



**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*

**LORI GRIFA**  
*Commissioner*

**FINAL DECISION**

**October 25, 2011 Government Records Council Meeting**

Bernard S. Reid  
Complainant

Complaint No. 2010-83

v.

New Jersey Department of Corrections  
Custodian of Record

At the October 25, 2011 public meeting, the Government Records Council (“Council”) considered the October 18, 2011 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that because the Complainant has failed to establish in his motion for reconsideration of the Council’s May 24, 2011 Final Decision that 1) the GRC’s decision is based upon a “palpably incorrect or irrational basis” or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably and failed to submit any evidence to the contrary, said motion for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

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 25<sup>th</sup> Day of October, 2011

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: October 28, 2011**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
October 25, 2011 Council Meeting**

**Bernard S. Reid<sup>1</sup>  
Complainant**

**GRC Complaint No. 2010-83**

v.

**New Jersey Department of Corrections<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of:

1. The New Jersey Department of Corrections' ("DOC") Ethical Standards.
2. The DOC's Officers' Uniform Code of Conduct.<sup>3</sup>

**Request Made:** February 25, 2010

**Response Made:** March 8, 2010

**Custodian:** John Falvey, Esq.<sup>4</sup>

**GRC Complaint Filed:** April 22, 2010<sup>5</sup>

**Background**

**May 24, 2011**

Government Records Council's ("Council") Final Decision. At its May 24, 2011 public meeting, the Council considered the May 17, 2011 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 Complainant's OPRA request identified the specific government records sought, MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), and Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), do not apply to the Complainant's OPRA request seeking "the DOC's Ethical Standards" and "the DOC's Officers' Uniform Code of Conduct." The OPRA request does not require research in order to identify responsive records, but rather requires the Custodian to locate and provide the two specific records sought. Thus, pursuant to N.J.S.A. 47:1A-6, the Custodian failed to bear her burden of

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by DAG Ellen Hale, on behalf of the NJ Attorney General.

<sup>3</sup> The Complainant requested additional records that are no longer at issue in this complaint.

<sup>4</sup> The original Custodian of Record was Deirdre Fedkenheuer.

<sup>5</sup> The GRC received the Denial of Access Complaint on said date.

proving that her initial denial of access to the Complainant's OPRA request was lawful.

2. Based on the court's holding in In re Adoption of a Child by M.W., 116 N.J. Super. 506 (App. Div. 1971), R. 1:13-2(a) contains no language relieving the Complainant from paying the appropriate copying costs because he is indigent. Thus, the Complainant must pay the proposed copy cost of \$32.25 in order to receive the records at issue in this complaint.
3. Because the Custodian made the requested records available to the Complainant upon payment of the appropriate copying costs, her response is appropriate pursuant to N.J.S.A. 47:1A-5.b., Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006) and Ortiz v. New Jersey Department of Corrections, GRC Complaint No. 2007-101 (November 2008), and the Custodian is not required to provide the requested records until receipt of payment of \$32.50. Thus, the Custodian did not unlawfully deny access to the requested records.
4. Although the Custodian failed to bear her burden of proving that her initial denial of access to the Complainant's OPRA request was lawful, the Custodian subsequently offered the requested records to the Complainant upon payment of copying cost, which the GRC has deemed to be an appropriate response pursuant to Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006) and Ortiz v. New Jersey Department of Corrections, GRC Complaint No. 2007-101 (November 2008). Additionally, 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 initial denial of access does not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

#### **June 2, 2011**

Council's Final Decision distributed to the parties.

#### **June 15, 2011**

Letter from the Complainant to the GRC.<sup>6</sup> The Complainant states that he received the Council's May 24, 2011 Final Decision on June 9, 2011. The Complainant states that he is aware that he has until June 19, 2011 to submit a request for reconsideration. The Complainant thus requests an extension of time to submit a request for reconsideration.

#### **June 28, 2011**

Letter from the GRC to the Complainant. The GRC grants the Complainant an extension until July 15, 2011 to submit his request for reconsideration.

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<sup>6</sup> The GRC did not receive the Complainant's letter until June 22, 2011.

## June 29, 2011

Complainant's request for reconsideration. The Complainant requests that the GRC reconsider its May 24, 2011 Final Decision based on mistake, new evidence, extraordinary circumstances and illegality.

The Complainant states that a request for reconsideration "should be utilized only for those cases which fall into that narrow corridor in which either 1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence[.]" See Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996)(quoting D'Atria, supra, at 401). The Complainant states that he does not dispute the facts of the instant complaint.

The Complainant argues that the Council acted arbitrarily in determining that Sandin v. Conners, 515 U.S. 472, 484 (1995) and Rhodes v. Robinson, 612 F.2d. 766, 773 (3d. Cir. 1979) were not relevant to issues involving OPRA. See Reid v. New Jersey Department of Corrections, GRC Complaint No. 2010-83 (May 24, 2011) at pg. 2, FN 2. The Complainant asserts that the Council's actions are inconsistent with the Court's holding in Trentacost v. Brussel, 82 N.J. 214 (1980) and Braitman v. Overlook Terrace Corp., 68 N.J. 368 (1975). The Complainant further asserts that under the circumstances, the validity of OPRA disappears because its application impinges on the Complainant's constitutional rights. Parham v. Hughes, 441 U.S. 347 (1979), Bell v. Stafford, 110 N.J. 384, 395 (1988) and In re Bd. Educ., 99 N.J. 523, 537-538 (1985).

The Complainant states DOC's regulations govern the rights of an inmate: "[the Complainant has] the right to be treated respectfully, impartially and fairly by all personnel." N.J.A.C. 10A:4-3.1(a)(1). The Complainant states that DOC's regulations further allow the Complainant to "be informed of the rules, procedures and schedules concerning the operation of the correctional facility." *Id.* at (a)(2). The Complainant asserts that in Sandin, supra, the Supreme Court established that the codes sought by the Complainant were sufficient to impose upon a custodian the duty to provide the records sought. The Complainant further asserts that the Court in Rhodes, supra, extended this duty to the instance in which the records sought were needed to support the Complainant before the courts. The Complainant contends that based on the foregoing, the Custodian had a duty to maintain the Complainant's constitutional rights; thus, both Sandin, supra, and Rhodes, supra, are relevant to the instant complaint.

Moreover, the Complainant argues that the Council further acted arbitrarily by including extraneous information that was not supported by the evidence of record. The Complainant argues that the Council violated N.J.S.A. 2A:23C-4 by recognizing DOC's proposed cost of \$32.25, which was offered to the Complainant while this complaint was in mediation, without obtaining the Complainant's consent to waive the privilege associated with mediation.

The Complainant states that pursuant to N.J.S.A. 2A:23C-1 et seq, communications that take place during the mediation process are not deemed to be public records subject to disclosure under OPRA and that all communications which occur during the mediation process are privileged from disclosure and may not be used in any

judicial, administrative or legislative proceeding, or in any arbitration. *Id.* The Complainant states that OPRA additionally places the burden of proving a lawful denial of access on the custodian. N.J.S.A. 47:1A-6. The Complainant states that in Mazza v. Cavicchia, 15 N.J. 498, 514 (1954), the Court held that “[w]here a hearing is prescribed by statute, nothing must be taken into account by the administrative tribunal in arriving at its determination that has not been introduced in some manner into the record of the hearing.” *Benjamin, Administrative Adjudication in New York*, 207 (1942).” *Id.*<sup>7</sup>

The Complainant contends that the proposed fee cited by the Council in its May 24, 2011 Final Decision was actually a settlement offer that DOC proposed during the mediation process. The Complainant argues that he did not consent to this information being disclosed; however, the Council relied heavily on this proposed fee in making its determination in this complaint. The Complainant thus argues that the Council’s decision-making process was tainted by the impermissible consideration of the proposed copying fee of \$32.25.

Further, the Complainant contends that the Custodian’s actions did in fact rise to the level of a knowing and willful violation of OPRA. The Complainant argues that the Custodian unlawfully denied access to the records at issue because the request was overly broad and unclear; however, the Council determined that the Complainant’s request was proper. The Complainant asserts that the Custodian’s actions were intentional and deliberate and with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. Alston v. City of Camden, 168 N.J. 170, 185 (2001) Fielder v. Stonack, 141 N.J. 101, 124 (1995) and ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996).

The Complainant states that the Court in Alston, *supra*, noted that “...willful misconduct will fall somewhere on the continuum between simple negligence and the intentional infliction of harm.” (Internal Citation Omitted) *Id.* at 185. The Complainant states that although some statutes immunize persons from liability for their actions, as was the case in Fielder, *supra*, OPRA requires that a custodian of record prove that a denial of access is lawful. N.J.S.A. 47:1A-6. The Complainant states that the Fielder Court stated that “... willful misconduct will fall somewhere on the continuum between simple negligence and the intentional infliction of harm ... [W]illful misconduct is not immutably defined but takes its meaning from the context and purpose of its use. While its general contours, given its language, are similar in all contexts, it may differ depending on the common-law rule or the statute to which it is relevant...” *Id.* at 124. The Complainant further states that in ECES, *supra*, the Court held that:

“... the offending conduct must be something more than just willful. It must also be continuous. The Supreme Court has defined ‘continuing’ as ‘pervasive or chronic’ in Uricoli v. Police & Fire Retirement System, 91 N.J. 62, 78-79, 449 A.2d 1267 (1982). We find this definition analogous to

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<sup>7</sup> The GRC notes that the Complainant included his own version of this quote to read “[w]here a [council meeting] is prescribed by [the above said provisions, the contested offer of settlement] must [not] be taken into account by the [council] in arriving at its [final decision] ... in ... the ... [meeting].” In his submissions to the GRC, the Complainant commonly inserted OPRA-related terms into quotes from cases that are not related to OPRA in any way.

the word ‘continuous’ as it is used in section 21(i). Therefore, the willful conduct must involve more than a few isolated acts. We hold that the phrase ‘willful and continuous disregard’ conveys a legislative intent that the offending conduct involve not only a pervasive and chronic disregard of the ethics laws but that the conduct must be: (1) intentional with knowledge of its wrongfulness, (2) deliberate, (3) conceived, and (4) not merely negligent, heedless, or unintentional.” *Id.* at 107-108.<sup>8</sup>

The Complainant argues that the evidence of record indicates that the Custodian acted in bad faith to unlawfully deny the Complainant access to the requested records throughout the pendency of this complaint. The Complainant argues that the Custodian’s continuing attempts to shield from access the records sought is consistent with the Court’s analysis in ECES, *supra*.

The Complainant asserts that his request for reconsideration should be granted because he has been treated unfairly and unjustly because he was subjected to an adverse adjudication process that OPRA was designed to prevent. The Complainant argues that more specifically, the Council adjudicated this complaint in a way that they saw fit with little checks and balances besides the provisions of OPRA. The Complainant argues that based on the foregoing, the Council can continue to make decisions based upon a palpably irrational basis giving the Council the ability to arbitrarily obtain an result as it sees fit.<sup>9</sup>

### Analysis

#### **Whether the Complainant has met the required standard for reconsideration of the Council’s May 24, 2011 Final Decision?**

Pursuant to *N.J.A.C.* 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. *N.J.A.C.* 5:105-2.10(a) – (e).

In the matter before the Council, the Complainant sent a letter to the GRC on June 15, 2011 requesting an extension of time to submit a request for reconsideration. The GRC responded to the Complainant on June 28, 2011 granting an extension of time until

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<sup>8</sup> The reference to section “21(i)” refers to the Conflicts of Interest Law which provides in relevant part that: “[i]f the commission finds that the conduct of such officer or employee constitutes a willful and continuous disregard of the provisions of this act or of a code of ethics promulgated pursuant to the provisions of this act, it *may* order such person removed from his office or employment and *may* further bar such person from holding any public office or employment in this State in any capacity whatsoever for a period of not exceeding 5 years from the date on which he was found guilty by the commission.” N.J.S.A. 52:13D-21(i)

<sup>9</sup> The Complainant also argues that his request for a stay should be granted; however, no stay is necessary in this case because the Council’s May 24, 2011 Final Decision did not include any orders.  
Bernard S. Reid v. New Jersey Department of Corrections, 2010-83 – Supplemental Findings and Recommendations of the Executive Director

July 15, 2011. The Complainant filed the request for reconsideration of the Council's Order dated May 24, 2011 on June 29, 2011, well within the extended time frame to submit same.

Applicable case law holds that:

“[a] party should not seek reconsideration merely based upon dissatisfaction with a decision.” D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, supra, 242 N.J. Super. at 401. ‘Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.’ *Ibid.*” In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

In support of his request for reconsideration, the Complainant first contended that GRC acted arbitrarily and capriciously in determining that Sandin v. Connors, 515 U.S. 472, 484 (1995) and Rhodes v. Robinson, 612 F.2d. 766, 773 (3d. Cir. 1979) were not relevant to issues involving OPRA. In the Council's May 24, 2011 Final Decision, the GRC determined that these two cases were not relevant to the issues involving OPRA.

The GRC reviewed both Sandin and Rhodes during its investigation of this complaint and found that neither case was on point with the matter herein. In Sandin, supra, a Hawaii state prison inmate sued prison officials alleging that he had been deprived of procedural due process in connection with a disciplinary hearing. In Rhodes, supra, a prisoner at a correctional institution in Pennsylvania sued several parties alleging a series of violations of his constitutional rights. Based on the Complainant's filing of this reconsideration, the GRC again reviewed these two (2) cases, as well as the others cited in his request for reconsideration and found that these cases have no bearing on OPRA. Additionally, there is nothing either in OPRA or any relevant case law that would corroborate the Complainant's argument that his constitutional rights invalidate or overrule OPRA. Therefore, the Complainant has provided no evidence to support his contention that the GRC's decision is based upon a "palpably incorrect or irrational basis," or was otherwise arbitrary and capricious.

The Complainant further argued that the GRC acted arbitrarily and violated N.J.S.A. 2A:23C-4 by referring to the DOC's proposed cost of \$32.25, which was offered to the Complainant while this complaint was in mediation, without obtaining the Complainant's consent to waive the privilege associated with mediation.



However, the evidence of record is clear that the Custodian certified in the SOI that the New Jersey Department of Corrections would provide access to the requested records upon payment of \$32.25, thus informing the GRC of the proposed copying costs for the responsive records. Thus, the proposed copying fee was properly before the GRC and the parties' rights to confidentiality in mediation were not abrogated. Moreover, the GRC noted in its Decision that both the Complainant and the Custodian submitted materials to the GRC during the adjudication of this matter which included submissions from the mediation process. *See Reid, supra*, at pg. 3. Therefore, the Complainant has offered no evidence to support that the Council's decision based on the proposed copying cost was based upon a "palpably incorrect or irrational basis" or was otherwise arbitrary and capricious.

The Complainant finally argued that the GRC arbitrarily determined that the Custodian did not knowingly and willfully violate OPRA. The Complainant raises the point that the Fielder Court determined that the term "willful misconduct" is determined within the context and purposes of the statute in which it is being applied. In this instance, the GRC finds no evidence that the Custodian's actions rose to the level of a knowing and willful violation. The Complainant has further provided no evidence to indicate that the Custodian acted in a manner that was not consistent with OPRA. Although the GRC determined that the Complainant's OPRA request was valid, the Custodian appropriately offered the records to the Complainant upon payment of a copy cost. This action is supported by OPRA, as previously stated in the Council's May 24, 2011 Final Decision. Thus, the Complainant failed to establish that the Council's Final Decision was based upon a "palpably incorrect or irrational basis" or that the Council did not consider, or failed to appreciate, the significance of probative, competent evidence.

Therefore, because the Complainant has failed to establish in his request for reconsideration of the Council's May 24, 2011 Final Decision that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably and failed to submit any evidence to the contrary, said motion for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that because the Complainant has failed to establish in his motion for reconsideration of the Council's May 24, 2011 Final Decision that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably and failed to submit any evidence to the contrary, said motion for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The

Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

October 18, 2011



State of New Jersey  
GOVERNMENT RECORDS COUNCIL  
101 SOUTH BROAD STREET  
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CHRIS CHRISTIE  
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**FINAL DECISION**

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Custodian of Record

At the May 24, 2011 public meeting, the Government Records Council (“Council”) considered the May 17, 2011 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 Complainant’s OPRA request identified the specific government records sought, MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), and Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), do not apply to the Complainant’s OPRA request seeking “the DOC’s Ethical Standards” and “the DOC’s Officers’ Uniform Code of Conduct.” The OPRA request does not require research in order to identify responsive records, but rather requires the Custodian to locate and provide the two specific records sought. Thus, pursuant to N.J.S.A. 47:1A-6, the Custodian failed to bear her burden of proving that her initial denial of access to the Complainant’s OPRA request was lawful.
2. Based on the court’s holding in In re Adoption of a Child by M.W., 116 N.J. Super. 506 (App. Div. 1971), R. 1:13-2(a) contains no language relieving the Complainant from paying the appropriate copying costs because he is indigent. Thus, the Complainant must pay the proposed copy cost of \$32.25 in order to receive the records at issue in this complaint.
3. Because the Custodian made the requested records available to the Complainant upon payment of the appropriate copying costs, her response is appropriate pursuant to N.J.S.A. 47:1A-5.b., Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006) and Ortiz v. New Jersey Department of Corrections, GRC Complaint No. 2007-101 (November 2008), and the Custodian is not required to provide the requested records until receipt of payment of \$32.50. Thus, the Custodian did not unlawfully deny access to the requested records.
4. Although the Custodian failed to bear her burden of proving that her initial denial of access to the Complainant’s OPRA request was lawful, the Custodian subsequently



offered the requested records to the Complainant upon payment of copying cost, which the GRC has deemed to be an appropriate response pursuant to Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006) and Ortiz v. New Jersey Department of Corrections, GRC Complaint No. 2007-101 (November 2008). Additionally, 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 initial denial of access does 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 24<sup>th</sup> Day of May, 2011

Robin Berg Tabakin, Chair  
Government Records Council

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

Charles A. Richman, Secretary  
Government Records Council

**Decision Distribution Date: June 2, 2011**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
May 24, 2011 Council Meeting**

**Bernard S. Reid<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2010-83**

v.

**New Jersey Department of Corrections<sup>2</sup>**  
**Custodian of Records**

**Records Relevant to Complaint:** Copies of:

1. The New Jersey Department of Corrections' ("DOC") Ethical Standards.
2. The DOC's Officers' Uniform Code of Conduct.<sup>3</sup>

**Request Made:** February 25, 2010

**Response Made:** March 8, 2010

**Custodian:** Deirdre Fedkenheuer

**GRC Complaint Filed:** April 22, 2010<sup>4</sup>

**Background**

**February 25, 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.

**March 8, 2010**

Custodian's response to the OPRA request. The Custodian received the Complainant's OPRA request on March 8, 2010. The Custodian responds in writing to the Complainant's OPRA request on the same business day as receipt of such request. The Custodian states that Items No. 1 and No. 2 of the Complainant's OPRA request are overly broad and do not adequately identify the records sought. The Custodian states that OPRA only requires a response to a request for specific records, not requests for information, nor does OPRA require the creation of any document in order to respond to an OPRA request. The Custodian states that pursuant to past case law, a request is invalid where it requires a custodian to conduct research and correlate data from various records. *See* MAG Entertainment v. Division of ABC, 375 N.J. Super. 534 (App. Div. 2005).

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by DAG Ellen Hale, on behalf of the NJ Attorney General.

<sup>3</sup> The Complainant requested additional records that are no longer at issue in this complaint.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

**April 22, 2010**

Denial of Access Complaint filed with the Government Records Council (“GRC”) attaching a letter from the Custodian to the Complainant dated March 8, 2010.

The Complainant states that he submitted an OPRA request to the DOC on an unknown date.<sup>5</sup> The Complainant states that the Custodian responded in writing on March 8, 2010 denying access to the Complainant’s request.

The Complainant contends that this action has been brought against the Custodian because the Complainant’s OPRA request was not overly broad, but identified the specific records sought. The Complainant requests that the GRC determine that the Custodian unlawfully denied access to the Complainant’s OPRA request.

The Complainant argues that with respect to the records at issue in this complaint, *N.J.A.C. 10A:4-3.1(a)(2)* of the DOC’s administrative code provides that an inmate has “... the right to be informed of the rules, procedures and schedules concerning the operation of the correctional facility.” *Id.* The Complainant argues that based on the foregoing, it would not be unreasonable for the requested records to be provided to the Complainant in order to inform him of the ethical and officers’ standards.

The Complainant further argues that the requested records are necessary to support claims raised by the Complainant against the DOC in a pending proceeding before the Superior Court of New Jersey, Appellate Division.<sup>6</sup>

The Complainant agrees to mediate this complaint.

**May 25, 2010**

Offer of Mediation sent to the Custodian.

**June 1, 2010**

The Custodian agrees to mediate this complaint.

**June 4, 2010**

Complaint referred to mediation.

**August 2, 2010**

Complaint referred back from mediation.

**August 6, 2010**

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 SOI from the Custodian. The GRC states that the Complainant’s response is due by close of business on August 13, 2010.

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<sup>5</sup> The evidence of record indicates that the Complainant’s OPRA request was submitted to the Custodian on February 25, 2010.

<sup>6</sup> The Complainant cites to two (2) cases that are not relevant to issues involving OPRA.

**August 12, 2010**

Complainant's amended Denial of Access Complaint.<sup>7</sup> The Complainant states that the following records are at issue in the instant complaint:

1. "DOC Policy No. ADM. 010-000" Code of Ethics (4 pages).
2. New Jersey State Ethics Commission ("SEC") "Uniform Ethics Code" (95 pages).

The Complainant asserts that the Custodian unlawfully denied access to the requested records identified above.<sup>8</sup> The Complainant requests that the GRC waive all copying costs connected with providing the requested records since the Complainant is indigent. *See* R. 1:13-2(a).

**September 2, 2010**

Request for the SOI sent to the Custodian.

**September 9, 2010**

E-mail from the Custodian's Counsel to the GRC. Counsel requests an extension of time until September 16, 2010 to submit the requested SOI.

**September 9, 2010**

E-mail from the GRC to the Custodian's Counsel. The GRC grants Counsel an extension of time until September 16, 2010 to submit the requested SOI.

**September 16, 2010**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated February 25, 2010.
- Letter from the Custodian to the Complainant dated March 8, 2010.<sup>9</sup>

The Custodian certifies that her search for the requested records included her office attempting to locate the records sought by the Complainant.

The Custodian also certifies that retention schedule for the records 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") is ten (10) years.

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<sup>7</sup> The Complainant included additional information regarding correspondence between the parties that occurred while this complaint was in mediation. Pursuant to the Uniform Mediation Act, N.J.S.A. 2A:23C-1 et seq., communications that take place during the mediation process are not deemed to be public records subject to disclosure under OPRA. N.J.S.A. 2A:23C-2. All communications which occur during the mediation process are privileged from disclosure and may not be used in any judicial, administrative or legislative proceeding, or in any arbitration, unless all parties and the mediator waive the privilege. N.J.S.A. 2A:23C-4.

<sup>8</sup> The Complainant requests that the GRC determine that the Custodian violated the U.S. Constitution and Federal provisions and order that the DOC reimburse the Complainant in the amount of \$350.00 for expenditures on this complaint. The Complainant also requests that the GRC grant compensatory damages in the amount of \$7,500.00. The GRC has no authority to make such findings or order compensatory damages pursuant to N.J.S.A. 47:1A-7.

<sup>9</sup> The Custodian included additional information regarding correspondence between the parties that occurred while this complaint was in mediation. See FN # 7.

The Custodian certifies that she received the Complainant's OPRA request on March 8, 2010. The Custodian certifies that she responded in writing on the same day as receipt of such request stating that the Complainant's request items were overly broad and unclear. The Custodian states that the Complainant subsequently filed a Denial of Access Complaint.

The Custodian certifies that following an attempt to mediate the instant complaint, the Complainant filed an amended Denial of Access Complaint requesting that the GRC order disclosure of the records at issue in this complaint.

The Custodian states that the Complainant also requested that the GRC waive the proposed copying cost for the records due to his indigency status.<sup>10</sup> The Custodian argues that pursuant to N.J.S.A. 47:1A-6.b., records do not have to be provided until payment is received. The Custodian cites to Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006) and Ortiz v. New Jersey Department of Corrections, GRC Complaint No. 2007-101 (November 2008) in support of this contention.

The Custodian certifies that because the Complainant has failed to pay the appropriate copying costs, no records have been provided to the Complainant. The Custodian asserts that for the foregoing reasons, this complaint should be dismissed.

The Custodian's Counsel submitted a letter brief in support of the DOC's position. Counsel states that in the amended Denial of Access Complaint, the Complainant identified the following as at issue in this complaint:

1. "DOC Policy No. ADM. 010-000" Code of Ethics (4 pages).
2. New Jersey State Ethics Commission ("SEC") "Uniform Ethics Code" (95 pages).

Counsel states that OPRA provides that:

"[a] copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation ... the fee assessed for the duplication of a government record embodied in the form of printed matter shall not exceed the following: first page to tenth page, \$0.75 per page; eleventh page to twentieth page, \$0.50 per page; all pages over twenty, \$0.25 per page." N.J.S.A. 47:1A-5.b.<sup>11</sup>

Counsel states that the copying costs associated with such records amounts to \$32.25. Counsel further states that the Complainant believes that copying costs for the

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<sup>10</sup> Additionally, the Custodian notes that the Complainant requested that the GRC make a determination regarding violations of the U.S. Constitution, federal laws and payment for costs incurred for the filing of this complaint and compensatory damages.

<sup>11</sup> The GRC notes that although the Custodian's per page copying charge was consistent with OPRA and case law at the time, in Smith v. Hudson County Register, 411 N.J. Super. 538 (App. Div. 2010), the Appellate Division ordered all public agencies to calculate and charge the "actual cost" of providing paper copies. The Legislature subsequently amended OPRA to provide that a public agency charge \$0.05 per copy for letter size paper and \$0.07 for legal size paper. This amendment took effect on November 9, 2010.



requested records should be waived because the Appellate Division determined that the Complainant was indigent in the matter of Reid v. NJDOC, Docket No. A-3458-09T3. Counsel argues that this argument is flawed because OPRA does not provide a waiver for indigency.

Counsel states that the DOC also promulgated a fee schedule consistent with OPRA. *N.J.A.C. 10A:1-1.4*.

Counsel argues that the Complainant is not entitled to a waiver of fees because no such waiver exists under OPRA. Further, Counsel argues that a determination of indigency pursuant to R. 1:13-2(a) only applies to court fees and not to non-judicial public officers. Counsel states that in In re Adoption of a Child by M.W., 116 N.J. Super. 506 (App. Div. 1971), the court clarified that:

“[a]lthough the first sentence of the amended rule speaks of waiver not only of ‘fees provided for by law which are payable to any court or clerk of court’ but also of those payable to ‘any public officer of this State,’ it is apparent from a reading of the entire amended rule that the italicized reference is only to such charges of public officers as are mentioned in the second sentence, ‘charges of public officers of this State for service of process.’” *Id.* at 513.

Counsel contends that based on the foregoing, although the Appellate Division granted the Complainant indigent status for the pending matter against the DOC, thus allowing him to file an appeal without paying court filing fees, nothing in R. 1:13-2(a) grants a waiver of fees for records under OPRA.

Counsel states that because the DOC has not received payment of copying costs of \$32.25 for the responsive records, no records were provided to the Complainant. Counsel argues that withholding the records until payment is received is consistent with the Council’s holdings in both Paff, *supra* and Ortiz, *supra*. Counsel states that if the Complainant pays the required copying cost from his inmate account, the DOC will immediately forward the records at issue in this complaint.<sup>12</sup>

### **October 5, 2010**

The Complainant’s response to the Custodian’s SOI. The Complainant asserts that Counsel’s assertion that R. 1:13-2(a) does not apply to OPRA is erroneous. The Complainant argues that the terms of N.J.S.A. 47:1A-5.b. are not universal and without exception because of the existence of R. 1:13-2(a). The Complainant argues that M.W., *supra*, generalizes the meaning of the rule without taking into account its effect on OPRA.<sup>13</sup>

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<sup>12</sup> Counsel also disputes the Complainant’s request for the GRC to make a determination regarding violations of the U.S. Constitution, federal laws and payment for costs incurred for the filing of this complaint and compensatory damages.

<sup>13</sup> Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC. The Complainant also disputed Counsel’s arguments regarding apparent violations of the U.S. Constitution and Federal laws, as well as compensatory damages.

## Analysis

### **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 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 GRC first addresses whether the Custodian’s response on March 8, 2010 lawfully denied access to the Complainant’s OPRA request as overly broad.

The Complainant’s OPRA request in the instant complaint sought “the DOC’s Ethical Standards” and “the DOC’s Officers’ Uniform Code of Conduct.” The Custodian responded in a timely manner denying access to the Complainant’s OPRA request stating that said request was overly broad and did not adequately identify the records sought.

The New Jersey Superior Court has held that “[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records ‘readily accessible for inspection, copying, or examination.’* N.J.S.A. 47:1A-1.” (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). The Court further held that “[u]nder OPRA, *agencies are required to disclose only*

'*identifiable*' government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files." (Emphasis added.) *Id.* at 549.

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),<sup>14</sup> 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."<sup>15</sup>

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

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009) the Council held 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)."

The Complainant's OPRA request at issue herein requests specific government records. It is not unreasonable for the Custodian to be able to easily identify and locate DOC's current ethics code and officers' uniform code of conduct. The evidence of record indicates that the Complainant's amended Denial of Access Complaint provided minimal additional clarification of the records sought, such as the number of pages and a formal document title.

Therefore, because the Complainant's OPRA request identified the specific government records sought, MAG, *supra*, and Bent, *supra*, do not apply to the Complainant's OPRA request seeking "the DOC's Ethical Standards" and "the DOC's Officers' Uniform Code of Conduct." The OPRA request does not require research in order to identify responsive records, but rather requires the Custodian to locate and provide the two specific records sought. Thus, pursuant to N.J.S.A. 47:1A-6, the Custodian failed to bear her burden of proving that her initial denial of access to the Complainant's OPRA request was lawful.

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<sup>14</sup> Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

<sup>15</sup> As stated in Bent, *supra*.

The GRC next addresses the issue of whether R. 1:13-2(a) operates to waive the Complainant's obligation to pay copying costs prescribed under OPRA.

R. 1:13-2(a) provides that:

“Except when otherwise specifically provided by these rules, whenever any person by reason of poverty seeks relief from the payment of any fees provided for by law which are payable to any court or clerk of court including the office of the surrogate or any public officer of this State, any court upon the verified application of such person, which application may be filed without fee, may in its discretion order the payment of such fees waived...” *Id.*

In his amended Denial of Access Complaint, the Complainant requested that the GRC waive all copying costs connected with providing the requested records since the Complainant has been adjudicated as indigent pursuant to R. 1:13-2(a).

In the SOI, the Custodian's Counsel argued that the Complainant is not entitled to a waiver of the copying fees, amounting to \$32.25, because no such waiver exists under OPRA. Counsel states that in In re Adoption of a Child by M.W., 116 N.J. Super. 506 (App. Div. 1971), the court's holding construed R. 1:13-2(a) as inapplicable to non-judicial public officers. Counsel contended although the Appellate Division granted the Complainant indigent status for the pending appeal matter against the DOC, nothing in R. 1:13-2(a) grants a waiver of fees for records under OPRA.

The Complainant responded to the SOI arguing that Counsel erroneously argued that R. 1:13-2(a) does not apply to OPRA. The Complainant further argued that the court's decision in M.W., *supra*, generalized the meaning of the rule without taking into account its effect on OPRA.

In M.W., *supra*, the plaintiff appealed a judgment ordering the plaintiff to pay \$240.00 to the Bureau of Children's Services of the New Jersey Department of Institutions and Agencies (“Bureau”) for costs associated with statutory services in connection with plaintiff's adoption of a child. The plaintiff argued, among other things, “that statutory and rule provisions authorizing a court to waive payment of specified fees in case a litigant is indigent should be construed to include the power to waive or dispense with payment of the reimbursement sought by the Bureau.” *Id.* at 512. The court found that there was no basis for the plaintiff's argument.

The court reasoned that R. 1:13-2(a) does not embody a grant of power “to deprive the approved agency reimbursement ... [t]he rule, prior to its amendment effective September 13, 1971, was also limited to authority to waive ‘fees provided for by law which are payable to any court or clerk of court.’” *Id.* at 513. The court noted that R. 1:13-2(a) as amended subsequent to the judgment herein, includes the language “or any public officer of this State.” The court found that:

“[a]lthough the first sentence of the amended rule speaks of waiver not only of ‘fees provided for by law which are payable to any court or clerk of court’ but also of those payable to ‘*any public officer of this State,*’ it is apparent from a reading of the entire amended rule that the italicized reference is only to such charges of public officers as are mentioned in the second sentence, ‘charges of public officers of this State for service of process.’

The amendment to R. 1:13-2 to add ‘charges of public officers of this State for service of process’ to the fees which may be waived in case the litigant is indigent was obviously adopted, following the decision in Boddie v. Connecticut, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971), to insure that a litigant would not be denied access to our courts by reason of his financial inability to pay for such service of process.

The amendment *goes no further than to insure* an impecunious litigant *access to the courts...*” (Emphasis added.) *Id.* at 513-514.

The Complainant here correctly argues that M.W., *supra*, does not take into account how R. 1:13-2(a) effects the statutorily prescribed fees provided for in N.J.S.A. 47:1A-5.b., because it does not deal with an issue of waiver of fees under OPRA. However, the court’s findings in M.W., *supra*, can be applied to the instant complaint.

Specifically, although the Complainant here may be considered an indigent before the court, paying the prescribed OPRA fees will not impede the Complainant’s access to the courts.

Moreover, the M.W. court further acknowledged that R. 1:13-2(a) contains no language granting the court with the ability to deprive an agency of reimbursement for from its fee schedule. The court’s acknowledgement of this fact is useful to the dispute herein. In M.W., *supra*, the Bureau was determined to be an approved agency to place children in New Jersey for purposes of adoption pursuant to N.J.S.A. 9:3-18. Additionally, the Bureau was entitled to reimbursement of costs for its services pursuant to orders of the court under N.J.S.A. 9:3-32, which provides that “[t]he costs of all proceedings pursuant to this act shall be borne by the plaintiff, including the costs incurred by an approved agency acting pursuant to an order or orders of the court.” *Id.* at 509.

Pursuant to OPRA, any agency defined as a public agency pursuant to N.J.S.A. 47:1A-1.1. must respond to requests for government records made pursuant to the statute. Further, OPRA provides that requestors must pay the appropriate copying cost for paper copies of the records requested, which at the time of the Complainant’s OPRA request were \$0.75/\$0.50/\$0.25.<sup>16</sup> N.J.S.A. 47:1A-5.b. Thus, OPRA operates to require requestors to pay for paper copies of records similar to how N.J.S.A. 9:3-32 operates to allow an approved agency to recoup costs for working on adoption cases. Henceforth, the court’s holding in M.W., *supra*, can be applied to the current situation: R. 1:13-2(a)

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<sup>16</sup> See FN No. 10.

does not operate to relieve an indigent requestor's obligation to pay the prescribed copying costs required under OPRA.

Therefore, based on the court's holding in M.W., *supra*, R. 1:13-2(a) contains no language relieving the Complainant from his obligation of paying the appropriate copying costs because he is indigent. Thus, the Complainant must to pay the proposed copy cost of \$32.50 in order to receive the records at issue in this complaint.

The GRC next addresses the issue of whether the Custodian can withhold disclosure of the records at issue in this complaint until after the Complainant has paid the appropriate copying cost.

The Custodian argued in the SOI that pursuant to N.J.S.A. 47:1A-6.b., records do not have to be provided until payment is received. The Custodian cited to both Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006) and Ortiz v. New Jersey Department of Corrections, GRC Complaint No. 2007-101 (November 2008). The Custodian further certified that because the Complainant failed to remit the appropriate copying cost of \$32.25, the records were not provided to the Complainant.

In Paff, *supra*, the custodian responded to the complainant's February 6, 2005 OPRA request stating that the requested record will be made available upon payment of copying costs. The Council held that:

"...the Custodian is...not required to release said records until payment is received pursuant to N.J.S.A. 47:1A-5.b., Santos v. New Jersey State Parole Board, GRC Case No. 2004-74 (August, 2004) and Cuba v. Northern State Prison, GRC Case No. 2004-146 (February, 2005)."

In Ortiz v. New Jersey Department of Corrections, GRC Complaint No. 2007-101 (November 2008), the Council referred to Paff, *supra*, in reaffirming that the custodian was "not required to release the requested records until payment is received..." *Id.* at pg. 8. The Council subsequently held in Leak v. Union County Prosecutor's Office, GRC Complaint No. 2007-148 (June 2009) that the custodian had complied in part with the Council's February 25, 2009 Interim Order "by advising that the requested records would be provided upon payment of copying costs ... pursuant to N.J.S.A. 47:1A-5.b., [Paff, *supra*], and Mejias v. New Jersey Department of Corrections, GRC Complaint No. 2007-181 (July 2008)." *Id.* at pg. 4 (Council's June 11, 2009 Supplemental Findings & Recommendations of the Executive Direction).

In the instant complaint, the evidence of record indicates that the Custodian offered the requested records to the Complainant conditioned upon payment of the appropriate copying cost. Thus, the Custodian was under no obligation to provide the records at issue in this complaint until receipt of the appropriate copying fees.

Therefore, because the Custodian made the requested records available to the Complainant upon payment of the appropriate copying costs, her response is appropriate pursuant to N.J.S.A. 47:1A-5.b., Paff, *supra* and Ortiz, *supra*, and the Custodian is not required to provide the requested records until receipt of payment of \$32.25. Thus, the Custodian did not unlawfully deny access to the requested records.

**Whether the Custodian’s initial denial of access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

OPRA states that:

“[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ...” N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

“... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Although the Custodian failed to bear her burden of proving that her initial denial of access to the Complainant’s OPRA request was lawful, the Custodian subsequently offered the requested records to the Complainant upon payment of copying costs, which the GRC has deemed to be an appropriate response pursuant to Paff, *supra* and Ortiz, *supra*. Additionally, 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 initial denial of access does 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 Complainant's OPRA request identified the specific government records sought, MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), and Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), do not apply to the Complainant's OPRA request seeking "the DOC's Ethical Standards" and "the DOC's Officers' Uniform Code of Conduct." The OPRA request does not require research in order to identify responsive records, but rather requires the Custodian to locate and provide the two specific records sought. Thus, pursuant to N.J.S.A. 47:1A-6, the Custodian failed to bear her burden of proving that her initial denial of access to the Complainant's OPRA request was lawful.
2. Based on the court's holding in In re Adoption of a Child by M.W., 116 N.J. Super. 506 (App. Div. 1971), R. 1:13-2(a) contains no language relieving the Complainant from paying the appropriate copying costs because he is indigent. Thus, the Complainant must pay the proposed copy cost of \$32.25 in order to receive the records at issue in this complaint.
3. Because the Custodian made the requested records available to the Complainant upon payment of the appropriate copying costs, her response is appropriate pursuant to N.J.S.A. 47:1A-5.b., Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006) and Ortiz v. New Jersey Department of Corrections, GRC Complaint No. 2007-101 (November 2008), and the Custodian is not required to provide the requested records until receipt of payment of \$32.50. Thus, the Custodian did not unlawfully deny access to the requested records.
4. Although the Custodian failed to bear her burden of proving that her initial denial of access to the Complainant's OPRA request was lawful, the Custodian subsequently offered the requested records to the Complainant upon payment of copying cost, which the GRC has deemed to be an appropriate response pursuant to Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006) and Ortiz v. New Jersey Department of Corrections, GRC Complaint No. 2007-101 (November 2008). Additionally, 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 initial denial of access does 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: Frank F. Caruso  
Senior Case Manager

Approved By: Catherine Starghill, Esq.



Executive Director

May 17, 2011