



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

July 29, 2014 Government Records Council Meeting

Derek J. Fenton
Complainant

Complaint No. 2013-289

v.

NJ State Parole Board
Custodian of Record

At the July 29, 2014 public meeting, the Government Records Council (“Council”) considered the July 22, 2014 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:

1. The Custodian complied with the Council’s June 24, 2014 Interim Order because she responded within the prescribed time frame by providing the records responsive to Item No. 1, advising the Complainant that the fulfillment of Item No. 2 required the payment of a special service charge pursuant to N.J.S.A. 47:1A-5(c), and simultaneously providing certified confirmation of compliance to the Executive Director.
2. Although the Custodian initially unlawfully denied access to the requested records, the Custodian ultimately provided the Complainant with the records responsive to Item No. 1 and made the records responsive to Item No. 2 available upon the payment of a special service charge pursuant to N.J.S.A. 47:1A-5. 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, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.



Final Decision Rendered by the
Government Records Council
On The 29th Day of July, 2014

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: July 31, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
July 29, 2014 Council Meeting**

**Derek J. Fenton¹
Complainant**

GRC Complaint No. 2013-289

v.

**New Jersey State Parole Board²
Custodial Agency**

Records Relevant to Complaint:

Item No. 1: Every approved residence plan for all adult parolees residing in Passaic County as of May 15, 2013.

Item No. 2: Copies of all of the certificates of parole for all adult persons residing in Passaic County that are on parole as of May 15, 2013.

Custodian of Record: Dina I. Rogers, Esq.

Request Received by Custodian: May 14, 2013

Response Made by Custodian: May 21, 2013

GRC Complaint Received: September 30, 2013

Background

June 24, 2014 Council Meeting:

At its June 24, 2014 public meeting, the Council considered the June 17, 2014 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 potential for harm stemming from non-consensual disclosure, coupled with the parolees' and third-parties' reasonable expectations of privacy, warrants non-disclosure of the full residence plans. However, these concerns do not extend to the limited disclosure of each responsive parolee's name and town of residence. N.J.S.A. 47:1A-1; Burnett v. County of Bergen, 198 N.J. 408, 427 (2009); Levitt v. Montclair Parking Authority, GRC Complaint No. 2012-150 (June 2013). Thus, the Custodian has failed to bear her burden of proving that the entireties of the residence plans are exempt from disclosure. N.J.S.A. 47:1A-6. The Custodian shall disclose the

¹ No legal representation listed on record.

² Represented by DAG Christopher C. Josephson.

- responsive records, making all other appropriate redactions in light of OPRA and N.J.S.A. 10A:71-2.2, but listing the town of residence.
2. The Custodian has not borne her burden of proving that she lawfully denied access to the requested parole certificates. *See* N.J.S.A. 47:1A-6. The Complainant's request was limited to a type of particular government records, and the required search was narrowed by the inclusion of sufficient identifying information. *See* Burke v. Brandes, 429 N.J. Super. 169, 176-78 (App. Div. 2012). The Custodian shall thus disclose all responsive parole certificates to the Complainant, making all necessary redactions in light of OPRA and N.J.A.C. 10A:71-2.2.
 3. **The Custodian shall comply with items number one (1) and number two (2) above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,³ to the Executive Director.⁴**
 4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On June 25, 2014, the Council distributed its Interim Order to all parties. On June 30, 2014, the Custodian responded to the Council's Interim Order by providing a certification, a copy of correspondence sent to the Complainant, and copies of records responsive to the underlying request.

Analysis

Compliance

At its June 24, 2014 meeting, the Council ordered the Custodian to disclose redacted copies of the requested residence plans (Item No. 1), though listing the town of residence, and to disclose copies of the requested parole certificates (Item No. 2), making all necessary redactions, within five (5) business days from receipt of same and to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On June 25, 2014, the Council distributed its Interim Order to all parties, providing the Custodian five (5)

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."

⁴ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on July 2, 2014.

On June 30, 2014, the third (3rd) business day after receipt of the Council's Order, the Custodian provided a certification stating that on June 27, 2014 she sent the Complainant the records responsive to Item No. 1 and that she had "advised the [C]omplainant . . . that the fulfillment of [Item No. 2] requires a special service charge pursuant to N.J.S.A. 47:1A-5(c) and that payment of the special service charge is required prior to . . . the release of the records." Additionally, the Custodian provided a copy of the disclosed records responsive to Item No. 1, and a letter to the Complainant, also dated June 27, 2014, explaining the basis for, amount of, and computational methodology used to determine the special service charge.

Therefore, the Custodian complied with the Council's June 24, 2014 Interim Order because she responded within the prescribed time frame by providing the records responsive to Item No. 1, advising the Complainant that the fulfillment of Item No. 2 required the payment of a special service charge pursuant to N.J.S.A. 47:1A-5(c), and simultaneously providing certified confirmation of compliance to the Executive Director.

Knowing & Willful

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 "[i]f 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 (Felder 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 (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); 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 initially unlawfully denied access to the requested records, the Custodian ultimately provided the Complainant with the records responsive to Item No. 1 and

made the records responsive to Item No. 2 available upon the payment of a special service charge pursuant to N.J.S.A. 47:1A-5. 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, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's June 24, 2014 Interim Order because she responded within the prescribed time frame by providing the records responsive to Item No. 1, advising the Complainant that the fulfillment of Item No. 2 required the payment of a special service charge pursuant to N.J.S.A. 47:1A-5(c), and simultaneously providing certified confirmation of compliance to the Executive Director.

2. Although the Custodian initially unlawfully denied access to the requested records, the Custodian ultimately provided the Complainant with the records responsive to Item No. 1 and made the records responsive to Item No. 2 available upon the payment of a special service charge pursuant to N.J.S.A. 47:1A-5. 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, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Robert T. Sharkey, Esq.
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

July 22, 2014



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

June 24, 2014 Government Records Council Meeting

Derek J. Fenton
Complainant

Complaint No. 2013-289

v.

NJ State Parole Board
Custodian of Record

At the June 24, 2014 public meeting, the Government Records Council (“Council”) considered the June 17, 2014 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 potential for harm stemming from non-consensual disclosure, coupled with the parolees’ and third-parties’ reasonable expectations of privacy, warrants non-disclosure of the full residence plans. However, these concerns do not extend to the limited disclosure of each responsive parolee’s name and town of residence. N.J.S.A. 47:1A-1; Burnett v. County of Bergen, 198 N.J. 408, 427 (2009); Levitt v. Montclair Parking Authority, GRC Complaint No. 2012-150 (June 2013). Thus, the Custodian has failed to bear her burden of proving that the entireties of the residence plans are exempt from disclosure. N.J.S.A. 47:1A-6. The Custodian shall disclose the responsive records, making all other appropriate redactions in light of OPRA and N.J.S.A. 10A:71-2.2, but listing the town of residence.
2. The Custodian has not borne her burden of proving that she lawfully denied access to the requested parole certificates. *See* N.J.S.A. 47:1A-6. The Complainant’s request was limited to a type of particular government records, and the required search was narrowed by the inclusion of sufficient identifying information. *See* Burke v. Brandes, 429 N.J. Super. 169, 176-78 (App. Div. 2012). The Custodian shall thus disclose all responsive parole certificates to the Complainant, making all necessary redactions in light of OPRA and N.J.A.C. 10A:71-2.2.
3. **The Custodian shall comply with items number one (1) and number two (2) above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified**



confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²

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

Interim Order Rendered by the
Government Records Council
On The 24th Day of June, 2014

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: June 25, 2014

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

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

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 24, 2014 Council Meeting**

**Derek J. Fenton¹
Complainant**

GRC Complaint No. 2013-289

v.

**New Jersey State Parole Board²
Custodial Agency**

Records Relevant to Complaint:

Item No. 1: Every approved residence plan for all adult parolees residing in Passaic County as of May 15, 2013.

Item No. 2: Copies of all of the certificates of parole for all adult persons residing in Passaic County that are on parole as of May 15, 2013.

Custodian of Record: Dina I. Rogers, Esq.

Request Received by Custodian: May 14, 2013

Response Made by Custodian: May 21, 2013

GRC Complaint Received: September 30, 2013

Background³

Request and Response:

On May 14, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On May 21, 2013, five (5) business days later, the Custodian responded in writing denying the Complainant’s request for being overbroad and for consisting of confidential personnel information not subject to disclosure.

Denial of Access Complaint:

On September 30, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts, first, that his request was not

¹ No legal representation listed on record.

² Represented by DAG Christopher C. Josephson.

³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

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overly broad because he specified the records sought, the laws that mandate the records' creation, and the range of dates in question. *Citing* N.J.A.C. 10A:71-2.1; N.J.A.C. 10A:71-2.2.

The Complainant then turns to elements from the seven (7) point balancing test used by New Jersey courts to assess the disclosure of information that implicates a citizen's reasonable expectation of privacy. *Citing* Bernstein v. Borough of Wallington, GRC Complaint No. 2005-1 (April 2005); Merino v. Ho-Ho-Kus, GRC Complaint No. 2003-121 (June 2004). Regarding the potential for harm from nonconsensual disclosure, the Complainant contends that the Legislature and courts already allow the disclosure of the names and addresses of convicted sex offenders. The Complainant argues that there is also no danger of disclosure injuring the relationship in which the records were generated because no parolees "will refuse to be paroled and insist on staying in jail." The Complainant asserts that there is a need for access to the requested information because the public should be able to know where parolees are placed due to the recidivism rate of parolees, and because the public is already notified when inmates are considered for parole. *Citing* N.J.S.A. 30:4-123.48(g); N.J.S.A. 30:4-123.45(b)(5). Also, the Complainant argues that the release of this information would allow the public to examine the "political ramifications" of the residence plans, such as the types of areas parolees live in and how close parolees are to schools. Additionally, the Complainant contends that there is no express statutory mandate militating against the public distribution of the requested documents; rather, the Complainant asserts that N.J.A.C. 10A:71-2.2 does not explicitly deem the requested information to be confidential, and that making such information public as it pertains to convicted sex offenders could not occur if it could not be disclosed.

Statement of Information:

On December 18, 2013, the Custodian filed a Statement of Information ("SOF"). The Custodian certifies that she received the Complainant's OPRA request on May 14, 2013 and responded on May 21, 2013.

Counsel for the Custodian ("Counsel") argues first that Item No. 1 and Item No. 2 are overly broad and improper, though he only addresses Item No. 2 directly. *Citing* Bart v. Passaic Cnty. Pub. Hous. Agency Docket No. A-5049-07T3 (App. Div. 2009); MAG Entm't LLC v. Div. of Alcoholic Bev. Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30 (App. Div. 2005). Specific to Item No. 2, Counsel states that because the State Parole Board ("SPB") maintains copies of parole certificates in the files of offenders on parole supervision, fulfilling the request for all such certificates for adults residing in Passaic County as of May 15, 2013 would require the SPB to generate a list of offenders residing in Passaic County, obtain the files of those parolees, and then retrieve the certificates from those files. Counsel contends that such a process would impermissibly require the Custodian to search the agency's files and analyze, compile, and collate the requested information.

In turning to Item No. 1, Counsel does not address whether the request is overly broad, but instead analyzes the seven (7) factor privacy balancing test related to N.J.S.A. 47:1A-1. *Citing* Doe v. Poritz, 142 N.J. 1, 88 (1995); Burnett v. Cnty. of Bergen, 198 N.J. 408, 422-23, 427 (2009). Counsel states that the records responsive to Item No. 1 would include each offender's name, address, city, state, and zip code. Counsel argues that disclosing these records implicates parolees' privacy interests, that third parties who provide residences to parolees might

then be discouraged from doing so, and that the Complainant could use the information to contact parolees directly. Also, Counsel notes that the Complainant has neither described any reasonable safeguards in place to protect from the unauthorized dissemination of the information, nor indicated that he does not plan to redistribute the records. Additionally, Counsel contends that OPRA provides that public agencies have a responsibility to safeguard from disclosure information that would violate a citizen's reasonable expectation of privacy. Further, Counsel asserts that the New Jersey Legislature has specified that the names and addresses of only certain groups of convicted sex offenders can be released to the public. *Citing N.J.S.A. 2C:7-12; G.H. v. Twp. of Galloway*, 401 N.J. Super. 392 (App. Div. 2008). Therefore, Counsel argues, the Complainant is requesting information that the Legislature did not intend to have released to the public.

Analysis

Unlawful Denial of Access

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.

Item No. 1

OPRA provides that "a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy" N.J.S.A. 47:1A-1. As privacy interests are at issue here, it is necessary to employ the common law balancing test established by the New Jersey Supreme Court in *Doe v. Poritz*, 142 N.J. 1 (1995). The Supreme Court has explained that N.J.S.A. 47:1A-1's safeguard against the disclosure of personal information is substantive and requires "a balancing test that weighs both the public's strong interest in disclosure with the need to safeguard from public access personal information that would violate a reasonable expectation of privacy." *Burnett v. Cnty. of Bergen*, 198 N.J. 408, 422-23, 427 (2009).

When "balanc[ing] OPRA's interests in privacy and access," courts consider the following factors:

- (1) the type of record requested;
- (2) the information it does or might contain;
- (3) the potential for harm in any subsequent nonconsensual disclosure;
- (4) the injury from disclosure to the relationship in which the record was generated;
- (5) the adequacy of safeguards to prevent unauthorized disclosure;
- (6) the degree of need for access; and
- (7) whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access.

Id. at 427 (quoting Poritz, 142 N.J. at 88).

This test will enable the Council to weigh SPB's asserted need to protect the privacy of the parolees against the Complainant's asserted need to access the requested records.

A. Courts Have Required that Certain Personal Information Be Redacted From Records Released In Response to an OPRA Request Where the Interest in Privacy Outweighs the Interest in Access

In Burnett, a commercial business requested approximately eight million pages of land title records extending over a twenty-two (22) year period and containing names, addresses, social security numbers, and signatures of numerous individuals. Burnett, 198 N.J. at 418. After balancing the seven factors, the Court found "that the twin aims of public access and protection of personal information weigh in favor of redacting [social security numbers] from the requested records before releasing them" because "[i]n that way, disclosure would not violate the reasonable expectation of privacy citizens have in their personal information." Id. at 437. Moreover, "the requested records [were] not related to OPRA's core concern of transparency in government." Id.

B. Courts Have Not Required Redaction of Certain Personal Information From Records Released In Response to an OPRA Request Where the Interest in Access Outweighs the Interest in Privacy

In contrast, the Appellate Division has affirmed a trial court's determination that, in light of Burnett, the identity of a person who called 911 to complain about illegal parking blocking his driveway should not be redacted when the owner of the car filed an OPRA request seeking a copy of the 911 call. Ponce v. Town of W. New York, No. A-3475-10, at *3-4, *10 (App. Div. February 27, 2013) (<http://njlaw.rutgers.edu/collections/courts/>). The trial judge explained that:

The type of information requested by [the car owner] is not particularly sensitive or confidential. When the caller made a complaint [to] the police department that someone was blocking his or her driveway he or she could reasonably expect that his name may be revealed in connection with the complaint. There has not been evidence presented to suggest that revealing the caller's identity or the call itself would result in any serious harm or confrontation between the caller and the - - [sic] and the [car owner]. It may in fact be helpful for the [car owner] to know the information in order to challenge his parking violation.

Id. at *7-8.

Similarly, the Appellate Division has concluded that addresses should not be redacted from a mailing list of self-identified "senior citizens" compiled by a county to contact those individuals through a newsletter. Renna v. Cnty. of Union, No. A-1811-10, at *1, *11-12 (App. Div. February 17, 2012) (<http://njlaw.rutgers.edu/collections/courts/>). A website operator filed an OPRA request seeking access to that mailing list so that she could disseminate information in

furtherance of non-profit activities related to monitoring county government. *Id.* at *2. The court found that the Burnett factors weighed in favor of disclosure because “the intent and spirit of OPRA are to maximize public awareness of governmental matters[,]” and “the interest in the dissemination of information, even that unrelated to senior matters, outweighs a perceived notion of expectation of privacy.” *Id.* at *12.

C. Application of the Burnett Factors to the Present Matter Demonstrates that the Custodian Permissibly Withheld the Requested Residence Plans

i. *Burnett Factors One and Two*

The first and second Burnett factors require consideration of the records requested, and the type of information contained therein, respectively. Regarding the type of record requested, the Complainant sought “copies of every approved residence plan for all adult parolees residing in Passaic County as of May 15, 2013.” Counsel stated that these records contain each offender’s name, address, city, state and zip code.

ii. *Burnett Factors Three and Four*

The third and fourth Burnett factors address the potential for harm in a subsequent nonconsensual disclosure of the residence plans and the injury from disclosure to the relationship in which the records were generated.

The Custodian has demonstrated the existence of risk, due to the non-consensual disclosure of the requested records, of both potential harm and an injury to the relationship in which the record was generated. The Complainant argued that there is no possibility of harm to the parolees because the posting of certain convicted sex offenders’ addresses has not generated significant retaliatory or vigilante behavior, and that there will not be an injury to the relationship in which the records were generated because disclosure will not cause potential parolees to insist on instead remaining incarcerated. Counsel, in turn, has rightly contended that parolees do not expect that their residence plans will be released, and that the disclosure of the plans could allow members of the public make direct, unsolicited contact with parolees. Further, Counsel pointed out that many parolees live in residences that are owned or leased by a third-party and, therefore, that making the residence plans public may result in parole plan sponsors no longer permitting parolees to reside with them. However, although the GRC agrees that disclosure of the full residence plans could lead to certain potential harms, this risk could be eliminated by disclosure of redacted copies of the requested records.

iii. *Burnett Factor Five*

The fifth Burnett factor requires consideration of the adequacy of safeguards to prevent unauthorized disclosure of the requested residence plans. By the Complainant’s own admission, there are none.

iv. *Burnett Factor Six*

The sixth Burnett factor addresses the degree of need for access to the residence plans. The Complainant stated that he seeks the requested residence plans to “avoid criminals,” contending that the recidivism rate amongst parolees indicates that the SPB “cannot be relied upon to keep the public safe.” The Complainant also argued that disclosure is necessary to examine the “political ramifications” of the residence plans, such as how close to schools or public housing parolees live, whether parolees are funneled into certain communities based on race, and if residence plans in areas with high gang activity are approved. Counsel asserted that the Complainant’s stated intentions do not provide for any safeguarding of the information, the disclosure of which “exposes parolees [to] risks to their person or property.” It is unclear that the Complainant’s possession of the residence plans of all Passaic County parolees would necessarily allow him to “avoid criminals” or improve public safety. Likewise, in addition to the privacy and personal safety concerns involved, making public the full residence plans of parolees is not the only way to probe the policy questions asked by the Complainant.

v. *Burnett Factor Seven*

The seventh Burnett factor requires consideration as to whether an express statutory mandate, articulated public policy, or other recognized public interest militating toward access to the names and addresses exists. The Complainant noted that the Legislature has recognized, under N.J.S.A. 30:4-123.48(g), the need for the public to be notified when inmates are considered for parole and argues that, in contrast, inmates’ personal identifying information has not been specifically deemed confidential by the Department of Corrections under N.J.A.C. 10A:71-2.2. Additionally, the Complainant contended that if such information could not be disclosed, the disclosure of the names and addresses of convicted sex offenders allowed for in Poritz could not occur. In response, Counsel highlighted both OPRA’s mandated protection of personal information that, if disclosed, would violate a citizen’s reasonable expectation of privacy, and the fact that “[t]he Legislature carefully selected criteria for determining which [convicted sex offenders] pose a sufficiently substantial risk to the community to warrant inclusion on the Sex Offender Internet Registry.” Counsel argues that this decision by the Legislature to limit which convicted sex offenders’ information is made public demonstrates that the Legislature did not intend to release the addresses of all classes of convicted sex offenders or, by extension, parolees in general.

vi. *Balancing of the Burnett Factors*

On balance, considering OPRA’s dual aims of providing both public access and the protection of personal information, the Burnett factors weigh in favor of not disclosing the complete residence plans. Most notably, there are concerns regarding security, given that the parolees are by definition individuals who have been convicted of crimes, and individuals’ reasonable expectation of privacy, as applied to both parolees and those who may provide them with residences. The Complainant has articulated no reasonable safeguards to prevent unauthorized disclosure or unsolicited contact, while the statutory language and intent does not militate towards the disclosure of the full residence plans. Thus, the potential for harm outweighs the degree of need for access to the record in its totality.

The New Jersey Supreme Court has determined that the packaging of home addresses into a single publicly-available document containing additional personal identifiers raises privacy concerns. Doe v. Poritz, 142 N.J. 1 (1995). Accordingly, the Poritz Court found that although information under Megan's Law “may be available to the public, in some form or other, [that] does not mean that plaintiff has no interest in limiting its dissemination.” 142 N.J. at 84. *See also* State v. Reid, 194 N.J. 386, 389 (2008) (recognizing reasonable expectation of privacy in subscriber information under State Constitution, notwithstanding disclosure to Internet service providers); State v. McAllister, 184 N.J. 17, 25, 31-33 (2005) (recognizing reasonable expectation of privacy in bank records under State Constitution, notwithstanding disclosure to banks). The Court found that the state interest in protecting the public was legitimate and substantial, and that the state’s interest in the disclosure of sexual offender’s home addresses substantially outweighed the plaintiff’s interest in privacy. Poritz, 142 N.J. at 90. The Court also noted, however, that the degree and scope of disclosure is carefully calibrated to the need for public disclosure. Id.

Moreover, the GRC has consistently held that home addresses can be appropriately redacted from government records pursuant to N.J.S.A. 47:1A-1 *See* Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110, 2003-121 (July 2004); Perino v. Borough of Haddon Heights, GRC Complaint No. 2004-128 (November 2004); Faulkner v. Rutgers Univ., GRC Complaint No. 2007-149 (May 2008); Feasel v. City of Trenton, GRC Complaint No. 2008-103 (September 2009). The Council, however, has also ordered the disclosure of only the town of residence portion of an individual’s home address when privacy interests weighed against the disclosure of precise street addresses. Levitt v. Montclair Parking Auth., GRC Complaint No. 2012-150 (June 2013).

Here, the potential disclosure of the full residence plans raises legitimate security and privacy concerns. However, the disclosure of the responsive town of residence does not weigh in favor of confidentiality. *See* Burnett, 198 N.J. at 427; Levitt, GRC 2012-150. Instead, this partial disclosure will mitigate possible security risks and protect the reasonable expectation of privacy of both parolees and those who house them. Disclosure of the town of residence will mitigate the possibility of harmful redistribution of the information that could allow for the unwanted contact of parolees by members of the public.

Additionally, the policy concerns which underpinned the Poritz Court’s decision regarding the full disclosure of individuals’ home addresses are not present here. As Counsel noted, the Legislature delineated specific groups of convicted sex offenders whose addresses would be made publically available under N.J.S.A. 2C:7-12 and N.J.S.A. 2C:7-13g. Disclosure of all of the information requested in Item No. 1 would, in effect, make public the addresses of individuals that the Legislature purposefully did not include within the reach of the statute. Further, N.J.A.C. 10A:71-2.2(a)(3) states that “[i]nformation, files, documents, reports, records or other written materials that, if disclosed, would infringe or jeopardize privacy rights of the offender or others or endanger the life or physical safety of any person” shall be deemed confidential and not subject to public access. Though this regulation does not specifically mention parolees’ addresses, its focus on the need for confidentiality to ensure the privacy and safety of both offenders and, notably, other members of the public contradicts the Complainant’s assertion that N.J.A.C. 10A:71-2.2 does not speak to the records at issue here. The full addresses of parolees are currently not available to the public, but the SPB does allow for the online search

of parolees by inmate and SBI number, first and last name, sex, age, ethnicity, or county of residence.

Therefore, the potential for harm stemming from non-consensual disclosure, coupled with the parolees' and third-parties' reasonable expectations of privacy, warrants non-disclosure of the full residence plans. However, these concerns do not extend to the limited disclosure of each responsive parolee's name and town of residence. N.J.S.A. 47:1A-1; Burnett, 198 N.J. at 427; Levitt, GRC 2012-150. Thus, the Custodian has failed to bear her burden of proving that the entireties of the residence plans are exempt from disclosure. N.J.S.A. 47:1A-6. The Custodian shall disclose the responsive records, making all other appropriate redactions in light of OPRA and N.J.S.A. 10A:71-2.2, but listing the town of residence.

Item No. 2

The New Jersey Appellate Division has held that:

While 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."

MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) (citing N.J.S.A. 47:1A-1).

The Court reasoned that:

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

Id. at 549.

The Court further held that "[u]nder OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt" Id. at 549; Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

More recently, the Appellate Division has found a request for “EZ Pass benefits afforded to retirees of the Port Authority, including all . . . correspondence between the Office of the Governor . . . and the Port Authority . . .” to be valid under OPRA because it “was confined to a specific subject matter that was clearly and reasonably described with sufficient identifying information . . . [and] was limited to particularized identifiable government records, namely, correspondence with another government entity, rather than information generally.” Burke v. Brandes, 429 N.J. Super. 169, 172, 176 (App. Div. 2012). The Court noted that the complainant had “narrowed the scope of the inquiry to a discrete and limited subject matter,” and that fulfilling the request would involve “no research or analysis, but only a search for, and production of,” identifiable government records. Id. at 177-78.

Here, the Complainant requested copies of all parole certificates for adult parolees residing in Passaic County as of May 15, 2013. Pursuant to N.J.A.C. 10A:71-6.3(a)-(b), “[p]rior to release on parole, the [SPB] shall issue a written certificate of parole which shall be delivered to and signed by each inmate[,]” and “[s]uch certificate . . . shall include all general and special conditions of parole imposed prior to release.” Counsel notes in the SOI that “the [SPB] maintains copies of parole certificates in the file of the offender on parole supervision.” The Complainant has thus limited his request to “particularized identifiable government records” that are maintained by the SPB. Burke, 429 N.J. Super. at 176. Rather than existing as a “broad generic description” that would require the Custodian to perform research in order to “siphon useful information,” the Complainant narrowed his request to a discreet and limited subject matter: parolees living in Passaic County as of a certain date. Id. at 177; MAG, 375 N.J. Super. at 546, 549. Counsel states in the SOI that, in order to fulfill the request, the Custodian would have to generate a list of parolees in Passaic County, obtain the files of those individuals, and then retrieve the corresponding parole certificates. This does not involve research and analysis but, instead, a search for, and production of, government records. *See* Burke, 429 N.J. Super. at 178.

Therefore, the Custodian has not borne her burden of proving that she lawfully denied access to the requested parole certificates. *See* N.J.S.A. 47:1A-6. The Complainant’s request was limited to a type of particular government records, and the required search was narrowed by the inclusion of sufficient identifying information. *See* Burke, 429 N.J. Super. at 176-78. The Custodian shall thus disclose all responsive parole certificates to the Complainant, making all necessary redactions in light of OPRA and N.J.A.C. 10A:71-2.2.

Knowing & Willful

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The potential for harm stemming from non-consensual disclosure, coupled with the parolees’ and third-parties’ reasonable expectations of privacy, warrants non-disclosure of the full residence plans. However, these concerns do not extend to the

- limited disclosure of each responsive parolee's name and town of residence. N.J.S.A. 47:1A-1 Burnett v. County of Bergen, 198 N.J. 408, 427 (2009); Levitt v. Montclair Parking Auth., GRC Complaint No. 2012-150 (June 2013). Thus, the Custodian has failed to bear her burden of proving that the entirety of the residence plans are exempt from disclosure. N.J.S.A. 47:1A-6. The Custodian shall disclose the responsive records, making all other appropriate redactions in light of OPRA and N.J.S.A. 10A:71-2.2, but listing the town of residence.
2. The Custodian has not borne her burden of proving that she lawfully denied access to the requested parole certificates. *See* N.J.S.A. 47:1A-6. The Complainant's request was limited to a type of particular government records, and the required search was narrowed by the inclusion of sufficient identifying information. *See* Burke, 429 N.J. Super. at 176-78. The Custodian shall thus disclose all responsive parole certificates to the Complainant, making all necessary redactions in light of OPRA and N.J.A.C. 10A:71-2.2.
 3. **The Custodian shall comply with items number one (1) and number two (2) above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁴ to the Executive Director.⁵**
 4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

June 17, 2014

⁴ "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."

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

Fenton v. N.J. State Parole Board, GRC Complaint No. 2013-289 – Findings and Recommendations of the Executive Director