



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

JON S. CORZINE
Governor

JOSEPH V. DORIA, JR.
Commissioner

FINAL DECISION

June 11, 2009 Government Records Council Meeting

James Leak
Complainant

Complaint No. 2007-148

v.

Union County Prosecutor's Office
Custodian of Record

At the June 11, 2009 public meeting, the Government Records Council ("Council") considered the May 20, 2009 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. While the Custodian's letter to the Complainant on March 12, 2009 advising that the requested records would be provided upon payment of copying costs 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 Mejias v. New Jersey Department of Corrections, GRC Complaint No. 2007-181 (July 2008), because the Custodian failed to simultaneously provide certified confirmation of his compliance to the GRC until March 25, 2009, the Custodian has not fully complied with the Council's February 25, 2009 Interim Order pursuant to Jung & O'Halloran v. Borough of Roselle (Union), GRC Complaint No. 2007-299; 2007-307 (April 2009).
2. Although the Custodian's failure to respond in writing to the Complainant's May 5, 2007 OPRA request Items No. 4 through No. 8 resulted in a deemed denial and the Custodian failed to fully comply with the Council's February 25, 2009 Interim Order by not providing certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹, to the Executive Director, the Custodian did bear his burden of proving a lawful denial of access to request Items No. 1, No. 2 and No. 3 and provided access to the records responsive to request Items No. 4 through No. 8 pending payment of the appropriate copying cost to the Complainant

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."



within the five (5) business days after receipt of the Council's February 25, 2009 Interim Order. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

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 11th Day of June, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Janice L. Kovach
Government Records Council

Decision Distribution Date: June 16, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
June 11, 2009 Council Meeting**

**James Leak¹
Complainant**

GRC Complaint No. 2007-148

v.

**Union County Prosecutor's Office²
Custodian of Records**

Records Relevant to Complaint:

1. Copy of autopsy results from a 1994 trial in Union County.³
2. Copy of ballistics results from a 1994 trial in Union County.
3. Copy of crime scene photos from a 1994 trial in Union County.
4. Copy of a direct appeal brief prepared by Kevin Byrnes, Esq., in 1995.
5. Copy of Union County Prosecutor's direct appeal brief prepared in 1995.
6. Copy of post conviction relief ("PCR") brief prepared by Thomas R. Ashley, Esq., in 1999.
7. Copy of appeal of PCR prepared by Cariddi and Garcia, Esqs.
8. Copy of trial transcripts prepared by Joseph W. Spagnoli, Esq., from a 1994 trial in Union County.⁴

Request Made: May 5, 2007

Response Made: May 15, 2007

Custodian: John Holl⁵

GRC Complaint Filed: July 9, 2007⁶

Background

February 25, 2009

Government Records Council's ("Council") Interim Order. At its February 25, 2009 public meeting, the Council considered the February 18, 2009 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 No legal representation listed on record.

² Represented by Alexandra DeFresco, Esq. (Elizabeth, NJ).

³ The Complainant failed to provide a specific docket number, caption or other information regarding said trial.

⁴ The Complainant also requested one (1) additional record that is not at issue in this complaint.

⁵ The original custodian of record is Eileen Walsh.

⁶ The GRC received the Denial of Access Complaint on said date.

1. Pursuant to N.J.S.A. 47:1A-6 the Custodian has borne her burden of proving a lawful denial of access to records responsive to request Items No. 1, No. 2 and No. 3 because the records are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1, McCrone (The Trenton Times) v. Burlington County Prosecutor's Office, GRC Complaint No. 2005-146 (November 2005) and Executive Order No. 69 (Whitman, 1997).
2. The Custodian's failure to respond in writing to the Complainant's OPRA request Items No. 4 through No. 8 either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
3. The Custodian's assertion in this complaint that the Complainant should have been provided request Items No. 4 through No. 8 by a defense attorney or public defender is not a lawful reason for the Custodian's failure to respond pursuant to Vessio v. Township of Manchester, GRC Complaint No. 2006-130 (April, 2008).
4. Pursuant to N.J.S.A. 47:1A-6, the Custodian has failed to bear his burden of proving a lawful denial of access to the records requested in the Complainant's May 5, 2007 OPRA request. **The Custodian shall disclose all records requested in Items No. 4 through No. 8 with appropriate redactions, if any, and a redaction index detailing the general nature of the information redacted and the lawful basis for such redactions as required by N.J.S.A. 47:1A-6 and 47:1A-5.g. If no records responsive to request Items No. 4 through No. 8 exist, the Custodian must provide a certification stating as such to the GRC.**
5. **The Custodian shall comply with Item No. 4 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁷, to the Executive Director.**
6. 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.

March 6, 2009

Council's Interim Order distributed to the parties.

⁷ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

March 12, 2009

Letter from the Custodian to the GRC, attaching a letter from the Custodian to the Complainant dated March 12, 2009.⁸

The Custodian states that the Union County Prosecutor's Office is willing to provide the records responsive to the Complainant upon payment of the appropriate copying cost and has notified the Complainant of such on March 12, 2009 via U.S. mail. The Custodian avers that pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006), the Custodian is not required to release the requested records until payment is received.

Additionally, the Custodian disputes the GRC's finding that the Union County Prosecutor's Office failed to bear its burden of producing a lawful denial of access without taking into consideration events that occurred in mediation. The Custodian requests that the GRC revise its Findings and Recommendations of the Executive Director to reflect that the Union County Prosecutor's Office agreed to comply with the Complainant's May 5, 2007 OPRA request months before the Council's February 25, 2009 Interim Order.

March 24, 2009

E-mail from the GRC to the Custodian. The GRC states it is in receipt of the Custodian's letter dated March 12, 2009, attaching a letter from the Custodian to the Complainant advising that the records responsive to Complainant's May 5, 2007 OPRA request Item's No. 4 through No. 8 are still available upon payment of the appropriate copying cost. The GRC states that compliance for this complaint was due on March 13, 2009.

The GRC states that to date, no certified confirmation of compliance has been received from the Custodian. The GRC requests that the Custodian provide certified confirmation of compliance as soon as possible but no later than close of business on March 26, 2009.

March 25, 2009

Custodian's response to the Council's Interim Order. The Custodian certifies that he sent a letter to the Complainant on March 12, 2009 advising that the records ordered to be provided in the Council's February 25, 2009 Interim Order are available upon payment of the appropriate copying cost. The Custodian certifies that, to date, the Complainant has not responded to the Custodian's March 12, 2009 letter.⁹

⁸ The Custodian requests that the GRC consider attached correspondence that occurred during mediation between the original Custodian of Record and the Complainant.

⁹ The Custodian provided correspondence between parties during mediation in a subsequent mailing on March 26, 2009.

Analysis

Whether the Custodian complied with the Council's February 25, 2009 Interim Order?

The Custodian certified that he sent a letter to the Complainant on March 12, 2009 advising that the records responsive to request Items No. 4 through No. 8 were available for the appropriate copying cost. The Custodian averred that pursuant to Paff, supra, and N.J.S.A. 47:1A-5.b., the Custodian is not required to provide records until payment is received.

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 had not unlawfully denied access to the requested records pursuant to N.J.S.A. 47:1A-5.b. and Santos v. New Jersey State Parole Board, GRC Case No. 2004-74 (August, 2004).

Additionally, in Mejias v. New Jersey Department of Corrections, GRC Complaint No. 2007-181 (July 2008), the Council ordered the Custodian in its May 28, 2008 Interim Order to provide the requested annual reports to the Complainant. The Custodian certified on June 11, 2008 that the Complainant was advised that the records would be provided upon payment of copying costs. The Council held:

“because the Custodian informed the Complainant in writing that she would provide the requested records upon payment of the copy fee and because the Custodian is not required to release the requested records until payment is received pursuant to N.J.S.A. 47:1A-5.b. and [Paff, supra], as well as because the Custodian provided certified confirmation of compliance to the Executive Director within the five (5) business days as ordered by the Council, the Custodian has complied with the Council's May 28, 2008 Interim Order.”

In the instant complaint, the Custodian sent a letter to the Complainant on March 12, 2009, advising that the requested records would be provided upon payment of the appropriate copying cost. Therefore, this response is appropriate pursuant to N.J.S.A. 47:1A-5.b., Paff, supra and Mejias, supra.

However, the Custodian failed to simultaneously provide certified confirmation until March 25, 2009, or thirteen (13) business days after receipt of the Council's February 25, 2009 Interim Order.

In Jung & O'Halloran v. Borough of Roselle (Union), GRC Complaint Nos. 2007-299; 2007-307 (April 2009), the Council's December 18, 2008 Interim Order ordered the Custodian to comply with the Administrative Law Judge's ("ALJ") decision to provide records responsive:

“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 and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.”

The Custodian complied with the ALJ’s order, but failed to provide certified confirmation to the GRC within five (5) business days. The GRC held that the Custodian failed to fully comply with the Council’s Interim Order.

Therefore, while the Custodian’s letter to the Complainant on March 12, 2009, advising that the requested records would be provided upon payment of copying costs is appropriate pursuant to N.J.S.A. 47:1A-5.b., Paff, supra, and Mejias, supra, because the Custodian failed to simultaneously provide certified confirmation of his compliance to the GRC until March 25, 2009, the Custodian has not fully complied with the Council’s February 25, 2009 Interim Order pursuant to Jung & O’Halloran, supra.

Whether the GRC is authorized to take into consideration correspondence related to the mediation process?

The Custodian contends that the GRC should have considered correspondence between the parties that took place in mediation before finding that the Custodian failed to comply with the Complainant’s May 5, 2007 OPRA request. The Custodian asserts that based on said correspondence, the Union County Prosecutor’s Office has long agreed to comply with the Complainant’s May 5, 2007 OPRA request and requests that the Council’s holding reflects this compliance.

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 absolutely 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.

The provisions of N.J.S.A. 2A:23C-1, et seq., clearly identify any correspondence occurring in mediation as privileged and restrict consideration of such during the GRC’s adjudication of a complaint. The statute does allow for use of correspondence only when all parties and the mediator waive the privilege. However, because N.J.S.A. 47:1A-6 provides that the burden of proving a lawful denial of access rests on the Custodian, the Custodian is responsible for securing written permission from the mediator and all parties in order for the GRC to consider mediation correspondence in the adjudication process.

However, regardless of whether the GRC could consider correspondence between parties during mediation, the Custodian’s initial failure to respond in writing to request Items No. 4 through No. 8 within the statutorily mandated seven (7) business days resulted in a deemed denial of access and a violation of N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. Therefore, based on the Custodian’s deemed denial of the Complainant’s May 5, 2007 OPRA request, the GRC will not amend the Council’s February 25, 2009 Interim Order.

Whether the Custodian’s deemed denial of access and failure to fully comply with the Council’s February 25, 2009 Interim Order 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 at 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 (App. Div. 1996) at 107).

Although the Custodian’s failure to respond in writing to the Complainant’s May 5, 2007 OPRA request Items No. 4 through No. 8 resulted in a deemed denial and the Custodian failed to fully comply with the Council’s February 25, 2009 Interim Order by not providing certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹⁰, to the Executive Director, the Custodian did bear her burden of proving a lawful denial of access to request Items No. 1, No. 2 and No. 3 and provided access to the records responsive to request Items No. 4 through No. 8 pending payment of the appropriate copying cost to the Complainant within the five (5) business days after receipt of the Council’s February 25, 2009 Interim Order. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of

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."
James Leak v. Union County Prosecutor’s Office, 2007-148 – Supplemental Findings and Recommendations of the Executive Director

OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. While the Custodian's letter to the Complainant on March 12, 2009 advising that the requested records would be provided upon payment of copying costs 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 Mejias v. New Jersey Department of Corrections, GRC Complaint No. 2007-181 (July 2008), because the Custodian failed to simultaneously provide certified confirmation of his compliance to the GRC until March 25, 2009, the Custodian has not fully complied with the Council's February 25, 2009 Interim Order pursuant to Jung & O'Halloran v. Borough of Roselle (Union), GRC Complaint No. 2007-299; 2007-307 (April 2009).
2. Although the Custodian's failure to respond in writing to the Complainant's May 5, 2007 OPRA request Items No. 4 through No. 8 resulted in a deemed denial and the Custodian failed to fully comply with the Council's February 25, 2009 Interim Order by not providing certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹¹, to the Executive Director, the Custodian did bear his burden of proving a lawful denial of access to request Items No. 1, No. 2 and No. 3 and provided access to the records responsive to request Items No. 4 through No. 8 pending payment of the appropriate copying cost to the Complainant within the five (5) business days after receipt of the Council's February 25, 2009 Interim Order. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

May 20, 2009

¹¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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ROBIN BERG TABAKIN, Chair
COMMISSIONER JOSEPH V. DORIA, JR.
COMMISSIONER LUCILLE DAVY
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

INTERIM ORDER

February 25, 2009 Government Records Council Meeting

James Leak
Complainant

Complaint No. 2007-148

v.

Union County Prosecutor's Office (Union)
Custodian of Record

At the February 25, 2009 public meeting, the Government Records Council ("Council") considered the February 18, 2009 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. Pursuant to N.J.S.A. 47:1A-6 the Custodian has borne her burden of proving a lawful denial of access to records responsive to request Items No. 1, No. 2 and No. 3 because the records are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1, McCrone (The Trenton Times) v. Burlington County Prosecutor's Office, GRC Complaint No. 2005-146 (November 2005) and Executive Order No. 69 (Whitman, 1997).
2. The Custodian's failure to respond in writing to the Complainant's OPRA request Items No. 4 through No. 8 either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
3. The Custodian's assertion in this complaint that the Complainant should have been provided request Items No. 4 through No. 8 by a defense attorney or public defender is not a lawful reason for the Custodian's failure to respond pursuant to Vessio v. Township of Manchester, GRC Complaint No. 2006-130 (April, 2008).
4. Pursuant to N.J.S.A. 47:1A-6, the Custodian has failed to bear his burden of proving a lawful denial of access to the records requested in the



Complainant's May 5, 2007 OPRA request. **The Custodian shall disclose all records requested in Items No. 4 through No. 8 with appropriate redactions, if any, and a redaction index detailing the general nature of the information redacted and the lawful basis for such redactions as required by N.J.S.A. 47:1A-6 and 47:1A-5.g. If no records responsive to request Items No. 4 through No. 8 exist, the Custodian must provide a certification stating as such to the GRC.**

5. **The Custodian shall comply with Item No. 4 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹, to the Executive Director.**
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 25th Day of February, 2009

Robin Berg Tabakin, Chairman
Government Records Council

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

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: March 6, 2009

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."

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 25, 2009 Council Meeting**

**James Leak¹
Complainant**

GRC Complaint No. 2007-148

v.

**Union County Prosecutor's Office (Union)²
Custodian of Records**

Records Relevant to Complaint:

1. Copy of autopsy results from a 1994 trial in Union County.³
2. Copy of ballistics results from a 1994 trial in Union County.
3. Copy of crime scene photos from a 1994 trial in Union County.
4. Copy of a direct appeal brief prepared by Kevin Byrnes, Esq. in 1995.
5. Copy of Union County Prosecutor's direct appeal brief prepared in 1995.
6. Copy of post conviction relief ("PCR") brief prepared by Thomas R. Ashley, Esq. in 1999.
7. Copy of appeal of PCR prepared by Cariddi and Garcia, Esq.
8. Copy of trial transcripts prepared by Joseph W. Spagnoli, Esq. from a 1994 trial in Union County.⁴

Request Made: May 5, 2007

Response Made: May 15, 2007

Custodian: John Holl⁵

GRC Complaint Filed: July 9, 2007⁶

Background

May 5, 2007

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.

May 15, 2007

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the third (3rd) business day following receipt of such request. The Custodian states that access to records request Items No. 1, No. 2 and No. 3

¹ No legal representation listed on record.

² Represented by Alexandra DeFresco, Esq. (Elizabeth, NJ).

³ The Complainant failed to provide a specific docket number, caption or other information regarding said trial.

⁴ The Complainant also requested one (1) additional record that is not at issue in this complaint.

⁵ The original custodian of record is Eileen Walsh.

⁶ The GRC received the Denial of Access Complaint on said date.

is denied as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1. and Executive Order No. 69 (Governor Whitman, 1997)(“E.O. No. 69”).⁷

June 28, 2007

Letter from the Custodian to the Complainant. The Custodian states that she is in receipt of the Complainant’s Denial of Access Complaint. The Custodian reiterates that criminal investigatory records, which include autopsy reports, ballistics results and crime scene photographs, are exempt from disclosure pursuant to OPRA.

Further, the Custodian states that request Items No. 4 through No. 8 should have been provided to the Complainant by the Complainant’s defense attorney. Finally, the Custodian states that the Complainant should direct his request for Items No. 4 through No. 8 to the public defender or defense attorney that represented the Complainant during trial.⁸

July 9, 2007

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

- Complainant’s OPRA request dated May 5, 2007.
- Letter from the Custodian to the Complainant dated May 15, 2007.

The Complainant states that he sent an OPRA request to the Custodian on May 5, 2007. The Complainant states that the Custodian responded on May 15, 2007, denying access to Items No. 1, No. 2 and No. 3 as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1. and E.O. No. 69. The Complainant states that he received no response to the remaining request items.

July 12, 2007

Offer of Mediation sent to both parties.

July 17, 2007

The Complainant agrees to mediate this complaint.

July 19, 2007

The Custodian agrees to mediate this complaint.

July 31, 2007

Complaint referred to mediation.

August 13, 2008

Complaint referred back from mediation.

⁷ The Custodian does not include a response to request Items No. 4 through No. 8.

⁸ The Custodian received a copy of the Complainant’s Denial of Access complaint prior to the GRC’s receipt of said complaint.

August 19, 2008

Letter from the GRC to the Complainant. The GRC informs the Complainant that he has the opportunity to amend this Denial of Access Complaint prior to the GRC's request for the Statement of Information from the Custodian. The GRC states that the Complainant's response is due by close of business on August 27, 2008.

September 30, 2008

Request for the Statement of Information sent to the Custodian.

October 7, 2008

Custodian's Statement of Information ("SOI") with the following attachments:

- Complainant's OPRA request dated May 5, 2007.⁹
- Letter from the Custodian to the Complainant dated May 15, 2007.
- Letter from the Custodian to the Complainant dated June 28, 2007.¹⁰

The Custodian states that the Union County Prosecutor's Office received the Complainant's May 5, 2007 OPRA request on May 10, 2007. The Custodian states that Eileen Walsh ("Ms. Walsh"), the original Custodian of Record, responded in writing to the Complainant's OPRA request on May 15, 2007, denying access to the records request Items No. 1, No. 2 and No. 3 pursuant to N.J.S.A. 47:1A-1.1 and E.O. No. 69.

The Custodian states that Ms. Walsh responded to the Complainant's Denial of Access Complaint on June 28, 2007, reiterating the reasons for her denial of access to request Items No. 1, No. 2 and No. 3. The Custodian states that Ms. Walsh also informed the Complainant that request Items No. 4 through No. 8 should have been provided to the Complainant by the Complainant's defense attorney. The Custodian finally states that Ms. Walsh informed the Complainant that he should direct his request for Items No. 4 through No. 8 to the public defender or defense attorney that represented the Complainant during trial.¹¹

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.

⁹The Custodian also includes a letter dated May 7, 2007. This letter appears to be the cover letter for the Complainant's OPRA request and bears Union County's date stamp confirming receipt of the request on May 10, 2007.

¹⁰Additional attachments pertaining to mediation provided by the Custodian are irrelevant to the adjudication of this complaint.

¹¹The Custodian certifies that the factual basis of the Statement of Information comes from records kept by Ms. Walsh and a telephone conversation on October 8, 2008.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file...or that has been received* in the course of his or its official business...[a] government record *shall not include...criminal investigatory records...*” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA states that:

“[a] request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian....If 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.” N.J.S.A. 47:1A-5.g.

OPRA further provides that:

“a custodian of a government record shall grant access to a government record or deny access to a government record as soon as possible, but not later than seven business days after receiving the request, provided that the record is currently available and not in storage or archived....” N.J.S.A. 47:1A-5.i.

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

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

OPRA also provides that:

“[t]he provisions of [OPRA] shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.” (Emphasis added.) N.J.S.A. 47:1A-9.a.

Executive Order No. 69 states that:

“[t]he following records shall not be deemed to be public records subject to inspection and examination and available for copying pursuant to the

provisions of [OPRA], as amended: *fingerprint cards, plates and photographs and similar criminal investigation records* that are required to be made, maintained or kept by any State or local governmental agency.” (Emphasis added.) E.O. Order 69 (Whitman, 1997).

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.

Items No. 1, No. 2 and No. 3 of the Complainant’s May 5, 2007 OPRA request

Request Item No. 1 seeks an autopsy report relating to a criminal trial in 1994. In McCrone (The Trenton Times) v. Burlington County Prosecutor’s Office, GRC Complaint No. 2005-146 (November 2005), the Complainant requested records pertaining to a fatal auto accident, which included an autopsy report. The Custodian responded, denying access to the requested autopsy record as a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1. The GRC held that the Custodian had borne his burden of proving that the denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6.

In the matter currently before the Council, the Custodian denied access to the requested autopsy report as a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1. Therefore, the autopsy report responsive to request Item No. 1 of the Complainant’s May 5, 2007 OPRA request is exempt from disclosure pursuant to N.J.S.A. 47: 1 A-1.1 and McCrone, supra.

Request Item No. 2 seeks a ballistic report relating to a criminal trial in 1994. The term “ballistics,” as defined in the Merriam Webster dictionary, is “the firing characteristics of a firearm or cartridge.”¹² Police and forensic scientists conduct ballistics tests to discern whether a particular firearm was used in the course of committing a crime. These tests include identifying and matching the markings left on a bullet from the rifling (spiral groove engraved into the inside of a barrel to add spin to a bullet resulting in better accuracy) of a gun to a bullet found at a crime scene. *See State v. Powell*, 84 N.J. 305 (1980). Because ballistics testing is conducted to determine whether a particular firearm was used in the commission of a crime, a ballistics report can be considered criminal investigatory in nature and not subject to disclosure pursuant to N.J.S.A. 47:1A-1.1. Therefore, the ballistics report responsive to Item No. 2 of the Complainant’s May 5, 2007 OPRA request is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

Request Item No. 3 seeks crime scene photographs relating to a criminal trial in 1994. The Custodian responded, stating that the request was denied pursuant to N.J.S.A. 47:1A-1.1 and E.O. No. 69. E.O. No. 69, enacted on May 15, 1997, modified Executive

¹² <http://www.merriam-webster.com/dictionary/ballistics>

Order No. 9 (Gov. Hughes, 1963) and Executive Order No. 123 (Gov. Kean, 1983). E.O. No. 69 holds that:

“[t]he following records *shall not be deemed to be public records...* pursuant to [OPRA], as amended: fingerprint cards, plates and *photographs* and similar criminal investigatory records... required to be made, maintained or kept by any State or local governmental agency.” (Emphasis added.)

N.J.S.A. 47:1A-9.a. recognizes exemptions from disclosure included in state and federal statutes, regulations and executive orders. In this complaint, E.O. No. 69 explicitly states that criminal investigatory photographs shall not be deemed to be public records. Therefore, the crime scene photographs responsive to request Item No. 3 of the Complainant’s May 5, 2007 OPRA request are exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-9.a and E.O. No. 69.

Therefore, pursuant to N.J.S.A. 47:1A-6, the Custodian has borne his burden of proving a lawful denial of access to records responsive to request Items No. 1, No. 2 and No. 3 because the records are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1, McCrone, supra and E.O. No. 69.

Items No. 4 through No. 8 of the Complainant’s May 5, 2007 OPRA request

The Custodian’s May 15, 2007 response to the Complainant does not address records request Items No. 4 through No. 8. The Custodian stated in her letter to the Complainant on June 28, 2008 that the records should have been made available by the Complainant’s defense attorney and that the request for Items No. 4 through No. 8 should be directed to that attorney or public defender that represented the Complainant during trial.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.¹³ Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Therefore, the Custodian’s failure to respond in writing to the Complainant’s OPRA request Items No. 4 through No. 8, either granting access, denying access, seeking

¹³ It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

clarification or requesting an extension of time, within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Additionally, the Custodian’s response that the records should have been made available at the time of the trial is not a lawful reason to deny access. In Vessio v. Township of Manchester, GRC Complaint No. 2006-130 (April 2008), the Custodian denied access to a disposition of the municipal court, stating that the record was previously offered to the Complainant, but the Complainant declined to accept the disposition. The GRC held that the Custodian unlawfully denied access to the disposition and ordered disclosure of the requested record. Therefore, the Custodian’s assertion in this complaint that the Complainant should have been provided request Items No. 4 through No. 8 by a defense attorney or public defender is not a lawful reason for the Custodian's failure to respond pursuant to Vessio, supra.

Pursuant to N.J.S.A. 47:1A-6, the Custodian has failed to bear his burden of proving a lawful denial of access to the records requested in the Complainant’s May 5, 2007 OPRA request. The Custodian shall disclose all records requested in Items No. 4 through No. 8 with appropriate redactions, if any, and a redaction index detailing the general nature of the information redacted and the lawful basis for such redactions as required by N.J.S.A. 47:1A-6 and 47:1A-5.g. If no records responsive to request Items No. 4 through No. 8 exist, the Custodian must provide a certification stating as such to the GRC.

Whether the Custodian’s delay in 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?

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. Pursuant to N.J.S.A. 47:1A-6 the Custodian has borne her burden of proving a lawful denial of access to records responsive to request Items No. 1, No. 2 and No. 3 because the records are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1, McCrone (The Trenton Times) v. Burlington County Prosecutor’s Office, GRC Complaint No. 2005-146 (November 2005) and Executive Order No. 69 (Whitman, 1997).
2. The Custodian’s failure to respond in writing to the Complainant’s OPRA request Items No. 4 through No. 8 either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A.

47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

3. The Custodian's assertion in this complaint that the Complainant should have been provided request Items No. 4 through No. 8 by a defense attorney or public defender is not a lawful reason for the Custodian's failure to respond pursuant to Vessio v. Township of Manchester, GRC Complaint No. 2006-130 (April, 2008).
4. Pursuant to N.J.S.A. 47:1A-6, the Custodian has failed to bear his burden of proving a lawful denial of access to the records requested in the Complainant's May 5, 2007 OPRA request. **The Custodian shall disclose all records requested in Items No. 4 through No. 8 with appropriate redactions, if any, and a redaction index detailing the general nature of the information redacted and the lawful basis for such redactions as required by N.J.S.A. 47:1A-6 and 47:1A-5.g. If no records responsive to request Items No. 4 through No. 8 exist, the Custodian must provide a certification stating as such to the GRC.**
5. **The Custodian shall comply with Item No. 4 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹⁴, to the Executive Director.**
6. 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: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

February 18, 2009

¹⁴ "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."