



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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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

Raheem Taylor
Complainant

Complaint No. 2010-319

v.

New Jersey Department of Corrections
Custodian of Record

At the May 29, 2012 public meeting, the Government Records Council (“Council”) considered the May 22, 2012 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 although the New Jersey Department of Corrections has already submitted compliance in response to the Council’s March 27, 2012 Interim Order, in order to prevent the unnecessary expenditure of administrative costs by the GRC to process this matter for the benefit of the parties, said complaint should be dismissed pursuant to Swindell v. New Jersey Department of Environmental Protection and Energy, Bureau of Coastal and Land Use Enforcement, OAL Docket No. ESA 5675-92 (Initial Decision 1993), because the GRC cannot contact the Complainant and because the Complainant has not made attempts to contact the GRC regarding this complaint. *See also Siddeeq v. New Jersey Department of Corrections*, GRC Complaint No. 2009-182 and 2009-183 (November 2009).

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**

**Raheem Taylor¹
Complainant**

GRC Complaint No. 2010-319

v.

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

Records Relevant to Complaint: Documents showing the names and titles of each employee assigned to the New Jersey State Prison's ("NJSP") mailroom including but not limited to whether each employee is full or part time and duties.

Request Made: September 23, 2010³

Response Made: October 6, 2010

Custodian: Deidre Fedkenheuer⁴

GRC Complaint Filed: December 3, 2010⁵

Background

March 27, 2012

Government Records Council's ("Council") Interim Order. At its March 27, 2012 public meeting, the Council considered the March 20, 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. The Complainant's OPRA request for "[t]he names and titles of each employee assigned to the New Jersey State Prison's mailroom including but not limited to whether full or part time ..." is a valid OPRA request pursuant to N.J.S.A. 47:1A-10 and Jackson v. Kean University, GRC Complaint No. 2002-98 (February 2004). The GRC notes that the portion of the Complainant's OPRA request seeking "duties" is not specifically identified in N.J.S.A. 47:1A-10 as personnel information required to be disclosed and thus is the only portion of the request seeking information that is invalid. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The Complainant identifies the date of his OPRA request as October 12, 2010; however, the evidence of record indicates that the request at issue is dated September 23, 2010.

⁴ Ms. Wendy Myers of the New Jersey Department of Corrections verbally notified the GRC on August 15, 2011 that Mr. John Falvey, Esq., replaced Ms. Deirdre Fedkenheuer as Custodian of Record.

⁵ The GRC received the Denial of Access Complaint on said date.

Super. 534, 546 (App. Div. 2005), *Bent v. Stafford Police Department*, 381 N.J. Super. 30, 37 (App. Div. 2005), *New Jersey Builders Association v. New Jersey Council of Affordable Housing*, 390 N.J. Super. 166, 180 (App. Div. 2007) and *LaMantia v. Jamesburg Public Library (Middlesex)*, GRC Complaint No. 2008-140 (February 2009).

2. Pursuant to *Paff v. NJ Department of Labor, Board of Review*, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the Custody Staff Daily Shift Roster to determine the validity of the Custodian's assertion that the record is exempt from disclosure because said disclosure would "... jeopardize the security ..." of New Jersey State Prison and its employees and would "create a risk to the safety of persons [and] property" at New Jersey State Prison pursuant to N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver⁶ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 2 above), a document or redaction index⁷, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4⁸, that the record provided is the record requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. The Council defers analysis of whether the original Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

March 29, 2012

Council's Interim Order distributed to the parties.

March 26, 2012

E-mail from the Custodian to the GRC. The Custodian states that the Complainant's OPRA request sought Custody Staff Daily Shift Rosters ("Rosters") for the time period of March 1, 2010 through October 12, 2010 for NJSP. The Custodian requests that the GRC advise whether it wishes to receive all 226 Rosters or if one (1) Roster would be sufficient. The Custodian states that if the GRC wishes to receive all Rosters, he will need an extension of time to comply with the Council's Order.

March 30, 2012

E-mail from the GRC to the Custodian. The GRC states that it will need to review all of the responsive Rosters.

⁶ The *in camera* record may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁷ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁸ "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."

March 30, 2012

E-mail from the Custodian to the GRC. The Custodian requests an extension of time to comply with the Council's Order. The Custodian states that nine (9) copies of the Rosters will amount to 20,340 pages. The Custodian further states that he will also explore providing the responsive records to the GRC electronically.

March 30, 2012

E-mail from the GRC to the Custodian. The GRC states that the current prescribed deadline to comply with the Council's Order is April 5, 2012. The GRC states that it will thus grant the Custodian an extension of time until April 13, 2012 to comply with said Order.

April 5, 2012

E-mail from the Custodian to the GRC (with attachment). The Custodian states that attached is the record responsive to the Complainant's OPRA request. The Custodian states that the Information Technology ("IT") Department was able to sort through the Rosters to create a spreadsheet version. The Custodian states that this document negates the need to provide over 20,000 pages of records to the GRC for an *in camera* review. The Custodian states that the New Jersey Department of Corrections ("DOC") maintains that providing any records relating to staffing jeopardizes the safety and security of that facility by allowing persons to assess the facility's weakness through allocation of staff.

The Custodian further requests that the GRC review the U.S. Supreme Court's holding in Florence v. Board of Chosen Freeholders of County of Burlington, No. 10-945 (April 2012). The Custodian states that the Court cites a long line of case law giving deference to a correctional agency's decisions in matters of safety and security.

April 9, 2012

The Complainant's copy of the Council's Order is returned to the GRC for the following reason: "Correct Street [No.] Needed, Not Delivered."

April 13, 2012

E-mail from the GRC to the Custodian. The GRC states that it is in receipt of the spreadsheet created by DOC's IT Department. The GRC requests that the Custodian provide three (3) samples of the actual Rosters so that the GRC may verify that the spreadsheet is a sufficient substitute for the actual Rosters. The GRC further states that it has not yet received the Custodian's certified confirmation of compliance with the Council's Order of which receipt was required by the end of the day.

The GRC thus extends the Custodian's deadline to comply with the Council's Order until April 18, 2012 to allow the Custodian time to provide the requested Rosters and certified confirmation of compliance.

April 13, 2012

E-mail from the GRC to the Complainant. The GRC states that it recently sent the Complainant a copy of the Council's Order via Overnight UPS to the address on file. The GRC states that UPS returned the package indicating that the GRC had the wrong street

number. The GRC thus requests that the Complainant provide an updated mailing address by April 18, 2012.⁹

April 16, 2012

Custodian's response to the Council's Interim Order. The Custodian certifies that pursuant to the Council's Order, he provided the record requested by the GRC for an *in camera* review in a spreadsheet on April 5, 2012. The Custodian certifies that the record provided is the record requested by the GRC. The Custodian certifies that attached are copies of three (3) daily shift rosters that the GRC requested on April 13, 2012 to compare with the spreadsheet it received on April 5, 2012.

Analysis

Whether the Council should dismiss this complaint?

OPRA provides that:

“[t]he Government Records Council shall...receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian...” N.J.S.A. 47:1A-7.b.

The Complainant contacted the GRC upon his release from incarceration on May 29, 2011 and provided the GRC with an updated mailing address and e-mail address. However, the GRC has attempted to contact the Complainant regarding this complaint at the street and e-mail address for the Complainant known by the GRC with no success.

In Swindell v. New Jersey Department of Environmental Protection and Energy, Bureau of Coastal and Land Use Enforcement, OAL Docket No. ESA 5675-92 (Initial Decision 1993), the petitioner appealed the assessment of a penalty pursuant to the Waterfront Development Statute. In response to said appeal, the Office of Administrative Law scheduled a mandatory early settlement conference at which the petitioner failed to appear. In the Administrative Law Judge's ("ALJ") Initial Decision, the ALJ found that:

“[a]fter having given petitioner Swindell every opportunity to contact either the deputy attorney general or this tribunal to afford an explanation for his nonappearance and noncontact regarding this matter subsequent to the filing of his appeal, I **FIND** that petitioner Swindell has unilaterally disregarded his obligations in this matter even though it was he who initiated the process in the first instance. In the process, I **FIND** that petitioner Swindell has, for reasons unknown to this tribunal, caused the expenditure of unnecessary funds in order to prepare for a defense of his appeal, as well as the administrative costs generated at the Office of Administrative Law in order to process this matter for the benefit of the parties.” *Id.*

⁹ The Complainant did not respond to the GRC's request for an updated address.

The New Jersey Department of Environmental Protection accepted the ALJ's Initial Decision on March 1, 1993.

Similarly in this complaint, the GRC has made several attempts to contact the Complainant with no success and the Complainant has failed to make any attempt to contact the GRC regarding this complaint since his release from custody on May 29, 2011.

Therefore, although DOC has already submitted compliance in response to the Council's March 27, 2012 Interim Order, in order to prevent the unnecessary expenditure of administrative costs by the GRC to process this matter for the benefit of the parties, said complaint should be dismissed pursuant to Swindell, supra, because the GRC cannot contact the Complainant and because the Complainant has not made attempts to contact the GRC regarding this complaint. *See also* Siddeeq v. New Jersey Department of Corrections, GRC Complaint No. 2009-182 and 2009-183 (November 2009).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that although the New Jersey Department of Corrections has already submitted compliance in response to the Council's March 27, 2012 Interim Order, in order to prevent the unnecessary expenditure of administrative costs by the GRC to process this matter for the benefit of the parties, said complaint should be dismissed pursuant to Swindell v. New Jersey Department of Environmental Protection and Energy, Bureau of Coastal and Land Use Enforcement, OAL Docket No. ESA 5675-92 (Initial Decision 1993), because the GRC cannot contact the Complainant and because the Complainant has not made attempts to contact the GRC regarding this complaint. *See also* Siddeeq v. New Jersey Department of Corrections, GRC Complaint No. 2009-182 and 2009-183 (November 2009).

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

May 25, 2012



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

INTERIM ORDER

March 27, 2012 Government Records Council Meeting

Raheem Taylor
Complainant

Complaint No. 2010-319

v.

New Jersey Department of Corrections
Custodian of Record

At the March 27, 2012 public meeting, the Government Records Council (“Council”) considered the March 20, 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. The Complainant’s OPRA request for “[t]he names and titles of each employee assigned to the New Jersey State Prison’s mailroom including but not limited to whether full or part time ...” is a valid OPRA request pursuant to N.J.S.A. 47:1A-10 and Jackson v. Kean University, GRC Complaint No. 2002-98 (February 2004). The GRC notes that the portion of the Complainant’s OPRA request seeking “duties” is not specifically identified in N.J.S.A. 47:1A-10 as personnel information required to be disclosed and thus is the only portion of the request seeking information that is invalid. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) and LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009).
2. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the Custody Staff Daily Shift Roster to determine the validity of the Custodian’s assertion that the record is exempt from disclosure because said disclosure would “... jeopardize the security ...” of New Jersey State Prison and its employees and would “create a risk to the safety of persons [and] property” at New Jersey State Prison pursuant to N.J.S.A. 47:1A-1.1.



3. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 2 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4³, that the record provided is the record requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. The Council defers analysis of whether the original 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 27th Day of March, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Catherine Starghill, Executive Director
Government Records Council

Decision Distribution Date: March 29, 2012

¹ The *in camera* record may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

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

³ "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."

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 27, 2012 Council Meeting**

**Raheem Taylor¹
Complainant**

GRC Complaint No. 2010-319

v.

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

Records Relevant to Complaint: Documents showing the names and titles of each employee assigned to the New Jersey State Prison's ("NJSP") mailroom including but not limited to whether each employee is full or part time and duties.

Request Made: September 23, 2010³

Response Made: October 6, 2010

Custodian: Deidre Fedkenheuer⁴

GRC Complaint Filed: December 3, 2010⁵

Background

September 23, 2010

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.

October 6, 2010

Custodian's response to the OPRA request. The Custodian responds in writing via letter to the Complainant's OPRA request on the same day as receipt of such request.⁶ The Custodian requests that the Complainant clarify his request by providing a specific time period within which the Custodian can focus her search.

October 12, 2010

Letter from the Complainant to the Custodian. The Complainant states that he is in receipt of the Custodian's October 6, 2010 response. The Complainant states that the applicable time frame is between March 2010 and the present. The Complainant further

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The Complainant identifies the date of his OPRA request as October 12, 2010; however, the evidence of record indicates that the request at issue is dated September 23, 2010.

⁴ Ms. Wendy Myers of the New Jersey Department of Corrections verbally notified the GRC on August 15, 2011 that Mr. John Falvey, Esq., replaced Ms. Deirdre Fedkenheuer as Custodian of Record.

⁵ The GRC received the Denial of Access Complaint on said date.

⁶ The Custodian certifies in the Statement of Information that she received the Complainant's OPRA request on October 6, 2010.

notes that the Custodian only needs to provide names and titles for each individual identified.

October 25, 2010

Letter from the Custodian to the Complainant. The Custodian states that she is in receipt of the Complainant's October 12, 2010 letter. The Custodian states that after a review of the Complainant's OPRA request, the New Jersey Department of Corrections ("DOC") has determined that the responsive information is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1., which provides that:

"[a] government record shall not include the following information which is deemed to be confidential ... Emergency or security information or procedures which, if disclosed, would jeopardize the security of the building or facility or persons therein." *Id.*

The Custodian states that the Complainant's OPRA request is denied.

Additionally, the Custodian states that the Complainant's OPRA request is invalid because it is a request for information. The Custodian states that OPRA only requires a response to requests for specific records and not information. The Custodian further states that OPRA does not require custodians to create records. The Custodian states that an OPRA request is also invalid when it requires a custodian to conduct research and correlate data from various records. *See* MAG Entertainment v. Div. of ABC, 375 N.J. Super. 534 (App. Div. 2005).

December 3, 2010

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

The Complainant states that he submitted an OPRA request to DOC seeking records showing the names and titles of employees in the mailroom. The Complainant states that the Custodian denied access to the records sought on October 25, 2010. The Complainant contends that the Custodian's denial of access is unlawful and unreasonable.

The Complainant agrees to mediate this complaint.

December 16, 2010

Offer of Mediation sent to the Custodian.

December 17, 2010

The Custodian agrees to mediation.

December 21, 2010

Complaint referred to mediation.

March 4, 2011

Complaint referred back from mediation at the request of the Complainant.

March 16, 2011

Letter from the GRC to the Complainant. The GRC informs the Complainant that he has the opportunity to amend this Denial of Access Complaint prior to the GRC's request for the Statement of Information ("SOI") from the Custodian. The GRC states that the Complainant's response is due by close of business on March 23, 2011.⁷

April 15, 2011

Request for the SOI sent to the Custodian.

April 29, 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 April 15, 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.

May 4, 2011

E-mail from Ms. Wendy Myers ("Ms. Myers"), Secretarial Assistant III, to the GRC. Ms. Myers requests an extension of time until May 10, 2011 to submit the requested SOI.

May 4, 2011

E-mail from the GRC to Ms. Myers. The GRC grants Ms. Myers an extension of time until May 10, 2011 to submit the requested SOI.

May 10, 2011

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated September 23, 2010 with DOC's date stamp thereon dated October 6, 2010.
- Letter from the Custodian to the Complainant dated October 6, 2010.
- Letter from the Complainant to the Custodian dated October 12, 2010.
- Letter from the Custodian to the Complainant dated October 25, 2010.

The Custodian certifies that the responsive records must be maintained for three (3) years in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management.⁸

The Custodian certifies that she received the Complainant's OPRA request on October 6, 2010. The Custodian certifies that she responded in writing on the same day requesting clarification of a specific time period within which the records sought would fall. The Custodian certifies that she received the Complainant's letter providing a specific time frame on October 20, 2010. The Custodian certifies that after receiving the Complainant's letter, DOC determined that the only record containing the responsive information was the "Custody Staff Daily Shift Roster" ("Roster"). The Custodian

⁷ The Complainant did not provide an amended Denial of Access Complaint.

⁸ The Custodian did not certify to the search undertaken to locate the records responsive as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).

certifies that the Roster contains such data as the staff member's name, start time, assignment, assignment location, etc.

The Custodian certifies that DOC's special legal advisor reviewed the Roster and determined that disclosure of the record, even if redacted, would pose a significant safety and security risk if released to the Complainant, who is currently incarcerated in NJSP. The Custodian certifies that DOC's regulations also prohibit the Complainant from possessing the Roster. *N.J.A.C.* 10A:3-6.5.

The Custodian certifies that she responded to the Complainant in writing on October 25, 2010 denying access to the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-1.1. The Custodian certifies that she also advised the Complainant that his request was invalid because it sought information pursuant to MAG.

February 16, 2012

Letter from the GRC to the current Custodian. The GRC states that its regulations provide that "[t]he Council, acting through its Executive Director, may require custodians to submit, within prescribed time limits, additional information deemed necessary for the Council to adjudicate the complaint." *N.J.A.C.* 5:105-2.4(1). The GRC states that it has reviewed the parties' submissions and has determined that additional information is required.

The GRC states that the original Custodian certified in the SOI that she could not disclose the responsive Roster, even with redactions, to the Complainant. The GRC states that the original Custodian does not explain the reasons why the records could not be disclosed to the Complainant. The GRC requests a legal certification, pursuant to N.J. Court Rule 1:4-4, in response to the following question:

1. Why the responsive record or records could not be disclosed to the Complainant, even with redactions?

The GRC requests that the Custodian provide any documentation supporting the requested certification.

The GRC requests that the Custodian submit the requested legal certification by close of business on February 21, 2012. The GRC advises that submissions received after this deadline date may not be considered by the Council for adjudication.

February 17, 2012

Custodian's legal certification. The Custodian certifies that the Roster cannot be disclosed to the Complainant because disclosure would jeopardize the safe and secure operation of the correctional facility, as well as pose a significant safety and security risk. The Custodian certifies that even if redacted, the Roster would reveal the allocation of staff by time and location, which an inmate could use to determine where the institution is most vulnerable at a given time. The Custodian certifies that the inmates could then plan and carry out activities to include criminal acts, assaults or contraband offenses.

The Custodian further certifies that retention of the Roster by an inmate, if found in his possession, would be considered contraband and subsequently confiscated. The Custodian certifies that appropriate disciplinary actions against the inmate would be enforced pursuant to *N.J.A.C. 10A:4.4-1*. (Inmate Discipline) and *N.J.A.C. 10A:3-6.5*. (Disposal of Contraband Threatening to Security or Disruptive to Operations.).

Analysis

Whether the Complainant's request is an invalid request for information under OPRA?

OPRA provides that:

“... the *personnel or pension records* of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and *shall not be made available for public access, except that: an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record ...*” (Emphasis added.) N.J.S.A. 47:1A-10.

In the matter before the Council, the Complainant requested “[t]he names and titles of each employee assigned to the [NJSP] mailroom including but not limited to whether full or part time and duties.” The Custodian contended in the SOI that the Complainant’s OPRA request was invalid because it sought information rather than identifiable government records. The GRC thus must determine whether the Complainant’s OPRA request is invalid under OPRA.

OPRA provides that “personnel ... records ... shall not be considered a government record ... except that ... an individual's *name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received ... shall be a government record[.]*” N.J.S.A. 47:1A-10.

Although name and title information is specifically disclosable as a government record under OPRA pursuant to N.J.S.A. 47:1A-10, the Complainant’s request for “... full or part time ...” status does not clearly identify a specific type of information which is disclosable under N.J.S.A. 47:1A-10. However, such information as that requested by the Complainant could be encompassed within a payroll record, which is specifically referenced as disclosable in N.J.S.A. 47:1A-10. The GRC previously addressed the definition of a payroll record for purposes of OPRA. In Jackson v. Kean University, GRC Complaint No. 2002-98 (February 2004), the Council defined the term “payroll record” as follows:

“[n]either OPRA nor Executive Order [No.] 11 defines the term ‘payroll record.’ Thus, we look to the ordinary meaning of that term, and are informed by other regulatory provisions defining that phrase. ‘Payroll’ is defined as a list of employees to be paid and the amount due to each of

them. Black's Law Dictionary (7th Ed., 1999). It is also clear that documents included within the payroll record exception are, in part, records required by law to be maintained or reported in connection with payment of salary to employees and is adjunct to salary information required to be disclosed. In this regard, *N.J.A.C. 12:16-2.1*, a Department of Labor regulation entitled 'Payroll records,' requires the following:

Every employing unit having workers in employment, regardless of whether such unit is or is not an "employer" as defined in the Unemployment Compensation Law, shall keep *payroll records that shall show*, for each pay period:

1. The beginning and ending dates;
2. The full name of each employee and the day or days in each calendar week on which services for remuneration are performed;
3. *The total amount of remuneration paid to each employee showing separately cash, including commissions and bonuses; the cash value of all compensation in any medium other than cash; gratuities received regularly in the course of employment if reported by the employee, or if not so reported, the minimum wage rate prescribed under applicable laws of this State or of the United States or the amount of remuneration actually received by the employee from his employing unit, whichever is the higher; and service charges collected by the employer and distributed to workers in lieu of gratuities and tips;*
4. The total amount of all remuneration paid to all employees;
5. The number of weeks worked.

The State of New Jersey, as well as its constituent agencies, is an employing unit. (See N.J.S.A. 43:21-19, a statute entitled 'Definitions' in Article 1 of the Unemployment Compensation Law, which defines 'employing unit' to mean the State or any of its instrumentalities or any political subdivisions.) Therefore, the State is required to keep payroll records in accordance with *N.J.A.C. 12:16-2*. By the same token, Kean University, as an instrumentality of the State, is an employing unit. See N.J.S.A. 18A:62-1 and 18A:64-21-1 (Governor continues as public employer for purposes of negotiation by state colleges.)

Additionally, because certain types of sick leave payments are treated as wages within the meaning of the Unemployment Compensation and Temporary Disability Benefits laws for both tax and benefit entitlement purposes, the payroll record should include the type of leave so that it may be treated appropriately for tax and benefit purposes. See *N.J.A.C. 12:16-4.2*.

Based upon the above, an employee's payroll records should include information that will allow a person to determine whether an employee took a leave of absence, the dates of the leave, whether it was paid, and if so, the amount of salary received for the paid leave of absence. For example, if a payroll record is for a two week period, and the employee is paid \$52,000.00 a year, and has taken a paid leave of absence of one week for that pay period, the payroll record should show that the employee actually worked one week, took one week of leave and received \$2,000.00. The fact that the employee received her full salary during the pay period, even though she took a week of leave, shows that it was a paid leave of absence. Therefore, the relevant law supports a conclusion that the requested information should be disclosed." (Footnotes omitted.)(Emphasis added.) *Id.* at ____.

As previously stated, although the Court in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) held that "agencies are required to disclose only 'identifiable' government records not otherwise exempt," OPRA has clearly identified certain types of personnel information that fall under the definition of a government record. Payroll records are a type of information subject to disclosure as a government record pursuant to N.J.S.A. 47:1A-10.

In the instant complaint, the Complainant's OPRA request for names and titles are definitely disclosable under OPRA pursuant to N.J.S.A. 47:1A-10. Additionally, the request for "... full or part time ..." status can be considered a part of a payroll record because whether an employee is full or part time is shown in the "day or days in each calendar week on which services for remuneration are performed." Thus, the full or part time status is information that is subject to disclosure under OPRA pursuant to the GRC's definition of a payroll record pursuant to the Council's decision in Jackson, *supra* and *N.J.A.C. 12:16-2.1*.

Therefore, based on the foregoing, the Complainant's request for "[t]he names and titles of each employee assigned to [NJSP] mailroom including but not limited to whether full or part time ..." is a valid OPRA request pursuant to N.J.S.A. 47:1A-10 and Jackson, *supra*. The GRC notes that the portion of the Complainant's OPRA request seeking "...duties" is not specifically identified in N.J.S.A. 47:1A-10 as personnel information required to be disclosed and thus is the only portion of the request seeking information that is invalid. MAG, *supra*, Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) and LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009).

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 ... A government record *shall not include* the following information ... emergency or security information or procedures *for any buildings or facility* which, if disclosed, *would jeopardize security* of the building or facility or persons therein;” (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 further provides that:

“The provisions of this act ... 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 ...*” N.J.S.A. 47:1A-9.a.

DOC’s regulations provide that:

“All contraband determined to pose a threat to security or to be disruptive to the orderly running of a correctional facility shall be taken into the custody of the correctional facility and under no circumstances shall be returned to the inmate.” *N.J.A.C.* 10A:3-6.5(a).

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 filed this complaint arguing that the Custodian unlawfully denied access to his OPRA request.

The Custodian certified in the SOI that the only record responsive to the Complainant’s OPRA request is the Custody Staff Daily Shift Roster (“Roster”). The Custodian argued that DOC determined that disclosure of the Roster, even if redacted, would pose a significant safety and security risk if released to the Complainant, who was

incarcerated in NJSP at the time of his OPRA request.⁹ The Custodian further argued in the SOI that *N.J.A.C.* 10A:3-6.5 also prohibited the Complainant from possessing the Roster.

The current Custodian also submitted a legal certification to the GRC on February 17, 2012 in which he certified that even if redacted, the responsive Roster could give inmates, which the Complainant was at the time of his request, the ability to expose vulnerable places in an institution. The Custodian further certified that inmates would be sanctioned if it was discovered that said inmates were in possession of the Rosters. *N.J.A.C.* 10A:4.4-1.

In *Paff v. NJ Department of Labor, Board of Review*, 379 *N.J. Super.* 346 (App. Div. 2005), the complainant appealed a final decision of the Council¹⁰ in which the Council dismissed the complaint by accepting the custodian's legal conclusion for the denial of access without further review. The Court stated that:

“OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records ... When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.”

The Court also stated that:

“[t]he statute also contemplates the GRC’s *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ *N.J.S.A.* 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ *N.J.S.A.* 47:1A-7f. This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.”

Further, the Court stated that:

“[w]e hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal ... There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC’s obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in *N.J.S.A.* 47:1A-7f, which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.”

⁹ The Complainant was released from custody following the filing of this Denial of Access Complaint.

¹⁰ *Paff v. NJ Department of Labor, Board of Review*, GRC Complaint No. 2003-128 (October 2005).

Therefore, pursuant to Paff, *supra*, the GRC must conduct an *in camera* review of the Roster to determine the validity of the Custodian's assertion that the record is exempt from disclosure because said disclosure would "... jeopardize the security ..." of NJSP and its employees and would "create a risk to the safety of persons [and] property" at NJSP pursuant to N.J.S.A. 47:1A-1.1.

Whether the original 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 original 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. The Complainant's OPRA request for "[t]he names and titles of each employee assigned to the New Jersey State Prison's mailroom including but not limited to whether full or part time ..." is a valid OPRA request pursuant to N.J.S.A. 47:1A-10 and Jackson v. Kean University, GRC Complaint No. 2002-98 (February 2004). The GRC notes that the portion of the Complainant's OPRA request seeking "duties" is not specifically identified in N.J.S.A. 47:1A-10 as personnel information required to be disclosed and thus is the only portion of the request seeking information that is invalid. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) and LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009).
2. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the Custody Staff Daily Shift Roster to determine the validity of the Custodian's assertion that the record is exempt from disclosure because said disclosure would "... jeopardize the security ..." of New Jersey State Prison and its employees and would "create a risk to the safety of persons [and] property" at New Jersey State Prison pursuant to N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver¹¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 2 above), a document or redaction index¹², as well as a legal certification from the Custodian, in**

¹¹ The *in camera* record may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

¹² The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

accordance with N.J. Court Rule 1:4-4¹³, that the record provided is the record requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.

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

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

March 20, 2012

¹³ "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."