



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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COMMISSIONER LUCILLE DAVY
ROBIN BERG TABAKIN
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

April 30, 2008 Government Records Council Meeting

John Bart
Complainant

Complaint No. 2007-162

v.

City of Passaic (Passaic)
Custodian of Record

At the April 30, 2008 public meeting, the Government Records Council (“Council”) considered the April 23, 2008 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that because the Custodian provided the Complainant with redacted copies of the requested arrest reports, lawfully redacted the information contained on the arrest report which is not expressly disclosable pursuant to N.J.S.A. 47:1A-3.b., and provided certified confirmation of compliance, pursuant to N.J. Court Rule 1:4-4, to the Executive Director within five (5) business days of receiving the Council’s February 27, 2008 Interim Order, the Custodian has complied with said Order.

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 30th Day of April, 2008

Robin Berg Tabakin, Chairman
Government Records Council



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

David Fleisher, Vice Chairman & Secretary
Government Records Council

Decision Distribution Date: May 12, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
April 30, 2008 Council Meeting**

**John A. Bart, Esq.¹
Complainant**

GRC Complaint No. 2007-162

v.

**City of Passaic (Passaic)²
Custodian of Records**

Records Relevant to Complaint:

1. All records concerning the arrest of Luis Carasquillo on or about January 14, 2007 for violation of N.J.S.A 2C:35-6
2. All records connecting Luis Carasquillo to 45 Aspen Place Apt. 5C Passaic, NJ
3. All records listing the names and badge numbers of the City of Passaic Police Officers involved in the arrests of Luis Carasquillo after November 1, 2006
4. All documents forwarded to the City of Passaic Housing Authority concerning Luis Carasquillo
5. All documents forwarded to the City of Passaic Housing Authority concerning any connection between Luis Carasquillo and 45 Aspen Place Apt. 5C Passaic, NJ
6. All documents showing any and all past and present residences of Luis Carasquillo
7. All police reports, rap sheets, parole records for Luis Carasquillo
8. All written witness accounts of Luis Carasquillo's activities since October 2006
9. All documents listing the names, contact number and contact information for Luis Carasquillo's attorneys

Request Made: July 2, 2007

Response Made: July 12, 2007

Custodian: Amada Curling

GRC Complaint Filed: July 20, 2007

Background

February 27, 2008

Government Records Council's ("Council") Interim Order. At its February 27, 2008 public meeting, the Council considered the February 20, 2008 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 Sheri Siegelbaum, Esq. (Lyndhurst, NJ).

1. Pursuant to Mid-Atlantic Recycling Technologies v. City of Vineland, 222 F.R.D. 81 (D.N.J. 2004), the Custodian's denial of the Complainant's OPRA request, on the grounds that the Complainant could only obtain the requested records through discovery, is not a lawful basis for a denial of access.
2. Because the records listed below relate to a criminal investigation of a possible violation of N.J.S.A. 2C:35-6 and are not required by law to be made, maintained or kept on file, pursuant to N.J.S.A. 47:1A-1.1 and Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004), said records are criminal investigatory records and are not disclosable under OPRA. As such, the Custodian has borne the burden of proving a lawful denial of access to the following records pursuant to N.J.S.A. 47:1A-6:
 - Passaic Police Investigation Report dated January 14, 2007, File Control No. 07-2405
 - U.S. Currency Seizure Report prepared by the Passaic Police in conjunction with the record listed above
 - Passaic Police Investigation Report dated November 18, 2001, File Control No. 01-47009
3. Because arrest reports are government records pursuant to N.J.S.A. 47:1A-1.1 and because N.J.S.A. 47:1A-3.b. delineates the specific information contained on an arrest report which must be disclosed to the public, the Custodian has not borne her burden of proving a lawful denial of access to the arrest reports and should release said reports to the Complainant with a appropriate redactions including a detailed document index explaining the legal basis for each redaction.
4. **The Custodian shall comply with item #3 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 1:4-4, including a detailed document index explaining the lawful basis for each redaction, if any, to the Executive Director.**
5. Pursuant to Executive Order No. 26 (McGreevey 2002), Kamau v. NJ Department of Corrections, GRC Complaint No. 2004-175 (February 2005) and Caban v. NJ Department of Corrections, GRC Complaint No. 2007-174 (March 2005) the City of Passaic EMS Division Incident Report dated November 20, 2001 is exempt from disclosure as a medical record. As such, the Custodian has borne the burden of proving a lawful denial of access to said report pursuant to N.J.S.A. 47:1A-6 despite the fact that the Custodian failed to provide the specific provisions of HIPAA and OPRA on which she relied for the denial of access.
6. Because items #1-6 and #9 of the Complainant's OPRA request are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant

to Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (March 2005), NJ Builders Association v NJ Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Bent v. Stafford Police Department, 381 N.J. Super. 30 (October 2005), and Caggiano v. Borough of Stanhope, GRC Complaint No. 2005-211 et seq. (January 2006).³

7. Although the Custodian unlawfully denied access to the arrest reports responsive to the Complainant's request on the basis of prior GRC decisions, because the Custodian carried her burden of proving a lawful denial of access to some of the requested records because said records are exempt as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1 and medical records pursuant to Executive Order No. 26 (McGreevey 2002), 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 improper denial of the Complainant's request on the basis that the Complainant could obtain the requested records pursuant to discovery appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law. Additionally, the Assistant City Clerk's inaccurate certification that arrest reports responsive to the Complainant's request are not required to be maintained on file appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

March 3, 2008

Council's Interim Order distributed to the parties.

March 6, 2008

Custodian's response to the Council's Interim Order. The Custodian certifies that she provided the Complainant with copies of the arrest reports as ordered in the Council's Interim Order dated February 27, 2008. The Custodian certifies that she redacted the arrest reports as follows (each number corresponds to an individual redaction):

January 14, 2007 Arrest Report:

1. Social security number pursuant to N.J.S.A. 47:1A-1.1
2. Date of birth pursuant to N.J.S.A. 47:1A-3 (age disclosed)
3. SBI number pursuant to Executive Order No. 69 (concerning the confidentiality of fingerprint cards)
4. Home telephone number pursuant to N.J.S.A. 47:1A-1.1
5. Mother's address pursuant to N.J.S.A. 47:1A-1 (concerning a citizen's reasonable expectation of privacy)

³ Caggiano v. Borough of Stanhope, GRC Complaint Nos. 2005-211, 2005-226, 2005-227, 2005-228, 2005-229, 2005-230, 2005-231, 2005-232, 2005-233, 2005-234, 2005-235, 2005-250 and 2005-252 (January 2006).

November 19, 2001 Arrest Report:

1. Social security number pursuant to N.J.S.A. 47:1A-1.1
2. Alias social security number pursuant to N.J.S.A. 47:1A-1.1
3. Alias social security number pursuant to N.J.S.A. 47:1A-1.1
4. Date of birth pursuant to N.J.S.A. 47:1A-3
5. FBI number pursuant to Executive Order No. 69 (concerning the confidentiality of fingerprint cards)
6. SBI number pursuant to Executive Order No. 69 (concerning the confidentiality of fingerprint cards)
7. Mother's address pursuant to N.J.S.A. 47:1A-1 (concerning a citizen's reasonable expectation of privacy)

March 7, 2008

Letter from Custodian's Counsel to Complainant. Counsel states that enclosed are copies of the arrest reports which the Council ordered the Custodian to disclose at its February 27, 2008 meeting. Counsel states that the records have been redacted in accordance with the enclosed document index.

Analysis

Whether the Custodian complied with the Council's February 27, 2008 Interim Order?

The Custodian certifies that she provided the Complainant (via letter dated March 7, 2008) redacted copies of the arrest reports as ordered by the Council on February 27, 2008. The Custodian also certifies that the redactions made to said records are as follows:

January 14, 2007 Arrest Report:

1. Social security number pursuant to N.J.S.A. 47:1A-1.1
2. Date of birth pursuant to N.J.S.A. 47:1A-3 (age disclosed)
3. SBI number pursuant to Executive Order No. 69 (concerning the confidentiality of fingerprint cards)
4. Home telephone number pursuant to N.J.S.A. 47:1A-1.1
5. Mother's address pursuant to N.J.S.A. 47:1A-1 (concerning a citizen's reasonable expectation of privacy)

November 19, 2001 Arrest Report:

1. Social security number pursuant to N.J.S.A. 47:1A-1.1
2. Alias social security number pursuant to N.J.S.A. 47:1A-1.1
3. Alias social security number pursuant to N.J.S.A. 47:1A-1.1
4. Date of birth pursuant to N.J.S.A. 47:1A-3
5. FBI number pursuant to Executive Order No. 69 (concerning the confidentiality of fingerprint cards)

6. SBI number pursuant to Executive Order No. 69 (concerning the confidentiality of fingerprint cards)
7. Mother's address pursuant to N.J.S.A. 47:1A-1 (concerning a citizen's reasonable expectation of privacy)

In this matter, the Council ordered the Custodian to release redacted copies of the requested arrest reports pursuant to N.J.S.A. 47:1A-3.b.

N.J.S.A. 47:1A-3.b. provides that:

“[i]f an arrest has been made ... [the following information shall be made available to the public] ... the defendant's name, age, residence, occupation, marital status and similar background information and the identity of the complaining party...the text of any charges...the identity of the investigating and arresting personnel and agency...the time and place of arrest...and information as to circumstances surrounding bail, whether it was posted and the amount thereof.” N.J.S.A. 47:1A-3.b.

Based on the Custodian's Certification dated March 6, 2008, in which the Custodian identified the information she redacted from the arrest reports, as well as the GRC's examination of the redacted arrest reports, it is concluded that the redacted information is not information which is subject to disclosure pursuant to N.J.S.A. 47:1A-3.b. Thus, the Custodian has lawfully redacted the information contained on the arrest report which is not expressly disclosable pursuant to N.J.S.A. 47:1A-3.b.

Therefore, because the Custodian provided the Complainant with redacted copies of the requested arrest reports, lawfully redacted the information contained on the arrest report which is not expressly disclosable pursuant to N.J.S.A. 47:1A-3.b., and provided certified confirmation of compliance, pursuant to N.J. Court Rule 1:4-4, to the Executive Director within five (5) business days of receiving the Council's February 27, 2008 Interim Order, the Custodian has complied with said Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Custodian provided the Complainant with redacted copies of the requested arrest reports, lawfully redacted the information contained on the arrest report which is not expressly disclosable pursuant to N.J.S.A. 47:1A-3.b., and provided certified confirmation of compliance, pursuant to N.J. Court Rule 1:4-4, to the Executive Director within five (5) business days of receiving the Council's February 27, 2008 Interim Order, the Custodian has complied with said Order.

Prepared By:

Dara Lownie
Senior Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

April 23, 2008



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

INTERIM ORDER

February 27, 2008 Government Records Council Meeting

John A. Bart, Esq.
Complainant

Complaint No. 2007-162

v.

City of Passaic (Passaic)
Custodian of Record

At the February 27, 2008 public meeting, the Government Records Council (“Council”) considered the February 20, 2008 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 Mid-Atlantic Recycling Technologies v. City of Vineland, 222 F.R.D. 81 (D.N.J. 2004), the Custodian’s denial of the Complainant’s OPRA request, on the grounds that the Complainant could only obtain the requested records through discovery, is not a lawful basis for a denial of access.
2. Because the records listed below relate to a criminal investigation of a possible violation of N.J.S.A. 2C:35-6 and are not required by law to be made, maintained or kept on file, pursuant to N.J.S.A. 47:1A-1.1 and Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004), said records are criminal investigatory records and are not disclosable under OPRA. As such, the Custodian has borne the burden of proving a lawful denial of access to the following records pursuant to N.J.S.A. 47:1A-6:
 - Passaic Police Investigation Report dated January 14, 2007, File Control No. 07-2405
 - U.S. Currency Seizure Report prepared by the Passaic Police in conjunction with the record listed above
 - Passaic Police Investigation Report dated November 18, 2001, File Control No. 01-47009
3. Because arrest reports are government records pursuant to N.J.S.A. 47:1A-1.1 and because N.J.S.A. 47:1A-3.b. delineates the specific information contained



on an arrest report which must be disclosed to the public, the Custodian has not borne her burden of proving a lawful denial of access to the arrest reports and should release said reports to the Complainant with appropriate redactions including a detailed document index explaining the legal basis for each redaction.

4. **The Custodian shall comply with item #3 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 1:4-4, including a detailed document index explaining the lawful basis for each redaction, if any, to the Executive Director.**
5. Pursuant to Executive Order No. 26 (McGreevey 2002), Kamau v. NJ Department of Corrections, GRC Complaint No. 2004-175 (February 2005) and Caban v. NJ Department of Corrections, GRC Complaint No. 2007-174 (March 2005) the City of Passaic EMS Division Incident Report dated November 20, 2001 is exempt from disclosure as a medical record. As such, the Custodian has borne the burden of proving a lawful denial of access to said report pursuant to N.J.S.A. 47:1A-6 despite the fact that the Custodian failed to provide the specific provisions of HIPAA and OPRA on which she relied for the denial of access.
6. Because items #1-6 and #9 of the Complainant's OPRA request are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (March 2005), NJ Builders Association v. NJ Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Bent v. Stafford Police Department, 381 N.J. Super. 30 (October 2005), and Caggiano v. Borough of Stanhope, GRC Complaint No. 2005-211 et seq. (January 2006).¹
7. Although the Custodian unlawfully denied access to the arrest reports responsive to the Complainant's request on the basis of prior GRC decisions, because the Custodian carried her burden of proving a lawful denial of access to some of the requested records because said records are exempt as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1 and medical records pursuant to Executive Order No. 26 (McGreevey 2002), 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 improper denial of the Complainant's request on the basis that the Complainant could obtain the requested records pursuant to discovery appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law. Additionally, the Assistant City Clerk's inaccurate

¹ Caggiano v. Borough of Stanhope, GRC Complaint Nos. 2005-211, 2005-226, 2005-227, 2005-228, 2005-229, 2005-230, 2005-231, 2005-232, 2005-233, 2005-234, 2005-235, 2005-250 and 2005-252 (January 2006).

certification that arrest reports responsive to the Complainant's request are not required to be maintained on file appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Interim Order Rendered by the
Government Records Council
On The 27th Day of February, 2008

Robin Berg Tabakin, Vice Chairman
Government Records Council

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

Government Records Council

Decision Distribution Date: March 3, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 27, 2008 Council Meeting**

**John A. Bart, Esq.¹
Complainant**

GRC Complaint No. 2007-162

v.

**City of Passaic (Passaic)²
Custodian of Records**

Records Relevant to Complaint:

1. All records concerning the arrest of Luis Carasquillo on or about January 14, 2007 for violation of N.J.S.A 2C:35-6
2. All records connecting Luis Carasquillo to 45 Aspen Place Apt. 5C Passaic, NJ
3. All records listing the names and badge numbers of the City of Passaic Police Officers involved in the arrests of Luis Carasquillo after November 1, 2006
4. All documents forwarded to the City of Passaic Housing Authority concerning Luis Carasquillo
5. All documents forwarded to the City of Passaic Housing Authority concerning any connection between Luis Carasquillo and 45 Aspen Place Apt. 5C Passaic, NJ
6. All documents showing any and all past and present residences of Luis Carasquillo
7. All police reports, rap sheets, parole records for Luis Carasquillo
8. All written witness accounts of Luis Carasquillo's activities since October 2006
9. All documents listing the names, contact number and contact information for Luis Carasquillo's attorneys

Request Made: July 2, 2007

Response Made: July 12, 2007

Custodian: Amada Curling

GRC Complaint Filed: July 20, 2007

Background

July 2, 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. The Complainant requests that the Custodian charge the actual cost of copying the requested records.

¹ No legal representation listed on record.

² Represented by Sheri Siegelbaum, Esq. (Lyndhurst, NJ).

July 12, 2007

Custodian's response to the OPRA request. The Custodian responds to the Complainant's OPRA request in writing on the seventh (7th) business day following receipt of such request. The Custodian states that access to the requested records is denied because as per the Chief of Police's memorandum, the Passaic County Prosecutor advised that the records could not be released without a request for discovery.

July 16, 2007

Letter from Complainant to Custodian. The Complainant asks the Custodian to specify the sections and subsections of OPRA on which the Custodian relied for her denial of access to the requested records.

July 20, 2007

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

- Complainant's OPRA request dated July 2, 2007
- Custodian's response to the OPRA request dated July 12, 2007
- Letter from Complainant to Custodian dated July 16, 2007
- Summary of Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007)

The Complainant states that he submitted his OPRA request on July 2, 2007. The Complainant states that he received a call from the Clerk's office in which a staff member asked the Complainant to clarify his request. The Complainant states that he indicated he needed the requested records for the defense of a City of Passaic Housing Authority eviction proceeding against his client.

July 30, 2007

Offer of Mediation sent to both parties.

August 1, 2007

The Complainant declines mediation. The Custodian did not respond to the Offer of Mediation.

August 1, 2007

Request for the Statement of Information sent to the Custodian.

August 6, 2007

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

- Complainant's OPRA request dated July 2, 2007
- Custodian's response to the request dated July 12, 2007

The Custodian certifies receiving the Complainant's OPRA request on July 2, 2007 and providing a written response on July 12, 2007. The Custodian certifies that the records responsive to the Complainant's request are:

1. Passaic Police investigation report dated January 14, 2007, File Control No. 07-2405
2. U.S. Currency Seizure Report dated January 14, 2007, File Control No. 07-02405
3. Passaic Police arrest report dated January 14, 2007, File Control No. 07-2405
4. Passaic Police investigation report dated November 18, 2001, File Control No. 07-47009
5. Passaic Police arrest report dated November 19, 2001, File Control No. 2001-47009
6. City of Passaic EMS Division incident report dated November 20, 2001

The Custodian certifies that the records responsive listed above regarding the arrest of Luis Carasquillo concern a possible violation of N.J.S.A. 2C:35-6.³ The Custodian certifies that said records are maintained by the Police Department and asserts that said records are confidential as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-3. The Custodian states that the Passaic County First Assistant Prosecutor advised the Police Department that said records could not be released pursuant to an OPRA request but could be released pursuant to a discovery request. The Custodian certifies that the records concern an ongoing investigation of Luis Carasquillo.

Additionally, the Custodian contends that under the Health Insurance Portability and Accountability Act (“HIPAA”), medical records are exempt from disclosure and thus the EMS incident report cannot be released. Further, the Custodian certifies that the City of Passaic has no additional records responsive on file.

August 8, 2007

Letter from GRC to Custodian. The GRC requests that the Custodian provide a legal certification pursuant to NJ Court Rule 1:4-4 indicating all the records responsive to the Complainant’s OPRA request, a general nature description of each record, an explanation as to why the Custodian deems that said records are criminal investigatory records, and whether said records are required to be maintained on file.

August 16, 2007

GRC grants the Custodian an extension of time until the close of business on August 24, 2007 to submit the requested certification.⁴

August 22, 2007

The Complainant’s response to the Custodian’s SOI. The Complainant certifies that he needs the requested records to represent his client, Elizabeth Perez, in an eviction proceeding with the City of Passaic Public Housing Authority (“PHA”). The Complainant certifies that the PHA issued a Notice to Quit against Ms. Perez, alleging that Luis Carasquillo was engaged in drug related criminal activity, presuming that Mr. Carasquillo was a member of Ms. Perez’s household. The Complainant asserts that discovery is not permitted in this type of proceeding.

³ N.J.S.A. 2C:35-6: “Employing a juvenile in a drug distribution scheme.”

⁴ Custodian’s Counsel requested said extension of time via telephone on or about August 15, 2007.

The Complainant certifies that he discussed this matter with the PHA's attorney who informed the Complainant that the source of information connecting Mr. Carasquillo to Ms. Perez's apartment was a meeting between the PHA and the Police Department. As such, the Complainant contends that the Custodian is barred from using the criminal investigatory records privilege because this privilege was waived when the Police Department communicated information to the PHA with knowledge that the PHA would take adverse action against Ms. Perez. The Complainant asserts that Ms. Perez has an interest in the subject matter of the requested records and that her interest (the prevention of her family's eviction) outweighs the public interest in the confidentiality of the records.

Further, the Complainant contends that pursuant to N.J.S.A. 47:1A-3.b. and Executive Order 123, Sec. 2, the Custodian should have provided some of the records requested, even if redacted. The Complainant states that the Custodian's SOI lacks an accurate document index as required by *Paff v. N.J. Dept. of Labor*, decided April 24, 2007.⁵ The Complainant asks the GRC to conduct an in camera review of the records to determine if they were properly withheld. The Complainant asks the GRC to deem the Custodian's response to his OPRA request legally insufficient and in violation of OPRA. Additionally, the Complainant asks the GRC to refer this complaint to the Office of Administrative Law for a determination of a knowing and willful violation of OPRA.

August 24, 2007

Certification of Assistant City Clerk in the absence of the Custodian. The Assistant City Clerk certifies to the following information:

Title of Record	General Nature Description	Justification that Records Relates to Investigation that is Criminal in Nature	Is Record Required by Law to be Made, Maintained or Kept on File
Passaic Police Investigation Report dated January 14, 2007, File Control No. 07-2405	Investigation and arrest of Luis Carasquillo for possible violation of <u>N.J.S.A.</u> 2C:35-6 (2 pages)	Arrest records of Luis Carasquillo on or about January 14, 2007 for violation of 2C:35-6 represents criminal investigatory records. <i>See Vercammen v. City of Plainfield</i> , GRC Complaint No. 2002-109 (February 2004), <i>Janeczko v. Division of Criminal Justice</i> , GRC Complaint Nos. 2002-79 and 2002-80 (June 2004). <u>N.J.S.A.</u>	No

⁵ *John Paff v. NJ Department of Labor*, 392 N.J. Super. 334 (App. Div. 2007).
John A. Bart, Esq. v. City of Passaic (Passaic), 2007-162 – Findings and Recommendations of the Executive Director

		47:1A-1.1 states that a criminal investigatory record is “a record which is not required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation.”	
U.S. Currency Seizure Report prepared by the Passaic Police in conjunction with the record listed above	Form NJ/LDPWS/DCJ Operations Form E (1 page)	Same as above	No
Passaic Police Arrest Report dated January 14, 2007, File Control No. 07-02405	Prepared by the Passaic Police in conjunction with the investigation report listed above	Same as above	No
Passaic Police Investigation Report dated November 18, 2001, File Control No. 01-47009	Investigation of Luis Carasquillo on November 18, 2001 for possibly resisting apprehension (2 pages)	Same as above	No
Passaic Police Arrest Report dated November 19, 2001, File Control No. 2001-47009	Arrest of Luis Carasquillo for possible violation of <u>N.J.S.A. 2C:36-2</u> and <u>N.J.S.A. 2C:39-3(b)(4)</u>	Same as above	No
City of Passaic EMS Division Incident Report dated November 20, 2001	Ambulance medical report regarding Luis Carasquillo (1 page)	Withheld under HIPAA, OPRA and Executive Order No. 26 (medical records) <i>See <u>Kamau v. NJ Department of Corrections</u>, GRC Complaint No. 2004-175 (February 2005).</i>	No

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...A government record shall not include the following information which is deemed to be confidential... *criminal investigatory records ... ‘Criminal investigatory record’* means a record which is not required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding. ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also provides:

“[i]f an arrest has been made ... [the following information shall be made available to the public] ... the defendant’s name, age, residence, occupation, marital status and similar background information and the identity of the complaining party...the text of any charges...the identity of the investigating and arresting personnel and agency...the time and place of arrest...and information as to circumstances surrounding bail, whether it was posted and the amount thereof.” N.J.S.A. 47:1A-3.b.

OPRA also states that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor.” (Emphasis added). N.J.S.A. 47:1A-5.g.

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:

“The provisions of this act...shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to...Executive Order of the Governor.” N.J.S.A. 47:1A-9.a.

Executive Order No. 26 states:

“[t]he following records shall not be considered to be government records subject to public access pursuant to [OPRA]... Information concerning individuals as follows: Information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation...” N.J. Executive Order No. 26 (McGreevey, 2002).

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. A custodian must also 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.

Further, pursuant to N.J.S.A. 47:1A-5.g, if the Custodian is unable to fulfill the OPRA request the Custodian is required to promptly return the OPRA request form to the requestor with a written explanation as to why the records are unavailable.

In this complaint, the Custodian certifies receiving the Complainant’s OPRA request on July 2, 2007 and providing a written response on July 12, 2007, the seventh (7th) business day following the Custodian’s receipt of such request, in which the Custodian denied the Complainant’s request by stating that the records responsive could not be released without a request for discovery.

In Mid-Atlantic Recycling Technologies v. City of Vineland, 222 F.R.D. 81 (D.N.J. 2004), the City of Vineland sought a protective order precluding Mid-Atlantic from conducting discovery outside the limitations of the Federal Rules of Civil Procedure by requesting records under OPRA. In said case, the requestor, Mid-Atlantic, sought access to records under OPRA which were related to a law suit involving the parties. The court held that:

“...documents that are ‘government records’ and subject to public access under OPRA are no less subject to public access because the requestor filed a lawsuit against the governmental entity. The fact that a party may obtain documents through OPRA at an earlier time or that OPRA provides for a shorter time period to respond than the time when document requests are permitted to be served under Rule 26 [of the Federal Rules of Civil Procedure] does not create a conflict so as to deny a citizen of legal rights to seek governmental records under OPRA...”

Therefore, pursuant to Mid-Atlantic, *supra*, the Custodian’s denial of the Complainant’s OPRA request, on the grounds that the Complainant could only obtain the requested records through discovery, is not a lawful basis for a denial of access.

However, in the Custodian’s Statement of Information dated August 6, 2007, the Custodian asserts that the requested records could not be released because the records are

criminal investigatory records which are exempt under N.J.S.A. 47:1A-1.1 and medical records which are exempt under HIPAA, OPRA and Executive Order No. 26.

OPRA defines a "criminal investigatory record" as a record which is not required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding (N.J.S.A. 47:1A-1.1).

The status of records purported to fall under the criminal investigatory records exemption pursuant to N.J.S.A. 47:1A-1.1 was examined by the GRC in Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004), affirmed in an unpublished opinion of the Appellate Division of the New Jersey Superior Court in May 2004. The Council found that under OPRA, "criminal investigatory records include records involving all manner of crimes, resolved or unresolved, and includes information that is part and parcel of an investigation, confirmed and unconfirmed."

In this complaint, the Assistant City Clerk, Erna DeIntinis, certifies that the following records are criminal investigatory records relating to a possible violation of N.J.S.A. 2C:35-6, which are not required to be maintained on file:

1. Passaic Police Investigation Report dated January 14, 2007, File Control No. 07-2405
2. U.S. Currency Seizure Report prepared by the Passaic Police in conjunction with the record listed above
3. Passaic Police Investigation Report dated November 18, 2001, File Control No. 01-47009

Therefore, because the records listed above relate to a criminal investigation of a possible violation of N.J.S.A. 2C:35-6 and are not required by law to be made, maintained or kept on file, pursuant to N.J.S.A. 47:1A-1.1 and Janeczko, supra, said records are criminal investigatory records and are not disclosable under OPRA. As such, the Custodian has borne the burden of proving a lawful denial of access to said records pursuant to N.J.S.A. 47:1A-6.

However, the Assistant City Clerk also lists two (2) arrest reports as criminal investigatory records which the Assistant City Clerk certifies are not required to be maintained on file. Although the Council has previously found that police arrest reports are criminal investigatory records that are not disclosable under OPRA, *See Vercammen v. City of Plainfield*, GRC Complaint No. 2002-109 (March 2004) and *Lanosga v. Borough of Princeton*, GRC Complaint No. 2004-37 (June 2004), the GRC now revisits the applicability of OPRA to police arrest reports and recommends they be released pursuant to N.J.S.A. 47:1A-1.1.

The New Jersey Department of State, Division of Archives and Records Management ("DARM") is responsible for setting forth the records retention schedules for public agencies. On DARM's website (www.nj.gov/state/darm/links/retention.html), arrest reports are listed under Record Series No. 0007-0000 which are required to be

maintained on file until the final disposition of the case. Because the arrest report *is required by law to be maintained or kept on file* (emphasis added), it is a government record pursuant to N.J.S.A. 47:1A-1.1, and is subject to disclosure with appropriate redactions pursuant to any lawful exemption under OPRA, if any. Further, arrest reports typically contain the arrestee's (defendant's) name, age, residence, occupation, marital status, time and place of arrest, text of the charges, arresting agency, identity of the arresting personnel, amount of bail and whether bail was posted. This is much of the same information that is mandated for disclosure pursuant to N.J.S.A. 47:1A-3.b.

Therefore, because arrest reports are government records pursuant to N.J.S.A. 47:1A-1.1 and because N.J.S.A. 47:1A-3.b delineates the specific information contained on an arrest report which must be disclosed to the public, the Custodian has not borne her burden of proving a lawful denial of access to the arrest reports and should release said reports to the Complainant with appropriate redactions, including a detailed document index explaining the legal basis for each redaction.

Further, the Custodian contends that the EMS Division Incident Report dated November 20, 2001 is exempt as a medical record under HIPAA, OPRA and Executive Order No. 26. The Custodian fails to cite to the specific provisions of HIPAA and OPRA on which she relies for the denial of access. However, Executive Order No. 26 paragraph 4.b.1. (McGreevey 2002) provides that an individual's medical records are not considered government records subject to public access.

In Kamau v. NJ Department of Corrections, GRC Complaint No. 2004-175 (February 2005), the Council dismissed the complaint "on the basis that the records requested are not disclosable under N.J.S.A. 47:1A-9 pursuant to Executive Order 26 as they are medical records." The Council reached a similar conclusion in Caban v. NJ Department of Corrections, GRC Complaint No. 2007-174 (March 2005).

Therefore, pursuant to Executive Order No. 26 (McGreevey 2002), Kamau, supra, and Caban, supra, the City of Passaic EMS Division Incident Report dated November 20, 2001 is exempt from disclosure as a medical record. As such, the Custodian has borne the burden of proving a lawful denial of access to said report pursuant to N.J.S.A. 47:1A-6 despite the fact that the Custodian failed to provide the specific provisions of HIPAA and OPRA on which she relied for the denial of access.

Additionally, items #1-6 and #9 of the Complainant's OPRA request are for "any and all" records and do not specifically request an identifiable government record.

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

countenance open-ended searches of an agency's files." (Emphasis added.) *Id.* at 549. See also NJ Builders Association v NJ Council on Affordable Housing, 390 N.J. Super. 166, 175 (App. Div. 2007).

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005)⁶, the Superior Court references Mag, *supra*, in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."⁷

Also, in Caggiano v. Borough of Stanhope, GRC Complaint No. 2005-211 et. seq.⁸ (January 2006), the Council held that:

"[t]he November 1, 2005, November 14, 2005, December 8, 2005 and December 9, 2005 records requests were broad and unclear requests for information that sought 'any' and 'all' documents without identifying the record or records with sufficient specificity and which would necessitate some form of research or searching on the part of the Custodian. Therefore, on the basis of Mag [*supra*] and the GRC decision and the Court ruling in Bent [*supra*], there was no unlawful denial of access pursuant to OPRA."

Therefore, because items #1-6 and #9 of the Complainant's OPRA request are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to Mag, *supra*, NJ Builders, *supra*, Bent, *supra*, and Caggiano, *supra*.

Whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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:

⁶ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁷ As stated in Bent.

⁸ Caggiano v. Borough of Stanhope, GRC Complaint Nos. 2005-211, 2005-226, 2005-227, 2005-228, 2005-229, 2005-230, 2005-231, 2005-232, 2005-233, 2005-234, 2005-235, 2005-250 and 2005-252 (January 2006).

“... 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 unlawfully denied access to the arrest reports responsive to the Complainant’s request on the basis of prior GRC decisions, because the Custodian carried her burden of proving a lawful denial of access to some of the requested records because said records are exempt as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1 and medical records pursuant to Executive Order No. 26 (McGreevey 2002), 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 improper denial of the Complainant’s request on the basis that the Complainant could obtain the requested records pursuant to discovery appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law. Additionally, the Assistant City Clerk’s inaccurate certification that arrest reports responsive to the Complainant’s request are not required to be maintained on file appears negligent and heedless since she 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. Pursuant to Mid-Atlantic Recycling Technologies v. City of Vineland, 222 F.R.D. 81 (D.N.J. 2004), the Custodian’s denial of the Complainant’s OPRA request, on the grounds that the Complainant could only obtain the requested records through discovery, is not a lawful basis for a denial of access.
2. Because the records listed below relate to a criminal investigation of a possible violation of N.J.S.A. 2C:35-6 and are not required by law to be made, maintained or kept on file, pursuant to N.J.S.A. 47:1A-1.1 and Janeczko v. NJ

Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004), said records are criminal investigatory records and are not disclosable under OPRA. As such, the Custodian has borne the burden of proving a lawful denial of access to the following records pursuant to N.J.S.A. 47:1A-6:

- Passaic Police Investigation Report dated January 14, 2007, File Control No. 07-2405
 - U.S. Currency Seizure Report prepared by the Passaic Police in conjunction with the record listed above
 - Passaic Police Investigation Report dated November 18, 2001, File Control No. 01-47009
3. Because arrest reports are government records pursuant to N.J.S.A. 47:1A-1.1 and because N.J.S.A. 47:1A-3.b. delineates the specific information contained on an arrest report which must be disclosed to the public, the Custodian has not borne her burden of proving a lawful denial of access to the arrest reports and should release said reports to the Complainant with a appropriate redactions including a detailed document index explaining the legal basis for each redaction.
 4. **The Custodian shall comply with item #3 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 1:4-4, including a detailed document index explaining the lawful basis for each redaction, if any, to the Executive Director.**
 5. Pursuant to Executive Order No. 26 (McGreevey 2002), Kamau v. NJ Department of Corrections, GRC Complaint No. 2004-175 (February 2005) and Caban v. NJ Department of Corrections, GRC Complaint No. 2007-174 (March 2005) the City of Passaic EMS Division Incident Report dated November 20, 2001 is exempt from disclosure as a medical record. As such, the Custodian has borne the burden of proving a lawful denial of access to said report pursuant to N.J.S.A. 47:1A-6 despite the fact that the Custodian failed to provide the specific provisions of HIPAA and OPRA on which she relied for the denial of access.
 6. Because items #1-6 and #9 of the Complainant’s OPRA request are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (March 2005), NJ Builders Association v NJ Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Bent v. Stafford Police Department, 381 N.J. Super. 30 (October 2005), and Caggiano v. Borough of Stanhope, GRC Complaint No. 2005-211 et seq. (January 2006).⁹

⁹ Caggiano v. Borough of Stanhope, GRC Complaint Nos. 2005-211, 2005-226, 2005-227, 2005-228, 2005-229, 2005-230, 2005-231, 2005-232, 2005-233, 2005-234, 2005-235, 2005-250 and 2005-252 (January 2006).

7. Although the Custodian unlawfully denied access to the arrest reports responsive to the Complainant's request on the basis of prior GRC decisions, because the Custodian carried her burden of proving a lawful denial of access to some of the requested records because said records are exempt as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1 and medical records pursuant to Executive Order No. 26 (McGreevey 2002), 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 improper denial of the Complainant's request on the basis that the Complainant could obtain the requested records pursuant to discovery appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law. Additionally, the Assistant City Clerk's inaccurate certification that arrest reports responsive to the Complainant's request are not required to be maintained on file appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By:

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Executive Director

February 20, 2008