



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

July 27, 2010 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2008-281

v.

Wall Police Department (Monmouth)
Custodian of Record

At the July 27, 2010 public meeting, the Government Records Council (“Council”) considered the July 20, 2010 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 Item No. 1 through Item No. 6 of the records relevant to this complaint 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 27th Day of July, 2010



Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: July 30, 2010

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL
Reconciliation of Complaint Status
Supplemental Findings and Recommendations of the Executive Director
July 27, 2010 Council Meeting

Richard Rivera¹

GRC Complaint No. 2008-281²

v.

Wall Police Department (Monmouth)³
Custodian of Records

Records Relevant to Complaint:

1. Mobile to mobile data terminal (“MDT”) transmission for August 4, 2007 from 4:00 pm to 4:30 pm.
2. All radio transmissions for August 4, 2007 from 4:00 pm to 4:30 pm.
3. All recorded telephone tapes for August 4, 2007 from 4:00 pm to 4:30 pm.
4. Police radio transmission and Fire Department band tapes for September 12, 2007 from 3:15 pm to 3:35 pm.
5. Police telephone tapes from all recorded phone lines for September 12, 2007 from 3:15 pm to 3:35 pm.
6. Police MDT messages for September 12, 2007 from 3:15 pm to 4:15 pm.

Requests Made: October 9, 2008

Responses Made: October 15, 2008

Custodian: Kevin Pressey, Records and ID Manager

GRC Complaints Filed: December 23, 2008⁴

Background

April 8, 2010

At the April 8, 2010 public meeting, the Government Records Council (“Council”) considered the April 1, 2010 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 found, *inter alia*, that because the Complainant’s requests for Item

¹ Represented by Walter M. Luers, Esq. (Oxford, NJ).

² Complaint Nos. 2008-280 and 2008-281 were initially combined when presented to the Council on April 8, 2010. Although all of the issues raised in Complaint No. 2008-281 were resolved at that time, the Council’s Interim Order provided that Complaint No. 2008-280 should be referred to the Office of Administrative Law. The GRC, in the interest of expeditiously resolving Complaint No. 2008-281, has separated it from its former combined status so that it could be presented to the Council for a Final Decision.

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

⁴ The GRC received the Denial of Access Complaint on said date.

No. 1 through Item No. 6 of the records relevant to this complaint 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).

April 12, 2010

Council's Interim Order distributed to the parties.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that Item No. 1 through Item No. 6 of the records relevant to this complaint 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).

Prepared By: John E. Stewart
Case Manager/*In Camera* Attorney

Approved By: Catherine Starghill, Esq.
Executive Director

July 23, 2010



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Acting Commissioner

INTERIM ORDER

April 8, 2010 Government Records Council Meeting

Richard Rivera
Complainant

Complaint Nos. 2008-280 and 2008-281

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. Following the Council’s decision in Gorman v. Gloucester City Police Department, GRC Complaint No. 2004-108 (October 2008) because privacy interests of citizens is at issue, it is necessary for the GRC to conduct an *in camera* examination of the requested mobile video recording media and then employ the common law balancing test established by the New Jersey Supreme Court in Doe v. Poritz, 142 N.J. 1 (1995) and subsequently applied by the Council in Merino v. Ho-Ho-Kus, GRC Complaint No. 2003-110 (February 2004). Therefore, the Custodian must disclose the requested mobile video recording media to the GRC so that an *in camera* examination may be conducted.
2. **The Custodian must deliver¹ to the Council in a sealed envelope a copy of the requested unredacted mobile video recording media document (see #1 above), a record index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4³, that the record provided is the record requested by the Council for the *in camera***

¹ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

² The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

³ “I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.”



examination. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.

3. Because the Complainant's requests for Item No. 2 through Item No. 4 of the records relevant to GRC Complaint Number 2008-280 and the Complainant's requests for Item No. 1 through Item No. 6 of the records relevant to GRC Complaint Number 2008-281 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).
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order 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 12, 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:
2008-280 and 2008-281²**

v.

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

Records Relevant to Complaint:

GRC Complaint Number 2008-280

1. DVD or VHS format copies of mobile video and audio recordings made by Wall Police Officer Eric Olsen on April 14, 2008 from 9:00 am to 9:20 am.
2. Telephone and police radio transmission audio recordings for April 14, 2008 from 9:00 am to 9:30 am.
3. Telephone and police radio transmission audio recordings for May 8, 2008 from 9:00 pm to 9:20 pm.
4. Telephone and police radio transmission audio recordings for November 21, 2008 from 8:00 am to 8:15 am.

GRC Complaint Number 2008-281

1. Mobile to mobile data terminal (“MDT”) transmission for August 4, 2007 from 4:00 pm to 4:30 pm.
2. All radio transmissions for August 4, 2007 from 4:00 pm to 4:30 pm.
3. All recorded telephone tapes for August 4, 2007 from 4:00 pm to 4:30 pm.
4. Police radio transmission and Fire Department band tapes for September 12, 2007 from 3:15 pm to 3:35 pm.
5. Police telephone tapes from all recorded phone lines for September 12, 2007 from 3:15 pm to 3:35 pm.
6. Police MDT messages for September 12, 2007 from 3:15 pm to 4:15 pm.

Requests Made: October 9, 2008 and November 21, 2008

Responses Made: October 15, 2008 and November 25, 2008

Custodian: Kevin Pressey, Records and ID Manager

GRC Complaints Filed: December 23, 2008⁴

¹ Represented by Walter M. Luers, Esq. (Oxford, NJ).

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).

Richard Rivera v. Wall Police Department (Monmouth), 2008-280 & 2008-281 – Findings and Recommendations of the Executive Director

Background

October 9, 2008

Complainant's Open Public Records Act ("OPRA") requests. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

October 15, 2008

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's request which formed the basis for GRC Complaint No. 2008-281 on the second (2nd) business day following receipt of such request. The Custodian denies the Complainant's request and informs the Complainant that the request is too broad because it seeks recordings of blocks of time rather than a specific and identifiable record. The Custodian also asserts that the Complainant's request may encompass sensitive information pertaining to an investigation which could jeopardize the investigation, may encompass personal information such as social security numbers, driver's license numbers and similar information of a personal nature and may result in the release of medical, juvenile or domestic incident information. The Custodian asserts that he cannot redact information from all recorded phone lines and radio transmissions. The Custodian further asserts that retrieving the records that the Complainant requests would be labor intensive and substantially disrupt agency operations pursuant to N.J.S.A. 47:1A-5.g.

November 21, 2008

Complainant's Open Public Records Act ("OPRA") requests. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

November 25, 2008

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's request which formed the basis for GRC Complaint No. 2008-280 on the second (2nd) business day following receipt of such request. The Custodian denies the Complainant's request and informs the Complainant that the request is too broad because it seeks a window of police radio and telephone recordings. The Custodian informs the Complainant that the Complainant must identify the specific record sought by referencing an event, person, case number, or other like criteria.

December 23, 2008

Denial of Access Complaint filed with the Government Records Council ("GRC") under complaint number 2008-280 with the following attachments:

- Complainant's OPRA request dated November 21, 2008
- Custodian's response to the OPRA request dated November 25, 2008

The Complainant's Counsel states that the Complainant filed his OPRA request for the records relevant to this complaint on November 21, 2008 and the Custodian responded to the Complainant's request on November 25, 2008. Counsel states that there

⁴The GRC received the Denial of Access Complaints on said date.
Richard Rivera v. Wall Police Department (Monmouth), 2008-280 & 2008-281 – Findings and Recommendations of the
Executive Director

is no dispute between the parties that the recordings requested by the Complainant are “public records” within the definition of OPRA.⁵

Counsel asserts that the Custodian stated he denied the Complainant’s request because it was not sufficiently specific and because the Custodian did not want to sift through a window of public records. Counsel states that the Custodian bears the burden of proving his denial is lawful pursuant to N.J.S.A. 47:1A-6. Counsel states that unlike the requestors in 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), the Complainant has not requested the Custodian undertake an open-ended research project. Counsel contends that, conversely, the Complainant was very specific and identified dates and times circumscribing the records sought. Counsel argues that the instant complaint is analogous to Paff v. Borough of Roselle, GRC Complaint No. 2007-255 (June 2008) because Counsel contends that the Council held in that matter that the complainant identified a type of government record within a specific date and therefore concluded the request was “not open-ended, nor does it require research[.]” Counsel states that if redactions are deemed necessary, the Custodian bears the burden of reviewing the recordings to determine what redactions, if any, would apply.

The Complainant’s Counsel requests the following relief:

1. That the GRC order the Custodian to produce copies of all of the records requested by the Complainant.
2. That the GRC make a determination that the Complainant is the prevailing party and award reasonable attorney’s fees.
3. That after investigating this matter the GRC makes a determination that the Custodian knowingly and willfully violated OPRA and unreasonably denied access to the records under the totality of the circumstances.

The Complainant does not agree to mediate this complaint.

December 23, 2008

Denial of Access Complaint filed with the Government Records Council (“GRC”) under complaint number 2008-281 with the following attachments:

- Complainant’s OPRA request dated October 9, 2008
- Custodian’s response to the OPRA request dated October 15, 2008

The Complainant’s Counsel states that the Complainant filed his OPRA request for the records relevant to this complaint on October 9, 2008 and the Custodian responded to the Complainant’s request on October 15, 2008. Counsel contends the Custodian denied the Complainant’s request for five (5) reasons:

⁵ The Complainant’s Counsel means “government records” pursuant to the definition in N.J.S.A. 47:1A-1.1.

1. The request is too broad.

Counsel states that unlike the requestors in MAG, supra, and Bent, supra, the Complainant has not requested the Custodian undertake an open-ended research project. Counsel contends that, conversely, the Complainant was very specific and identified dates and times circumscribing the records sought. Counsel argues that the instant complaint is analogous to Paff, supra, because Counsel contends that the Council held in that matter that the complainant identified a type of government record within a specific date and therefore concluded the request was “not open-ended, nor does it require research[.]” The Complainant’s Counsel asserts that the GRC should apply its decision in Paff, supra, and reject the Custodian’s argument. Counsel also asserts that there is no evidence the requested records are filed by names and identifiers; therefore the format of Complainant’s request is logical.

2 - 4. The information requested may be confidential.

Counsel argues that there is no evidence that the Custodian has reviewed any of the requested information, and, as such, the Custodian cannot espouse a good-faith belief that confidential information is contained within the requested records. Accordingly, Counsel asserts that this claim by the Custodian should also be rejected.

5. Retrieving the information would substantially disrupt agency operations.

Counsel argues that the Custodian’s contention that retrieving the information would substantially disrupt agency operations is only available to the Custodian after the Custodian has attempted to reach a reasonable solution with the Complainant that accommodates the interests of the Complainant and the agency, as per N.J.S.A. 47:1A-5.g. Counsel argues that because the Custodian did not attempt to reach a reasonable accommodation with the Complainant, this provision of OPRA is unavailable to the Custodian.

Counsel states that there is no dispute between the parties that the recordings requested by the Complainant are “public records” within the definition of OPRA.⁶ Further, Counsel asserts that if redactions are deemed necessary, the Custodian bears the burden to review the recordings and determine what redactions, if any, would apply.

The Complainant’s Counsel requests the following relief:

1. That the GRC order the Custodian to produce copies of all of the records requested by the Complainant.
2. That the GRC make a determination that the Complainant is the prevailing party and award reasonable attorney’s fees.
3. That after investigating this matter the GRC makes a determination that the Custodian knowingly and willfully violated OPRA and unreasonably denied access to the records under the totality of the circumstances.

The Complainant does not agree to mediate this complaint.

⁶ See footnote 5.

December 30, 2008

Request for the Statements of Information (“SOI”) sent to the Custodian.

January 5, 2009

Custodian’s SOI in response to GRC Complaint No. 2008-280 with the following attachments:

- Complainant’s OPRA request dated November 21, 2008
- Custodian’s response to the OPRA request dated November 25, 2008

The Custodian certifies that he did not conduct a search for the requested records because he knows the location of the records. 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 November 22, 2008 and responded to the request on November 25, 2008.⁷ The Custodian certifies that the Complainant’s request is to review police radio and telephone transmissions as well as mobile video recordings (“MVR”) made during a period unilaterally defined by the Complainant. The Custodian avers that the Complainant does not identify a specific identifiable government record within the meaning of OPRA, but instead defines a period of time and asks that he be allowed to sift through all records in that time period. The Custodian denies the Complainant’s request because the Custodian contends the request 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).⁸

The Custodian avers that the complaint relied upon by the Complainant in his Denial of Access Complaint, Paff, *supra*, is distinguishable from the instant matter because in Paff the complainant requested resolutions and minutes relating to certain public meetings whereas in the instant complaint the Complainant refers only to a time frame and not an externally fixed event such as a public meeting.

January 5, 2009

Custodian’s SOI in response to GRC Complaint No. 2008-281 with the following attachments:

- Complainant’s letter request dated October 9, 2008

⁷ The evidence of record reveals the Custodian received the records request on November 21, 2008. Further, November 22, 2008 was a Saturday and not a regular business day.

⁸ 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).

- Custodian's response to the OPRA request dated October 15, 2008

The Custodian does not certify as to what his search for the requested records entailed. The Custodian certifies that the records 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 October 10, 2008 and responded to the request on October 15, 2008. The Custodian certifies that the Complainant's request is to review police radio, telephone and data transmissions made during a period unilaterally defined by the Complainant. The Custodian avers that the Complainant does not identify a specific identifiable government record within the meaning of OPRA, but instead defines a period of time and asks that he be allowed to sift through all records in that time period. The Custodian denies the Complainant's request because the Custodian contends the request 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, *supra*, MAG, *supra*, and Bent, *supra*.

The Custodian avers that the complaint relied upon by the Complainant in his Denial of Access Complaint, Paff, *supra*, is distinguishable from the instant matter because in Paff the complainant requested resolutions and minutes relating to certain public meetings whereas in the instant complaint the Complainant refers only to a time frame and not an externally fixed event such as a public meeting.

January 8, 2009

The Complainant's response to the Custodian's SOIs. The Complainant's Counsel recites the facts of MAG, *supra*, and Bent, *supra*. Counsel states that both of these cases contained requests that were framed as requests for discovery. Counsel asserts that the Complainant's requests were targeted according to date and time. Counsel cites three (3) cases that the GRC should rely upon in adjudicating the instant complaint: Paff, *supra*, Rivera v. Town of Guttenberg, GRC Complaint No. 2006-154 (June 2008) and O'Shea v. Stillwater, GRC Complaint No. 2007-253 (August 2009). The Complainant's Counsel states that all of the cases are analogous to the instant Complaint, but that Rivera is particularly noteworthy because in Rivera the Complainant requested telephone recordings for time periods ranging from less than one (1) hour to eleven (11) hours and the GRC did not find the requests overly broad or unclear.

January 8, 2009

E-mail from the Custodian's Counsel to the GRC. Counsel states that in the Complainant's response to the Custodian's SOIs the Complainant's Counsel cites an additional case, O'Shea, *supra*. Counsel requests an opportunity to reply, but during the interim, states that Paff, *supra*, is distinguishable from the instant matter because in Paff the records related to a public meeting, which is a fixed external event, and not a unilaterally defined window of time fixed by the requestor.

January 8, 2009

E-mail from the Custodian’s Counsel to the GRC. Counsel states that neither O’Shea, supra, nor Rivera, supra, addresses the Custodian’s argument. Counsel contends that the Custodian’s argument goes not to the breadth of the request but to the proper form of request, which under OPRA must be a request for a specifically identifiable government record.

October 2, 2009

E-mail from the GRC to the Complainant. The GRC asks the Complainant if he wants the GRC to use the same responses he provided to the GRC in an earlier complaint against the Wall Police Department⁹ as his answers 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 2, 2009

E-mail from the Complainant to the GRC. The Complainant states that the GRC should use his responses and documentation from Complaint Nos. 2008-142 and 2008-143 to answer the following questions:

Need for Access Questions	Complainant’s Response ¹⁰
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.”

⁹ Rivera v. Wall Police Department (Monmouth), GRC Consolidated Complaint Nos. 2008-142 and 2008-143.

¹⁰ The Complainant went into much more detail in his responses which he put in the form of a certification. The Complainant indicated that 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.

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 AUTHORIZATION.”

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 ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA further provides:

“...If the custodian of a government record asserts that part of a particular record is exempt from public access...the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record...[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.” 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 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.

Item No. 1 of GRC Complaint No. 2008-280 records request – DVD or VHS format copies of mobile video and audio recordings made by Wall Police Officer Eric Olsen on April 14, 2008 from 9:00 am to 9:20 am.

The Custodian stated he denied the Complainant’s request for this item because the request was too broad and sought a window of time. The Custodian informed the Complainant that the Complainant must identify the specific record sought by referencing an event, person, case number, or other like criteria. The Custodian in the SOI cites New Jersey Builders, supra, MAG, supra, and Bent, supra in support of his position.

The Complainant’s Counsel asserted that the Custodian stated he denied the Complainant’s request because it was not sufficiently specific. Counsel argued that the Custodian’s reliance upon the court decisions in MAG, supra, and Bent, supra, is misplaced because the Complainant has not requested that the Custodian undertake an open-ended research project. Counsel stated that the Complainant was very specific and identified dates and times circumscribing the records sought. Counsel argued that the instant complaint is analogous to Paff, supra, because Counsel asserted that the Council held in that matter that the complainant identified a type of government record within a specific date; therefore, like here, the Complainant’s request was not open-ended.

As to the determination of whether the Complainant’s request is broad and unclear, 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.

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),¹¹ 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.”¹²

¹¹ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹² As stated in Bent, supra.

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. 2-5 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)."

Based upon established prior Court and GRC decisions, the Complainant's request is not overly broad since he identifies the records sought by media, date, time and officer who created such records. Thus, the Complainant's request seeks specifically identifiable records.

Additionally, of paramount concern to the GRC with respect to the disclosure of the requested MVR media is the privacy interests of the citizenry. The New Jersey Superior Court, Appellate Division held that the GRC must enforce OPRA's declaration, in N.J.S.A. 47:1A-1, that "a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy." Serrano v. South Brunswick Twp., 358 N.J. Super. 352, 368 (App. Div. 2003). More recently, the New Jersey Supreme Court in Burnett v. County of Bergen, 198 N.J. 408, 422-423 (2009) made the following observations with respect to N.J.S.A. 47:1A-1:

"...[N.J.S.A. 47:1A-1] is neither a preface nor a preamble. It has no telltale "whereas" clauses that often appear in a preamble. It appears after OPRA's enactment clause, making the provision part of the body of the law. PRB Enterprises, Inc. v. S. Brunswick Planning Board, 105 N.J. 1, 5, 518 A.2d 1099 (1987)...[p]lus the very language expressed in the privacy clause reveals its substantive nature: it does not offer reasons why OPRA was adopted, as preambles typically do; instead, it focuses on the law's implementation. Specifically, it imposes an obligation on public agencies to protect against disclosure of personal information which would run contrary to reasonable privacy interests." *Id.* at 422-423.

The Council examined the issue concerning disclosure of MVR media in Gorman v. Gloucester City Police Department, GRC Complaint No. 2004-108 (October 2008). In that complaint the Council conducted an *in camera* examination of the MVR tape that was withheld from disclosure. Because the *in camera* examination raised substantial issues relevant to a citizen's privacy interest, in deciding Gorman, the Council turned to its decision in Merino v. Ho-Ho-Kus, GRC Complaint No. 2003-110 (February 2004). In that decision, the Council addressed the citizen's reasonable expectation of privacy under N.J.S.A. 47:1A-1 and, after stating that the GRC is required to safeguard from public access a citizen's personal information pursuant to the court's decision in Serrano, *supra*, turned to a common law test to determine whether, on balance, certain records should be disclosed.

In the instant matter (like in Gorman, *supra*), because privacy interests of citizens is at issue, it is necessary for the GRC conduct an *in camera* examination of the requested MVR media and then employ the common law balancing test established by the New Jersey Supreme Court in Doe v. Poritz, 142 N.J. 1 (1995) and subsequently applied by the Council in Merino, *supra*. This balancing test is applicable to cases in which privacy interests are implicated and it allows the GRC to exercise its discretion in determining whether an individual's privacy interest is outweighed by any factors militating in favor of disclosure of a government record, including the Complainant's stated need for access to such information.

Thus, the Custodian must disclose the requested MVR media to the GRC so that an *in camera* examination may be conducted.

Item No. 2, Item No. 3 and Item No. 4 of GRC Complaint No. 2008-280 records request – Telephone and police radio transmission audio recordings for: April 14, 2008 from 9:00 am to 9:30 am (Item No. 2), May 8, 2008 from 9:00 pm to 9:20 pm (Item No. 3) and November 21, 2008 from 8:00 am to 8:15 am (Item No. 4).

Item No. 1 through Item No. 6 of GRC Complaint No. 2008-181 records request –

1. Mobile to mobile data terminal (“MDT”) transmission for August 4, 2007 from 4:00 pm to 4:30 pm.
2. All radio transmissions for August 4, 2007 from 4:00 pm to 4:30 pm.
3. All recorded telephone tapes for August 4, 2007 from 4:00 pm to 4:30 pm.
4. Police radio transmission and Fire Department band tapes for September 12, 2007 from 3:15 pm to 3:35 pm.
5. Police telephone tapes from all recorded phone lines for September 12, 2007 from 3:15 pm to 3:35 pm.
6. Police MDT messages for September 12, 2007 from 3:15 pm to 4:15 pm.

The Custodian certified that the Complainant's requests are for police radio, telephone and data transmissions made during a period of time defined by the Complainant. The Custodian certified that the Complainant's request for these items is too broad and does not identify a specific identifiable government record within the meaning of OPRA, but instead seeks recordings of blocks of time rather than specific and identifiable records. In support of his position, the Custodian cited New Jersey Builders, *supra*, MAG, *supra*, and Bent, *supra*.

The Custodian also stated that the Complainant's requests may encompass sensitive and personal information such as social security numbers, driver's license numbers and similar information of a personal nature. The Custodian further stated that he cannot redact information from all recorded phone lines and radio transmissions and that retrieving the records that the Complainant requests would be labor intensive and substantially disrupt agency operations pursuant to N.J.S.A. 47:1A-5.g.

The Complainant's Counsel argued that unlike the requestors in MAG, supra, and Bent, supra, the Complainant did not request that the Custodian undertake an open-ended research project. Counsel asserted that the Complainant was very specific and identified dates and times circumscribing the records sought. Counsel further argued that there is no evidence that the Custodian reviewed any of the requested information; therefore the Custodian cannot now assert that confidential information is contained within the requested records. Counsel claimed the instant complaint is analogous to Paff, supra, because Counsel asserted that the Council held in that matter that the complainant identified a type of government record within a specific date; therefore like here, the Complainant's request was not open-ended. The Complainant's Counsel also cites three (3) cases that he argued the GRC should rely upon in adjudicating the instant complaint: Paff, supra, O'Shea, supra, nor Rivera, supra. Counsel argued that all of the cases are analogous to the instant Complaint, but that Rivera is particularly noteworthy because in Rivera the Complainant requested telephone recordings for time periods ranging from less than one (1) hour to eleven (11) hours and the GRC did not find the requests overly broad or unclear.

The Complainant's Counsel further argued that the Custodian's statement that retrieving the information would substantially disrupt agency operations is not applicable in the instant matter because the Custodian under such circumstances has an obligation to attempt to reach a reasonable solution with the Complainant and the Custodian did not attempt to reach such a solution with the Complainant. Counsel also noted that the Custodian cannot escape the burden of reviewing the records prior to any disclosure and making redactions as necessary.

The Custodian's Counsel argued that, contrary to the Complainant's contention, Paff, supra, is not applicable in this matter because in Paff the complainant requested resolutions and minutes relating to certain public meetings whereas in the instant complaint the Complainant refers only to a time frame and not an externally fixed event such as a public meeting. Further, Counsel argued that Rivera, supra, and O'Shea, supra, cited by the Complainant do not address the Custodian's argument that a request for recordings covering a period of time defined by the Complainant does not constitute a request for a specifically identifiable government record within the meaning of OPRA.

In the Complainant's requests for Item No. 2 through 4 of the records relevant to GRC Complaint No. 2008-280 and the Complainant's requests for Item No. 2 through 5 of the records relevant to GRC Complaint No. 2008-281, the Complainant sought segments of police telephone and radio audio recordings spanning a fixed time period that he defined. With respect to Item No. 1 and 6 of the records relevant to GRC Complaint No. 2008-281 the Complainant sought segments of MDT message recordings for mobile to mobile and "police" transmissions, respectively.

In the above-referenced requests, despite the Custodian's request that he do so, the Complainant failed to identify the records he sought or even to make an attempt to identify the records by incident number, name of the person or persons involved, location of incident or even the type of incident in generic terms. Yet the Complainant knows enough about the records he is targeting to substantially narrow the scope of the time period encompassing several of the records. This is clear because the Complainant significantly reduced the time parameters in several of the records relevant to the instant complaint from those of an earlier complaint wherein he had requested the same recordings.¹³ The Complainant reduced the number of MVR recordings requested for April 14, 2008 from those made by all officers using such equipment down to those made by one (1) specific officer and he reduced the amount of recording time requested by almost seventy percent (70%). Also, the Complainant reduced the amount of telephone and police radio recording times requested for April 14, 2008 and May 8, 2008 by over eighty-five percent (85%) and almost eighty-seven percent (87%), respectively. The fact that the Complainant was able to decrease the time parameters of his requests so drastically supports the Custodian's position that the Complainant must be required to identify a *specific identifiable record*; otherwise the Custodian is forced to review and redact unnecessarily large segments of storage media on which the record is maintained.

Further, except for Item No. 5 of the records relevant to GRC Complaint No. 2008-281, the Complainant provided neither the telephone line(s) or number(s), nor the frequency number(s) or generic description(s) of the radio frequencies, from which he sought the recordings. For MDT transmissions, the Complainant failed to identify the transmitting or receiving terminal or terminals.

As made clear in MAG, *supra*, and its progeny (see analysis on pages 9 and 10), "...[u]nder OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt ..." (Emphasis added.) MAG, *supra*, at 549. Therefore, "...[t]o qualify under OPRA...the request must reasonably identify a record and not generally data, information or statistics." Bent, *supra*, at 37.

The Complainant's Counsel argued that unlike the requestors in MAG, *supra*, and Bent, *supra*, the Complainant was very specific and identified dates and times circumscribing the records he sought. The Complainant's Counsel argued that instead Paff, *supra*, Rivera, *supra*, and O'Shea, *supra*, are analogous to the instant Complaint and therefore should be followed by the GRC in this adjudication.

However in the withdrawn Rivera complaint, unlike here, the Custodian never denied the Complainant access to the records. The Custodian was prepared to disclose the requested records upon the Complainant's payment of a special service charge and the issue was whether the special service charge was reasonable and warranted. The only similarity between Rivera and the instant complaint is in the nature of the request. In Rivera, the complainant requested police telephone recordings for much longer periods of time than were requested in the instant complaint, but because the custodian decided to

¹³ See Rivera v. Wall Police Department, GRC Consolidated Complaint Nos. 2008-142 and 2008-143 (November 2009).
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disclose the requested records the Council never had to adjudicate the issue of the validity of the request.

Although O'Shea had a fact pattern very similar to Paff, it is unnecessary to analyze O'Shea because the Council cited to Paff as precedent for its decision in O'Shea. In Paff, the Complainant identified the specific type of records sought and the dates said records were made by reference to an event fixed in time. All the Custodian had to do was check the meeting schedule and retrieve the records made on the pertinent meeting dates. Accordingly, the Council found that "...[b]ecause the Complainant identifies a type of government record...within a specific date...MAG and Bent do not apply to the request relevant to this complaint." The test of Paff, therefore, is a two-pronged one: the Complainant must identify (1) the record and (2) the specific date. Here, although the Complainant identified the specific date, he failed to identify the records. Instead, the Complainant identified the media upon which the records were recorded and, in effect, requested any and all records that happened to be captured on such media over a given period of time. Accordingly, because the facts of the instant complaint are materially different than the facts of Paff, Paff cannot be asserted to defeat the Custodian's contention that the Complainant's request is too broad and does not identify a specific identifiable government record pursuant to MAG and Bent.

Therefore, because the Complainant's requests for Item No. 2 through Item No. 4 of the records relevant to GRC Complaint Number 2008-280 and the Complainant's requests for Item No. 1 through Item No. 6 of the records relevant to GRC Complaint Number 2008-281 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*.

Because the Custodian did not unlawfully deny the Complainant access to any of the records relevant to the complaints, it is unnecessary for the Council to analyze whether the Custodian's retrieval of the records would substantially disrupt agency operations or whether the Custodian could redact information from all recorded phone lines and radio transmissions pursuant to N.J.S.A. 47:1A-5.g.

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?

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees?

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Following the Council's decision in Gorman v. Gloucester City Police Department, GRC Complaint No. 2004-108 (October 2008) because privacy interests of citizens is at issue, it is necessary for the GRC to conduct an *in camera* examination of the requested mobile video recording media and then employ the common law balancing test established by the New Jersey Supreme Court in Doe v. Poritz, 142 N.J. 1 (1995) and subsequently applied by the Council in Merino v. Ho-Ho-Kus, GRC Complaint No. 2003-110 (February 2004). Therefore, the Custodian must disclose the requested mobile video recording media to the GRC so that an *in camera* examination may be conducted.
2. **The Custodian must deliver¹⁴ to the Council in a sealed envelope a copy of the requested unredacted mobile video recording media document (see #1 above), a record index¹⁵, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4¹⁶, that the record provided is the record requested by the Council for the *in camera* examination. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. Because the Complainant's requests for Item No. 2 through Item No. 4 of the records relevant to GRC Complaint Number 2008-280 and the Complainant's requests for Item No. 1 through Item No. 6 of the records relevant to GRC Complaint Number 2008-281 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).
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

¹⁴ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

¹⁵ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

¹⁶ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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Executive Director

April 1, 2010