



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

June 27, 2017 Government Records Council Meeting

Demetrius Minor
Complainant

Complaint No. 2016-03

v.

NJ Department of Corrections
Custodian of Record

At the June 27, 2017 public meeting, the Government Records Council (“Council”) considered the June 20, 2017 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 May 23, 2017 Interim Order because he responded in the prescribed time frame by providing the record and simultaneously providing certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully withheld the responsive record at the time of the request, the Custodian ultimately provided the Complainant with the requested record in compliance with the Council’s Interim Order. 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 27th Day of June, 2017

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 30, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
June 27, 2017 Council Meeting**

**Demetrius Minor,¹
Complainant**

GRC Complaint No. 2016-3

v.

**New Jersey Department of Corrections,²
Custodial Agency**

Records Relevant to Complaint:³

October 8, 2015 OPRA request: Inspection of:

1. Records showing that the New Jersey State Prison (“NJSP”) has certified special education teachers
2. Records showing educational services available at NJSP
3. Records showing that NJSP is in compliance with special education requirements

October 14, 2015 OPRA request: Inspection of:

1. 2014-2015 Budget for NJDOC Education Department
2. Audit of resources and services being used
3. Special Education Services offered by NJSP

November 23, 2015 OPRA request: Inspection of:

1. NJSP Legal Access Plan
2. Written Management Procedure for NJSP’s Legal Access Plan
3. Policy/written management Plan for Legal Supplies

Custodian of Record: John Falvey

Request Received by Custodian: October 8, 2015, October 14, 2015, November 23, 2015

Response Made by Custodian: October 23 2015, October 14, 2015, November 23, 2015, December 11, 2015, December 23, 2015

GRC Complaint Received: January 6, 2016

Background

¹ No legal representation listed on record.

² No legal representation listed on record.

³ Other records were sought that are not relevant to this Complaint.

May 23, 2017 Council Meeting:

At its May 23, 2017 public meeting, the Council considered the May 16, 2017 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 Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).
2. The Complainant's October 8, 2015 and October 14 OPRA requests, which did not request identifiable government records but instead sought information, asked questions, and required the Custodian to conduct research, were invalid under OPRA. *See* MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dept., 381 N.J. Super. 30, 37 (App. Div. 2005); New Jersey Builders Ass'n, 390 N.J. Super. 166, 180; Vance v. Cnty. of Sussex Sheriff's Office, GRC Complaint No. 2012-188 (June 2013); LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009); Donato v. Twp. of Union, GRC Complaint No. 2005-182 (February 2007). *See also* Caligiuri v. Monroe Twp. Public Sch. (Middlesex), GRC Complaint No. 2015-381 (May 2016). Thus, the Custodian lawfully denied access. N.J.S.A. 47:1A-6.
3. The Custodian failed to show that he lawfully denied access to the Institutional Legal Access Plan to ensure the security of a correctional facility pursuant to N.J.S.A. 47:1A-1.1, because the record is required to be made accessible to inmates in each housing area and the inmate law library. N.J.S.A. 47:1A-6; N.J.A.C. 10A:6-2.15. The Custodian shall therefore disclose the record.
4. **The Custodian shall comply with item #3 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 "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.

5. 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 May 24, 2017, the Council distributed its Interim Order to all parties. On May 25, 2017, the Custodian responded to the Council's Interim Order. The Custodian certified that he mailed a copy of the record to the Complainant on May 25, 2017, in accordance with the Interim Order.

Analysis

Compliance

At its May 23, 2017 meeting, the Council ordered the Custodian to disclose a copy of the Institutional Legal Access Plan ("ILAP") and to submit certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4 to the Executive Director. On May 24, 2017, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on June 1, 2017.

On May 25, 2017, the first (1st) business day after receipt of the Council's Order, the Custodian responded in writing, certifying that a copy of the ILAP was mailed to the Complainant that same day. The Custodian attached a copy of the ILAP within his response.

Therefore, the Custodian complied with the Council's May 23, 2017 Interim Order because he responded in the prescribed time frame by providing the record 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 (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 (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 unlawfully withheld the responsive record at the time of the request, the Custodian ultimately provided the Complainant with the requested record in compliance with the Council's Interim Order. 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 May 23, 2017 Interim Order because he responded in the prescribed time frame by providing the record and simultaneously providing certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully withheld the responsive record at the time of the request, the Custodian ultimately provided the Complainant with the requested record in compliance with the Council's Interim Order. 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: Samuel A. Rosado
Staff Attorney

June 20, 2017



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

May 23, 2017 Government Records Council Meeting

Demetrius Minor
Complainant

Complaint No. 2016-3

v.

NJ Department of Corrections
Custodian of Record

At the May 23, 2017 public meeting, the Government Records Council (“Council”) considered the May 16, 2017 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 did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).
2. The Complainant’s October 8, 2015 and October 14 OPRA requests, which did not request identifiable government records but instead sought information, asked questions, and required the Custodian to conduct research, were invalid under OPRA. See MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dept., 381 N.J. Super. 30, 37 (App. Div. 2005); New Jersey Builders Ass’n, 390 N.J. Super. 166, 180; Vance v. Cnty. of Sussex Sheriff’s Office, GRC Complaint No. 2012-188 (June 2013); LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009); Donato v. Twp. of Union, GRC Complaint No. 2005-182 (February 2007). See also Caligiuri v. Monroe Twp. Public Sch. (Middlesex), GRC Complaint No. 2015-381 (May 2016). Thus, the Custodian lawfully denied access. N.J.S.A. 47:1A-6.
3. The Custodian failed to show that he lawfully denied access to the Institutional Legal Access Plan to ensure the security of a correctional facility pursuant to N.J.S.A. 47:1A-1.1, because the record is required to be made accessible to inmates in each



housing area and the inmate law library. N.J.S.A. 47:1A-6; N.J.A.C. 10A:6-2.15. The Custodian shall therefore disclose the record.

4. **The Custodian shall comply with item #3 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**
5. 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 23rd Day of May, 2017

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: May 24, 2017

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
May 23, 2017 Council Meeting**

**Demetrius Minor¹
Complainant**

GRC Complaint No. 2016-3

v.

**New Jersey Department of Corrections,²
Custodial Agency**

Records Relevant to Complaint:³

October 8, 2015 OPRA request: Inspection of:

1. Records showing that the New Jersey State Prison (“NJSP”) has certified special education teachers
2. Records showing educational services available at NJSP
3. Records showing that NJSP is in compliance with special education requirements

October 14, 2015 OPRA request: Inspection of:

1. 2014-2015 Budget for NJDOC Education Department
2. Audit of resources and services being used
3. Special Education Services offered by NJSP

November 23, 2015 OPRA request: Inspection of:

1. NJSP Legal Access Plan
2. Written Management Procedure for NJSP’s Legal Access Plan
3. Policy/written management Plan for Legal Supplies

Custodian of Record: John Falvey

Request Received by Custodian: October 8, 2015, October 14, 2015, November 23, 2015

Response Made by Custodian: October 23 2015, October 14, 2015, November 23, 2015, December 11, 2015, December 23, 2015

GRC Complaint Received: January 6, 2016

¹ No legal representation listed on record.

² No legal representation listed on record.

³ Other records were sought that are not relevant to this Complaint.

Background⁴

Request and Response:

October 8, 2015 OPRA Request

On October 8, 2015, the Complainant, an inmate at NJSP, submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On October 23, 2015, the tenth business day after receipt of the OPRA request, the Custodian responded in writing, seeking a ten (10) business day extension of time to respond. On October 31, 2015, the Complainant modified his request to seek an onsite inspection. On November 9, 2015, the Custodian, citing logistics problems with the onsite inspection, requested in writing an additional fourteen (14) business days to arrange the inspection. On December 3, 2015, the requested onsite inspection took place.

October 14, 2015 OPRA Request

On October 14, 2015, the Complainant submitted a second OPRA request seeking the above-mentioned records. On the same day, the Custodian responded in writing and requested an extension of ten (10) business days. On October 28, the tenth business day following the extension request, the Custodian wrote to the Complainant, seeking an additional extension until November 9, 2015, to respond. On October 31, 2015, the Complainant modified his request to seek an onsite inspection of the aforesaid records. On November 9, 2015, again citing logistics problems caused by the onsite inspection request, the Custodian wrote to the Complainant, seeking an additional fourteen (14) days to arrange the inspection. On November 16, 2015, and again on November 30, 2015, the Custodian extended the date for the onsite inspection for no later than December 31, 2015. On December 3, 2015, the requested onsite inspection took place.

November 23, 2015 OPRA Request

On November 23, 2015, the Complainant submitted a third OPRA request seeking the above-mentioned records. That same day, the Custodian responded in writing and advised the Complainant that the Department’s Internal Management Procedure for NJSP Legal Access Plan (referred herein as Institutional Legal Access Plan “ILAP” as denoted in N.J.A.C. 10A:6-2.15) was responsive to requested Item Nos. 1, 2, and 3 but noted that the record was exempt because it consisted of “emergency or security information or procedures for any building or facility which if disclosed would create a risk of safety for persons or property.” N.J.S.A. 47:1A-1.1. In its place, the Custodian offered to produce a copy of the NJSP Inmate Handbook. On December 3, 2015, the requested onsite inspection took place. The Custodian responded to the Complainant’s request for an explanation on why the ILAP was withheld on December 11 and December 23, 2015, stating that the ILAP is a security related document. However, the Custodian stated that excerpts of the NJSP Inmate Handbook containing information responsive to the Complainant’s request were made available for inspection on December 3, 2015.

⁴ 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.

Denial of Access Complaint:

On January 6, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). With respect to his first and second OPRA requests, the Complainant asserted that the Custodian provided written “answers,” instead of the requested, responsive records. Regarding his third request, the Complainant argued that the records are not exempt because N.J.A.C. 10A:6-2.15 specifically states that the ILAP must be made available to inmates as part of the Inmate Handbook and must be posted in the inmate law library.

Statement of Information:

On January 28, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s first OPRA request on October 8, 2015. The Custodian conceded that no written response was given to the Complainant until October 23, 2015, the tenth (10th) business day following receipt of the request.

The Custodian stated that the Complainant made a second OPRA request on October 14, 2015. The Custodian further stated that he responded in writing to the Complainant on that same day, seeking an additional ten (10) days to process the Complaint. Ten days later, the Custodian requested a second ten (10) day extension. The Custodian further stated that he received letters from the Complainant on or before November 9, 2015, modifying the request to seek an onsite inspection. The Custodian further certified that he wrote to the Complainant on November 16, 2015, advising that responsive records had been forwarded to the NJSP and that an extension was needed until November 30, 2015, to arrange the onsite inspection.

On November 30, 2015, the Custodian wrote to the Complainant, advising that the date for onsite inspection had to be extended to December 31, 2015. The Custodian certified that the onsite inspection ultimately took place on December 3, 2015, and that all responsive records for the first and second OPRA requests were made available at that time.

Regarding the third OPRA request, the Custodian certified that he received it on November 23, 2015, and responded to the Complainant on that same day, stating that the requested record was exempt because disclosure would reveal “emergency or security information or procedures for any building or facility, which if disclosed, would jeopardize the security of the building or facility or person within.” N.J.S.A. 47:1A-1.1. Although he denied access to the exempt record, the Custodian stated that he offered the Complainant portions of the Inmate Handbook, which covered the subject matter of the NJSP’s ILAP. The Custodian certified that the Complainant received access to these excerpts during the December 3, 2015 onsite inspection.⁵ The Custodian argued that the denial of the ILAP was required for security reasons, and notwithstanding N.J.A.C. 10A:6-2.15, it would be improper for the Custodian to disclose security related material through OPRA. Moreover, the Custodian noted that the GRC had previously upheld a prior denial of the same document in Smith v. NJ Dep’t of Corr., GRC Complaint No. 2013-337 (July 2014).

⁵ A second onsite inspection was completed on December 31, 2015. However, the Complainant asserted no denial of access for any records connected to the second onsite inspection.

Additional Information:

On September 1, 2016, the GRC wrote to the Custodian, seeking clarification as to whether some of the responsive records that were identified in the “Records Denied” portion of the Complaint were not records “made, maintained, or kept on file” in the ordinary course of business but rather documents prepared by the NJSP to answer questions posed by the OPRA request. The GRC also requested copies of all responsive records provided. On the same day, the Custodian responded to the GRC, certifying that except for a twenty-three (23) page budget document, all records provided to the Complainant were created by the NJSP to provide information to the inmate addressing his OPRA request.

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Id. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁶ Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).

Here, the Complainant filed his first OPRA request on October 8, 2015. The Custodian initially responded to the Complainant on the tenth (10th) day following that request. In his SOI, the Custodian conceded that he had simply failed to respond in writing as required within the mandated seven business days.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

Unlawful Denial of Access

October 8, 2015 and October 14, 2015 OPRA Requests

⁶ A custodian’s written response, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

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 New Jersey Appellate Division has ruled that the Council is permitted to raise additional defenses regarding the disclosure of records. Paff v. Twp. of Plainsboro, 2007 N.J. Super. Unpub. LEXIS 2135 (App. Div. Apr. 2, 2007).⁷ In Paff, The Council affirmed the custodian’s denial of portions of the executive session minutes but for reasons other than those cited by the custodian. The complainant appealed, arguing that the Council did not have the authority to uphold a denial of access for reasons not raised by the custodian. The court sided with the Council, which held that:

The GRC has an independent obligation to ‘render a decision as to whether the record which is the subject of the complaint is a government record which must be made available for public access pursuant to’ OPRA . . . The GRC is not limited to assessing the correctness of the reasons given for the custodian’s initial determination; it is charged with determining if the initial decision was correct.

[Id. at *4.]

See also Chiappini v. Twp. of Fairfield (Cumberland), GRC Complaint No. 2013-139 (Interim Order dated July 29, 2014).

Additionally, the Appellate Division 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.*” MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) (emphasis added). The MAG 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.” Id. (emphasis added). See also Bent v. Twp. of Stafford Police Dept., Custodian of Records, 381 N.J. Super. 30, 37 (App. Div. 2005), N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

The Council has also addressed the matter of “open ended searches” in Vance v. Cnty. of Sussex Sheriff’s Office, GRC Complaint No. 2012-188 (June 2013), wherein the complainant sought answers to questions: “[h]ow many inmates received threatening notes and what actions were taken?” The GRC found the request invalid, as it sought “information [and] fails to seek identifiable government records.” Citing MAG, Bent, NJ Builders, and Schuler, *supra*.

⁷ On appeal from Paff v. Twp. of Plainsboro, GRC Complaint No. 2005-29 (March 2006).

In the instant matter, the Complainant's October 8, 2015 request sought "records showing" that the NJSP has certified special education teachers, which educational services were available, and that NJSP is in compliance with special education requirements. The October 14, 2015 request sought an audit of resources and services being used and "special education services [being] offered by the NJSP."⁸ In those instances, the requests failed to specify the type of record sought and only described information contained in whatever records the Custodian had on hand, thus requiring the Custodian to conduct research. Furthermore, the requests impermissibly sought information, *e.g.*, the "special services" being offered by the NJSP.⁹

Therefore, the Complainant's October 8, 2015 and October 14 OPRA requests were invalid under OPRA, which did not request identifiable government records but instead sought information, asked questions, and required the Custodian to conduct research. Thus, the Custodian lawfully denied access. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; Vance, GRC 2012-188; Donato, GRC 2005-182; LaMantia, GRC 2008-140. *See also* Caligiuri v. Monroe Twp. Public Sch. (Middlesex), GRC Complaint No. 2015-381 (May 2016).

November 23, 2015 OPRA Request

OPRA provides that records pertaining to "emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein" and "security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons [or] property" are not government records subject to disclosure. N.J.S.A. 47:1A-1.1.

In an earlier case regarding emergency or security information of a correctional facility, the Council found that the custodian properly denied access to policies and post orders for a section of East Jersey State Prison. Fischer v. Dep't of Corr., GRC Complaint No. 2005-171 (February 2006). The Council determined that "the requested information contains procedures for emergencies [and] when doors are opening and closing." Id. In the current matter however, the Complainant noted that the record sought is explicitly required to be posted at the NJSP's law library under N.J.A.C. 10A:6-2.15, which provides in pertinent part:

- (a) The Administrator or designee of each correctional facility shall ensure that written internal management procedures pursuant to this subchapter are established. These written internal management procedures shall be known as the Institutional Legal Access Plan and shall be incorporated into the next revision of the correctional facility Inmate Handbook. A copy of the written internal management procedures shall also be posted in the inmate law library.
- (b) New and revised internal management procedures to the Institutional Legal Access Plan shall be posted in each housing area and in the Inmate Law Library. These revisions shall be incorporated into the next publication of the Inmate Handbook.

⁸ As noted above, the Complainant also sought the 2014-2015 Budget for NJDOC's Education Department. The GRC has reviewed the twenty-three (23) page document provided by the Custodian in response to that request and finds no denial of access because the Custodian provided the responsive record.

⁹ The Custodian provided records that he created, apparently in an effort to address the Complainant's concerns over special services available at the NJSP. However, the Custodian had no such obligation under OPRA.

N.J.A.C. 10A:6-2.15.

The Council has previously addressed a complaint regarding the ILAP in Smith v. NJ Dep't of Corr., GRC Complaint No. 2013-337 (July 2014). As the Custodian argued in the present matter, the custodian certified that the IMP manual (ILAP) details policies and procedures regarding transporting inmates around the NJSP to facilitate access to legal services, including the NJSP's law library. Furthermore, the custodian certified that each page of the ILAP at the time had been stamped "Confidential." Therefore, the Council held that the custodian met his burden of lawfully denying access to the record under N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-9. However, the Council was unaware of the requirements under N.J.A.C. 10A:6-2.15, mandating the ILAP's publication at the inmate law library and incorporation within the Inmate Handbook. In light of the new information, the Council should depart from the Smith ruling because N.J.A.C. 10A:6-2.15 does not grant the Custodian discretion to withhold portions of the ILAP to maintain confidence of security measures. Furthermore, the agency's own regulations do not apportion any of the ILAP as confidential, and the Custodian makes no argument rebutting the applicability of the regulation requiring disclosure of the requested document.

Based on the foregoing, the Custodian failed to show that he lawfully denied access to the ILAP to ensure the security of a correctional facility pursuant to N.J.S.A. 47:1A-1.1, because the record is required to be made accessible to inmates in each housing area and the inmate law library. N.J.S.A. 47:1A-6; N.J.A.C. 10A:6-2.15. The Custodian shall therefore disclose the record.

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 Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).
2. The Complainant's October 8, 2015 and October 14 OPRA requests, which did not request identifiable government records but instead sought information, asked

questions, and required the Custodian to conduct research, were invalid under OPRA. See MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dept., 381 N.J. Super. 30, 37 (App. Div. 2005); New Jersey Builders Ass'n, 390 N.J. Super. 166, 180; Vance v. Cnty. of Sussex Sheriff's Office, GRC Complaint No. 2012-188 (June 2013); LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009); Donato v. Twp. of Union, GRC Complaint No. 2005-182 (February 2007). See also Caligiuri v. Monroe Twp. Public Sch. (Middlesex), GRC Complaint No. 2015-381 (May 2016). Thus, the Custodian lawfully denied access. N.J.S.A. 47:1A-6.

3. The Custodian failed to show that he lawfully denied access to the Institutional Legal Access Plan to ensure the security of a correctional facility pursuant to N.J.S.A. 47:1A-1.1, because the record is required to be made accessible to inmates in each housing area and the inmate law library. N.J.S.A. 47:1A-6; N.J.A.C. 10A:6-2.15. The Custodian shall therefore disclose the record.
4. **The Custodian shall comply with item #3 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 1:4-4,¹⁰ to the Executive Director.¹¹**
5. 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.

Prepared By: Samuel A. Rosado
Staff Attorney

May 16, 2017

¹⁰ "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."

¹¹ 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.