



State of New Jersey

GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

FINAL DECISION

COMMISSIONER JOSEPH V. DORIA, JR.
COMMISSIONER LUCILLE DAVY
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April 30, 2008 Government Records Council Meeting

Milton Durham
Complainant

Complaint No. 2007-212

v.

NJ Department of Corrections
Custodian of Record

At the April 30, 2008 public meeting, the Government Records Council (“Council”) considered the April 23, 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. Item # 1 of the Complainant’s request is invalid because it is not a request for identifiable government records and because the Custodian is not required to conduct research in response to an OPRA request 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), and Bent v. Stafford Police Department, 381 N.J. Super 30 (October 2005). *See* N.J.S.A. 47:1A-1.1. Additionally, the Custodian properly requested clarification of the request pursuant to Cody v. Middletown Township Public Schools, GRC Complaint No. 2005-98 (December 2005). Therefore, the Custodian has not unlawfully denied access to the requested records at item # 1.
2. Because item # 2 of the Complainant’s request did identify the record sought, said request is not invalid as a broad or unclear request 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), and Bent v. Stafford Police Department, 381 N.J. Super 30 (October 2005), and thus the Custodian has not carried her burden of proving a lawful denial of access to item # 2 of the Complainant’s request pursuant to N.J.S.A. 47:1A-6.
3. Pursuant to N.J.S.A. 47:1A-6, the Custodian has carried her burden of proving a lawful denial of access to item # 3 of the Complainant’s request because said



records are exempt from disclosure pursuant to N.J.S.A. 47:1A-9.a., N.J.A.C. 10A:22-3.2(b), the court's decision in Newark Morning Ledger Co., Publisher of the Star-Ledger v. Division of the State Police of the New Jersey Department of Law and Public Safety, Law Division – Mercer County, Docket No. MER-L-1090-05 (July 5, 2005) and Tillery v. NJ Department of Corrections, GRC Complaint No. 2007-155 (February 2008).

4. Although the Custodian unlawfully denied access to item # 2 of the Complainant's request because the Complainant's request did identify the record sought and thus said request is not invalid as a broad or unclear request 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), and Bent v. Stafford Police Department, 381 N.J. Super. 30 (October 2005), because the Custodian made the records responsive to said request available to the Complainant via letter dated October 11, 2007 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 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 13, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Milton P. Durham¹
Complainant**

GRC Complaint No. 2007-212

v.

**NJ Department of Corrections²
Custodian of Records**

Records Relevant to Complaint:

1. Name, date of hire, title, present assignment and age of all New Jersey State employees at New Jersey State Prison.
2. Record of all the names of custody staff assigned to duties on first shift at New Jersey State Prison for the post of “7 Up” and “7 Right” on August 17, 2006, including Special Operations Group.
3. Name of staff authorizing charge, number and/or title of charges, date and result of all disciplinary charges on any inmate from January 2006 to January 2007 at New Jersey State Prison.³

Request Made: May 24, 2007

Response Made: June 4, 2007

Custodian: Michelle Hammel

GRC Complaint Filed: September 6, 2007

Background

May 24, 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.

June 4, 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.⁴ The Custodian states that items # 1-2 of the requested records listed above are invalid requests under OPRA because said requests are for information and not specific records. The Custodian states that pursuant to Mag Entertainment v. Div. of ABC, 375

¹No legal representation listed on record.

² Represented by DAG Lisa A. Puglisi, on behalf of the NJ Attorney General.

³ The Complainant requested additional records; however, said records are not the subject of this complaint.

⁴ The Custodian certifies in her Statement of Information dated October 11, 2007 that she received the Complainant’s OPRA request on May 30, 2007.

N.J. Super. 534 (App. Div. 2005), a request is invalid when said request requires a custodian to conduct research and correlate data from various records. The Custodian asks that the Complainant clearly identify the records requested and provide a description of the records sought, otherwise the Custodian denies said requests.

Additionally, the Custodian states that she cannot release any information to an inmate regarding another inmate. The Custodian states that the Department's regulations specifically exclude the release of records that may jeopardize the safety of any person or the safe and secure operation of a correctional facility. Thus, the Custodian denies item # 3 of the requested records listed above.

September 6, 2008

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

- Complainant's OPRA request dated May 24, 2007
- Custodian's response to the Complainant's OPRA request dated June 4, 2007⁵

The Complainant states that he submitted his OPRA request on May 24, 2007 and received the Custodian's denial of said request dated June 4, 2007 on June 9, 2007. The Complainant states that he needs items # 1-2 of the records requested for a pro se litigation. The Complainant asserts that the requested records are not sensitive security information and should be easy to acquire.

Regarding item # 3 of the Complainant's request, the Complainant contends that the Custodian's denial of access is unlawful. The Complainant contends that he is not requesting inmates' names or identification numbers on disciplinary charge records.

September 19, 2007

Offer of Mediation sent to both parties.

September 21, 2007

Complainant's signed Agreement to Mediate. The Custodian did not respond to the Offer of Mediation.

October 2, 2008

Request for the Statement of Information sent to the Custodian.

October 11, 2007

Letter from Custodian to Complainant. The Custodian states that, via letter dated June 4, 2007, the Custodian denied the Complainant's request for records of all the names of custody staff assigned to duties on "7 Up" and "7 Right" at New Jersey State Prison, first shift on August 17, 2006 including Special Operations Group on the basis that said request was invalid because it did not specify an identifiable government record and OPRA does not require a custodian to conduct research in response to an OPRA request pursuant to Mag, *supra*. The Custodian states that in said letter she also asked the

⁵ The Complainant attached additional records which are not relevant to the adjudication of this complaint.
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Complainant to provide a better description of the record sought, but states that to date she has not received such clarification from the Complainant.

The Custodian states that in responding to the Complainant's Denial of Access Complaint, the Custodian identified two (2) records that appear to be responsive to the Complainant's request. However, the Custodian states that she still maintains her initial position that said request was an invalid request for information. The Custodian states that no records exist which specifically identify all custody staff assigned to duties on "7 Up" and "7 Right" at New Jersey State Prison, first shift, on August 17, 2006 including Special Operations Group. The Custodian states that a one (1) page daily schedule of all officers assigned to all posts on the first shift at New Jersey State Prison on August 17, 2006 exists, which the Custodian states will show the officers assigned to 7-wing. Additionally, the Custodian states that a two (2) page Special Operations Personnel Roster of all personnel assigned to New Jersey State Prison on August 17, 2006 exists, which the Custodian states does not provide a specific assignment location for Special Operations Group personnel. The Complainant also states that she has enclosed an OPRA Records Request Payment Notification and Authorization Form in the amount of \$2.25. The Custodian states that she will provide the records responsive upon payment of the appropriate fee.

October 11, 2007

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

- Complainant's OPRA request dated May 24, 2007
- Custodian's response to the Complainant's request dated June 4, 2007
- Letter from Custodian to Complainant dated October 11, 2007
- Letter from Custodian's Counsel to GRC dated October 11, 2007

The Custodian certifies receiving the Complainant's OPRA request on May 30, 2007 and providing a written response on June 4, 2007 with a follow-up letter on October 11, 2007. The Custodian asserts that item # 1 of the Complainant's request fails to identify specific records and fulfilling said request would require the Custodian to conduct research. The Custodian certifies that, regarding item # 2 of the Complainant's request, she made a daily shift roster dated August 17, 2006 available to the Complainant on October 11, 2007. Additionally, the Custodian contends that fulfilling item # 3 of the Complainant's OPRA request would require research on the part of the Custodian, which is not required pursuant to Mag, *supra*, because disciplinary records are maintained in inmates' individual classification files.

Additionally, the Custodian certifies that the search undertaken to satisfy the records request upon which this complaint is based involved the Custodian contacting the institutional liaison and the Lieutenant in charge of the Special Operations Group at New Jersey State Prison. The Custodian also certifies that no records responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM").

October 11, 2007

Letter from Custodian's Counsel to GRC. Regarding item #1 of the Complainant's request, the Custodian's Counsel asserts that the Custodian properly denied said request pursuant to Mag, supra, because no records exist which list the name, date of hiring, title, present assignment and age of all State employees at New Jersey State Prison and fulfilling the request would require the Custodian to conduct research.

Counsel states that the Custodian made available to the Complainant the records responsive to the Complainant's request for the names of custody staff assigned to duties on the first shift for 7 Up and 7 Right at New Jersey State Prison on August 17, 2006 upon the Complainant's payment of the appropriate copying fee.

Additionally, Counsel contends that the Custodian properly denied item # 3 of the Complainant's request because disciplinary records are not maintained in a central location. Counsel states that each inmate's disciplinary charges are maintained in each inmate's individual classification file and thus in order to fulfill the Complainant's request, the Custodian would have to research approximately twenty-eight thousand (28,000) individual or separate files. Counsel asserts that pursuant to Mag, supra, the Custodian is not required to conduct research in response to an OPRA request. Counsel also contends that the Custodian properly denied said request pursuant to the Department's proposed regulations N.J.A.C. 10A:22-3.2(b), which prohibit an inmate from obtaining records regarding another inmate. *See* Executive Orders No. 21 and 26 (McGreevey), Newark Morning Star Ledger Co. v. Division of the State Police of the New Jersey Department of Law and Public Safety, Superior Court of New Jersey – Law Division – Mercer County, Docket No. MER-L-1090-05 (decided July 5, 2005). *See also* Vasquez v. Burlington County, GRC Complaint No. 2005-193 (February 2006).

Further, Counsel asserts that this complaint should be dismissed because the Custodian provided the Complainant with records responsive to item # 2 of the Complainant's request and the Custodian properly denied the remainder of the Complainant's request.

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*...government records shall be subject to public access unless exempt from such access by...*Executive Order of the Governor*...” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document,

information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

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

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

OPRA also provides:

“[t]he 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.

The New Jersey Department of Corrections’ Proposed Rules provide in part that:

“[a]n inmate shall not be permitted to inspect, examine or obtain copies of documents concerning any other inmate.” N.J.A.C. 10A:22-3.2(b).

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.

In this complaint, the Custodian certifies receiving the Complainant’s OPRA request on May 30, 2007 and providing the Complainant with a written response to said request on June 4, 2007, the third (3rd) business day following receipt of said request. The Custodian denied items # 1-2 of the Complainant’s request in said letter on the basis that the Complainant did not request a specific or identifiable government record and the Custodian is not required to conduct research in order to fulfill a request pursuant to Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (March 2005). In the Custodian’s June 4, 2007 response to the Complainant, the Custodian also sought clarification from the Complainant regarding his requests, which the Complainant never provided to the Custodian. Additionally, via letter dated October 11, 2007, the Custodian informed the Complainant that she located two (2) records responsive to item # 2 of the Complainant’s request and would make such records available upon the Complainant’s payment of the appropriate copying fee.

The GRC has previously ruled on whether a custodian’s request for clarification results in a denial of access. In Cody v. Middletown Township Public Schools, GRC Complaint No. 2005-98 (December 2005), the Custodian required clarification from the Complainant regarding the Complainant’s OPRA request because said request was broad

or unclear. The Council held that “[i]n the case of the records that needed clarification, there is no denial of access to records because the Custodian did properly respond to those requests in writing within the statutorily required seven (7) business days, indicating to the Complainant that clarification was necessary but did not receive a response in return from the Complainant.”

Additionally, 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 (October 2005)⁶, the Superior Court references Mag in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records “accessible.” “As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents.”⁷

In this instant matter, regarding item # 1 of the Complainant’s request, the Complainant does not specifically identify specific records of any New Jersey State employees but rather requests the names, date of hire, title, present assignment and age of all New Jersey State employees at New Jersey State Prison. In order to fulfill said request, the Custodian would have to conduct research to identify said employees.

Therefore, item # 1 of the Complainant’s request is invalid because it is not a request for identifiable government records and because the Custodian is not required to conduct research in response to an OPRA request pursuant to Mag, *supra*, NJ Builders, *supra*, and Bent, *supra*. See N.J.S.A. 47:1A-1.1. Additionally, the Custodian properly requested clarification of the request pursuant to Cody, *supra*. Therefore, the Custodian has not unlawfully denied access to the requested records at item # 1.

However, although the Custodian asserted that item # 2 of the Complainant’s request was invalid because said request was not a request for a specific government record, it is evident that the Complainant sought access to a roster of staff assigned to posts “7 Up” and “7 Right” on August 17, 2006.⁸ The Complainant’s request was

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

⁷ As stated in Bent.

⁸ It should be noted that there is a nine (9) month gap between the date of the records at issue and the date of the Complainant’s request.

apparently specific enough to enable the Custodian to locate a daily schedule of all personnel assigned to New Jersey State Prison on August 17, 2006, which the Custodian made available to the Complainant via letter dated October 11, 2007.

Therefore, because item # 2 of the Complainant's request did identify the record sought, said request is not invalid as a broad or unclear request pursuant to Mag, *supra*, NJ Builders, *supra*, and Bent, *supra*, and thus the Custodian has not carried her burden of proving a lawful denial of access to item # 2 of the Complainant's request pursuant to N.J.S.A. 47:1A-6.

Additionally, the Custodian's Counsel contends that the Custodian lawfully denied access to item # 3 of the Complainant's request based on the Department of Corrections' proposed regulation providing that "[a]n inmate shall not be permitted to inspect, examine or obtain copies of documents concerning any other inmate." N.J.A.C. 10A:22-3.2(b), which remains in effect pursuant to paragraph 4 of Executive Order No. 21 (McGreevey) and paragraph 6 of Executive Order No. 26 (McGreevey).

Paragraph 4 of Executive Order No. 21 provides in relevant part as follows:

"[i]n light of the fact that State departments and agencies have proposed rules exempting certain government records from public disclosure, and these regulations have been published for public comment, but cannot be adopted prior to the effective date of the Open Public Records Act, State agencies are hereby directed to handle all government records requests in a manner consistent with the rules as they have been proposed and published, and the records exempted from disclosure by those proposed rules are exempt from disclosure by this Order..."

Paragraph 6 of Executive Order No. 26 provides that "[t]he remaining provisions of Executive Order No. 21 are hereby continued to the extent that they are not inconsistent with this Executive Order." Paragraph 4 of Executive Order No. 21 was one of its remaining provisions.

Although these Orders were issued over five years ago, no rescinding or modifying order has been issued. Accordingly, they are still in full force and effect. The Superior Court in an unpublished opinion examined the continuing effect of these Orders in 2005. In Newark Morning Ledger Co., Publisher of the Star-Ledger v. Division of the State Police of the New Jersey Department of Law and Public Safety, Law Division – Mercer County, Docket No. MER-L-1090-05 (July 5, 2005), the court stated "[paragraph 6 of Executive Order No. 26] continues to permit a department or agency within State Government (sic) to adopt rules and regulations and to permit the operation of a proposed rule or regulation prior to its final adoption. Therefore...public 'agencies are hereby directed to handle all government records requests in a manner consistent with the rules as they have been proposed and published..." *Id.* at 11.

In that case, the court went on to state that:

"[i]t appears, from the language of both Executive Orders, that these provisions were added to provide sufficient time for departments and

agencies within State government to evaluate their records, propose regulations and withhold certain documents from public inspection pending the adoption of the proposed rules. While this process may be at variance with the normal regulatory process, one can only conclude that the Executive Branch, understanding the broad scope of OPRA, felt it was appropriate to have agencies and departments, within State government, undertake a careful review and analysis of its records to determine, for purposes of security and safety, those records to be considered confidential." *Id.* at 12.

The court further held that "[r]ecognizing the time delay inherent in the normal rule adoption process, Executive Order No. 21 and Executive Order No. 26 included language to permit custodians of records to deny access, based on the proposed rule, pending final adoption. Now, three years after the passage of OPRA, for the court, the continued efficacy of that practice raises some concerns." *Id.*

The court concluded, however, that "[w]hile [it] does not know the status of this proposed regulation, under Executive Order No. 21, paragraph 4 and Executive Order No. 26, paragraph 6, resolution of that issue is not required. ... the court assumes that the proposed rule change is still pending." *Id.* at 13.

Additionally, in Tillery v. NJ Department of Corrections, GRC Complaint No. 2007-155 (February 2008), the Council held that:

“[b]ecause the records requested in item #6, comprising all data records of any inmate who has more than fifteen (15) misconducts and remains in New Jersey State Prison, are prohibited from release because an inmate is not permitted to inspect, examine or obtain copies of documents concerning any other inmate pursuant to the Department of Correction’s proposed rule set forth in *N.J.A.C. 10A:22-3.2(b)*, continued in effect pursuant to Executive Orders No. 21 and No. 26 (McGreevey), they are exempt from disclosure pursuant to N.J.S.A. 47:1A-9.a. and the court’s decision in Newark Morning Ledger Co., Publisher of the Star-Ledger v. Division of the State Police of the New Jersey Department of Law and Public Safety, Law Division – Mercer County, Docket No. MER-L-1090-05 (July 5, 2005).”

Therefore, in the matter presently before the Council, pursuant to N.J.S.A. 47:1A-6, the Custodian has carried her burden of proving a lawful denial of access to item # 3 of the Complainant’s request because said records are exempt from disclosure pursuant to N.J.S.A. 47:1A-9.a., N.J.A.C. 10A:22-3.2(b), the court’s decision in Newark Morning Ledger, *supra* and the GRC’s decision in Tillery, *supra*.

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?

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.

In this complaint, the Custodian has not carried her burden of proving a lawful denial of access to item # 2 of the Complainant’s request pursuant to N.J.S.A. 47:1A-6 because item # 2 of the Complainant’s request did identify the record sought and thus said request is not invalid as a broad or unclear request pursuant to Mag, supra, NJ Builders, supra, and Bent, supra. However, the Custodian did make the records responsive to said request available to the Complainant via letter dated October 11, 2007.

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).

Therefore, although the Custodian unlawfully denied access to item # 2 of the Complainant’s request because the Complainant’s request did identify the record sought and thus said request is not invalid as a broad or unclear request pursuant to Mag, supra, NJ Builders, supra, and Bent, supra, because the Custodian made the records responsive to said request available to the Complainant via letter dated October 11, 2007 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Item # 1 of the Complainant's request is invalid because it is not a request for identifiable government records and because the Custodian is not required to conduct research in response to an OPRA request 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), and Bent v. Stafford Police Department, 381 N.J. Super 30 (October 2005). See N.J.S.A. 47:1A-1.1. Additionally, the Custodian properly requested clarification of the request pursuant to Cody v. Middletown Township Public Schools, GRC Complaint No. 2005-98 (December 2005). Therefore, the Custodian has not unlawfully denied access to the requested records at item # 1.
2. Because item # 2 of the Complainant's request did identify the record sought, said request is not invalid as a broad or unclear request 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), and Bent v. Stafford Police Department, 381 N.J. Super. 30 (October 2005), and thus the Custodian has not carried her burden of proving a lawful denial of access to item # 2 of the Complainant's request pursuant to N.J.S.A. 47:1A-6.
3. Pursuant to N.J.S.A. 47:1A-6, the Custodian has carried her burden of proving a lawful denial of access to item # 3 of the Complainant's request because said records are exempt from disclosure pursuant to N.J.S.A. 47:1A-9.a., N.J.A.C. 10A:22-3.2(b), the court's decision in Newark Morning Ledger Co., Publisher of the Star-Ledger v. Division of the State Police of the New Jersey Department of Law and Public Safety, Law Division – Mercer County, Docket No. MER-L-1090-05 (July 5, 2005) and Tillery v. NJ Department of Corrections, GRC Complaint No. 2007-155 (February 2008).
4. Although the Custodian unlawfully denied access to item # 2 of the Complainant's request because the Complainant's request did identify the record sought and thus said request is not invalid as a broad or unclear request 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), and Bent v. Stafford Police Department, 381 N.J. Super. 30 (October 2005), because the Custodian made the records responsive to said request available to the Complainant via letter dated October 11, 2007 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:

Dara Lownie
Senior Case Manager

Approved By:

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