



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

JON S. CORZINE
Governor

JOSEPH V. DORIA, JR.
Commissioner

FINAL DECISION

June 23, 2009 Government Records Council Meeting

Lewis M. Springer, Jr.
Complainant

Complaint No. 2008-45

v.

NJ Casino Control Commission
Custodian of Record

At the June 23, 2009 public meeting, the Government Records Council (“Council”) considered the June 16, 2009 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian released the requested e-mails to the Complainant in redacted form within five (5) business days as ordered by the Council and provided certified confirmation of compliance to the GRC’s Executive Director, the Custodian has complied with the Council’s March 25, 2009 Interim Order.
2. Although the Custodian unlawfully denied access to portions of the three (3) specific e-mails requested by the Complainant, the Custodian lawfully denied access to the remaining portions of said e-mails. Additionally, the Custodian properly responded to the Complainant’s OPRA request, did not unlawfully deny access to the Complainant’s broad and unclear request, and complied with the Council’s December 18, 2008 and March 25, 2009 Interim Orders. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian’s unlawful denial of access to portions of the three (3) specific e-mails requested by the Complainant appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to



be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 23rd Day of June, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Kathryn Forsyth
Government Records Council

Decision Distribution Date: June 29, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
June 23, 2009 Council Meeting**

**Lewis M. Springer, Jr.¹
Complainant**

GRC Complaint No. 2008-45

v.

**NJ Casino Control Commission²
Custodian of Records**

Records Relevant to Complaint:

1. E-mail dated March 25, 2006 3:59 am from Inspector Lewis M. Springer, Jr. to Supervising Inspector Barbara Cranmer with the subject "Power surge at Showboat Casino on Friday, March 24, 2006 at 22:46."
2. E-mail dated March 25, 2006 8:26 am from Inspector Lewis M. Springer, Jr. to Supervising Inspector Barbara Cranmer with the subject "Follow-up to power surge at Showboat Casino on 3/24/06 at 22:46."
3. E-mail dated June 13, 2007 2:10 am from Inspector Lewis M. Springer, Jr. to Director of Compliance Jim Fehon with the subject "Fw: Power surge at Showboat Casino on Friday, March 24, 2006 at 22:46."
4. Any and all e-mail messages between NJ Casino Control Commission Inspectors, Supervisors, Managers, Directors, Chiefs of Staff, Attorneys and Commissioners sent to or received by staff, newspapers, any casino employee, Atlantic City casino licensees, casino patrons, general public or Inspector Lewis M. Springer, Jr., regarding power surges at any Atlantic City casino which affected the operations of casino slot machines before, during and after Friday, March 24, 2006.

Request Made: February 24, 2008

Response Made: February 28, 2008

Custodian: Daniel Heneghan

GRC Complaint Filed: March 17, 2008³

Background

March 25, 2009

Government Records Council's ("Council") Interim Order. At its March 25, 2009 public meeting, the Council considered the March 18, 2009 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by

¹ No legal representation listed on record.

² Represented by Dianna W. Fautleroy, Esq., of the NJ Casino Control Commission (Atlantic City, NJ).

³ The GRC received the Denial of Access Complaint on said date.

the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian has complied with the Council’s December 18, 2008 Interim Order by providing the Council with all records set forth in Paragraph 2 of the Order within five (5) business days of receiving the Council’s Order.
2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the table below within five (5) business days from receipt of this Order and provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**

Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian’s Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination ⁴
1	E-mail from Lewis Springer to Barbara Cranmer dated March 25, 2006 at 3:59 a.m.	Communication relating to an alleged power surge at the Showboat Hotel Casino and its impact on gaming voucher systems and advice regarding how to prevent such future problems.	Exempt as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Information regarding internal controls is confidential pursuant to <u>N.J.S.A. 5:12-74</u> and <u>N.J.S.A. 47:1A-9</u> .	Redact everything in the third full paragraph in the body of the e-mail after the word “hour” in the first sentence through the end of the paragraph. Also, redact the fourth, fifth, and sixth paragraphs. This material contains confidential information

⁴ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

				<p>obtained relative to internal controls specified in <u>N.J.S.A. 5:12-99a</u>, applicable to OPRA through <u>N.J.S.A. 47:1A-9.a</u>. Paragraph six is also exempt as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u>. Disclose balance of record.</p>
2	E-mail from Lewis Springer to Barbara Cranmer dated March 25, 2006 at 8:26 a.m.	Same as #1	Same as #1	<p>Redact everything in the first full paragraph in the body of the e-mail after “10:46 pm” in the first sentence through the end of the paragraph. Also, redact everything in the second paragraph after “10:46 pm” in the first sentence through the end of the paragraph. This material contains confidential information obtained relative to internal controls specified in <u>N.J.S.A. 5:12-99a</u>, applicable to OPRA through <u>N.J.S.A. 47:1A-9.a</u>. Disclose balance of record.</p>

3	E-mail from Lewis Springer to James Fehon dated June 13, 2007 at 2:10 a.m.	Same as #1	Same as #1	<p>Redact everything in the first sentence of the first full paragraph in the body of the e-mail after “3:00 pm” to the end of the sentence because it contains confidential information obtained relative to internal controls specified in <u>N.J.S.A. 5:12-99a</u>, applicable to OPRA through <u>N.J.S.A. 47:1A-9.a</u>.</p> <p>The attachment referred to in the second sentence was not provided to the GRC, therefore it is not within the scope of the <i>in camera</i> examination; however, if it is either record #1 or #2 listed above in this table, then those previously identified redactions apply.</p> <p>Redact the third and fourth sentences because they make reference to a redacted segment in the first sentence.</p>
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				<p>Redact the fifth sentence as ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p> <p>Disclose balance of record.</p>
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March 30, 2009

Council’s Interim Order distributed to the parties.

April 1, 2009⁵

Custodian’s response to the Council’s Interim Order. The Custodian certifies that he received the Council’s Interim Order on March 30, 2009, in which the Council directed him to redact the three (3) requested e-mails addressed to Supervising Inspector Cranmer and Compliance Director Fehon and to release the redacted e-mails to the Complainant. The Custodian also certifies that the Council’s Interim Order directed him to provide certified confirmation of compliance to the Executive Director within five (5) business days. The Custodian certifies that he provided the Complainant with the redacted e-mails as ordered by the Council via letter dated April 1, 2009.

Analysis

Whether the Custodian complied with the Council’s March 25, 2009 Interim Order?

The Council’s March 25, 2009 Interim Order directed the Custodian to release redacted copies of the requested e-mails to the Complainant within five (5) business days from receipt of said Order, as well as to provide certified confirmation of compliance to the GRC’s Executive Director. Via letter dated April 1, 2009, the Custodian certified that on April 1, 2009, he provided the Complainant with the redacted e-mails, as ordered by the Council.

Therefore, because the Custodian released the requested e-mails to the Complainant in redacted form within five (5) business days as ordered by the Council and provided certified confirmation of compliance to the GRC’s Executive Director, the Custodian has complied with the Council’s March 25, 2009 Interim Order.

Whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances?

OPRA states that:

⁵ The GRC received said submission on April 9, 2009.

“[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ...” N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

“... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

As concluded in the Council’s December 18, 2008 Interim Order, the Custodian provided the Complainant with a written response to his OPRA request within the statutorily mandated seven (7) business days in which the Custodian denied access to the Complainant’s request. As such, the Custodian properly responded to said request pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

Additionally, because the Complainant’s request for “any and all e-mail messages” failed to identify specific government records and because the Custodian is not required to conduct research in response to an OPRA request, said request is invalid under OPRA and the Custodian did not unlawfully deny access to the requested e-mails pursuant to 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, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008), and Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007).

Further, the Council ordered an *in camera* review of the three (3) specific e-mails requested in order to determine the validity of the Custodian’s assertion that said e-mails were exempt from public access as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1 and/or whether said records were exempt from disclosure pursuant to the Casino Control Act. The Custodian complied with the Council’s December 18, 2008 Interim Order by providing the Council with all records required for the *in camera* review within five (5) business days, pursuant to the Council’s Order.

After the Council’s *in camera* review of the three (3) e-mails, the Council concluded that portions of said e-mails were exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1, as well as pursuant to the Casino Control Act. However, the Council also concluded that portions of said e-mails were subject to public access and ordered the Custodian to release the redacted records to the Complainant within five (5) business days of receiving the Council’s Interim Order and provide certified confirmation of compliance to the Executive

Director. As stated above, the Custodian has complied with the Council's March 25, 2009 Interim Order.

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Although the Custodian unlawfully denied access to portions of the three (3) specific e-mails requested by the Complainant, the Custodian lawfully denied access to the remaining portions of said e-mails. Additionally, the Custodian properly responded to the Complainant's OPRA request, did not unlawfully deny access to the Complainant's broad and unclear request, and complied with the Council's December 18, 2008 and March 25, 2009 Interim Orders. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful denial of access to portions of the three (3) specific e-mails requested by the Complainant appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian released the requested e-mails to the Complainant in redacted form within five (5) business days as ordered by the Council and provided certified confirmation of compliance to the GRC's Executive Director, the Custodian has complied with the Council's March 25, 2009 Interim Order.
2. Although the Custodian unlawfully denied access to portions of the three (3) specific e-mails requested by the Complainant, the Custodian lawfully denied access to the remaining portions of said e-mails. Additionally, the Custodian properly responded to the Complainant's OPRA request, did not unlawfully deny access to the Complainant's broad and unclear request, and complied with the Council's December 18, 2008 and March 25, 2009 Interim Orders. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful denial of access to portions of the three (3) specific e-mails requested by the Complainant appears

negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

June 16, 2009



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

JON S. CORZINE
Governor

JOSEPH V. DORIA, JR.
Commissioner

INTERIM ORDER

March 25, 2009 Government Records Council Meeting

Lewis M. Springer, Jr.
 Complainant

Complaint No. 2008-45

v.

NJ Casino Control Commission
 Custodian of Record

At the March 25, 2009 public meeting, the Government Records Council (“Council”) considered the March 18, 2009 *In Camera* 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. The Custodian has complied with the Council’s December 18, 2008 Interim Order by providing the Council with all records set forth in Paragraph 2 of the Order within five (5) business days of receiving the Council’s Order.
2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the table below within five (5) business days from receipt of this Order and provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**

Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian’s Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination¹

¹ Unless expressly identified for redaction, everything in the record shall be disclosed. For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole



1	E-mail from Lewis Springer to Barbara Cranmer dated March 25, 2006 at 3:59 a.m.	Communication relating to an alleged power surge at the Showboat Hotel Casino and its impact on gaming voucher systems and advice regarding how to prevent such future problems.	Exempt as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Information regarding internal controls is confidential pursuant to <u>N.J.S.A. 5:12-74</u> and <u>N.J.S.A. 47:1A-9</u> .	Redact everything in the third full paragraph in the body of the e-mail after the word "hour" in the first sentence through the end of the paragraph. Also, redact the fourth, fifth, and sixth paragraphs. This material contains confidential information obtained relative to internal controls specified in <u>N.J.S.A. 5:12-99a</u> , applicable to OPRA through <u>N.J.S.A. 47:1A-9.a</u> . Paragraph six is also exempt as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Disclose balance of record.
2	E-mail from Lewis Springer to Barbara Cranmer dated March 25, 2006	Same as #1	Same as #1	Redact everything in the first full paragraph in the body of the e-mail after "10:46 pm"

paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

	at 8:26 a.m.			<p>in the first sentence through the end of the paragraph. Also, redact everything in the second paragraph after “10:46 pm” in the first sentence through the end of the paragraph. This material contains confidential information obtained relative to internal controls specified in <u>N.J.S.A. 5:12-99a</u>, applicable to OPRA through <u>N.J.S.A. 47:1A-9.a</u>.</p> <p>Disclose balance of record.</p>
3	E-mail from Lewis Springer to James Fehon dated June 13, 2007 at 2:10 a.m.	Same as #1	Same as #1	<p>Redact everything in the first sentence of the first full paragraph in the body of the e-mail after “3:00 pm” to the end of the sentence because it contains confidential information obtained relative to internal controls specified in <u>N.J.S.A. 5:12-99a</u>, applicable to OPRA through <u>N.J.S.A. 47:1A-</u></p>

				<p>9.a.</p> <p>The attachment referred to in the second sentence was not provided to the GRC, therefore it is not within the scope of the <i>in camera</i> examination; however, if it is either record #1 or #2 listed above in this table, then those previously identified redactions apply.</p> <p>Redact the third and fourth sentences because they make reference to a redacted segment in the first sentence.</p> <p>Redact the fifth sentence as ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u>.</p> <p>Disclose balance of record.</p>
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Interim Order Rendered by the
Government Records Council
On The 25th Day of March, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Janice L. Kovach
Government Records Council

Decision Distribution Date: March 30, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
March 25, 2009 Council Meeting**

**Lewis M. Springer, Jr.¹
Complainant**

GRC Complaint No. 2008-45

v.

**NJ Casino Control Commission²
Custodian of Records**

Request Made: February 24, 2008

Response Made: February 28, 2008

Custodian: Daniel Heneghan

GRC Complaint Filed: March 17, 2003³

Records Submitted for *In Camera* Examination:

1. E-mail dated March 25, 2006 3:59 am from Inspector Lewis M. Springer, Jr. to Supervising Inspector Barbara Cranmer with the subject "Power surge at Showboat Casino on Friday, March 24, 2006 at 22:46."
2. E-mail dated March 25, 2006 8:26 am from Inspector Lewis M. Springer, Jr. to Supervising Inspector Barbara Cranmer with the subject "Follow-up to power surge at Showboat Casino on 3/24/06 at 22:46."
3. E-mail dated June 13, 2007 2:10 am from Inspector Lewis M. Springer, Jr. to Director of Compliance Jim Fehon with the subject "Fw: Power surge at Showboat Casino on Friday, March 24, 2006 at 22:46."

Background

December 18, 2008

Government Records Council's Interim Order. At the December 18, 2008 public meeting, the Government Records Council ("Council") considered the December 10, 2008 Executive Director's Findings and Recommendations and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council therefore found that:

1. Because the Custodian provided the Complainant with a written response to his request within the statutorily mandated seven (7) business days in which the Custodian denied access to the Complainant's request, the Custodian properly responded to said request pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

¹ No legal representation listed on record.

² Represented by Dianna W. Fautleroy, Esq., of the NJ Casino Control Commission (Atlantic City, NJ).

³ The GRC received the Denial of Access Complaint on said date.

2. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the requested records (three (3) e-mails authored by the Complainant) to determine the validity of the Custodian's assertion that the records constitute advisory, consultative or deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and/or whether said records are exempt from disclosure pursuant to the Casino Control Act.
3. **The Custodian must deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see #2 above), a document or redaction index⁵, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. Because the Complainant failed to identify specific government records and because the Custodian is not required to conduct research in response to an OPRA request, the Complainant's request for any and all e-mails is invalid under OPRA and the Custodian has not unlawfully denied access to the requested e-mails pursuant to 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, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008), and Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007).
5. The issue of whether the Custodian violated the NJ Casino Control Act and/or the NJ State Constitution does not fall under the authority of the GRC and is not governed by OPRA pursuant to N.J.S.A. 47:1A-7.b., Allegretta v. Borough of Fairview, GRC Complaint No. 2005-132 (December 2006) and Donato v. Borough of Emerson, GRC Complaint No. 2005-125 (March 2007).
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the outcome of the Council's *in camera* review.

December 19, 2008

Council's Interim Order ("Order") distributed to the parties.

⁴ 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.

⁵ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

December 23, 2008

Certification of the Custodian in response to the Council's Interim Order with a document index and nine (9) copies each of the following attachments:

- E-mail from Lewis Springer to Barbara Cranmer dated March 25, 2006 at 3:59 a.m.
- E-mail from Lewis Springer to Barbara Cranmer dated March 25, 2006 at 8:26 a.m.
- E-mail from Lewis Springer to James Fehon dated June 13, 2007 at 2:10 a.m.

Analysis

The Custodian contends he lawfully denied access to the records submitted for the *in camera* examination because (a) the records constitute inter-agency or intra-agency advisory, consultative or deliberative ("ACD") material pursuant to N.J.S.A. 47:1A-1.1., and (b) the records are confidential pursuant to N.J.S.A. 5:12-74.d, applicable to OPRA by operation of N.J.S.A. 47:1A-9.⁶

OPRA excludes from the definition of a government record "inter-agency or intra-agency advisory, consultative or deliberative material." N.J.S.A. 47:1A-1.1. It is evident that this phrase is intended to exclude from the definition of a government record the types of documents that are the subject of the "deliberative process privilege."

The deliberative process privilege is a doctrine that permits government agencies to withhold documents that reflect advisory opinions, recommendations and deliberations submitted as part of a process by which governmental decisions and policies are formulated. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, 95 S. Ct. 1504, 1516, 44 L. Ed. 2d 29, 47 (1975). This long-recognized privilege is rooted in the concept that the sovereign has an interest in protecting the integrity of its deliberations. The earliest federal case adopting the privilege is Kaiser Alum. & Chem. Corp. v. United States, 157 F. Supp. 939 (1958). Federal district courts and circuit courts of appeal subsequently adopted the privilege and its rationale. United States v. Farley, 11 F.3d 1385, 1389 (7th Cir.1993). It has also been codified in the federal Freedom of Information Act ("FOIA") 5 U.S.C. §552(b) (5).

The deliberative process privilege was discussed at length in In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000). There, the court addressed the question of whether the Commissioner of Insurance, acting in the capacity of Liquidator of a regulated entity, could protect certain records from disclosure which she claimed contained opinions, recommendations or advice regarding agency policy. *Id.* at 81. The court adopted a qualified deliberative process privilege based upon the holding of McClain v. College Hospital, 99 N.J. 346 (1985), Liquidation of Integrity, *supra*, 165 N.J. at 88. In doing so, the court noted that:

"[a] document must meet two requirements for the deliberative process privilege to apply. First, it must have been generated before the adoption of an agency's policy or decision. In other words, it must be pre-decisional. ... Second, the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies...Purely factual material

⁶ N.J.S.A. 47:1A-9.a.

that does not reflect deliberative processes is not protected...Once the government demonstrates that the subject materials meet those threshold requirements, the privilege comes into play. In such circumstances, the government's interest in candor is the "preponderating policy" and, prior to considering specific questions of application, the balance is said to have been struck in favor of non-disclosure." (Citations omitted.) *Id.* at 84-85.

The court further set out procedural guidelines based upon those discussed in McClain:

“[t]he initial burden falls on the state agency to show that the documents it seeks to shield are pre-decisional and deliberative in nature (containing opinions, recommendations, or advice about agency policies). Once the deliberative nature of the documents is established, there is a presumption against disclosure. The burden then falls on the party seeking discovery to show that his or her compelling or substantial need for the materials overrides the government's interest in non-disclosure. Among the considerations are the importance of the evidence to the movant, its availability from other sources, and the effect of disclosure on frank and independent discussion of contemplated government policies.” In Re Liquidation of Integrity, *supra*, 165 N.J. at 88, citing McClain, *supra*, 99 N.J. at 361-62, 492 A.2d 991.

In O’Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006), the Council stated that “neither the statute nor the courts have defined the terms ‘intra-agency’ or ‘advisory, consultative, or deliberative’ in the context of the public records law. The Council looks to an analogous concept, the deliberative process privilege, for guidance in the implementation of OPRA’s ACD exemption. Both the ACD exemption and the deliberative process privilege enable a governmental entity to shield from disclosure material that is pre-decisional and deliberative in nature. Deliberative material contains opinions, recommendations, or advice about agency policies. Strictly factual segments of an otherwise deliberative document are not exempted from disclosure. In re the Liquidation of Integrity Insurance Company, 165 N.J. 75, 88 (2000); In re Readoption With Amendments of Death Penalty Regulations, *supra* at 73 (App. Div. 2004).”

In addition to the ACD exemption, the Custodian also contends that pursuant to N.J.S.A. 5:12-74.d, the requested records are confidential.⁷ Further, the Custodian states that N.J.S.A. 5:12-74.d is applicable to OPRA under N.J.S.A. 47:1A-9, which provides that OPRA does not abrogate any exemption of a government record made pursuant to any other statute or regulation promulgated under the authority of any statute.

The Custodian argues that pursuant to N.J.S.A. 5:12-99, each casino licensee is subject to a series of internal controls which it must submit to the Commission and the Division for approval and which govern its administrative, accounting and security

⁷ N.J.A.C. 19:40-4.1 defines "confidential information," as it relates to Casino Control Commission operations, to be any information or data, furnished to or obtained by the Commission or Division from any source, which is considered confidential pursuant to the provisions of N.J.S.A. 5:12-74(d) and (e), or which is otherwise confidential pursuant to applicable statutory provision, judicial decision or rule of court.

procedures. The Custodian also states that the inspectors in the Casino Control Commission's Compliance Division and Inspection Unit implement the statutory requirement through its Standard Operating Procedure ("SOP"). The Custodian asserts that SOP 1.1 provides that "all...staff incident reports...are considered confidential information." Accordingly, the Custodian argues that the records submitted for *in camera* examination were "in the nature of an incident report," therefore the denial of access to the requested records was lawful.

There is nothing in the evidence of record, however, that reveals SOP 1.1 was "...made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order." N.J.S.A. 47:1A-9.a. Therefore, the Custodian's reliance upon the SOP's declaration that staff incident reports are "considered confidential information" as a basis for denial of access to the requested records, whether or not they are in the nature of an incident report, is unsupported by the law.

However, N.J.S.A. 5:12-74.d is a statute that has not been abrogated by OPRA pursuant to N.J.S.A. 47:1A-9.a. and it provides, in relevant part, that:

"...all information and data required by the commission to be furnished hereunder, or which may otherwise be obtained, relative to the internal controls specified in section 99a of this act...shall be considered to be confidential and shall not be revealed in whole or in part...." (Emphasis added).

Portions of the requested records did contain information obtained relative to the internal controls specified in N.J.S.A. 5:12-99a, which in relevant part, provides that:

"[e]ach applicant for a casino license shall submit to the commission a description of its initial system of internal procedures...Each initial internal control submission shall contain a narrative description of the internal control system to be utilized by the casino, including, but not limited to...

(11) Procedures and standards for the...security of slot machines;

(14) Procedures governing the utilization of the private security force within the casino and simulcasting facility;

(15) Procedures and security standards for the handling...of gaming apparatus including cards, dice, machines, wheels and all other gaming equipment..."

N.J.S.A. 5:12-99a subsections (11), (14) and (15) set forth the type of internal controls addressed in the e-mails submitted for the *in camera* examination. Accordingly, to the extent that those e-mails contain information relative to such internal controls, said information would be considered confidential pursuant to N.J.S.A. 5:12-74.d as "confidential

information” is defined in *N.J.A.C.* 19:40-4.1., and therefore, exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-9.a.

An *in camera* examination was performed on the submitted records. The results of this examination are set forth in the following table:

Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian’s Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination ⁸
1	E-mail from Lewis Springer to Barbara Cranmer dated March 25, 2006 at 3:59 a.m.	Communication relating to an alleged power surge at the Showboat Hotel Casino and its impact on gaming voucher systems and advice regarding how to prevent such future problems.	Exempt as ACD material pursuant to <u>N.J.S.A.</u> 47:1A-1.1. Information regarding internal controls is confidential pursuant to <u>N.J.S.A.</u> 5:12-74 and <u>N.J.S.A.</u> 47:1A-9.	Redact everything in the third full paragraph in the body of the e-mail after the word “hour” in the first sentence through the end of the paragraph. Also, redact the fourth, fifth, and sixth paragraphs. This material contains confidential information obtained relative to internal controls specified in <u>N.J.S.A.</u> 5:12-99a, applicable to OPRA through <u>N.J.S.A.</u> 47:1A-

⁸ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

				9.a. Paragraph six is also exempt as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Disclose balance of record.
2	E-mail from Lewis Springer to Barbara Cranmer dated March 25, 2006 at 8:26 a.m.	Same as #1	Same as #1	Redact everything in the first full paragraph in the body of the e-mail after “10:46 pm” in the first sentence through the end of the paragraph. Also, redact everything in the second paragraph after “10:46 pm” in the first sentence through the end of the paragraph. This material contains confidential information obtained relative to internal controls specified in <u>N.J.S.A. 5:12-99a</u> , applicable to OPRA through <u>N.J.S.A. 47:1A-9.a</u> . Disclose balance of record.
3	E-mail from Lewis Springer to James Fehon dated June 13, 2007 at 2:10 a.m.	Same as #1	Same as #1	Redact everything in the first sentence of the first full paragraph in the body of the e-mail after “3:00

				<p>pm” to the end of the sentence because it contains confidential information obtained relative to internal controls specified in <u>N.J.S.A. 5:12-99a</u>, applicable to OPRA through <u>N.J.S.A. 47:1A-9.a</u>.</p> <p>The attachment referred to in the second sentence was not provided to the GRC, therefore it is not within the scope of the <i>in camera</i> examination; however, if it is either record #1 or #2 listed above in this table, then those previously identified redactions apply.</p> <p>Redact the third and fourth sentences because they make reference to a redacted segment in the first sentence.</p> <p>Redact the fifth sentence as ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u>.</p>
--	--	--	--	---

				Disclose balance of record.
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Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has complied with the Council’s December 18, 2008 Interim Order by providing the Council with all records set forth in Paragraph 2 of the Order within five (5) business days of receiving the Council’s Order.

2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**

Prepared By: John E. Stewart
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

March 18, 2009



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CATHERINE STARGHILL Esq., Executive Director

INTERIM ORDER

December 18, 2008 Government Records Council Meeting

Lewis M. Springer, Jr.
Complainant

Complaint No. 2008-45

v.

NJ Casino Control Commission
Custodian of Record

At the December 18, 2008 public meeting, the Government Records Council ("Council") considered the December 10, 2008 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian provided the Complainant with a written response to his request within the statutorily mandated seven (7) business days in which the Custodian denied access to the Complainant's request, the Custodian properly responded to said request pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
2. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the requested records (three (3) e-mails authored by the Complainant) to determine the validity of the Custodian's assertion that the records constitute advisory, consultative or deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and/or whether said records are exempt from disclosure pursuant to the Casino Control Act.
3. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see #2 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the documents provided are the documents requested by the Council for the *in camera* inspection.**

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.



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

4. Because the Complainant failed to identify specific government records and because the Custodian is not required to conduct research in response to an OPRA request, the Complainant's request for any and all e-mails is invalid under OPRA and the Custodian has not unlawfully denied access to the requested e-mails pursuant to 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, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008), and Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007).
5. The issue of whether the Custodian violated the NJ Casino Control Act and/or the NJ State Constitution does not fall under the authority of the GRC and is not governed by OPRA pursuant to N.J.S.A. 47:1A-7.b., Allegretta v. Borough of Fairview, GRC Complaint No. 2005-132 (December 2006) and Donato v. Borough of Emerson, GRC Complaint No. 2005-125 (March 2007).
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the outcome of the Council's *in camera* review.

Interim Order Rendered by the
Government Records Council
On The 18th Day of December, 2008

Robin Berg Tabakin, Chairman
Government Records Council

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

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: December 19, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 18, 2008 Council Meeting**

**Lewis M. Springer, Jr.¹
Complainant**

GRC Complaint No. 2008-45

v.

**NJ Casino Control Commission²
Custodian of Records**

Records Relevant to Complaint:

1. E-mail dated March 25, 2006 3:59 am from Inspector Lewis M. Springer, Jr. to Supervising Inspector Barbara Cranmer with the subject "Power surge at Showboat Casino on Friday, March 24, 2006 at 22:46."
2. E-mail dated March 25, 2006 8:26 am from Inspector Lewis M. Springer, Jr. to Supervising Inspector Barbara Cranmer with the subject "Follow-up to power surge at Showboat Casino on 3/24/06 at 22:46."
3. E-mail dated June 13, 2007 2:10 am from Inspector Lewis M. Springer, Jr. to Director of Compliance Jim Fehon with the subject "Fw: Power surge at Showboat Casino on Friday, March 24, 2006 at 22:46."
4. Any and all e-mail messages between NJ Casino Control Commission Inspectors, Supervisors, Managers, Directors, Chiefs of Staff, Attorneys and Commissioners sent to or received by staff, newspapers, any casino employee, Atlantic City casino licensees, casino patrons, general public or Inspector Lewis M. Springer, Jr., regarding power surges at any Atlantic City casino which affected the operations of casino slot machines before, during and after Friday, March 24, 2006.

Request Made: February 24, 2008

Response Made: February 28, 2008

Custodian: Daniel Heneghan

GRC Complaint Filed: March 17, 2008³

Background

February 24, 2008⁴

Complainant's OPRA request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

¹ No legal representation listed on record.

² Represented by Dianna W. Fauntleroy, Esq., of the NJ Casino Control Commission (Atlantic City, NJ).

³ The GRC received the Denial of Access Complaint on said date.

⁴ Although the Complainant's OPRA request is dated February 24, 2008, the Complainant states in his Denial of Access Complaint that he sent his request to the Custodian via certified mail on February 25, 2008.

February 28, 2008

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the second (2nd) business day following receipt of such request.⁵ The Custodian states that access to the requested e-mails sent to Supervising Inspector Barbara Cramner and Director of Compliance James Fehon is denied because said records are exempt from disclosure as advisory, consultative or deliberative material. Additionally, the Custodian states that the Complainant's request for "any and all" e-mails is denied because it is not a request for a specific government record.

March 17, 2008

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

- Complainant's OPRA request dated February 24, 2008
- Custodian's response to the Complainant's request dated February 28, 2008⁶

The Complainant states that he submitted his OPRA request via certified mail on February 25, 2008. The Complainant claims that his request was clear and unambiguous. The Complainant states that the Custodian denied access to the requested e-mails on the basis that said e-mails constitute advisory, consultative or deliberative material. The Complainant asserts that the Custodian violated N.J.S.A. 47:1A-6 because he failed to carry his burden of proving a lawful denial of access. Additionally, the Complainant contends that the Custodian violated N.J.S.A. 47:1A-5.i. by failing to provide the requested records within the statutorily mandated seven (7) business days.

Further, the Complainant contends that the Custodian violated the New Jersey Casino Control Act, as well as the New Jersey State Constitution.

The Complainant did not agree to mediate this complaint.

March 27, 2008

Request for the Statement of Information sent to the Custodian.

April 4, 2008⁷

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

- Complainant's OPRA request dated February 24, 2008
- Copy of portions of The Casino Control Act
- Copy of Casino Control Commission's Standard Operating Procedures

The Custodian certifies that he received the Complainant's OPRA request on February 26, 2008 and provided a written response on February 28, 2008. The Custodian

⁵ The Custodian certifies in his Statement of Information that he received the Complainant's request on February 26, 2008.

⁶ The Complainant attaches additional records which are not relevant to the adjudication of this complaint.

⁷ The parties submitted additional correspondence; however, said correspondence is not relevant to the adjudication of this complaint.

certifies that upon receiving the Complainant's request he reviewed the responsive e-mails with General Counsel prior to denying the Complainant access to said e-mails. The Custodian also certifies that the records retention schedule for e-mails is one (1) year and the e-mails responsive to the Complainant's request were not destroyed.

The Custodian's Counsel states that OPRA excludes from the definition of a government record inter-agency or intra-agency advisory, consultative or deliberative material ("ACD"). N.J.S.A. 47:1A-1.1. Counsel asserts that ACD material is similar to the deliberative process privilege which the New Jersey Supreme Court discussed in In re Liquidation of Integrity Ins. Co., 165 N.J. 75 (2000). Counsel states that the court held that in order for the deliberative process privilege to apply, the government agency must establish that the matters are both pre-decisional and deliberative. *Id.* at 88. Counsel states that the court defined "pre-decisional" as records that were generated before an agency adopted or reached its decision on policy. *Id.* Counsel also states that the court defined "deliberative" as records that contain opinions, recommendations, or advice about agency policies or decisions. *Id.* at 84-85. Counsel states that the court held that the exemption covers recommendations, draft documents, proposals, suggestions and other subjective documents which reflect the personal opinion of the author rather than the policy of the agency.

Counsel states that the specific e-mails requested by the Complainant were created by the Complainant during his employment with the Casino Control Commission ("CCC") as an Inspector. Counsel states that the requested e-mail sent at 3:59 am contained the Complainant's personal opinion about what he believed to be the cause of an alleged power outage at the Showboat Casino, personal impressions about the result of the outage and personal recommendations regarding a future solution. Counsel states that the requested e-mail sent at 8:26 am contained conclusive remarks and reiterated the Complainant's previous e-mail. Additionally, Counsel states that the Complainant's e-mail dated June 13, 2007 forwarded the prior two (2) e-mails to the Director of the Compliance Division.

Counsel contends that in order to determine whether a record falls within the ACD exemption, the analysis must focus on the content of the record. Counsel asserts that if the communication contains personal opinions, suggestions or recommendations regarding matters that are within the agency's decision-making purview then a determination of whether the record falls within the ACD exemption is appropriate. *See McCormack v. NJ Department of Treasury*, GRC Complaint No. 2005-102 (March 2007).

Further, Council claims that the requested e-mails are not subject to OPRA pursuant to N.J.S.A. 47:1A-9,⁸ which provides that any exemption to disclosure contained in another State statute or regulation shall be upheld under OPRA. Counsel states that the Casino Control Act provides that:

"all information and data required by the Commission to be furnished hereunder, or which may otherwise be obtained, relative to the internal controls specified in section 99a. of this act or to the earnings or revenue

⁸ N.J.S.A. 47:1A-9.a.

of any applicant, registrant, or licensee shall be considered confidential and shall not be revealed in whole or in part except in the course of the necessary administration of this act..." N.J.S.A. 5:12-74.d.

Counsel states that *N.J.A.C. 19:40-4.1* defines confidential information as "any information or data, furnished to or obtained by the commission or division from any source, which is considered confidential pursuant to the provisions of N.J.S.A. 5:12-74 (d) and (e)." Counsel states that pursuant to N.J.S.A. 5:12-99, each casino licensee is subject to a series of internal controls which it must submit to the commission and the division for approval and which govern its administrative, accounting and security procedures. Counsel states that the CCC's Compliance Division and Inspection Unit implements such statutory requirement through its Standard Operating Procedure ("SOP"). Counsel states that SOP §1-1 provides that "all internal controls, staff incident reports, and everything except the first page (the patron's version) of patrons' complaints are considered confidential information." Counsel asserts that the three (3) specific e-mails requested by the Complainant were similar to an incident report because they contained the same information as an incident report although they were in the form of an e-mail rather than hard copy. Counsel asserts that the form of the Inspector's report should not change its nature.

Additionally, Counsel asserts that the Complainant's request for "any and all" e-mails is not a valid request under OPRA. Counsel states that 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." MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). Counsel states that the court further concluded that "[u]nder OPRA, agencies are required to disclose only identifiable government records not otherwise exempt...In short, OPRA does not countenance open-ended searched of an agency's files." Counsel also states that pursuant to Donato (on behalf of Capitol Publishing) v. Township of Union, GRC Complaint No. 2005-182 (February 2007), a custodian is not required to research files to determine which records, if any, might be responsive to a broad or unclear request. As such, Counsel asserts that the Custodian's denial of the Complainant's broad and unclear request is warranted and valid pursuant to OPRA.

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 ... *The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.*” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also provides that:

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

OPRA further provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request ...*” (Emphasis added.) N.J.S.A. 47:1A-5.i.

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

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

Additionally, OPRA provides that:

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

The Casino Control Act states that:

“all information and data required by the Commission to be furnished hereunder, or which may otherwise be obtained, relative to the internal controls specified in section 99a. of this act or to the earnings or revenue of any applicant, registrant, or licensee shall be considered confidential

and shall not be revealed in whole or in part except in the course of the necessary administration of this act...” N.J.S.A. 5:12-74.d.

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.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.

The Complainant in this matter asserts that because the Custodian failed to provide the requested records within the statutorily mandated seven (7) business days the Custodian violated N.J.S.A. 47:1A-5.i. The Custodian certifies that he received the Complainant’s OPRA request on February 26, 2008. The Custodian certifies that he provided the Complainant with a written response dated February 28, 2008 in which the Custodian denied access to the Complainant’s request.

Therefore, because the Custodian provided the Complainant with a written response to his request within the statutorily mandated seven (7) business days in which the Custodian denied access to the Complainant’s request, the Custodian properly responded to said request pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

Additionally, the Custodian certifies that he denied access to the Complainant’s request for three (3) specific e-mails on the basis that said e-mails are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. The Custodian’s Counsel asserts that the requested e-mails contain the Complainant’s personal opinion about what he believed to be the cause of an alleged power outage at the Showboat Casino, personal impressions about the result of the outage and personal recommendations regarding a future solution.

Additionally, the Custodian’s Counsel claims that the requested e-mails are not subject to OPRA pursuant to N.J.S.A. 47:1A-9.a., which provides that any exemption to disclosure contained in another State statute or regulation shall be upheld under OPRA. The Casino Control Act states that “[e]ach applicant for a casino license shall submit to the commission a description of its initial system of internal procedures and administrative and accounting controls for gaming and simulcast wagering operations.” N.J.S.A. 5:12-99.a. Counsel states that the Casino Control Act also provides that:

“all information and data required by the Commission to be furnished hereunder, or which may otherwise be obtained, relative to the internal controls specified in section 99a. of this act or to the earnings or revenue of any applicant, registrant, or licensee shall be considered confidential

and shall not be revealed in whole or in part except in the course of the necessary administration of this act..." N.J.S.A. 5:12-74.d.

Counsel states that SOP § 1-1 provides that "all internal controls, staff incident reports, and everything except the first page (the patron's version) of patrons' complaints are considered confidential information." Counsel asserts that the three (3) specific e-mails requested by the Complainant were similar to an incident report because they contained the same information as an incident report although they were in the form of an e-mail rather than hard copy.

In Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the Complainant appealed a final decision of the GRC⁹ in which the GRC dismissed the complaint by accepting the Custodian's legal conclusion for the denial of access without further review. The court stated that:

"OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records...When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers."

The court also stated that:

"[t]he statute also contemplates the GRC's *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the 'Open Public Meetings Act,' N.J.S.A. 10:4-6 to -21, it also provides that the GRC 'may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.' N.J.S.A. 47:1A-7f. This provision would be unnecessary if the Legislature did not intend to permit *in camera* review."

Further, the court stated that:

"[w]e hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal...There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC's obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7f, which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption."

Therefore, pursuant to Paff, supra, the GRC must conduct an *in camera* review of the requested records (three (3) e-mails authored by the Complainant) to determine the validity of the Custodian's assertion that the records constitute advisory, consultative or deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1

⁹ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).
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and/or whether said records are exempt from disclosure pursuant to the Casino Control Act.

Additionally, the Complainant requested any and all e-mail messages between various CCC employees, newspapers, and the general public regarding power surges at any Atlantic City casino which effected the operations of casino slot machines before, during and after Friday, March 24, 2006. The Custodian certifies that he denied access to said request in writing on February 28, 2008 on the basis that said request is not valid under OPRA. The Custodian's Counsel asserts that custodians are only required to release identifiable government records and custodians are not required to conduct research in response to an OPRA request.

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),¹⁰ 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."¹¹

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..."

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008) the Council held that "[b]ecause the Complainant's OPRA requests # 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)."

In this instant complaint, the Complainant requested e-mails sent or received between various job titles within the CCC as well as newspapers and the general public.

¹⁰ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹¹ As stated in Bent, *supra*.

The Complainant failed to identify any specific parties to the requested e-mails or a definitive time frame. The Complainant's request requires an open-ended search for any and all e-mails between an unlimited number of persons. To fulfill said request, the Custodian would be required to conduct research.

In Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007), the Council held that pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005), a custodian is obligated to search his or her files to find identifiable government records listed in a requestor's OPRA request. The Complainant in Donato requested all motor vehicle accident reports from September 5, 2005 to September 15, 2005. The Custodian sought clarification of said request on the basis that it was not specific enough. The Council stated that:

“[p]ursuant to Mag, the Custodian is obligated to *search* her files to *find* the identifiable government records listed in the Complainant's OPRA request (all motor vehicle accident reports for the period of September 5, 2005 through September 15, 2005). However, the Custodian is not required to *research* her files to figure out which records, if any, might be responsive to a broad or unclear OPRA request. The word *search* is defined as ‘to go or look through carefully in order to find something missing or lost.’^[5] The word *research*, on the other hand, means ‘a close and careful study to find new facts or information.’^[6]”

Therefore, because the Complainant in this instant matter failed to identify specific government records and because the Custodian is not required to conduct research in response to an OPRA request, the Complainant's request for any and all e-mails is invalid under OPRA and the Custodian has not unlawfully denied access to the requested e-mails pursuant to MAG, *supra*, Bent, *supra*, NJ Builders, *supra*, Schuler, *supra*, and Donato, *supra*.

Whether the Custodian violated the NJ Casino Control Act and/or the NJ State Constitution?

OPRA states that:

“The Government Records Council shall:

- establish an informal mediation program to facilitate the resolution of disputes regarding access to government records;
- receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian;

^[5] “Search.” Dictionary.com Unabridged (v 1.1) Based on the Random House Unabridged Dictionary. Random House, Inc. 2006.

^[6] “Research.” Kerneman English Multilingual Dictionary (Beta Version), 2000-2006 K Dictionaries Ltd. Lewis M. Springer, Jr. v. NJ Casino Control Commission, 2008-45 – Findings and Recommendations of the Executive Director

- issue advisory opinions, on its own initiative, as to whether a particular type of record is a government record which is accessible to the public;
- prepare guidelines and an informational pamphlet for use by records custodians in complying with the law governing access to public records;
- prepare an informational pamphlet explaining the public's right of access to government records and the methods for resolving disputes regarding access, which records custodians shall make available to persons requesting access to a government record;
- prepare lists for use by records custodians of the types of records in the possession of public agencies which are government records;
- make training opportunities available for records custodians and other public officers and employees which explain the law governing access to public records; and
- operate an informational website and a toll-free helpline staffed by knowledgeable employees of the council during regular business hours which shall enable any person, including records custodians, to call for information regarding the law governing access to public records and allow any person to request mediation or to file a complaint with the council when access has been denied...”
N.J.S.A. 47:1A-7.b.

N.J.S.A. 47:1A-7.b. delineates the powers of the GRC. The GRC administers OPRA and adjudicates denial of access complaints. In this complaint, the Complainant asserts that the Custodian violated the NJ Casino Control Act as well as the NJ State Constitution.

In Allegretta v. Borough of Fairview, GRC Complaint No. 2005-132 (December 2006), the Council held that, “[b]ased on N.J.S.A. 47:1A-7.b., the GRC does not have authority to adjudicate whether a Custodian has complied with [the Open Public Meetings Act] or any statute other than OPRA.” See also Donato v. Borough of Emerson, GRC Complaint No. 2005-125 (March 2007).

Thus, the same ruling applies in this instant complaint. The issue of whether the Custodian violated the NJ Casino Control Act and/or the NJ State Constitution does not fall under the authority of the GRC and is not governed by OPRA pursuant to N.J.S.A. 47:1A-7.b., Allegretta, *supra*, and Donato, *supra*.

Whether the Custodian knowingly and willfully violated OPRA and unreasonably denied 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 outcome of the Council’s *in camera* review.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian provided the Complainant with a written response to his request within the statutorily mandated seven (7) business days in which the Custodian denied access to the Complainant's request, the Custodian properly responded to said request pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
2. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the requested records (three (3) e-mails authored by the Complainant) to determine the validity of the Custodian's assertion that the records constitute advisory, consultative or deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and/or whether said records are exempt from disclosure pursuant to the Casino Control Act.
3. **The Custodian must deliver¹² to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see #2 above), a document or redaction index¹³, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. Because the Complainant failed to identify specific government records and because the Custodian is not required to conduct research in response to an OPRA request, the Complainant's request for any and all e-mails is invalid under OPRA and the Custodian has not unlawfully denied access to the requested e-mails pursuant to 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, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008), and Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007).
5. The issue of whether the Custodian violated the NJ Casino Control Act and/or the NJ State Constitution does not fall under the authority of the GRC and is not governed by OPRA pursuant to N.J.S.A. 47:1A-7.b., Allegretta v. Borough of Fairview, GRC Complaint No. 2005-132 (December 2006) and Donato v. Borough of Emerson, GRC Complaint No. 2005-125 (March 2007).

¹² 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.

¹³ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the outcome of the Council's *in camera* review.

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Executive Director

December 10, 2008