



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Acting Commissioner

FINAL DECISION

April 8, 2010 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2008-142 and 2008-143

v.

Wall Police Department (Monmouth)
Custodian of Record

At the April 8, 2010 public meeting, the Government Records Council (“Council”) considered the April 1, 2010 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. Although the Custodian certified that the Complainant did not submit his request on an official OPRA request form, the Custodian’s attempt to fulfill the requests results in the requests being considered valid OPRA requests pursuant to Paff v. Borough of Audubon, GRC Complaint No. 2006-01 (March 2006).
2. Because the Complainant’s requests for the records relevant to GRC Complaint No. 2008-142 and 2008-143 are overbroad and fail to specifically identify the records sought, and because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to conduct research to locate records potentially responsive to the Complainant’s request pursuant to the Superior Court’s decisions in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and the Council’s decision in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008).

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 8th Day of April, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Harlynn A. Lack, Secretary
Government Records Council

Decision Distribution Date: April 13, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 8, 2010 Council Meeting**

**Richard Rivera¹
Complainant**

**GRC Complaint Number:
2008-142 and 2008-143²**

v.

**Wall Police Department (Monmouth)³
Custodian of Records**

Records Relevant to Complaint:⁴

GRC Complaint Number 2008-142

1. Copies of mobile video and audio recordings made by Wall Police Department (“WPD”) officers on May 8, 2008 between 7:00 pm and 10:00 pm in DVD or VHS format.
2. Copies of WPD telephone audio recordings on May 8, 2008 between 8:30 pm and 11:00 pm.
3. Copies of WPD police radio transmission audio recordings on May 8, 2008 between 8:30 pm and 11:00 pm.

GRC Complaint Number 2008-143

1. Copies of mobile video and audio recordings made by WPD officers on April 14, 2008 between 9:00 am and 10:00 am in DVD or VHS format.
2. Copies of WPD telephone audio recordings on April 14, 2008 between 9:00 am and 12:30 pm.
3. Copies of WPD police radio transmission audio recordings on April 14, 2008 between 9:00 am and 12:30 pm.
4. Reports, memoranda, orders, directives, letters, mailings and e-mails relating to police inquiries of www.thewallpolice.com and/or its owners, operators, hosts, registrants, bloggers and affiliates.

¹ Represented by Walter M. Luers, Esq. (Oxford, NJ). Mr. Luers entered his appearance in this matter on December 21, 2009.

² Unless separately dated, each of the entries in the Background applies equally to both of these complaints. These matters have been consolidated for adjudication by the GRC based on the commonality of parties and issues inherent in each complaint.

³ Represented by Michael Elward, Esq., of King, Kitrick & Jackson, LLC (Brick, NJ).

⁴ Additional records were requested that are not relevant to these complaints.

Requests Made: May 29, 2008
Responses Made: June 6, 2008 and June 9, 2008
Custodian: Kevin Pressey, Records and ID Manager
GRC Complaints Filed: July 9, 2008⁵

Background

August 7, 2007

Letter from the Custodian to the Complainant. The Custodian provides the Complainant with information pertinent to an OPRA request from the Complainant dated August 6, 2007. The Custodian further informs the Complainant that on August 6, 2007, the Custodian faxed the agency's official OPRA request form to the Complainant and the Custodian directs the Complainant to use said form for all future OPRA requests.

December 12, 2007

Letter from the Complainant to Lieutenant Gerald Ihnken of the WPD. The Complainant, in this letter which predates the Complainant's OPRA request, purports to confirm several phone conversations between the Complainant and Lt. Ihnken regarding record queries.

May 29, 2008

Complainant's Open Public Records Act ("OPRA") requests. The Complainant requests the records relevant to this complaint listed above in two (2) separate letter requests.

June 6, 2008

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's letter request which formed the basis for GRC Complaint No. 2008-143 on the sixth (6th) business day following receipt of such request. The Custodian discloses some of the requested records. The Custodian informs the Complainant that the Custodian is denying the Complainant access to Items No. 1 through 3 because the Complainant's requests for these items is too broad and also because the items may contain sensitive information that could reveal personal information such as social security numbers, driver's license numbers and similar information of a personal nature. The Custodian informs the Complainant that Item No. 4 is denied because the information requested constitutes inter-agency or intra-agency advisory material.

June 9, 2008

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's letter request which formed the basis for GRC Complaint No. 2008-142 on the seventh (7th) business day following receipt of such request. The Custodian discloses some of the requested records and thereby partially fulfills the Complainant's request. The Custodian informs the Complainant that the Custodian is denying the Complainant access to Items No. 1 through 3 because the Complainant's requests for these items is too broad and also because the items may contain sensitive information that

⁵The GRC received the Denial of Access Complaints on said date.
Richard Rivera v. Wall Police Department (Monmouth), 2008-142 & 2008-143 – Findings and Recommendations of the
Executive Director

could reveal personal information such as social security numbers, driver's license numbers and similar information of a personal nature.

July 9, 2008

Denial of Access Complaint filed with the Government Records Council ("GRC") under complaint number 2008-142 with the following attachments:

- Complainant's letter request dated May 29, 2008
- Custodian's response to the OPRA request dated June 9, 2008

The Complainant states that he submitted his OPRA request to the Custodian for the records relevant to this complaint on May 29, 2008. The Complainant states that he received a response to his OPRA request from the Custodian's Counsel dated June 6, 2008.⁶ The Complainant asserts that the Custodian denied the records relevant to the complaint because they were too broad and too sensitive. The Complainant contends that the Custodian denied the requested records without first reviewing the records to determine if sensitive information was contained therein. The Complainant further states that the Custodian did not offer to redact personal information from the recordings or provide the cost, if any, associated with accessing the records.

July 9, 2008

E-mail from the Complainant to the Custodian. The Complainant makes reference to two (2) e-mail attachments, 13.pdf and 14.pdf, which the Complainant states are Denial of Access Complaints that will be provided to the GRC unless the Custodian discloses the records the Complainant requested.⁷

July 9, 2008

Denial of Access Complaint filed with the Government Records Council ("GRC") under complaint number 2008-143 with the following attachments:

- Letter from the Complainant to Lt. Gerald Ihnken dated December 12, 2007
- Complainant's letter request dated May 29, 2008
- Custodian's response to the OPRA request dated June 6, 2008
- E-mail from the Complainant to the Custodian dated July 9, 2008

The Complainant states that he submitted his OPRA request to the Custodian for the records relevant to this complaint on May 29, 2008. The Complainant states that he received a response to his OPRA request from the Custodian's Counsel dated June 6, 2008. The Complainant asserts that the Custodian denied the records relevant to the complaint because they were too broad and too sensitive. The Complainant contends that the Custodian denied the requested records without first reviewing the records to determine if sensitive information was contained therein. The Complainant further states

⁶ This is the wrong date because the Custodian's response to the OPRA request which gave rise to the instant complaint was dated June 9, 2008.

⁷ The Complainant labeled his OPRA requests as PD 13 and PD 14. The Complainant's request labeled PD 14 was subsequently given the GRC complaint number 2008-142, and the Complainant's request labeled PD 14 was subsequently given the GRC complaint number 2008-143.

that the Custodian did not offer to redact personal information from the recordings or provide the cost, if any, associated with accessing the records. The Complainant states that with respect to Item No. 4 of the records relevant to the complaint, he previously spoke several times with Lt. Ihnken. The Complainant alleges that although Lt. Ihnken admitted contacting the website hosting company, the lieutenant refuses to disclose the requested records concerning the website.

July 18, 2008

E-mail from the GRC to the Complainant. The GRC informs the Complainant that he has used an obsolete Denial of Access Complaint form and that a current form may be found on the GRC's website. The GRC also attaches a current copy of the Denial of Access Complaint to the e-mail and informs the Complainant that the form contains a blank Agreement to Mediate which he should complete and return to the GRC if he is interested in mediation.

July 18, 2008

E-mail from the Complainant to the GRC. The Complainant declines mediation.

July 18, 2008

Request for the Statement of Information ("SOI") sent to the Custodian.

July 24, 2008

Telephone call from the Custodian's Counsel to the GRC. Counsel informs the GRC that he is entering his appearance as the legal representative for the WPD in this matter. Counsel requests a five (5) business day extension of time for the Custodian to complete and return the SOI to the GRC.

July 24, 2008

Facsimile transmission from the GRC to Custodian's Counsel. The GRC grants Counsel's request for a five (5) business day extension of time for the Custodian to complete and return the SOI to the GRC.

August 1, 2008

Custodian's SOI in response to GRC Complaint No. 2008-142 with the following attachments:

- Complainant's letter request dated May 29, 2008
- Custodian's response to the OPRA request dated June 9, 2008

The Custodian certifies that he did not conduct a search for the requested records because he knows the location of the records which are maintained pursuant to prevailing policy. The Custodian also certifies that no records relevant to the complaint have been destroyed and that they are maintained in accordance with New Jersey Department of State, Division of Archives and Records Management Local Police Departments Records Retention Schedule M900000-904.

The Custodian certifies that he received the Complainant's OPRA request on May 29, 2008 and responded to the request on June 9, 2008. The Custodian certifies that he

fulfilled part of the Complainant's OPRA request; however, the Custodian certifies that the Complainant's requests for Item No. 2 and 3 of the records relevant to the complaint constitute requests for all police radio and telephone transmissions made or received in a three (3) hour window.⁸ The Custodian avers that such a request is unduly broad and does not constitute a valid request for a specific identifiable government record within the meaning of OPRA. In support of his position denying the Complainant access to the records, the Custodian cites New Jersey Builders Association v. New Jersey Council on Affordable Housing, 360 N.J. Super. 166 (App. Div. 2006), MAG Entertainment LLC v. Div. of ABC, 375 N.J. 534 (App. Div. 2005) and Bent v. Twp. of Stafford Police Dept., 381 N.J. Super. 30 (App. Div. 2005).⁹

August 1, 2008

Custodian's SOI in response to GRC Complaint No. 2008-143 with the following attachments:

- Complainant's letter request dated May 29, 2008
- Custodian's response to the OPRA request dated June 6, 2008

The Custodian certifies that he did not conduct a search for the requested records because he knows the location of the records which are maintained pursuant to prevailing policy. The Custodian also certifies that no records relevant to the complaint have been destroyed and that they are maintained in accordance with New Jersey Department of State, Division of Archives and Records Management Local Police Departments Records Retention Schedule M900000-904.

The Custodian certifies that he received the Complainant's OPRA request on May 29, 2008 and responded to the request on June 6, 2008. The Custodian certifies that he fulfilled part of the Complainant's OPRA request; however, the Custodian further certifies that the Complainant's request for Item No. 1 of the records relevant to the complaint constitutes a request for mobile video recordings ("MVR") within a three (3) hour window and the Complainant's request for Items No. 2 and 3 of the records relevant to the complaint constitute all police radio and telephone transmissions made or received during a different three (3) hour window.¹⁰ The Custodian avers that such a request is unduly broad and does not constitute a valid request for a specific identifiable government record within the meaning of OPRA. In support of his position denying the Complainant access to the records the Custodian cites New Jersey Builders Association v. New Jersey Council on Affordable Housing, 360 N.J. Super. 166 (App. Div. 2006), MAG Entertainment LLC v. Div. of ABC, 375 N.J. 534 (App. Div. 2005) and Bent v. Twp. of Stafford Police Dept., 381 N.J. Super. 30 (App. Div. 2005).¹¹

⁸ The period of time during which the Complainant requested said records actually spanned two and one-half (2.5) hours.

⁹ The Custodian means New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005).

¹⁰ The period of time for which the Complainant requested MVR records actually spanned one (1) hour and the period of time for which the Complainant requested telephone and police radio transmission recordings actually spanned three and one-half (3.5) hours.

¹¹ See footnote 9 for the correct legal citations.

The Custodian certifies that the Complainant is attempting to make the case that a government record is a period of time spanning several hours during which telephone, radio, and vehicle recordings may have been made. The Custodian contends that the Complainant has misconstrued the meaning of a government record. The Custodian emphasizes that, despite the Custodian's instructions that he do so, the Complainant made no reference in his request for a recording defined by an identifiable characteristic such as an event or individual that may have constituted a government record. The Custodian asserts that the Complainant is required to identify a specific government record, and that the Complainant's request to sift through a self-defined window of information is not a permissible request under OPRA.

The Custodian further certifies that the Complainant's request for Item No. 4 of the records relevant to the complaint is similarly non-specific and further, that it seeks documentation which relates to criminal investigatory records.

August 5, 2008

The Complainant's response to the Custodian's SOIs. The Complainant asserts that in denying access to the Complainant, the Custodian has failed to:

1. Review the records to determine what, if any, information may be withheld as sensitive
2. State what, if any, information is sensitive and must not be disclosed
3. State what, if any, redactions are necessary
4. Provide a cost for producing the records

The Complainant further states that the Custodian, in claiming the requests are too broad has failed to:

1. Review the records to determine the contents
2. State what, if anything, is overly broad
3. Provide the requestor with the total number of records contained within the time period during which the records were requested
4. State what, if any, redactions are necessary
5. Provide a cost for producing the records

The Complainant contends that the request is not overly broad, but conversely, that it contains specific time periods. The Complainant repeats the time periods during which he requested the records relevant to these complaints. The Complainant states that, contrary to the Custodian's argument, the records sought are not specific incidents, but rather all the actual audio and video recordings for the stated time periods. The Complainant states that said recordings may comprise several incidents or contain no records whatsoever. The Complainant cites to Rivera v. Town of Guttenberg, GRC Complaint No. 2006-154 (June 2008) and Rivera v. Town of Guttenberg, GRC Complaint No. 2007-05 (June 2008), wherein he states the Custodian produced thirty-three (33) hours of police radio and telephone call records on a compact disk for less than two dollars (\$2.00).

The Complainant contends that because the Custodian recognizes the requested records are in the public domain, the Custodian should make said records immediately available and inform the Complainant of the total copying fee. The Complainant states that because the Custodian did not address a special service charge in the SOI, the Custodian should be barred from subsequently seeking such a charge. The Complainant also states that the Custodian has knowingly displayed a similar willful disregard of OPRA in other matters and that this complaint should be referred to the Office of Administrative Law for a determination of whether the custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

August 5, 2008

E-mail from the Custodian's Counsel to the GRC. Counsel states that there is no provision for a reply to the SOI and that the GRC should disregard the Complainant's response to the Custodian's SOIs. Along with the alleged procedural deficiency, Counsel states the Complainant's reply is substantively defective and that the Complainant is attempting to redefine a government record.

September 16, 2009

Facsimile transmission from the GRC to the Custodian. Because the Custodian attached to the SOI a letter from the Complainant which stated that it was an attachment to the agency's OPRA request, the GRC asks the Custodian for a copy of the official OPRA form that was submitted along with the attachment.

September 16, 2009

E-mail from the GRC to the Complainant. Because the Complainant included with his Denial of Access Complaint a letter which stated that it was an attachment to the agency's OPRA request, but failed to provide a copy of the official request form, the GRC asks the Complainant for a copy of the official OPRA request form that was submitted along with said attachment.

September 17, 2009

Custodian's certification. The Custodian certifies that the Complainant has forwarded numerous OPRA requests to the Custodian. Recently, despite being advised by the Custodian not to do so, the Custodian avers that the Complainant has been submitting his OPRA requests in the form of letter attachments without completing and submitting the required OPRA Request forms. The Custodian attaches to his certification a blank copy of the agency's OPRA request form, a blank copy of the agency's OPRA response form and a letter from the Custodian to the Complainant dated August 7, 2007.

September 18, 2009¹²

Complainant's certification. The Complainant certifies that on May 29, 2008 he transmitted a three (3) page fax to the Custodian which was his OPRA request in this matter. One (1) of the three (3) pages the Complainant certifies was the agency's official OPRA request form. The Complainant also avers that the Custodian will not accept an OPRA request without inclusion of the official request form. The Complainant further

¹² Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.
Richard Rivera v. Wall Police Department (Monmouth), 2008-142 & 2008-143 – Findings and Recommendations of the Executive Director

certifies that he is presently unable to locate the original request form that was faxed to the Custodian on May 29, 2008.

September 28, 2009

Letter from the GRC to the Complainant. The GRC requests that the Complainant respond to the following questions so that the GRC may employ the common law balancing test established by the New Jersey Supreme Court in Doe v. Poritz, 142 N.J. 1 (1995) to sufficiently analyze the Complainant’s requests for MVR materials:

1. Why do you need the requested record(s) or information?
2. How important is the requested record(s) or information to you?
3. Do you plan to redistribute the requested record(s) or information?
4. Will you use the requested record(s) or information for unsolicited contact of the individuals named in the government record(s)?

October 1, 2009

E-mail from the Complainant to the GRC. The Complainant provides the following responses to the GRC:

Need for Access Questions	Complainant’s Response ¹³
1. Why do you need the requested record(s) or information?	“I am seeking the information to determine what, if any, misconduct or criminal activity exists on the part of Wall Police officers and other Wall Township municipal employees as part of my independent review of activities.”
2. How important is the requested record(s) or information to you?	“Without these records and similar records requested on numerous occasions previously that were denied, I cannot demonstrate that Wall Police officers act ethically and in an unbiased manner when encountering members of the public with opposing views or seek more accountability.”
3. Do you plan to redistribute the requested record(s) or information?	“I have no intention to distribute the records.”
4. Will you use the requested record(s) or information for unsolicited contact of the individuals named in the government record(s)?	“I have no intention to contact named individuals other than [one individual] who was aware of my OPRA requests and provided [a] RELEASE

¹³ The Complainant went into much more detail in his responses which he put in the form of a certification. The Complainant indicated he has reason to believe the Wall Police may have engaged in misconduct; however, the Complainant alleges that he needs the requested records to substantiate his position. The Complainant stated an intention to provide the records to investigators but he did not identify the investigative agency.

Analysis

What constitutes a valid OPRA records request?

In this complaint, it is undisputed between the parties that the Complainant submitted his two (2) requests on May 29, 2008. In response to the GRC’s request for a copy of the records request form that the Complainant filed with the public agency, the Complainant attached a letter request that contained a lead paragraph stating, “[p]lease accept this letter as an attachment to your agency Open Public Records form.” The Complainant attached the letter to his Denial of Access Complaints but failed to attach the agency’s OPRA request form.

In response to Question No. 6 on the Statements of Information, which requested that the Custodian attach a copy of the OPRA records request upon which the complaint is based, the Custodian attached the same letter requests that were submitted by the Complainant. The Custodian did not attach the agency’s OPRA request forms. Upon query by the GRC, the parties both submitted certifications concerning the form of records requests. The Custodian certified that the Complainant filed only the letters without the accompanying agency request forms. The Complainant certified that he filed the agency request forms with the letters as an attachment as stated in the first paragraph of the letters; however, the Complainant certified that he could not produce a copy of the agency request forms for either GRC Complaint No. 2008-142 or 2008-143. The weight of the evidence of record therefore, militates against the Complainant having filed the official agency request forms. Accordingly, it is concluded that the Complainant’s requests were in letter form and not on official OPRA request forms.

Review of the OPRA statute and its legislative intent leads the Council to conclude that use of the request form is required for all requestors. The statute provides that the custodian “shall adopt a form for the use of any person who requests access to a government record held or controlled by the public agency.” N.J.S.A. 47:1A-5.f. The statute specifically prescribes what must be on the form:

- (1) space for the name, address and phone number of the requestor and a brief description of the government record sought;
- (2) space for the custodian to indicate which record will be made available, when the record will be available, and the fees to be charged;
- (3) specific directions and procedures for requesting a record;
- (4) a statement as to whether prepayment of fees for a deposit is required;
- (5) the time period in which the public agency is required by OPRA to make the record available;
- (6) a statement of the requestor’s right to challenge a decision by the public agency to deny access and the procedure for filing an appeal;
- (7) space for the custodian to list reasons if a request is denied in whole or in part;
- (8) space for the requestor to sign and date the form;

(9) space for the custodian to sign and date the form if the request is fulfilled or denied.

Id.

Although the statute does not expressly state that OPRA requests must be on the form adopted by the agency pursuant to N.J.S.A. 47:1A-5.f., principles of statutory construction show that the Legislature intended use of this form by all requestors to be mandatory. In interpreting a statute, it is axiomatic that “each part or section [of the statute] should be construed in connection with every other part or section so as to produce a harmonious whole.” Matturi v. Bd. of Trustees of JRS, 173 N.J. 368, 383 (2002), quoting In re Passaic Cty. Utilities Auth., 164 N.J. 270, 300 (2000). In addition, a construction which renders statutory language meaningless must be avoided. Bergen Comm. Bank v. Sisler, 157 N.J. 188, 204 (1999). *See also* G.S. v. Dept. of Human Serv., 157 N.J. 161, 172 (1999). (a statute should be interpreted so as to give effect to all of its provisions, without rendering any language inoperative, superfluous, void, or insignificant).

As noted, N.J.S.A. 47:1A-5.f. requires that custodians adopt a request form, and sets forth a detailed list of what the form must contain. The next subsection of the statute provides:

If 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.* The custodian *shall sign and date the form and provide the requestor with a copy thereof.* (Emphasis added.)
N.J.S.A. 47:1A-5.g.

The form to which N.J.S.A. 47:1A-5.g. refers is the form required by N.J.S.A. 47:1A-5.f. In providing, in 5.g., that the custodian “shall” sign and date the form, indicate the basis for denial on the form, and return the form to the requestor, the Legislature evidenced its clear intent that it is mandatory for the form to be used by requestors. *See* Harvey v. Essex Cty. Bd. Of Freeholders, 30 N.J. 381, 391-92 (1959) (the word “shall” in a statute is generally mandatory). The express requirement that the custodian use the request form in denying an OPRA request, construed together with the preceding statutory requirement that the custodian adopt a request form, demonstrates that the Legislature intended that this form would be used for all OPRA requests. If all requestors are not required to submit requests on the form prescribed by the statute, then the statutory provisions requiring the custodian to sign and date the form, and return it to the requestor, would be meaningless. Indeed, a custodian would be unable to fulfill these express requirements of N.J.S.A. 47:1A-5.g. if the requestor does not use the form in submitting his request.

The Appellate Division has indicated that the statute’s form requirement serves the additional purpose of prompting the legislative policy that a requestor must specifically describe identifiable records sought. *See* MAG Entertainment LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005) (an open-ended request that fails to identify records with particularity is invalid). In Bent v. Twp. of Stafford Police Dept., 381 N.J. Super. 30, 33 (App. Div. 2005), the Court held that the requestor’s general

request for information violated this policy and was therefore invalid. In reaching this conclusion, the Court noted that OPRA mandates that the request form provide space for a “brief description” of the record request. *Id.* Similarly, in Gannett New Jersey Partners L.P. v. County of Middlesex, 379 N.J. Super. 205, 213 (App. Div. 2005), the Court specifically pointed to the same statutory request form requirement in determining that OPRA does not authorize requestors to make blanket requests for agency records.

Accordingly, based on the language of the statute, as well as judicial recognition of the importance of the statutory request form, it is determined that the statute requires all requestors to submit OPRA requests on an agency’s official OPRA records request form. OPRA’s provisions come into play only where a request for records is submitted on an agency’s official OPRA records request form.

It should be noted that the Council takes cognizance of the Appellate Division’s recent decision in Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009), Docket No. A-0821-07T2. In Renna, the Appellate Division held that:

“...all requests for OPRA records must be in writing; that such requests shall utilize the forms provided by the custodian of records; however, no custodian shall withhold such records if the written request for such records, not presented on the official form, contains the requisite information prescribed in N.J.S.A. 47:1A-5.f. Where the requestor fails to produce an equivalent writing that raises issues as to the nature or substance of the requested records, the custodian may require that the requestor complete the form generated by the custodian pursuant to N.J.S.A. 47:1A-5.g.”

Renna was decided on May 21, 2009, over ten (10) months after the complaint was filed in the instant matter. Therefore, for the Renna decision to be considered in this matter it will have to be retroactively applied.

The New Jersey Supreme Court “has adopted the United States Supreme Court's definition that a ‘ “case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government . . . [or] if the result was not dictated by precedent existing at the time the defendant's conviction became final.”’ State v. Lark, 117 N.J. 331, 339 (1989) (quoting Teague v. Lane, 489 U.S. 288, 301, 109 S. Ct. 1060, 1070, 103 L. Ed.2d 334, 349 reh'g denied, 490 U.S. 1031, 109 S. Ct. 1771, 104 L. Ed.2d 266 (1989)). See also State v. Johnson, 166 N.J. 523, 546-47 (2001); State v. Knight, 145 N.J. 233, 250-51 (1996).” State v. Yanovsky, 340 N.J. Super. 1 (App. Div. 2001).

Although retroactive application of laws is generally disfavored, Gibbons v. Gibbons, 86 N.J. 515, 521 (1981), a clear intention by the Legislature that retroactive application is intended will be given effect. Phillips v. Curiale, 128 N.J. 608, 618 (1992). Courts recognize that retroactive laws enacted pursuant to the police power may impair the rights of individuals, Rothman v. Rothman, 65 N.J. 219, 225-226 (1974), but where the public interest sufficiently outweighs the impaired private right, retroactive

application is permissible. State Troopers Fraternal Assoc. v. New Jersey, 149 N.J. 38, 57 (1997).

In determining retroactive application of a new rule, four judicial options are available:

(1) make the new rule of law purely prospective, applying it only to cases whose operative facts arise after the new rule is announced; (2) apply the new rule to future cases and to the parties in the case announcing the new rule, while applying the old rule to all other pending and past litigation; (3) grant the new rule limited retroactivity, applying it to cases in (1) and (2) as well as to pending cases where the parties have not yet exhausted all avenues of direct review [pipeline retroactivity]; and, finally, (4) give the new rule complete retroactive effect, applying it to all cases, even those where final judgments have been entered and all avenues of direct review exhausted. State v. Nash, 64 N.J. 464, 468-70 (1974). State v. Knight, 145 N.J. 233, 249 (1996).

The determination of retroactive application is generally guided by three factors: "(1) the purpose of the rule and whether it would be furthered by a retroactive application, (2) the degree of reliance placed on the old rule by those who administered it, and (3) the effect a retroactive application would have on the administration of justice." *Id.* at 251 (citation and internal quotations omitted).

In Knight, the Court granted pipeline retroactivity to the rule previously announced in State v. Sanchez, 129 N.J. 261 (1992), that "post-indictment interrogation of defendant violated his right to counsel under Article 1, paragraph 10 of the New Jersey Constitution" requiring suppression of his confession, *Id.* at 279, because the purpose of that exclusionary rule was also to enhance the reliability of confessions. Knight supra, 145 N.J. at 256-58.

Although the Knight Court was addressing the retroactive application of a new rule in a criminal setting, the New Jersey Supreme Court has applied similar reasoning in the civil setting. In Olds v. Donnelly, 150 N.J. 424, 442 (1997), the Court abrogated its decision in Circle Chevrolet Co. v. Giordano, Halleran & Ciesla, 142 N.J. 280 (1995) and exempted attorney malpractice actions from the entire controversy doctrine. In addressing whether the decision should be applied retroactively or prospectively, the Court recognized that "[o]rordinarily, judicial decisions apply retroactively. Crespo v. Stapf, 128 N.J. 351, 367 (1992)... [but] [p]olicy considerations may justify giving a decision limited retroactive effect." *Ibid.* The Court then examined the considerations articulated in Knight and concluded that the Olds decision should be given limited "pipeline" retroactivity because such application "adequately protect existing relationships[,] and because the application of pipeline retroactivity to pending cases "serves the interests of justice by permitting resolution of their claims on the merits." *Id.* at 450. Perhaps most importantly, the Court recognized that complete retroactive application potentially exposes the judicial system to the undue burden of revisiting numerous matters already concluded. *Id.* See, e.g., Constantino v. Borough of Berlin, 348 N.J. Super. 327 (App. Div. 2002)(holding that the public interest in retroactive application of the Age

Discrimination in Employment Act, 29 U.S.C.A. §621 *et seq.*, which specifically prohibited municipalities from hiring persons as police officer under age 21 or over age 35, outweighs an individual's private rights); State v. Yanovsky, 340 N.J. Super. 1 (App. Div. 2001)(holding that State v. Carty, 332 N.J. Super. 200 (App. Div. 2000) established a new rule of law during the pendency of the case, but that the public interest and administration of justice favored limited application of retroactivity); Zuccarelli v. NJDEP, 376 N.J. Super. 372 (App. Div. 1999)(holding that cases which held New Jersey's waste flow control system was unconstitutional and discriminatory should be applied retroactively only to cases in the “pipeline”).

Here, the GRC examined the degree of reliance placed upon the prevailing Council decisions with respect to the use of request forms and found that the conclusion that *OPRA's provisions come into play only where a request for records is submitted on an agency's official OPRA records request form* was repeatedly cited by the GRC in prior adjudications. And because records custodians relied upon said decisions, the retroactive application of the new rule articulated in Renna, *supra*, would likely foster confusion among many records custodians who already responded to OPRA requests predating the Renna court's decision. Accordingly, the GRC will not apply the Renna court's rule retroactively, but rather only apply it, when applicable, to complaints whose operative facts arise after the rule was articulated.

Under existing procedure then, the GRC requires that custodians direct requestors to the agency's official OPRA request form when denying a letter request on the basis that said request is not submitted on an official request form. If the requestor refuses to use the form the Custodian can lawfully deny access because the request is not a valid OPRA request. See GRC Advisory Opinion 2006-01.

In the instant complaint, the Custodian certified that the Complainant was advised to submit OPRA requests on the Wall Township Police Department Government Records Request Form. Further, in support of his certification, the Custodian attached a copy of a letter from the Custodian to the Complainant dated August 7, 2007, wherein the Custodian directed the Complainant to use a provided revised Wall Township request form when submitting all future OPRA requests to the Custodian. Despite the Custodian's instructions to the Complainant to use the official request form however, the Complainant submitted letter requests for the records relevant to this complaint. Because the Complainant failed to submit his requests on the official request form, the Custodian could have lawfully denied the Complainant access to the requested records. Here, however, the Custodian chose to fulfill the Complainant's request as submitted in letter form.

In Paff v. Borough of Audubon, GRC Complaint No. 2006-01 (March 2006), after initially denying the complainant's request for records because it was not submitted on the agency's official OPRA request form, the custodian decided to fulfill the complainant's request. The Council subsequently determined that: “[t]he Custodian was not obligated to fulfill the Complainant's request, however she chose to do so and certifies that she notified the Complainant of such on January 9, 2006...” Thus, in Paff, the Council concluded that while the complainant's request was not submitted on an

official OPRA request form, because the custodian attempted to fulfill the request, OPRA's provisions come into play.

Therefore, although the Custodian certified that the Complainant did not submit his requests on an official OPRA request form, the Custodian's attempt to fulfill the requests results in the requests being considered valid OPRA requests pursuant to Paff, *supra*.

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 ..." (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 provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

The Custodian denied the Complainant's requests for Item No. 1 in both GRC Complaint No. 2008-142 and GRC Complaint No. 2008-143, which is MVR media, by informing the Complainant that his requests were too broad and that the records requested may contain sensitive information that could reveal personal information of victims such as social security numbers, driver's license numbers and similar information of a personal nature. In the SOI for GRC Complaint No. 2008-142, the Custodian did not elaborate on the denial of access for the MVR; however, in the SOI for GRC Complaint No. 2008-143, the Custodian did mention that the MVR segments were not government records because the Complainant did not identify a government record, but rather, sought all of the MVR media for certain periods of time.

The Complainant argued that the Custodian should have reviewed the requested material to determine if it contained any such sensitive information. The Complainant argued that sensitive information could be redacted from the record before disclosure. The Complainant also argued that his request was not overly broad because a specific segment of time was requested. The Complainant asserted that if he requested the record for a specific event or incident instead of for a period of time, the Custodian could reply by stating there is no record responsive to the Complainant's request.

The Complainant's request for Item No. 1 in both GRC Complaint Nos. 2008-142 and 2008-143 fails to specifically identify a government record. Rather, the request seeks all of the MVR media at certain times on certain dates. The Complainant failed to designate the specific record he sought by providing one or more of the following identifiers: name or number of the recording, agency-assigned number or serial number of the MVR device used to make the recording, name or badge number of the creator of the recording, police vehicle or mobile unit in which the MVR device is/was mounted when the recording was made, incident number or description of the incident that was captured on the MVR or other information that would identify with reasonable clarity the record sought.

The Custodian certified that the Complainant's request for Items No. 2 and 3 of the records relevant to both complaints, which constitute all police radio and telephone transmissions made or received during a period of time spanning several hours, is unduly broad and does not constitute a valid request for specific identifiable government records within the meaning of OPRA. The Custodian certified that the Complainant suggested a government record is a period of time spanning several hours during which telephone, radio, and vehicle recordings may have been made. The Custodian further asserted that the Complainant is incorrect.

The Custodian averred that he instructed the Complainant to be more specific and describe the requested records with some identifiable characteristics; however, the Custodian stated that the Complainant refused to do so. The Custodian asserts that the Complainant's several requests to sift through a self-defined window of information are not permissible requests under OPRA. In support of his position denying the Complainant access to the records because the Complainant's requests are overly broad, the Custodian cited New Jersey Builders, supra, MAG, supra and Bent, supra.

The Custodian also states that the Complainant's request for Item No. 4 of the records relevant to Complaint No. 2008-143 is similarly non-specific and further, that it seeks documentation which relates to criminal investigatory records.

The Complainant argues that the Custodian, in claiming the requests are too broad has failed to review the records to determine the contents and state what, if anything, is overly broad in the request. The Complainant contends that his requests are not overly broad because they contain specific time periods. The Complainant further contends that the requested records are not specific incidents, but rather all the actual audio and video recordings within the time parameters he requested. The Complainant states that the recordings may comprise several records or contain no records whatsoever. The Complainant cites to Rivera v. Town of Guttenberg, GRC Complaint Numbers 2006-154

and 2007-05 (June 2008) as precedence for his requests because he states that in those two (2) complaints the Custodian produced thirty-three (33) hours of police radio and telephone call records.

In the two (2) Rivera complaints cited, *supra*, by the Complainant however, the two (2) cited matters were withdrawn and consequently the GRC never adjudicated the issue of the validity of the requests. Further, in both complaints the custodians did not deny the complainant access to the records because the requests were overly broad, but rather, purported to disclose the records upon the Complainant's payment of a special service charge.¹⁴

In the Complainant's request for Items No. 2 and 3 of the records relevant to GRC Complaint Numbers 2008-142 and 2008-143, the Complainant requested all telephone and police radio transmissions spanning a fixed time period that he defined. With respect to Item No. 2 of the complaints, the Complainant did not specify from which telephone line or number he sought the recordings. With respect to Item No. 3 of the complaints, the Complainant did not specify a frequency number, band or even provide a generic description of the radio frequency (e.g. "city wide" or "primary band") from which he sought the recordings. Further, he neither identified the record he sought nor did he make an attempt to identify the record by incident number, name of the person or persons involved, location of incident or even the type of incident, so that the Custodian would have some search criteria. In fact, the Complainant admitted that he was just requesting a segment of recordings by time, irrespective of whether such recordings comprised a government record or not.

In the Complainant's request for Item No. 4 of the records relevant to GRC Complaint No. 2008-143, the Complainant requests numerous types of correspondence and documentation "relating to" a website "and/or its owners, operators, hosts, registrants, bloggers, and affiliates." This request not only fails to specifically identify a government record but would require the Custodian to conduct an extensive amount of research just to locate what may or may not be the target record(s).

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 (App. Div. 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.

¹⁴ The Complainant did note that he withdrew these two (2) complaints.
Richard Rivera v. Wall Police Department (Monmouth), 2008-142 & 2008-143 – Findings and Recommendations of the Executive Director

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),¹⁵ 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.”¹⁶

Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) the court cited MAG by stating that “...when a request is ‘complex’ because it fails to specifically identify the documents sought, then that request is not ‘encompassed’ by OPRA...” The court also quoted N.J.S.A. 47:1A-5.g in that “[i]f 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.” The court further stated that “...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency’s need to...generate new records...”

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009) the Council held that “[b]ecause the Complainant’s OPRA requests No. 2 through 5 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 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005).”

Therefore, because the Complainant’s requests for the records relevant to GRC Complaint No. 2008-142 and 2008-143 are overbroad and fail to specifically identify the records sought, and because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to conduct research to locate records potentially responsive to the Complainant’s request pursuant to the Superior Court’s decisions in MAG, *supra*, Bent, *supra*, New Jersey Builders, *supra* and the Council’s decision in Schuler, *supra*.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian certified that the Complainant did not submit his request on an official OPRA request form, the Custodian’s attempt to fulfill the requests results in the requests being considered valid OPRA requests pursuant to Paff v. Borough of Audubon, GRC Complaint No. 2006-01 (March 2006).

¹⁵ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹⁶ As stated in Bent, *supra*.

2. Because the Complainant's requests for the records relevant to GRC Complaint No. 2008-142 and 2008-143 are overbroad and fail to specifically identify the records sought, and because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to conduct research to locate records potentially responsive to the Complainant's request pursuant to the Superior Court's decisions in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and the Council's decision in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008).

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