)(holding that the public interest in retroactive application of the Age Discrimination in Employment Act, 29 U.S.C.A. §621 *et seq.*, which specifically prohibited municipalities from hiring persons as police officer under age 21 or over age 35, outweighs an individual's private rights); State v. Yanovsky, 340 N.J. Super. 1 (App. Div. 2001)(holding that State v. Carty, 332 N.J. Super. 200 (App. Div. 2000) established a new rule of law during the pendency of the case, but that the public interest and administration of justice favored limited application of retroactivity); Zuccarelli v. NJDEP, 376 N.J. Super. 372 (App. Div. 1999)(holding that cases which held New Jersey's waste flow control system was unconstitutional and discriminatory should be applied retroactively only to cases in the "pipeline").

Here, the GRC considered the purpose of the Bart Rule and whether it would be furthered by a retroactive application. The GRC concluded that, although the Bart court made clear that "requiring a custodian to duplicate another copy of the requested record...does not advance the purpose of OPRA, which is to ensure an informed citizenry" *Id.* at 618, neither would the retroactive application of the Bart Rule serve such purpose. Accordingly, the GRC concludes that the purpose of the rule would not be furthered by its retroactive application. Further, the GRC examined the degree of reliance placed on the old rule by those who administered it, and found that the rule articulated in Caggiano, supra; to wit, OPRA does not limit the number of times a requestor may ask for the same record even if it was previously provided, was repeatedly cited by the GRC in subsequent adjudications. Therefore, custodians relied upon the Council's decision in Caggiano, supra, when responding to OPRA requests for previously provided records. Accordingly, the retroactive application of Bart, supra, would likely foster confusion among many records custodians who already responded to

OPRA requests predating the Bart court's decision. For the aforementioned reasons, the GRC will not afford the Bart Rule retroactive application, but rather only apply it when it is applicable to cases whose operative facts arise after the rule was articulated.

Because OPRA does not limit the number of times a requestor may ask for the same record, the Custodian's failure to disclose or make available to the Complainant all of the records responsive to the Complainant's request, including those records previously provided, violates the provisions of N.J.S.A. 47:1A-5, g., N.J.S.A. 47:1A-6. and the Council's decision in Caggiano, *supra*. Therefore, the Custodian must disclose all of the records responsive to the Complainant's request, irrespective of their disclosure in response to any previous OPRA request(s).

Whether the Custodian's failure to disclose or make available to the Complainant all of the records responsive to the Complainant's request, including those records previously provided, 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)).

Although the Custodian failed to disclose or make available to the Complainant all of the records responsive to the Complainant's request, because the Custodian re-inspected the files and disclosed additional documents to the Complainant, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's failure to comply with the provisions of OPRA appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian certified that the records responsive to the request were provided to the Complainant by letter dated January 23, 2008 and there is no evidence in the record to the contrary, and because this date is within the statutorily mandated response time, the Custodian complied with the provisions of N.J.S.A. 47:1A-5.g.
2. Because OPRA does not limit the number of times a requestor may ask for the same record, the Custodian's failure to disclose or make available to the Complainant all of the records responsive to the Complainant's request, including those records previously provided, violates the provisions of N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-6. and the Council's decision in Caggiano v. Borough of Stanhope, GRC No. 2005-211 et al. (January 2006). **Therefore, the Custodian must disclose all of the records responsive to the Complainant's request, irrespective of their disclosure in response to any previous OPRA request(s).**
3. **The Custodian shall comply with item # 2 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, including a detailed redaction index explaining the legal basis for each redacted portion of the requested records to the Executive Director.**
4. Although the Custodian failed to disclose or make available to the Complainant all of the records responsive to the Complainant's request, because the Custodian re-inspected the files and disclosed additional documents to the Complainant, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's failure to comply with the provisions of OPRA 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

June 16, 2009



NEW JERSEY GOVERNMENT RECORDS COUNCIL

Administrative Complaint Disposition – All Records Responsive to the Request Provided in a Timely Manner

GRC Complaint No.: 2008-21

Complainant: Alfred M. Sallie, Sr.

Custodian: NJ Department of Law and Public Safety, Division of Criminal Justice,
Dale K. Perry

Date of Request: January 11, 2008

Date of Complaint: January 23, 2008

Complaint Disposition: The Custodian certifies that all records responsive to the Complainant's OPRA request have been provided to the Complainant within the statutorily mandated response time.

Applicable OPRA Provision: N.J.S.A. 47:1A-5.g.

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.

Effective Date of Disposition: February 27, 2008

Prepared By:

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

Approved By:

Catherine Starghill, Esq.
Executive Director

Date: February 20, 2008

Distribution Date: February 27, 2008