



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

FINAL DECISION

May 29, 2012 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2010-275

v.

Cliffside Park Police Department (Bergen)
Custodian of Record

At the May 29, 2012 public meeting, the Government Records Council (“Council”) considered the May 22, 2012 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 disclosed to the Complainant all records ordered for disclosure pursuant to the Order and provided certified confirmation of compliance to the Executive Director within the time period provided for compliance with said Order, the Custodian fully complied with the Council’s April 25, 2012 Interim Order.
2. Although the Custodian unlawfully withheld from disclosure request item number 1, seventeen (17) records of request item number 3, and request item number 9 until the date the Custodian submitted the Statement of Information to the GRC, and although the Custodian failed to bear his burden of proving that request item number 7 and request item number 8 were exempt from disclosure under OPRA, the Custodian did fully comply in a timely manner with the Council’s April 25, 2012 Interim Order by disclosing both records responsive to item numbers 7 and 8. Moreover, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. 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.

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 29th Day of May, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: June 1, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
May 29, 2012 Council Meeting**

**Richard Rivera¹
Complainant**

GRC Complaint No. 2010-275

v.

**Cliffside Park Police Department (Bergen)²
Custodian of Records**

Records Relevant to Complaint: The Complainant requests the following records in electronic format via e-mail:

1. Internal Affairs Annual Summary Reports for 2008-2009.
2. Use of force annual summary reports for 2005-2009.
3. Use of force incident reports for January 1, 2010 to September 30, 2010.
4. Police mobile data terminal (“MDT”) transmissions to and from all terminals from thirty (30) minutes prior to the traffic stop of Mr. Terrance Jones while operating a silver Lincoln Navigator at approximately 9:00 p.m. on August 31, 2010 (hereinafter “vehicle stop”) until thirty (30) minutes thereafter.
5. Police telephone recordings from all recorded phone extensions from thirty (30) minutes prior to the vehicle stop until thirty (30) minutes thereafter.
6. Police radio transmissions on all frequencies and channels from thirty (30) minutes prior to the vehicle stop until thirty (30) minutes thereafter.
7. Mobile video recording of the vehicle stop in DVD or VHS format.
8. Computer Aided Dispatch (“CAD”) entries for the shift that worked at the time of the vehicle stop.
9. Duty roster for police employees on August 31, 2010, including employee and vehicle assignments but excluding undercover officers.³

Request Made: September 30, 2010

Response Made: October 7, 2010

Custodian: Chief Donald V. Keane, Cliffside Park Police Department

GRC Complaint Filed: October 21, 2010⁴

¹ No legal representation listed on record.

² Represented by Christine Gillen, Esq., Diktas Schandler Gillen (Cliffside Park, NJ).

³ The request made reference to the time of the traffic stop on this date; however, the Custodian certified that the record encompassed the entire date.

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

Background

April 25, 2012

At the April 25, 2012 public meeting, the Government Records Council (“Council”) considered the April 18, 2012 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 notified the Complainant in writing that he would need an extension of time within the statutorily mandated seven (7) business days and provided an anticipated deadline date upon which the request would be completed, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Starkey v. NJ Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009).
2. Because there is no provision in OPRA which provides that, once a Denial of Access Complaint is filed, records responsive to the Complainant’s request shall be withheld from disclosure to the Complainant pending the initiation of the GRC adjudication process, the Custodian unlawfully withheld from disclosure request item number 1, seventeen (17) records of request item number 3, and request item number 9 until the date the Custodian submitted the Statement of Information to the GRC.
3. Because the Custodian certified in the Statement of Information dated February 8, 2011 that no records responsive to request item number 2 exist, and because there is no credible evidence in the record to refute the Custodian’s certification, the Custodian did not unlawfully deny access to said records pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. Because the Custodian certified that two (2) records responsive to request item number 3 are prohibited from disclosure pursuant to the provisions of N.J.S.A. 2A:4A-60, and because that statute is a law that contains provisions not abrogated by OPRA pursuant to N.J.S.A. 47:1A-9.a., the confidentiality provisions of N.J.S.A. 2A:4A-60 restricts public access to the requested records. Accordingly, the Custodian lawfully denied the Complainant access to said records.
5. The Complainant’s requests for item numbers 4, 5 and 6 are invalid under OPRA because they are overly broad and fail to identify specific government records sought. Moreover, because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to conduct research to locate records potentially

responsive to the Complainant's request pursuant to the Superior Court's decisions in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007).

6. Because the Custodian can identify the duty shift from the information provided in the Complainant's request, and because a Computer Aided Dispatch system can generate a record of entries from a data base within established time parameters defined by the shift start and end times, request item number 8 does not require the Custodian to conduct research to locate the record and the Custodian has unlawfully denied the Complainant access to this record. Therefore, the Custodian must disclose the record to the Complainant.
7. Because the Custodian has determined that request item number 7 is responsive to the Complainant's request, and there is no legal reason to withhold it from disclosure, the Custodian must disclose the record to the Complainant.
8. **The Custodian shall comply with paragraphs 6 and 7 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if any, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
9. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

April 27, 2012

Council's Interim Order ("Order") distributed to the parties.⁵

May 2, 2012

Letter from the Custodian's Counsel to the GRC. The Custodian's Counsel forwards to the GRC the Custodian's certification dated May 2, 2012. The Custodian certifies that pursuant to the terms of the Order he disclosed to the Complainant the records responsive to request item numbers 7 and 8, which are a mobile video recording of the vehicle stop in DVD format and CAD entries for the shift that worked at the time of the vehicle stop, respectively.

⁵ UPS Next Day Air® Proof of Delivery revealed that the Order was delivered to the Custodian on April 30, 2012 at 10:14 a.m.

Analysis

Whether the Custodian complied with the Council's April 25, 2012 Interim Order?

At its April 25, 2012 public meeting, the Council determined that the Custodian shall disclose the records responsive to request item number 7 and request item number 8 of the Complainant's OPRA request within five (5) business days from receipt of the Council's Interim Order with appropriate redactions as necessary, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.

On May 2, 2012, the Custodian provided certified confirmation that he provided the following records to the Complainant:

- Mobile video recording of the vehicle stop in DVD format
- CAD entries for the shift that worked at the time of the vehicle stop, which the Custodian determined were entries numbered 10-020749 through 10-020776

Therefore, because the Custodian disclosed to the Complainant all records ordered for disclosure pursuant to the Order and provided certified confirmation of compliance to the Executive Director within the time period provided for compliance with said Order, the Custodian fully complied with the Council's April 25, 2012 Interim Order.

Whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under 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)).

In the matter before the Council, although the Custodian unlawfully withheld from disclosure request item number 1, seventeen (17) records of request item number 3, and request item number 9 until the date the Custodian submitted the Statement of Information to the GRC, and although the Custodian failed to bear his burden of proving that request item number 7 and request item number 8 were exempt from disclosure under OPRA, the Custodian did fully comply in a timely manner with the Council's April 25, 2012 Interim Order by disclosing both records responsive to item numbers 7 and 8. Moreover, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian disclosed to the Complainant all records ordered for disclosure pursuant to the Order and provided certified confirmation of compliance to the Executive Director within the time period provided for compliance with said Order, the Custodian fully complied with the Council's April 25, 2012 Interim Order.
2. Although the Custodian unlawfully withheld from disclosure request item number 1, seventeen (17) records of request item number 3, and request item number 9 until the date the Custodian submitted the Statement of Information to the GRC, and although the Custodian failed to bear his burden of proving that request item number 7 and request item number 8 were exempt from disclosure under OPRA, the Custodian did fully comply in a timely manner with the Council's April 25, 2012 Interim Order by disclosing both records responsive to item numbers 7 and 8. Moreover, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of

conscious wrongdoing or was intentional and deliberate. 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.

Prepared By: John E. Stewart, Esq.

Approved By: Catherine Starghill, Esq.
Executive Director

May 22, 2012



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

INTERIM ORDER

April 25, 2012 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2010-275

v.

Cliffside Park Police Department (Bergen)
Custodian of Record

At the April 25, 2012 public meeting, the Government Records Council (“Council”) considered the April 18, 2012 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 notified the Complainant in writing that he would need an extension of time within the statutorily mandated seven (7) business days and provided an anticipated deadline date upon which the request would be completed, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Starkey v. NJ Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009).
2. Because there is no provision in OPRA which provides that, once a Denial of Access Complaint is filed, records responsive to the Complainant’s request shall be withheld from disclosure to the Complainant pending the initiation of the GRC adjudication process, the Custodian unlawfully withheld from disclosure request item number 1, seventeen (17) records of request item number 3, and request item number 9 until the date the Custodian submitted the Statement of Information to the GRC.
3. Because the Custodian certified in the Statement of Information dated February 8, 2011 that no records responsive to request item number 2 exist, and because there is no credible evidence in the record to refute the Custodian’s certification, the Custodian did not unlawfully deny access to said records pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. Because the Custodian certified that two (2) records responsive to request item number 3 are prohibited from disclosure pursuant to the provisions of N.J.S.A. 2A:4A-60, and because that statute is a law that contains provisions not abrogated by OPRA pursuant to N.J.S.A. 47:1A-9.a., the confidentiality provisions of N.J.S.A. 2A:4A-60 restricts public access to the requested records. Accordingly, the Custodian lawfully denied the Complainant access to said records.



5. The Complainant's requests for item numbers 4, 5 and 6 are invalid under OPRA because they are overly broad and fail to identify specific government records sought. Moreover, because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to conduct research to locate records potentially responsive to the Complainant's request pursuant to the Superior Court's decisions in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007).
6. Because the Custodian can identify the duty shift from the information provided in the Complainant's request, and because a Computer Aided Dispatch system can generate a record of entries from a data base within established time parameters defined by the shift start and end times, request item number 8 does not require the Custodian to conduct research to locate the record and the Custodian has unlawfully denied the Complainant access to this record. Therefore, the Custodian must disclose the record to the Complainant.
7. Because the Custodian has determined that request item number 7 is responsive to the Complainant's request, and there is no legal reason to withhold it from disclosure, the Custodian must disclose the record to the Complainant.
8. **The Custodian shall comply with paragraphs 6 and 7 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if any, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**
9. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 25th Day of April, 2012

Robin Berg Tabakin, Chair
Government Records Council

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: April 27, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 25, 2012 Council Meeting**

**Richard Rivera¹
Complainant**

GRC Complaint No. 2010-275

v.

**Cliffside Park Police Department (Bergen)²
Custodian of Records**

Records Relevant to Complaint: The Complainant requests the following records in electronic format via e-mail:

1. Internal Affairs Annual Summary Reports for 2008-2009.
2. Use of force annual summary reports for 2005-2009.
3. Use of force incident reports for January 1, 2010 to September 30, 2010.
4. Police mobile data terminal (“MDT”) transmissions to and from all terminals from thirty (30) minutes prior to the traffic stop of Mr. Terrance Jones while operating a silver Lincoln Navigator at approximately 9:00 p.m. on August 31, 2010 (hereinafter “vehicle stop”) until thirty (30) minutes thereafter.
5. Police telephone recordings from all recorded phone extensions from thirty (30) minutes prior to the vehicle stop until thirty (30) minutes thereafter.
6. Police radio transmissions on all frequencies and channels from thirty (30) minutes prior to the vehicle stop until thirty (30) minutes thereafter.
7. Mobile video recording of the vehicle stop in DVD or VHS format.
8. Computer Aided Dispatch (“CAD”) entries for the shift that worked at the time of the vehicle stop.
9. Duty roster for police employees on August 31, 2010, including employee and vehicle assignments but excluding undercover officers.³

Request Made: September 30, 2010

Response Made: October 7, 2010

Custodian: Chief Donald V. Keane, Cliffside Park Police Department

GRC Complaint Filed: October 21, 2010⁴

¹ No legal representation listed on record.

² Represented by Christine Gillen, Esq., Diktas Schandler Gillen (Cliffside Park, NJ).

³ The request made reference to the time of the traffic stop on this date; however, the Custodian certified that the record encompassed the entire date.

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

Background

September 30, 2010

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in an e-mail referencing OPRA.

October 7, 2010

Custodian's response to the OPRA request. The Custodian's Counsel responds in writing via letter to the Complainant's OPRA request on the fourth (4th) business day following receipt of such request.⁵ Counsel informs the Complainant that due to the nature and scope of the Complainant's request, the Custodian will need up to fourteen (14) days from October 7, 2010, in order to ensure a complete response.⁶

October 13, 2010

E-mail from the Complainant to the Custodian's Counsel. The Complainant acknowledges receipt of the Custodian's response to his OPRA request. The Complainant informs Counsel that he does not agree to an extension of time beyond October 15, 2010 for the Custodian to fulfill his request. The Complainant states that the "exact request was made of other police agencies simultaneously" and that the other police agencies have already disclosed the requested records to him. The Complainant asks the Custodian to communicate with him via e-mail or facsimile transmission.

October 21, 2010

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

- Custodian's response to the OPRA request dated October 7, 2010
- E-mail from the Complainant to the Custodian dated October 13, 2010

The Complainant states that he provided his OPRA request to the Custodian on October 1, 2010. The Complainant also states that on October 7, 2010, the Custodian's Counsel requested a fourteen (14) day extension of time to fulfill his request. The Complainant states that he informed Counsel that he would agree only to an extension of time until October 15, 2010, otherwise he would file a Denial of Access Complaint. The Complainant contends that the Custodian did not respond to him; therefore, he filed the complaint.

The Complainant does not agree to mediate this complaint.

⁵ The Custodian certifies in the Statement of Information that he received the Complainant's OPRA request on October 1, 2010. The Custodian's copy of the Complainant's request was also date stamped on October 1, 2010.

⁶ Although the Custodian did not specifically state that he needed business days, because municipal police departments do not conduct routine business on weekends and holidays the GRC understands the Custodian's communication to mean business days. Fourteen (14) business days from October 7, 2010 is October 28, 2010.

October 27, 2010

E-mail from the Complainant to the Custodian's Counsel. The Complainant informs Counsel that he filed a Denial of Access Complaint but that he is willing to withdraw the complaint if the Custodian discloses all of the records he requested. The Complainant further states that he is offering to withdraw the complaint in order to allow Cliffside Park officials to save face because he will be part of a television interview regarding his OPRA request activity and, from among dozens of agencies that he requested records, Cliffside Park is the sole agency to deny him requested records.

October 27, 2010

E-mail from the Custodian's Counsel to the Complainant. Counsel informs the Complainant that the Custodian did not deny him access to the requested records, but rather the Custodian informed the Complainant that the Custodian needed a reasonable period of time to address the Complainant's request pursuant to OPRA. Counsel further informs the Complainant that he filed a complaint before the estimated time for the Custodian's response had expired; therefore, in accordance with administrative regulations, the Custodian must address the complaint with the GRC. Counsel advises the Complainant that he may withdraw his complaint if he desires to do so but that the Custodian will address the Complainant's request within a period of time that is reasonable.

October 28, 2010

E-mail from the Complainant to the Custodian's Counsel. The Complainant informs Counsel that he e-mailed and telephoned the Custodian several times prior to filing the complaint but that the Custodian failed to reply to his communications. The Complainant further informs Counsel that it is presently beyond the Custodian's projected fourteen (14) day time period to fulfill the Complainant's request pursuant to the terms of Counsel's letter dated October 7, 2010; however, the Custodian has not yet made the records available. The Complainant states that the Custodian failed to provide any additional extension of time beyond the time period that was set forth in Counsel's letter dated October 7, 2010, and notwithstanding the fact that he filed a complaint, the Custodian can disclose the requested records to him during the pendency of the GRC's adjudication. The Complainant further states that if he does not withdraw the complaint and it proceeds to a GRC adjudication he intends to retain legal counsel, for which the Cliffside taxpayers will be obligated to pay.

January 20, 2011

Request for the Statement of Information ("SOI") sent to the Custodian.

January 31, 2011

Letter from GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for an SOI on January 20, 2011 and to date has not received a response. Further, the GRC states that if the SOI is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

January 31, 2011

E-mail from the Custodian's Counsel to the GRC. Counsel requests a five (5) business day extension of time for the Custodian to prepare and submit the SOI.

January 31, 2011

E-mail from the GRC to the Custodian's Counsel. The GRC grants the Custodian a five (5) business day extension of time to prepare and submit the SOI.

February 8, 2011

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated September 30, 2010
- Custodian's response to the OPRA request dated October 7, 2010
- E-mail from the Complainant to the Custodian's Counsel dated October 27, 2010
- E-mail from the Custodian's Counsel to the Complainant dated October 27, 2010
- E-mail from the Complainant to the Custodian's Counsel dated October 28, 2010⁷

The Custodian certifies that his search for the requested records involved directing Cliffside Park Police Captain Richard Gaito to search for paper records, including Internal Affairs Summary Reports and use of force reports. The Custodian further certifies that his search involved directing Officer Sergio Khanukayev to search for electronic records. The Custodian certifies that the retention schedules for the records that may have been responsive to the request in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM") are as follows:

- Request item number 1 must be retained indefinitely
- Request item number 2 has no DARM disposition schedule
- Request item number 3 has no DARM disposition schedule; however if juveniles are involved the reports must be retained for five (5) years after the juvenile reaches the age of majority
- Request item number 4 has no DARM disposition schedule
- Request item number 5 must be retained for thirty-one (31) days
- Request item number 6 has no DARM disposition schedule
- Request item number 7 must be retained for thirty-one (31) days
- Request item number 8 must be retained indefinitely
- Request item number 9 must be retained for three (3) years

⁷ The Custodian also attached to the SOI copies of all of the records that the Custodian determined were responsive to the Complainant's request and that were not otherwise exempt from disclosure. The Custodian did not state in the SOI the reason why the copies of the records were attached to the SOI; however, the Custodian did certify that a copy of the SOI was being provided to the GRC and the Complainant simultaneously. It is clear, therefore, that the Custodian intended to disclose the records attached to the SOI to the Complainant by copying the Complainant with the SOI on February 8, 2011.

The Custodian certifies that the Council should dismiss the complaint because the Custodian did not deny the Complainant's request and because the Complainant filed his complaint before allowing the Custodian the time the Custodian requested to effectively analyze and respond to the request. The Custodian certifies that he received the Complainant's OPRA request on October 1, 2010 and that he responded to said request in writing on October 7, 2010, informing the Complainant that due to the nature and scope of the Complainant's request, the Custodian would need up to fourteen (14) additional days to ensure a complete response. The Custodian certifies that the Complainant refused to allow the Custodian the fourteen (14) additional days and instead filed a Denial of Access Complaint. The Custodian certifies that he acted properly by informing the Complainant that he would need additional time to analyze the request, consult with legal counsel and respond to the Complainant. The Custodian cites New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 175 (App. Div. 2007) in support of the Custodian's assertion; that case stands for the proposition that a custodian need not comply with an OPRA request within the statutorily-mandated seven (7) day period if (a) additional time is reasonably required considering the magnitude and complexity of the request and (b) the custodian so notifies the requestor. The Custodian also certifies that a requestor who seeks to enforce his rights under OPRA prior to expiration of the extended period identified by a custodian does so prematurely and cannot be deemed a "prevailing party" pursuant to N.J.S.A. 47:1A-6.

The Custodian certifies that he located the records that were responsive to request item number 1 and attached copies of the records to the SOI. The Custodian further certifies that no records responsive to request item number 2 exist. The Custodian certifies that he located seventeen (17) records that were responsive to request item number 3 and attached copies of those records to the SOI. The Custodian further certifies that two (2) records responsive to request item number 3 were located but are exempt from disclosure pursuant to N.J.S.A. 2A:4A-60 because they involve juveniles. The Custodian also certifies that twenty (20) records relating to medical transportation or treatment were located but they are exempt from disclosure pursuant to Executive Order 26 (McGreevey, 2002) which exempts from disclosure information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation. Moreover, the Custodian certifies that records relating to medical transportation or treatment are exempt from disclosure under HIPAA.⁸

The Custodian certifies that the Complainant made a number of broad requests for entire categories of records without identifying the records he is seeking. The Custodian certifies that the Complainant's request for items numbered 4, 5, 6, 8 and 9 is overly broad because the Complainant only identified a time frame within which the requested records may have been created. The Custodian cites MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) as authority for the Custodian's argument that he is not obligated to research the requested records to determine when they may have been created in order to ascertain whether those records fall within the scope of the request.

⁸ The Custodian is referring to the Health Insurance Portability and Accountability Act of August 1996.

The Custodian certifies that request item number 7, mobile video recordings of a traffic stop, can be retrieved, copied, and disclosed to the Complainant. The Custodian further certifies that request item number 9, a police duty roster, can also be disclosed to the Complainant.

The Custodian argues that criminal investigatory records are exempt from the statutory definition of government records required to be made available upon request under OPRA. The Custodian further argues that a criminal investigatory record is any “record which is not required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding” under N.J.S.A. 47:1A-1.1. The Custodian cites to Janeczko v. New Jersey Department of Law and Public Safety, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004), wherein the Council held that criminal investigatory records are “records involving all manner of crimes, resolved or unresolved, and include information that is part and parcel of an investigation, confirmed and unconfirmed” in support of his argument. The Custodian also argues that a government record specifically excludes “inter-agency or intra-agency advisory, consultative, or deliberative material” pursuant to N.J.S.A. 47:1A-1.1.

Analysis

Whether the Custodian properly responded to the Complainant’s September 30, 2010 OPRA request?

OPRA provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof. If the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to [OPRA], the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record.” (Emphasis added). N.J.S.A. 47:1A-5.g.

OPRA also 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... If the government record is in storage or archived, the requestor shall be so advised within seven business days after the custodian receives the request. The requestor shall be advised by the custodian when the record can be made available. If the

record is not made available by that time, access shall be deemed denied.”(Emphasis added.) N.J.S.A. 47:1A-5.i.

Here, it is undisputed that the Complainant’s September 30, 2010 OPRA request was delivered to the Custodian on October 1, 2010. It is also undisputed that the Custodian responded to the Complainant’s request in writing on October 7, 2010, informing the Complainant that due to the nature and scope of the Complainant’s request the Custodian would need up to fourteen (14) additional days to analyze the request, consult with legal counsel, and respond to the Complainant.

The Complainant informed the Custodian that if the Custodian did not fulfill the Complainant’s OPRA request by October 15, 2010, he would file a Denial of Access Complaint. Subsequently, the Complainant filed a complaint on October 21, 2010 alleging that he was denied access to all of the records he had requested. The Custodian, citing as legal authority New Jersey Builders, *supra*, certified that he acted properly by informing the Complainant that he would need additional time to properly fulfill the Complainant’s request. Accordingly, the Custodian argued that the Council should dismiss the Complainant’s complaint.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.⁹ Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request 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 (Interim Order October 31, 2007).

In Starkey v. NJ Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009), the custodian provided the complainant with a written response to his OPRA request on the second (2nd) business day following receipt of said request in which the custodian requested an extension of time to respond to said request and provided the complainant with an anticipated deadline date upon which the custodian would respond to the request. The Council held that “because the custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g. [and] N.J.S.A. 47:1A-5.i.”

⁹ It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

Similarly in this complaint, the Custodian provided the Complainant with a written response to his OPRA request on the fourth (4th) business day and requested an extension of time up to fourteen (14) business days to fulfill the Complainant's request.

Therefore, because the Custodian notified the Complainant in writing that he would need an extension of time within the statutorily mandated seven (7) business days and provided an anticipated deadline date upon which the request would be completed, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Starkey, *supra*.

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

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

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

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

OPRA also 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.

Moreover, N.J.S.A. 2A:4A-60 provides that:

“(a)...records of law enforcement agencies, pertaining to juveniles charged as a delinquent or found to be part of a juvenile-family crisis, shall be strictly safeguarded from public inspection...(h) Whoever, except as provided by law, knowingly discloses...information concerning a particular juvenile derived from records listed in subsection (a)...shall, upon conviction thereof, be guilty of a disorderly persons offense.” (Emphasis added.) N.J.S.A. 2A:4A-60.

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.

Request item number 1 - Internal Affairs Annual Summary Reports for 2008-2009.

Request item number 3 - seventeen (17) use of force incident reports for January 1, 2010 to September 30, 2010.

Request item number 9 - duty roster for police employees working on August 31, 2010, including employee and vehicle assignments but excluding undercover officers.

The Complainant informed the Custodian in his response to the Complainant’s OPRA request dated October 7, 2010 that he would need fourteen (14) business days from the date of his response in order to analyze the request, consult with legal counsel and respond to the Complainant. Therefore, because the Custodian did not request a further extension of time, he was obligated to complete his response to the Complainant no later than October 28, 2010.

However, in a letter from the Custodian’s Counsel to the Complainant dated October 27, 2010, Counsel informed the Complainant that because the Complainant filed a complaint before the time for the Custodian’s response had expired, administrative regulations required the Custodian to address the complaint with the GRC. Thereafter, the Custodian located the above-listed records responsive to the Complainant’s request, which he did not disclose to the Complainant until he submitted the SOI to the GRC on February 8, 2011.

Accordingly, because there is no provision in OPRA which provides that, once a Denial of Access Complaint is filed, records responsive to the Complainant’s request shall be withheld from disclosure to the Complainant pending the initiation of the GRC adjudication process, the Custodian unlawfully withheld from disclosure request item number 1, seventeen (17) records of request item number 3, and request item number 9 until the date the Custodian submitted the SOI to the GRC.¹⁰

¹⁰ In Rivera v. Rutgers, The State University of New Jersey, GRC Complaint No. 2009-311 (January 2012), the Council, citing McElwee v. Borough of Fieldsboro, 400 N.J. Super. 388, 391 (App. Div. 2008), Richard Rivera v. Cliffside Park Police Department (Bergen), 2010-275 – Findings and Recommendations of the Executive Director 9

Request item number 2 - use of force annual summary reports for 2005-2009.

The Custodian certified in the SOI that no use of force annual summary reports for the years 2005-2009 exists. Further, the Complainant provided no evidence to refute the Custodian's certification.

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 and the complainant did not provide any evidence to refute the custodian's certification. 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.

Therefore, because the Custodian certified in the SOI dated February 8, 2011 that no records responsive to request item number 2 exist, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to said records pursuant to N.J.S.A. 47:1A-6 and Pusterhofer, supra.

Request item number 3 - two (2) use of force incident reports for January 1, 2010 to September 30, 2010.

The Custodian certifies that two (2) of the records responsive to request item number 3 involved juveniles and were therefore withheld from disclosure pursuant to N.J.S.A. 2A:4A-60 which proscribes disclosure of records involving juveniles.

N.J.S.A. 2A:4A-60 provides, in relevant part, that:

"... a. social, medical, psychological, legal and other records of the court and probation division, and records of law enforcement agencies, pertaining to juveniles charged as a delinquent or found to be part of a juvenile-family crisis, shall be strictly safeguarded from public inspection..."

The statute goes on to provide that:

determined that duty logs include details regarding surveillance techniques and staffing levels. As such, the Council concluded that if disclosed such information could pose a risk to the safety of police personnel and such records were therefore exempt from the definition of a government record pursuant to N.J.S.A. 47:1A-1.1. In the instant complaint, however, the Custodian determined that request item number 9, which is a duty roster of police employees, was not exempt from disclosure. Because the Custodian determined that the record was subject to disclosure, and in fact did disclose it to the Complainant, he was required under OPRA to have done so in a timely manner.

“... h. whoever, except as provided by law, knowingly discloses, publishes, receives, or makes use of or knowingly permits the unauthorized use of information concerning a particular juvenile derived from records listed in subsection a. or acquired in the course of court proceedings, probation, or police duties, shall, upon conviction thereof, be guilty of a disorderly persons offense...”

Because the Custodian certified that two (2) records responsive to request item number 3 are prohibited from disclosure pursuant to the provisions of N.J.S.A. 2A:4A-60, and because that statute is a law that contains provisions not abrogated by OPRA pursuant to N.J.S.A. 47:1A-9.a., the confidentiality provisions of N.J.S.A. 2A:4A-60 restrict public access to the requested records. Accordingly, the Custodian lawfully denied the Complainant access to said records.

The Custodian also certified that twenty (20) records responsive to request item number 3 related to medical transportation or treatment, and as such, are exempt from disclosure pursuant to Executive Order 26 (McGreevey, 2002) which exempts from disclosure information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation. The Custodian further certified that these records are also exempt from disclosure under the Health Insurance Portability and Accountability Act. However, the Complainant only requested use of force incident reports; he did not request the medical transportation or treatment records. Accordingly, because medical transportation or treatment records are not records responsive to the Complainant’s request, an analysis of their exemption from disclosure pursuant to certain legal provisions is moot.

Request item number 4 - MDT transmissions to and from all terminals from thirty (30) minutes prior to the vehicle stop until thirty (30) minutes thereafter.

Request item number 5 - police telephone recordings from all recorded phone extensions from thirty (30) minutes prior to the vehicle stop until thirty (30) minutes thereafter.

Request item number 6 - police radio transmissions on all frequencies and channels from thirty (30) minutes prior to the vehicle stop until thirty (30) minutes thereafter.

Request item number 8 - CAD entries for the shift that worked at the time of the vehicle stop.¹¹

The Custodian certified that the records responsive to request items numbered 4, 5, 6 and 8 are exempt from disclosure because the Complainant in his request failed to identify with specificity the records sought. The Custodian certified that the Complainant identified a time frame within which the records may have been created and left it to the

¹¹ The Custodian also listed request item number 9, which is a duty roster of police employees, as being overly broad and therefore exempt from disclosure; however, the Custodian previously stated that this record was not exempt from disclosure and in fact disclosed it to the Complainant on February 8, 2011. The disclosure of police duty logs is analyzed *supra*.

Custodian to conduct research to determine if the records had been created, and if so, whether the records fell within the scope of the request. The Custodian cited MAG, supra and Gannett New Jersey Partners LP v. County of Middlesex, 379 N.J. Super. 205, 211 (App. Div. 2005), in support of his argument.

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). As the court noted in invalidating MAG's request under OPRA:

"Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past. Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted." *Id.* at 549.

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.*

In addition, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),¹² 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."¹³

Moreover, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), the court enumerated the responsibilities of a custodian and a requestor as follows:

"OPRA identifies the responsibilities of the requestor and the agency relevant to the prompt access the law is designed to provide. The

¹² Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹³ As stated in Bent, supra.

custodian, who is the person designated by the director of the agency, N.J.S.A. 47:1A-1.1, must adopt forms for requests, locate and redact documents, isolate exempt documents, assess fees and means of production, identify requests that require "extraordinary expenditure of time and effort" and warrant assessment of a "service charge," and, when unable to comply with a request, "indicate the specific basis." N.J.S.A. 47:1A-5(a)-(j). The requestor must pay the costs of reproduction and submit the request with information that is essential to permit the custodian to comply with its obligations. N.J.S.A. 47:1A-5(f), (g), (i). *Research is not among the custodian's responsibilities.*" (Emphasis added), NJ Builders, 390 N.J. Super. at 177.

Moreover, 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 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..." Accordingly, the test under MAG then, is whether a requested record is a *specifically identifiable* government record.

Under such rationale, the GRC has repeatedly found that blanket requests are not valid OPRA requests. In the matter of Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009), the relevant part of the Complainant's request sought:

2. Item No. 2: "From the Borough Engineer's files: all engineering documents for all developments or modifications to Block 25, Lot 28; Block 25, Lot 18; Block 23, Lot 1; Block 23, Lot 1.02.
3. Item No. 3: From the Borough Engineer's files: all engineering documents for all developments or modifications to North St., to the south and east of Wilson St.
4. Item No. 4: From the Borough Attorney's files: all documents related to the development or modification to Block 25, Lot 28; Block 25, Lot 18; Block 23, Lot 1; Block 23, Lot 1.02.
5. Item No. 5: From the Borough Attorney's files: all documents related to the development or modification to North Street, to the south and east of Wilson St."

In reviewing the complainant's request, the Council found that "[b]ecause the Complainant's OPRA requests # 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).”

This matter is substantially different from the facts presented in Burnett v. County of Gloucester, 415 N.J. Super. 506 (App. Div. 2010). In Burnett, the plaintiff appealed from an order of summary judgment entered against him in his suit to compel production by the County of Gloucester of documents requested pursuant to OPRA, consisting of “[a]ny and all *settlements, releases or similar documents* entered into, approved or accepted from 1/1/2006 to present.” *Id.* at 508. (Emphasis added). The Appellate Division determined that the request sought a specific type of document, although it did not specify a particular case to which such document pertained, and was therefore not overly broad. *Id.* at 515-16.

In the instant case, for request item numbers 4, 5 and 6, the Complainant uses the approximate time of a vehicle stop on August 31, 2010 as a starting point from which the Custodian must search the records up to one-half hour before, and up to one-half hour after, in order to find all records responsive to the Complainant’s request. Moreover, request item numbers 4, 5 and 6 require the Custodian to search MDT transmissions to and from all terminals, police telephone recordings from all recorded phone extensions, and police radio transmissions on all frequencies and channels, respectively.

In Rivera v. Wall Police Department (Monmouth), GRC Complaint No. 2008-281 (July 2010), the Complainant’s OPRA request sought similar records to those requested in the instant complaint. In that complaint the Complainant requested, *inter alia*, the following records:

- An MDT transmission for August 4, 2007 from 4:00 p.m. to 4:30 p.m.
- All radio transmissions for August 4, 2007 from 4:00 p.m. to 4:30 p.m.
- All recorded telephone tapes for August 4, 2007 from 4:00 p.m. to 4:30 p.m.

The Council determined that the Complainant’s OPRA request was overly broad and failed to specifically identify the records sought, and because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to conduct research to locate records potentially responsive to the Complainant’s request pursuant to the Superior Court’s decisions in MAG, *supra*, Bent, *supra*, and New Jersey Builders, *supra*.

In the matter before the Council, the Complainant’s request item numbers 4, 5 and 6 are very similar to the requests in Rivera v. Wall Police Department (Monmouth), GRC Complaint No. 2008-281 (July 2010), and here the analysis calls for an equivalent conclusion.

Accordingly, the Complainant’s requests for item numbers 4, 5 and 6 are invalid under OPRA because they are overly broad and fail to identify specific government records sought. Moreover, because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to

conduct research to locate records potentially responsive to the Complainant's request pursuant to the Superior Court's decisions in MAG, supra, Bent, supra, and New Jersey Builders, supra.

Conversely, the Complainant's request for item number 8, which seeks CAD entries for the shift that worked at the time of the vehicle stop, is not overly broad. Here, it is clear that there was a shift working on August 31, 2010 at approximately 9:00 p.m.¹⁴ Whether such a shift was working from 3:00 p.m. until 11:00 p.m., 4:00 p.m. until midnight, or some other such time configuration is immaterial because the Custodian can identify the shift based upon the date and approximate time of the vehicle stop. The Complainant has requested the CAD entries for the time encompassed by the shift. If the municipality had a CAD system in place at the time of the vehicle stop, and there is nothing in the evidence of record to indicate the municipality did not have a CAD system, the requested record can be generated from the data base using the shift times as parameters. The generation of this record does not require the Custodian to conduct research to locate the record.

Therefore, because the Custodian can identify the duty shift from the information provided in the Complainant's request, and because a CAD system can generate a record of entries from a data base within established time parameters defined by the shift start and end times, request item number 8 does not require the Custodian to conduct research to locate the record and the Custodian has unlawfully denied the Complainant access to this record. Therefore, the Custodian must disclose the record to the Complainant.

Request item number 7 - mobile video recording of the vehicle stop in DVD or VHS format

The Custodian in the SOI certified that the record responsive to request item number 7 was located, determined to be retrievable, and could be copied and disclosed to the Complainant. The Custodian, however, failed to disclose the record to the Complainant within the statutorily-mandated time period, as extended, pending initiation of the GRC's adjudication. There is no provision in OPRA which provides that, once a Denial of Access Complaint is filed, records responsive to the Complainant's request shall be withheld from disclosure to the Complainant pending the initiation of the GRC adjudication process; therefore the Custodian must disclose this record to the Complainant.

Accordingly, because the Custodian has determined that request item number 7 is responsive to the Complainant's request, and there is no legal reason to withhold it from disclosure, the Custodian must disclose the record to the Complainant.

The Custodian in the SOI also argued that requested records are exempt from disclosure because they constitute criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1. and Janeczko, supra. However, the Custodian failed to identify any records responsive to the Complainant's request that were alleged to constitute criminal

¹⁴ This is the time and date the Complainant told the Custodian that the vehicle stop occurred.

investigatory records. Likewise, the Custodian certified that a government record specifically excludes “inter-agency or intra-agency advisory, consultative, or deliberative material” pursuant to N.J.S.A. 47:1A-1.1., but again, he did not identify any records responsive to the Complainant’s request that were alleged to constitute such material. As such, the GRC could not analyze the merits of these asserted grounds for denial of access to any of the requested records.

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

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian notified the Complainant in writing that he would need an extension of time within the statutorily mandated seven (7) business days and provided an anticipated deadline date upon which the request would be completed, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Starkey v. NJ Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009).
2. Because there is no provision in OPRA which provides that, once a Denial of Access Complaint is filed, records responsive to the Complainant’s request shall be withheld from disclosure to the Complainant pending the initiation of the GRC adjudication process, the Custodian unlawfully withheld from disclosure request item number 1, seventeen (17) records of request item number 3, and request item number 9 until the date the Custodian submitted the Statement of Information to the GRC.
3. Because the Custodian certified in the Statement of Information dated February 8, 2011 that no records responsive to request item number 2 exist, and because there is no credible evidence in the record to refute the Custodian’s certification, the Custodian did not unlawfully deny access to said records pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. Because the Custodian certified that two (2) records responsive to request item number 3 are prohibited from disclosure pursuant to the provisions of N.J.S.A. 2A:4A-60, and because that statute is a law that contains provisions not abrogated by OPRA pursuant to N.J.S.A. 47:1A-9.a., the confidentiality provisions of N.J.S.A. 2A:4A-60 restricts public access to the requested

records. Accordingly, the Custodian lawfully denied the Complainant access to said records.

5. The Complainant's requests for item numbers 4, 5 and 6 are invalid under OPRA because they are overly broad and fail to identify specific government records sought. Moreover, because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to conduct research to locate records potentially responsive to the Complainant's request pursuant to the Superior Court's decisions in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007).
6. Because the Custodian can identify the duty shift from the information provided in the Complainant's request, and because a Computer Aided Dispatch system can generate a record of entries from a data base within established time parameters defined by the shift start and end times, request item number 8 does not require the Custodian to conduct research to locate the record and the Custodian has unlawfully denied the Complainant access to this record. Therefore, the Custodian must disclose the record to the Complainant.
7. Because the Custodian has determined that request item number 7 is responsive to the Complainant's request, and there is no legal reason to withhold it from disclosure, the Custodian must disclose the record to the Complainant.
8. **The Custodian shall comply with paragraphs 6 and 7 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if any, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹⁵ to the Executive Director.¹⁶**
9. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

¹⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

¹⁶ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Prepared By: John E. Stewart, Esq.

Approved By: Catherine Starghill, Esq.
Executive Director

April 18, 2012