



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**

**December 21, 2010 Government Records Council Meeting**

Travis Shelby Moore  
Complainant

Complaint No. 2009-144

v.

New Jersey Department of Corrections  
Custodian of Record

At the December 21, 2010 public meeting, the Government Records Council (“Council”) considered the December 14, 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:

1. The Custodian lawfully denied access to the requested records pursuant to the Department’s proposed regulations at *N.J.A.C. 10A:1-1.4 through 31-6.13, PRN 2002-228, July 1, 2002*, which exempts access to informant documents and statements and Special Investigation Division investigations (provided that redaction of information would be insufficient to protect the safety of any person or the safe and secure operation of a correctional facility). While this exemption was invalidated by *Slaughter v. Government Records Council*, 413 *N.J. Super.* 544 (App. Div. 2010), such decision’s effectiveness was delayed until November 5, 2010. Meanwhile, the Department proposed new OPRA rules that contain the same exemption for Special Investigation Division records on November 1, 2010 and the Governor issued Executive Order 47 on November 3, 2010 which allows the Department’s proposed exemptions from public access to remain in full force and effect pending their adoption as final rules.
2. 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. Specifically, the Custodian’s denial of access to all information from an Special Investigation Division investigation file relating to a ban on a visitor and copies of all documents pertaining to the situation from July 7, 2008 is lawful pursuant to the Department’s proposed regulations at *N.J.A.C. 10A:1-1.4 through 31-6.13, PRN 2002-228, July 1, 2002*, which exempts access to informant documents and statements and Special Investigation Division investigations (provided that redaction



of information would be insufficient to protect the safety of any person or the safe and secure operation of a correctional facility), Slaughter v. Government Records Council, 413 N.J. Super. 544 (App. Div. 2010), the Department's newly proposed OPRA rules of November 1, 2010 which contains the exact same exemption from disclosure and the Governor's Executive Order 47 of November 3, 2010 which allows the Department's exemptions from public access contained in their proposed new OPRA rules to remain in full force and effect pending their adoption as final rules.

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 21<sup>st</sup> Day of December, 2010

Robin Berg Tabakin, Chair  
Government Records Council

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

James W. Requa, Secretary  
Government Records Council

**Decision Distribution Date: January 4, 2011**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
December 21, 2010 Council Meeting**

**Travis Shelby Moore<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-144**

v.

**New Jersey Department of Corrections<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of all information in the file for the Special Investigation Division (“SID”) ban of a visitor including a copy of the report made against the Complainant and a copy of his interrogation, reports of why the visitor was banned from the Complainant’s visitor’s and I-PIN lists. Also, copies of all documents concerning this situation from July 7, 2008.<sup>3</sup>

**Request Made:** February 9, 2009<sup>4</sup>

**Response Made:** February 26, 2009

**Custodian:** Deidre Fedkenheuer<sup>5</sup>

**GRC Complaint Filed:** April 29, 2009<sup>6</sup>

**Records Submitted for *In Camera* Examination:** All information from a SID investigation file relating to a ban on a visitor and copies of all documents pertaining to the situation from July 7, 2008.

**Background**

**October 26, 2010**

Government Records Council’s Interim Order. At the October 26, 2010 public meeting, the Government Records Council (“Council”) considered the October 19, 2010 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. The Custodian’s denial of access pursuant to N.J.S.A. 47:1A-9, Executive Order No. 26 and *N.J.A.C. 10A:1-1.4* through 31-6.13, PRN 2002-228, July 1, 2002 is no longer a lawful denial based on the Appellate Division’s holding in Slaughter

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> No legal representation listed on record.

<sup>3</sup> The Complainant requested additional records which are not at issue in the instant complaint.

<sup>4</sup> The Complainant’s OPRA request is actually dated January 28, 2009; however, Complainant states in the Denial of Access Complaint that said request was not sent until February 9, 2009.

<sup>5</sup> The original custodian named on this complaint was Michelle Hammel.

<sup>6</sup> The GRC received the Denial of Access Complaint on said date.

- v. Government Records Council, 413 N.J. Super. 544 (App. Div. 2010). However, the GRC declines to determine that the Custodian unlawfully denied access to the requested records based on the fact that her response was consistent with GRC case law prior to the Appellate Division's decision. See Newark Morning Ledger Co., Publisher of the Star-Ledger v. Division of the State Police of the New Jersey Department of Law and Public Safety, Superior Court of New Jersey, Law Division - Mercer County, Docket No.: MER-L-1090-05 (Decided July 5, 2005) and Lumumba v. New Jersey Department of Corrections, GRC Complaint No. 2008-196 (April 2009).
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 Special Investigation Division reports to determine whether the records responsive to the Complainant's OPRA request contain information which is exempt from disclosure as a security or surveillance measure which, if disclosed, would create a risk to the safety of persons involved in the July 7, 2008 incident pursuant to N.J.S.A. 47:1A-1.1.
  3. **The Custodian must deliver<sup>7</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), a document or redaction index<sup>8</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4<sup>9</sup>, that the records provided are the records 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. 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.

#### **October 28, 2010**

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

#### **November 1, 2010**

Certification of the Custodian in response to the Council's Interim Order with the requested SID file records attached for the *in camera* review. The Custodian certifies that she is the Coordinator of Media Affairs for the Department of Corrections, as well as the Records Custodian. The Custodian certifies that the circumstances creating this instant complaint occurred prior to her assuming the duties of Records Custodian and the persons who handled the request subject of this complaint are no longer employed by the Department. Additionally, the Custodian certifies that the file containing the disputed

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<sup>7</sup> 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.

<sup>8</sup> The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

<sup>9</sup> "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."

records, original complaint and other related documents has not been located. The Custodian certifies that she is not fully familiar with the facts of the original complaint but has had the opportunity to review the documents from the Special Investigation Division which were recently requested and provided to her office. Finally, the Custodian certifies that she has attached nine (9) copies of the SID records provided to her by the Special Investigation Division.

### Analysis

#### **Whether the Custodian complied with the Council's October 26, 2010 Interim Order?**

At its October 26, 2010 public meeting, the Council determined that the Custodian's denial of access pursuant to N.J.S.A. 47:1A-9, Executive Order No. 26 and the Department's proposed regulations at *N.J.A.C. 10A:1-1.4* through *31-6.13*, PRN 2002-228, July 1, 2002 is no longer a lawful denial based on the Appellate Division's holding in *Slaughter v. Government Records Council*, 413 N.J. Super. 544 (App. Div. 2010). However, the GRC declined to determine that the Custodian unlawfully denied access to the requested records based on the fact that her response was consistent with GRC case law prior to the Appellate Division's decision. See *Newark Morning Ledger Co., Publisher of the Star-Ledger v. Division of the State Police of the New Jersey Department of Law and Public Safety*, Superior Court of New Jersey, Law Division - Mercer County, Docket No.: MER-L-1090-05 (Decided July 5, 2005) and *Lumumba v. New Jersey Department of Corrections*, GRC Complaint No. 2008-196 (April 2009).

Pursuant to *Paff v. NJ Department of Labor, Board of Review*, 379 N.J. Super. 346 (App. Div. 2005), the GRC decided it must conduct an *in camera* review of the requested SID reports to determine whether the records responsive to the Complainant's OPRA request contain information which is exempt from disclosure as a security or surveillance measure which, if disclosed, would create a risk to the safety of persons involved in the July 7, 2008 incident pursuant to N.J.S.A. 47:1A-1.1.

The Council therefore ordered the Custodian to deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted documents, a document or redaction index, 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* review. Such delivery was to be received by the GRC within five (5) business days from receipt of the Council's Interim Order or on November 5, 2010.

The current Custodian provided the GRC with a legal certification and the unredacted records requested for the *in camera* review on November 1, 2010<sup>10</sup>. Therefore, the current Custodian timely complied with the Council's October 26, 2010 Interim Order.

#### **Whether the Custodian unlawfully denied the Complainant access to the requested records?**

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<sup>10</sup> The Custodian did not provide a redaction index since the records were denied in their totality. The Custodian also did not provide a document index.  
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The original Custodian asserts that she lawfully denied the Complainant access to the requested records because the records are exempt from access pursuant to N.J.S.A. 47:1A-9 and Executive Order No. 26 (McGreevey 2002) and the Department's proposed regulations at *N.J.A.C. 10A:1-1.4* through 31-6.13, PRN 2002-228, July 1, 2002, which exempts access to informant documents and statements and SID investigations (provided that redaction of information would be insufficient to protect the safety of any person or the safe and secure operation of a correctional facility).

After the Council issued its Interim Order in this matter and the Custodian's response to same submitted, the Governor issued Executive Order 47 (November 3, 2010) which allows the exemptions from public access that were proposed by the Department of Corrections (as well as other State Departments) on November 1, 2010 to remain in full force and effect pending their adoption as final rules pursuant to the provisions of the Administrative Procedures Act. This Executive Order expires on November 15, 2011 and effectively extends the time allowed for Departments to promulgate new OPRA regulations under Slaughter, *supra*.

The Department's November 1, 2010 rule proposal includes an exemption from public access for SID records and reports, provided that redaction of information would be insufficient to protect the safety of any person or the safe and secure operation of a correctional facility.

Thus, the Custodian lawfully denied access to the requested records pursuant to the Department's proposed regulations at *N.J.A.C. 10A:1-1.4* through 31-6.13, PRN 2002-228, July 1, 2002, which exempts access to informant documents and statements and SID investigations (provided that redaction of information would be insufficient to protect the safety of any person or the safe and secure operation of a correctional facility). While this exemption was invalidated by Slaughter, *supra*, such decision's effectiveness was delayed until November 5, 2010. Meanwhile, the Department proposed new OPRA rules that contain the same exemption for SID records on November 1, 2010 and the Governor issued Executive Order 47 on November 3, 2010 which allows the Department's proposed exemptions from public access to remain in full force and effect pending their adoption as final rules. Therefore, the GRC did not conduct the *in camera* review it ordered in the Council's October 26, 2010 Interim Order because there is no unlawful denial of access at issue.

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

OPRA states that:

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

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

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

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 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).

In this complaint, the Complainant requested all information from a SID investigation file relating to a ban on a visitor and copies of all documents pertaining to the situation from July 7, 2008. The Custodian denied access to the requested records pursuant to the Department’s proposed regulations at *N.J.A.C.* 10A:1-1.4 through 31-6.13, PRN 2002-228, July 1, 2002, which exempts access to informant documents and statements and SID investigations (provided that redaction of information would be insufficient to protect the safety of any person or the safe and secure operation of a correctional facility). While this exemption was invalidated by Slaughter, *supra*, such decision’s effectiveness was delayed until November 5, 2010. Meanwhile, the Department proposed new OPRA rules on November 1, 2010 which contains the exact same exemption from disclosure and the Governor issued Executive Order 47 on November 3, 2010 which allows the Department’s exemptions from public access contained in their proposed new OPRA rules to remain in full force and effect pending their adoption as final rules. Therefore, the GRC did not conduct the *in camera* inspection it ordered in the Council’s October 26, 2010 Interim Order because the Custodian’s denial of access to the requested SID records is lawful given the course of events outlined above.

It is therefore 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. Specifically, the Custodian’s denial of access to all information from a SID investigation file relating to a ban on a visitor and copies of all documents pertaining to the situation from July 7, 2008 is lawful pursuant to the Department’s proposed regulations at *N.J.A.C.* 10A:1-1.4 through 31-6.13, PRN 2002-228, July 1, 2002, which exempts access to informant documents and statements and SID investigations (provided that redaction of information would be insufficient to protect the safety of any person or the safe and secure operation of a correctional facility), Slaughter v. Government Records Council, 413 N.J. Super. 544 (App. Div. 2010), and the Department’s newly proposed OPRA rules of November 1, 2010 which contains the exact same exemption from disclosure and the

Governor's Executive Order 47 of November 3, 2010 which allows the Department's exemptions from public access contained in their proposed new OPRA rules to remain in full force and effect pending their adoption as final rules.

### Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian lawfully denied access to the requested records pursuant to the Department's proposed regulations at *N.J.A.C.* 10A:1-1.4 through 31-6.13, PRN 2002-228, July 1, 2002, which exempts access to informant documents and statements and Special Investigation Division investigations (provided that redaction of information would be insufficient to protect the safety of any person or the safe and secure operation of a correctional facility). While this exemption was invalidated by *Slaughter v. Government Records Council*, 413 *N.J. Super.* 544 (App. Div. 2010), such decision's effectiveness was delayed until November 5, 2010. Meanwhile, the Department proposed new OPRA rules that contain the same exemption for Special Investigation Division records on November 1, 2010 and the Governor issued Executive Order 47 on November 3, 2010 which allows the Department's proposed exemptions from public access to remain in full force and effect pending their adoption as final rules.
  
2. 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. Specifically, the Custodian's denial of access to all information from an Special Investigation Division investigation file relating to a ban on a visitor and copies of all documents pertaining to the situation from July 7, 2008 is lawful pursuant to the Department's proposed regulations at *N.J.A.C.* 10A:1-1.4 through 31-6.13, PRN 2002-228, July 1, 2002, which exempts access to informant documents and statements and Special Investigation Division investigations (provided that redaction of information would be insufficient to protect the safety of any person or the safe and secure operation of a correctional facility), *Slaughter v. Government Records Council*, 413 *N.J. Super.* 544 (App. Div. 2010), the Department's newly proposed OPRA rules of November 1, 2010 which contains the exact same exemption from disclosure and the Governor's Executive Order 47 of November 3, 2010 which allows the Department's exemptions from public access contained in their proposed new OPRA rules to remain in full force and effect pending their adoption as final rules.

Prepared and

Approved By: Catherine Starghill, Esq.  
Executive Director

December 14, 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  
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**INTERIM ORDER**

**October 26, 2010 Government Records Council Meeting**

Travis Shelby Moore  
Complainant

Complaint No. 2009-144

v.

New Jersey Department of Corrections  
Custodian of Record

At the October 26, 2010 public meeting, the Government Records Council (“Council”) considered the October 19, 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. The Custodian’s denial of access pursuant to N.J.S.A. 47:1A-9, Executive Order No. 26 and N.J.A.C. 10A:1-1.4 through 31-6.13, PRN 2002-228, July 1, 2002 is no longer a lawful denial based on the Appellate Division’s holding in Slaughter v. Government Records Council, 413 N.J. Super. 544 (App. Div. 2010). However, the GRC declines to determine that the Custodian unlawfully denied access to the requested records based on the fact that her response was consistent with GRC case law prior to the Appellate Division’s decision. See Newark Morning Ledger Co., Publisher of the Star-Ledger v. Division of the State Police of the New Jersey Department of Law and Public Safety, Superior Court of New Jersey, Law Division - Mercer County, Docket No.: MER-L-1090-05 (Decided July 5, 2005) and Lumumba v. New Jersey Department of Corrections, GRC Complaint No. 2008-196 (April 2009).
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 Special Investigation Division reports to determine the whether the records responsive to the Complainant’s OPRA request contain information which is exempt from disclosure as a security or surveillance measure which, if disclosed, would create a risk to the safety of persons involved in the July 7, 2008 incident pursuant to N.J.S.A. 47:1A-1.1.



3. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), a document or redaction index<sup>2</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4<sup>3</sup>, that the records provided are the records 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. 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.

Interim Order Rendered by the  
Government Records Council  
On The 26<sup>th</sup> Day of October, 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: October 28, 2010**

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<sup>1</sup> 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.

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

<sup>3</sup> "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."

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
October 26, 2010 Council Meeting**

**Travis Shelby Moore<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-144**

v.

**New Jersey Department of Corrections<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of all information in the file for the Special Investigation Division (“SID”) ban of a visitor including a copy of the report made against the Complainant and a copy of his interrogation, reports of why the visitor was banned from the Complainant’s visitor’s and I-PIN lists. Also, copies of all documents concerning this situation from July 7, 2008.<sup>3</sup>

**Request Made:** February 9, 2009<sup>4</sup>

**Response Made:** February 26, 2009

**Custodian:** Deidre Fedkenheuer<sup>5</sup>

**GRC Complaint Filed:** April 29, 2009<sup>6</sup>

**Background**

**February 9, 2009**

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

**February 26, 2009**

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the seventh (7) business day following receipt of such request.<sup>7</sup> The Custodian requests an additional seven (7) business days to respond to the Complainant’s OPRA request.

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> No legal representation listed on record.

<sup>3</sup> The Complainant requested additional records which are not at issue in the instant complaint.

<sup>4</sup> The Complainant’s OPRA request is actually dated January 28, 2009; however, Complainant states in the Denial of Access Complaint that said request was not sent until February 9, 2009.

<sup>5</sup> The original custodian named on this complaint was Michelle Hammel.

<sup>6</sup> The GRC received the Denial of Access Complaint on said date.

<sup>7</sup> The Custodian received the Complainant’s OPRA request on February 17, 2009 as evidenced by the date stamp on the OPRA request form.

**March 9, 2009**

Letter from the Custodian to the Complainant. The Custodian denies access to the requested records, stating that informant documents and statements of the SID, provided that redactions would be insufficient to protect the safety of any person or the safe and secure operations of a correctional facility, shall not be a government record pursuant to N.J.S.A. 47:1A-1. Moreover, the Custodian states that a report or record relating to an identified individual which, if disclosed, would jeopardize the safety of any person or the safe and secure operation of a correctional facility or other designated place of confinement, is exempt from disclosure pursuant to Executive Order No. 26 (Gov. McGreevey, 2002)(“E.O. No. 26”). Finally, the Custodian states that DOC cannot provide access to information gathered by the SID because the disclosure of information might compromise investigation techniques utilized by the DOC.

**April 29, 2009**

Denial of Access Complaint filed with the Government Records Council (“GRC”) attaching a letter from the Custodian to the Complainant dated March 9, 2009.

The Complainant states that he submitted an OPRA request to the New Jersey Department of Corrections (“DOC”) on February 9, 2009. The Complainant states that the Custodian responded on March 9, 2009 denying access to the requested records pursuant to N.J.S.A. 47:1A-1, E.O. No. 26 and stating that disclosure of any SID information might compromise the investigation techniques utilized by DOC.

The Complainant agrees to mediate this complaint.

**May 15, 2009**

Offer of Mediation sent to the Custodian. The Custodian did not respond to the Offer of Mediation.

**June 3, 2009**

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

**June 9, 2009**

E-mail from the Custodian to the GRC. The Custodian requests an extension of five (5) business days to submit the requested SOI.

**June 10, 2009**

E-mail from the GRC to the Custodian. The GRC grants an extension of five (5) business days (until June 17, 2009) to submit the requested SOI.

**June 17, 2009**

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated January 28, 2009.
- Letter from the Custodian to the Complainant dated February 26, 2009.
- Letter from the Custodian to the Complainant dated March 9, 2009.<sup>8</sup>

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<sup>8</sup> The Custodian attached additional documents that are not relevant to the instant complaint.  
Travis Shelby Moore v. New Jersey Department of Corrections, 2009-144 – Findings and Recommendations of the Executive Director

The Custodian certifies that her search involved directing staff to make inquiries with the SID regarding the records responsive to the Complainant's OPRA request.

The Custodian also certifies that no records responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM").

The Custodian certifies that she received the Complainant's OPRA request on February 17, 2009. The Custodian certifies that she responded in writing to the Complainant on February 26, 2009 requesting an extension of seven (7) business days (until March 9, 2009) to respond to the Complainant's request. The Custodian certifies that she responded to the request in writing on March 9, 2009 denying access to the requested records and outlining the reasons for the denial.

The Custodian contends that the Complainant's complaint should be dismissed. The Custodian states that OPRA defines a government records 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.

The Custodian states that OPRA provides that:

"[t]he provisions of [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." (Emphasis added). N.J.S.A. 47:1A-9.a.

Further, the Custodian states that OPRA provides that:

"[t]he provisions of [OPRA] shall not abrogate or erode any executive or legislative privilege or grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, court rule or judicial case law, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record." N.J.S.A. 47:1A-9.b.

The Custodian contends that pursuant to the foregoing authority, Executive Order No. 26 (McGreevey 2002)("E.O. No. 26") exempts from disclosure certain materials and recognizes other existing privileges. The Custodian states that OPRA contains language

that recognizes exemptions from disclosure of records contained in E.O. No. 26. Specifically, the Custodian states that informant documents and statements and SID investigations (provided that redaction of information would be insufficient to protect the safety of any person or the safe and secure operation of a correctional facility) shall not be considered government records pursuant to N.J.S.A. 47:1A-1 et seq. See DOC's proposed regulations at *N.J.A.C.* 10A:1-1.4 through 31-6.13, PRN 2002-228, July 1, 2002.

The Custodian states that the DOC denied access to the Complainant's OPRA request for the following reasons:

1. information documents and SID investigations shall not be considered government records;
2. a report or record relating to an identified individual which, if disclosed, would jeopardize the safety of any person or the safe and secure operation of the correctional facility or other designated place of confinement, pursuant to E.O. No. 26; and
3. providing a copy of any SID investigations would compromise investigative techniques utilized by the department and/or ongoing investigations.

The Custodian contends that the Complainant is not entitled to the requested records pursuant to the foregoing.

### 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 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.

In the instant complaint, the Complainant requested all information from an SID investigation file relating to a ban on a visitor and copies of all documents pertaining to the situation from July 7, 2008. The Custodian received the OPRA request on February 17, 2009 and responded in writing on February 26, 2009 requesting an extension of seven (7) business days to respond. The Custodian subsequently responded on March 9, 2009 denying access to the requested records pursuant to N.J.S.A. 47:1A-1 and E.O. No. 26.

In the SOI, the Custodian argued that the provisions of 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...*” N.J.S.A. 47:1A-9.a. The Custodian further argued that E. O. No. 26 contained exemptions that applied to the records requested in the instant complaint. E.O. No. 26, which superseded Executive Order No. 21 (McGreevey 2002), allowed for State agencies to respond to requests for records, “*in a manner consistent with the rules as they have been proposed and published, and the records exempted from disclosure by those proposed rules are exempt from disclosure by this Order...*” The Custodian asserted that access to records requested by the Complainant were denied pursuant to the DOC’s proposed regulations at *N.J.A.C.* 10A:1-1.4 through 31-6.13, PRN 2002-228, July 1, 2002, which exempts access to informant documents and statements and SID investigations (provided that redaction of information would be insufficient to protect the safety of any person or the safe and secure operation of a correctional facility).

However, in Slaughter v. Government Records Council, 413 N.J. Super. 544 (App. Div. 2010), the Appellate Division held that the executive order establishing that a government record that a State agency proposed to be exempt from disclosure in proposed regulations in accordance with the Administrative Procedure Act (“APA”), was intended to be temporary only and therefore the exemption cited by the New Jersey Law & Public Safety, Division of Criminal Justice (“DCJ”) is no longer in effect.

In, Slaughter, the complainant appealed a final decision of the GRC which upheld the DCJ’s asserted exemption of the requested record contained within their proposed regulations. The records sought were the “New Jersey State Police Forensic Laboratory’s policies and procedures on blood test analysis, DNA comparisons ... and records concerning presumptive and confirmative testing.” The DCJ denied access to the requested records pursuant to N.J.S.A. 47:1A-9.a., Executive Order 21, Executive Order 26, and *N.J.A.C.* 13:1E-3.2(a)2. The complainant contacted the GRC prior to filing a Denial of Access Complaint alleging that he could not find the cited regulation in the New Jersey Administrative Code because said section was reserved.

The Council, based on an unpublished decision of the Superior Court and past GRC case law, held that:

“...pursuant to N.J.S.A. 47:1A-9.a., Executive Order 21, Executive Order 26, and N.J.A.C. 13:1E-3.2(a)2, which exempts from disclosure the Standard Operating Procedures (the document responsive to Complainant’s request), the Custodian’s denial of access to the requested records is supported by law. See also Newark Morning Ledger Co., Publisher of the Star-Ledger v. Division of the State Police of the New Jersey Department of Law and Public Safety, Superior Court of New Jersey, Law Division - Mercer County, Docket No.: MER-L-1090-05 (Decided July 5, 2005) and Edward Buttimore v. NJ Department of Law & Public Safety, Division of Criminal Justice, GRC Complaint No. 2005-90 (March 2006). As such, the Custodian has carried her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6.” Slaughter v. New Jersey Law & Public Safety, Division of Criminal Justice, GRC Complaint No. 2007-274.

The Appellate Division, tasked with deciding whether DCJ’s proposed regulations remained in effect even after years of not being promulgated, discussed the impetus for the DCJ’s denial of access:

“OPRA was enacted on January 8, 2002, with an effective date of July 7, 2002. L. 2001, c. 404, § 18. In anticipation of OPRA going into effect, a number of State agencies published rule proposals in the New Jersey Register on July 1, 2002, which identified certain government records that would be exempt from disclosure under OPRA. See, e.g., 34 N.J.R. 2267(a) (July 1, 2002) (Department of Law & Public Safety); 34 N.J.R. 2175(a) (July 1, 2002) (Department of Community Affairs); 34 N.J.R. 2169(a) (July 1, 2002) (Department of Agriculture).

On July 8, 2002, the day after OPRA went into effect, Governor McGreevey issued Executive Order 21 for the purpose of implementing this new legislation. Executive Order 21 exempted certain specific categories of government records from disclosure under OPRA, such as documents whose disclosure would substantially interfere with the State’s ability to protect against acts of terrorism. In addition, Executive Order 21 included an omnibus provision that exempted any government record a State agency had proposed to exempt from disclosure by a rule that had been published for public comment but could not be adopted in accordance with the APA prior to the effective date of OPRA. This provision, which was paragraph 4 of Executive Order 21, stated:

‘In light of the fact that State departments and agencies have proposed rules exempting certain government records from public disclosure, and these regulations have been published for public comment, but cannot be adopted prior to the effective date of the Open Public Records Act, State



agencies are hereby directed to handle all government records requests in a manner consistent with the rules as they have been proposed and published, and the records exempted from disclosure by those proposed rules are exempt from disclosure by this Order. Once those regulations have been adopted, they shall govern all government records requests filed thereafter.’

One of the proposed rules covered by paragraph 4 of Executive Order 21 was proposed *N.J.A.C. 13:1E-3.2(a)(2)*, which would exempt any "Standard Operating Procedures" of the Department of Law and Public Safety from disclosure under OPRA. The Department published this proposed rule in the Register on July 1, 2002, 34 *N.J.R.* at 2270, but for reasons that are not disclosed by the record before us, the Department never adopted this rule.

A little more than a month after issuing Executive Order 21, Governor McGreevey issued a second Executive Order dealing with exemptions from disclosure under OPRA on August 13, 2002, Executive Order 26. This executive order modified certain of the specific exemptions from disclosure provided under Executive Order 21. Executive Order 26 also established exemptions from disclosure of a number of additional specific types of government records that had not been exempted by Executive Order 21. However, the "Standard Operating Procedures" of the Department of Law and Public Safety, which would have been exempted from disclosure by the proposed *N.J.A.C. 13:1E- 3.2(a)(2)*, were not included in this expanded list of specific exemptions.

In addition to these modifications and additions to the exemptions from disclosure of specific categories of governmental records, Executive Order 26 included a general provision, paragraph 6, which stated:

‘The remaining provisions of Executive Order No. 21 are hereby continued to the extent that they are not inconsistent with this Executive Order.’” *Id.* at 548-549.

Although the court agreed with Respondent’s contention that E.O. 26 directed State agencies to apply exemptions contained in proposed regulations to OPRA requests, the court stated that the contention did not answer the issue raised by claimant: whether a State agency’s proposed rules are still in effect nearly eight (8) years after the enactment of OPRA and the issuance of the enabling Executive Order.

In order to rule on the issue at hand, the court acknowledged that OPRA provides that it “shall not abrogate any exemption of a public record or government record from public access” by “Executive Order of the Governor.” *N.J.S.A. 47:1A-9.a*. The court next determined that the clear meaning of paragraph 4 of the Executive Order 21 was “to preserve, on a temporary basis, the confidentiality of government records that State agencies proposed to be exempt from disclosure under OPRA by administrative rules ... published but not yet adopted in conformity with the requirements of the [Administrative Procedures Act ...]” *Id.* at 550. The court held that:

“... we reverse the Council's final decision denying appellant's application for the disclosure under OPRA of the "New Jersey State Police Forensic Science Laboratory's policies and procedures on blood test analysis for testing swabs and smears for blood, DNA comparisons, semen, and saliva, specifically records concerning presumptive and confirmative testing," but delay the effectiveness of this decision until November 5, 2010. In the interim, the Department may withhold disclosure of the document.”<sup>9</sup> *Id.* at 555.

Although the GRC does not normally apply retroactively court decisions to complaints pursuant to Gibbons v. Gibbons, 86 N.J. 515, 521, 432 A.2d 80 (1981)(“it is a fundamental principle of jurisprudence that retroactive application of new laws involves a high risk of being unfair.” *Id.* at 522, 432 A.2d 80), the Appellate Division’s holding in Slaughter effectively rendered all proposed regulations invalid based on the fact that the “temporary basis” no longer exists.

Therefore, the Custodian’s denial of access pursuant to N.J.S.A. 47:1A-9, E.O. 26 and N.J.A.C. 10A:1-1.4 through 31-6.13, PRN 2002-228, July 1, 2002 is no longer a lawful denial based on the Appellate Division’s holding in Slaughter. However, the GRC declines to determine that the Custodian unlawfully denied access to the requested records based on the fact that her response was consistent with GRC case law prior to the Appellate Division’s decision. See Newark Morning Ledger Co., Publisher of the Star-Ledger v. Division of the State Police of the New Jersey Department of Law and Public Safety, Superior Court of New Jersey, Law Division - Mercer County, Docket No.: MER-L-1090-05 (Decided July 5, 2005) and Lumumba v. New Jersey Department of Corrections, GRC Complaint No. 2008-196 (April 2009).

Notwithstanding the Custodian’s assertion that N.J.S.A. 47:1A-9, E.O. 26 and N.J.A.C. 10A:1-1.4 through 31-6.13, PRN 2002-228, July 1, 2002, exempts from disclosure the records requested by the Complainant, the Council is permitted to raise additional defenses regarding the disclosure of records pursuant to Paff v. Township of Plainsboro, Docket No. A-2122-05T2 (App. Div. 2007).<sup>10</sup> In Paff, the complainant challenged the GRC’s authority to uphold a denial of access for reasons never raised by the custodian. Specifically, the Council did not uphold the basis for the redactions cited by the custodian. The Council, on its own initiative, determined that the Open Public Meetings Act (“OPMA”) prohibited the disclosure of the redacted portions to the requested executive session minutes. The Council affirmed the custodian’s denial to portions of the executive session minutes but for reasons other than those cited by the custodian. The complainant argued that the GRC did not have the authority to do anything other than determine whether the custodian’s cited basis for denial was lawful. The court held that:

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<sup>9</sup> The court noted that it was reluctant to require immediate disclosure of the requested records without affording the Department of Law & Public Safety an opportunity to consider whether to now adopt the exemption that would be provided by N.J.A.C. 13:1E-3.2(a)(2).

<sup>10</sup> On appeal from Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (March 2006).

“[t]he GRC has an independent obligation to ‘render a decision as to whether the record which is the subject of the complaint is a government record which must be made available for public access pursuant to’ OPRA...The GRC is not limited to assessing the correctness of the reasons given for the custodian’s initial determination; it is charged with determining if the initial decision was correct.”

The court further stated that:

“[a]side from the clear statutory mandate to decide if OPRA requires disclosure, the authority of a reviewing agency to affirm on reasons not advanced by the reviewed agency is well established. Cf. Bryant v. City of Atl. City, 309 N.J. Super. 596, 629-30 (App. Div. 1998) (citing Isko v. Planning Bd. Of Livingston, 51 N.J. 162, 175 (1968) (lower court decision may be affirmed for reasons other than those given below)); Dwyer v. Erie Inv. Co., 138 N.J. Super. 93, 98 (App. Div. 1975) (judgments must be affirmed even if lower court gives wrong reason), certif. denied, 70 N.J. 142 (1976); Bauer v. 141-149 Cedar Lane Holding Co., 42 N.J. Super. 110, 121 (App. Div. 1956) (question for reviewing court is propriety of action reviewed, not the reason for the action), aff’d, 24 N.J. 139 (1957).”

In the instant complaint, the Complainant requested all records within an SID file regarding the ban of a visitor and all records concerning the situation from July 7, 2008. OPRA provides for an exemption similar to that memorialized in *N.J.A.C. 10A:1-1.4* through 31-6.13, PRN 2002-228, July 1, 2002:

“[a] government record shall not include the following information which is deemed to be confidential ... *security measures* and *surveillance techniques* which, if disclosed, *would create a risk to the safety of persons, property, electronic data or software* ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

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 GRC<sup>11</sup> 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:

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<sup>11</sup> Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005). Travis Shelby Moore v. New Jersey Department of Corrections, 2009-144 – Findings and Recommendations of the Executive Director

“[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 SID reports to determine whether the records responsive to the Complainant’s OPRA request contain information which is exempt from disclosure as a security or surveillance measure which, if disclosed, would create a risk to the safety of persons involved in the July 7, 2008 incident pursuant to N.J.S.A. 47:1A-1.1.

**Whether the Custodian’s denial of access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

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.

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian’s denial of access pursuant to N.J.S.A. 47:1A-9, Executive Order No. 26 and N.J.A.C. 10A:1-1.4 through 31-6.13, PRN 2002-228, July 1, 2002 is no longer a lawful denial based on the Appellate Division’s holding in Slaughter v. Government Records Council, 413 N.J. Super. 544 (App. Div. 2010). However, the GRC declines to determine that the Custodian unlawfully denied access to the requested records based on the fact that her response was consistent with GRC case law prior to the Appellate Division’s decision. *See Newark Morning Ledger Co., Publisher of the Star-Ledger v. Division of the State Police of the New Jersey Department of Law and Public Safety*,

Superior Court of New Jersey, Law Division - Mercer County, Docket No.: MER-L-1090-05 (Decided July 5, 2005) *and Lumumba v. New Jersey Department of Corrections*, GRC Complaint No. 2008-196 (April 2009).

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 Special Investigation Division reports to determine the whether the records responsive to the Complainant's OPRA request contain information which is exempt from disclosure as a security or surveillance measure which, if disclosed, would create a risk to the safety of persons involved in the July 7, 2008 incident pursuant to N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver<sup>12</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), a document or redaction index<sup>13</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4<sup>14</sup>, that the records provided are the records 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. 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.

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

October 19, 2010

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<sup>12</sup> 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.

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

<sup>14</sup> "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."