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

RICHARD E. CONSTABLE, III
Acting Commissioner

FINAL DECISION

February 28, 2012 Government Records Council Meeting

Glenn D. Kassman
(on behalf of Joseph Tenaglia)
Complainant
v.
New Jersey Department of Corrections
Custodian of Record

Complaint No. 2009-297

At the February 28, 2012 public meeting, the Government Records Council ("Council") considered the February 21, 2012 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. Ms. Fedkenheuer provided the GRC with a legal certification and the unredacted records requested for the *in camera* review on December 3, 2010.[1] Therefore, the Ms. Fedkenheuer timely complied with the Council's November 30, 2010 Interim Order.

2. Although the original Custodian denied access to the Special Investigation Division's administrative investigation report sought in the Complainant's August 1, 2008 OPRA request pursuant to *N.J.A.C.* 10A:1-1.4, PRN 2002-228, July 1, 2002, which was later invalidated by the Court in Slaughter v. Government Records Council, 413 N.J. Super. 544 (App. Div. 2010), the Department of Corrections proposed new OPRA rules on October 4, 2010 that contain the same exemption for the Special Investigation Division's reports and records. Further, Executive Order 47 (Gov. Christie, 2010) allowed the Department of Corrections' proposed exemptions from public access to remain in full force and effect pending their adoption as final rules or until November 15, 2011. The proposed regulation was subsequently adopted as a new rule on February 7, 2011. Therefore, the original Custodian lawfully denied access to the Special Investigation Division's investigation report responsive to the Complainant's August 1, 2008 OPRA request pursuant to *N.J.A.C.* 10A:22-2.3. As such, the GRC did not conduct the *in camera* review it ordered in the Council's November 30, 2010 Interim Order because the denial of access to the requested records was lawful under OPRA.

3. The original Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to respond in writing to the Complainant's OPRA request within the statutorily mandated

[1] Ms. Fedkenheuer did not provide a redaction index since the records were denied in their totality. Ms. Fedkenheuer also did not provide a document index.

seven (7) business days. However, the original Custodian's denial of access to the internal documents relating to the December 9, 2007 incident at Northern State Prison is lawful pursuant to *N.J.A.C.* 10A:22-2.3, which exempts access to Special Investigation Division's investigations 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). Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original Custodian's delayed response does not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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 28th Day of February, 2012

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Denise Parkinson Vetti, Esq., Secretary
Government Records Council

Decision Distribution Date: March 5, 2012

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Supplemental Findings and Recommendations of the Executive Director
February 28, 2012 Council Meeting

Glenn D. Kassman[1] **GRC Complaint No. 2009-297**
(on behalf of Joseph Tenaglia)
Complainant

v.

New Jersey Department of Corrections[2]
Custodian of Records

Records Relevant to Complaint: "Subsequent to an incident that took place in Northern State Prison (NSP) on December 9, 2007, during which my client, inmate Joseph Tenaglia, was assaulted by other inmates, a memorandum or memoranda were issued regarding the incident and, I believe, the use of inmates to assist correction officers in search for contraband. I am requesting that I be provided with copies of any and all internal documents relating to the December 9, 2007 incident at NSP, including, but not limited to the aforementioned memorandum."

Request Made: August 27, 2009
Response Made: September 9, 2009 and September 30, 2009
Custodian: John Falvey[3]
GRC Complaint Filed: October 30, 2009

Records Submitted for *In Camera* Examination: Department of Corrections ("DOC"), Special Investigation Division's ("SID") Administrative Investigation Report relating to an incident that occurred on December 9, 2007 at NSP.

Background

November 30, 2010

Government Records Council's ("Council") Interim Order. At the November 30, 2010 public meeting, the Council considered the November 23, 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 failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or

[1] The Complainant is an attorney representing Joseph Tenaglia.
[2] No legal representation listed on record.
[3] The Custodian at the time of the Council's November 30, 2010 Interim Order was Deirdre Fedkenheuer. Furthermore, the Custodian at the time of the Complainant's OPRA request was Michelle Hammel.

requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). However, the Custodian's subsequent September 30, 2009 response was timely since it was made within the extended time frame until October 1, 2009.

2. 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).

3. 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 internal records 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 December 9, 2007 incident pursuant to N.J.S.A. 47:1A-1.1.

4. **The Custodian must deliver[4] to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 3 above), a document or redaction index[5], as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4[6], 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**.

5. 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.

[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.
[6] "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."

December 3, 2010

Council's Interim Order distributed to the parties.

December 7, 2010

Ms. Deirdre Fedkenheuer's ("Ms. Fedkenheuer") response to the Council's Interim Order attaching SID's Administrative Investigation Report relating to an incident that occurred on December 9, 2007 at NSP. Ms. Fedkenheuer certifies that the OPRA request subject to this complaint was filed prior to Ms. Fedkenheuer assuming duties as Custodian. Ms. Fedkenheuer attaches a legal certification dated December 1, 2009 from the original Custodian regarding the reasons for denying access to the Complainant's OPRA request.[7]

The original Custodian certifies that on August 27, 2009 the Complainant filed an OPRA request as follows:

> "Subsequent to an incident that took place in Northern State Prison (NSP) on December 9, 2007, during which my client, inmate Joseph Tenaglia, was assaulted by other inmates, a memorandum or memoranda were issued regarding the incident and, I believe, the use of inmates to assist correction officers in search for contraband. I am requesting that I be provided with copies of any and all internal documents relating to the December 9, 2007 incident at NSP, including, but not limited to the aforementioned memorandum."

The original Custodian also certifies that upon receipt of the OPRA request, she began inquiring into the existence of responsive records and determined that there were no memoranda referring to the use of inmates to assist corrections officers in searching for contraband. The original Custodian further certifies that there were no records responsive to the Complainant's OPRA request and thus, this request was denied. The original Custodian additionally certifies that with regard to the request for any and all internal records, it was determined that information was needed from the Special Investigations Division. Lastly, the original Custodian certifies that she responded to the Complainant's OPRA request for the portion of the request referring to internal documents, the Complainant should be advised that SID records are exempt from disclosure under OPRA for the following reasons:

- In addition to records designated as confidential pursuant to the provisions of N.J.S.A. 47:1A-1 et seq., any other law, regulation promulgated under the authority of any statute or Executive Order of the Governor, resolution of both houses of the Legislature, Executive Order of the Governor, Rules of Court, or any Federal law, Federal regulation or Federal order, may not be released. Information, documents, 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 subject to public access.

[7] It appears from the evidence of record that Ms. Hammel's legal certification is from the Department of Correction's Statement of Information received by the GRC on December 1, 2009.

- 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 is exempt from disclosure under OPRA pursuant to Executive Order 26 (Governor McGreevey, 2002)("EO 26").

- The Department of Corrections cannot provide information gathered by the SID with respect to their investigation because to do so might compromise investigative techniques utilized by the Department and/or ongoing investigations.

Analysis

Whether Ms. Fedkenheuer complied with the Council's November 30, 2010 Interim Order?

At its November 30, 2010 public meeting, the Council determined that the original Custodian's denial of access pursuant to N.J.S.A. 47:1A-9, EO 26 and the DOC'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 original 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 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 December 9, 2007 incident pursuant to N.J.S.A. 47:1A-1.1.

The Council therefore ordered the original Custodian to deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted records, 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 records provided are the records 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 December 10, 2010.

Ms. Fedkenheuer provided the GRC with a legal certification and the unredacted records requested for the *in camera* review on December 3, 2010.[8] Therefore, the Ms. Fedkenheuer timely complied with the Council's November 30, 2010 Interim Order.

Ms. Fedkenheuer did not provide a redaction index since the records were denied in their totality. Ms. Fedkenheuer also did not provide a document index.

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

OPRA provides that:

> "…government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions*…" (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

> "… any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file* … or *that has been received* in the course of his or its official business …" (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA further provides 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.

Paragraph 4 of Executive Order No. 21 (Governor McGreevey, 2002)("EO 21") provides in relevant part that:

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

EO 26 provides that:

> "[p]aragraphs 2 and 3 of [EO 21] are hereby rescinded … The remaining provisions of [EO 21] are hereby continued to the extent that they are not inconsistent with this Executive Order."

Executive Order No. 47 (Governor Christie, 2010)("EO 47") provides that:

> "[t]he exemptions from public access that have been proposed by [LPS] … shall be and shall remain in full force and effect pending their adoption as final rules pursuant to the provisions of the Administrative Procedure Act. Any provision of [EO 21] and [EO 26] that applies to any exemption initially proposed by an agency in the July 1, 2002 a New Jersey Register, is hereby rescinded. This Order shall take effect immediately and shall expire on November 15, 2011."

N.J.A.C. 10A:1-1.4, PRN 2002-228, July 1, 2002 provided that:

> "[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…[are exempt from disclosure]."

N.J.A.C. 10A:22-2.3 provides that:

> "[i]n addition to records designated as confidential pursuant to … [OPRA] … the following records shall not be considered government records subject to public access … [SID] investigations 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."

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.

At its November 30, 2010 meeting, the Council ordered an *in camera* review of the DOC's Administrative Investigation Report relating to an incident that occurred on December 9, 2007 at NSP to determine whether said report is exempt from public access as a security or surveillance measure which, if disclosed, would create a risk to the safety of persons involved in the December 9, 2007 incident pursuant to N.J.S.A. 47:1A-1.1. However, the Council declines to conduct the *in camera* review for the reasons discussed *infra*.

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 EO 26 and 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).

In Slaughter v. Government Records Council, 413 N.J. Super. 544 (App. Div. 2010), the complainant appealed a final decision of the Council which upheld the Division of Criminal Justice's ("DCJ") 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." DCJ denied access to the requested records pursuant to N.J.S.A. 47:1A-9.a., EO 21, EO 26, and *N.J.A.C.* 13:1E-3.2(a)2.

On appeal, the Court, tasked with deciding whether DCJ's proposed regulations remained in effect even after years of not being promulgated, discussed the impetus for DCJ's denial of access. Although the Court agreed with DCJ's contention that EO 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. The Court held that although DCJ could have properly relied upon proposed rule *N.J.A.C.* 13:1E-3.2(a)2 to deny the disclosure of records for the interim period established by EO 21 and EO 26, that interim period had since expired and therefore, EO 21 and EO 26 were no longer in effect.

However, the Court also stated that:

> "Nevertheless, we are reluctant to require immediate disclosure of those procedures, without affording [Law and Public Safety ("LPS")] an opportunity to consider whether to now adopt the exemption that would have been provided by *N.J.A.C.* 13:1E-3.2(a)(2). We note that a Law Division judge issued an unpublished decision in 2005, which seemed to indicate that [EO 21] provided continuing authority to State agencies to deny access to government records they had proposed to exempt from disclosure by administrative rule published before issuance of [EO 21] but never adopted. In addition, the Council expressly held in a decision issued in 2006 that [EO 21] exempted from disclosure documents covered by another subsection of proposed *N.J.A.C.* 13:1E-3.2(a). [LPS] may have concluded, based on these decisions, that it could rely upon *N.J.A.C.* 13:1E-3.2(a)(2) to deny access to government records without adoption of this proposed exemption in accordance with the APA." *Id.* at 555.

In so declaring, the Court recognized that at the time of the denial of access, it was reasonable for DCJ to rely upon its proposed rules prohibiting disclosure of the

requested records; further, the Court implicitly recognized the important public policy underlying non-disclosure of certain records made, maintained, kept on file or received in the course of business by DCJ. The Court therefore delayed the effectiveness of its decision to November 5, 2010 to permit DCJ time to propose and adopt new regulations regarding the disclosure of government records and held that in the interim, DCJ could withhold disclosure of the records. *Id*. at 555-556.

In the matter currently before the Council, the original Custodian's response to the Complainant's OPRA request and SOI argument relying on EO 21, EO 26 and *N.J.A.C.* 10A:1-1.4, PRN 2002-228, July 1, 2002, preceded the Court's holding in Slaughter. Thus, the Custodian's response was consistent with case law at the time.

After the Court's decision in Slaughter, LPS, DOC, the Department of Military and Veterans Affairs, the Department of Environmental Protection, and the Department of Community Affairs undertook the task of resubmitting proposed OPRA regulations for promulgation in accordance with the Administrative Procedures Act; however, it soon became apparent that the five (5) State agencies would be unable to meet the deadline set forth by the Slaughter Court. Therefore, Governor Chris Christie signed Executive Order 47 on November 3, 2010, which provides that:

> 1. The exemptions from public access that have been proposed by the Departments of Law and Public Safety, Corrections, Military and Veterans Affairs, Environmental Protection, and Community Affairs, set forth in Appendix A attached hereto, shall be and shall remain in full force and effect pending their adoption as final rules pursuant to the provisions of the Administrative Procedure Act.
> 2. Any provision of [EO 21] and [EO 26] that applies to any exemption initially proposed by an agency in the July 1, 2002 a New Jersey Register, is hereby rescinded.
> 3. This Order shall take effect immediately and shall expire on November 15, 2011."

DOC subsequently proposed regulations at *N.J.A.C.* 10A:22-2.3, October 4, 2010 exempting access to 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. EO 47 extended the promulgation deadline of DOC's proposed regulations until November 15, 2011. Henceforth, although the Court invalidated all proposed OPRA regulations including the one cited by the Custodian as of November 5, 2010, *N.J.A.C.* 10A:22-2.3 continued to remain in effect through November 15, 2011 pursuant to EO 47. The proposed regulation was adopted as a new rule on February 7, 2011.

Although the original Custodian denied access to the SID administrative investigation report sought in the Complainant's August 1, 2008 OPRA request pursuant to *N.J.A.C.* 10A:1-1.4, PRN 2002-228, July 1, 2002, which was later invalidated by the Court in Slaughter, *supra*, DOC proposed new OPRA rules on October 4, 2010 that contain the same exemption for SID reports and records. Further, EO 47 (Gov. Christie, 2010) allowed DOC's proposed exemptions from public access to remain in full force

and effect pending their adoption as final rules or until November 15, 2011. The proposed regulation was subsequently adopted as a new rule on February 7, 2011. Therefore, the original Custodian lawfully denied access to the SID investigation report responsive to the Complainant's August 1, 2008 OPRA request pursuant to *N.J.A.C.* 10A:22-2.3. As such, the GRC did not conduct the *in camera* review it ordered in the Council's November 30, 2010 Interim Order because the denial of access to the requested records was lawful under OPRA.

Whether the original Custodian's delayed response to the Complainant's OPRA request rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that:

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

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

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

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 the instant complaint, the Complainant requested the internal documents relating to the December 9, 2007 incident at NSP. The original Custodian responded on the eighth (8^{th}) business day and denied access to the requested records 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). While this exemption was invalidated by Slaughter, *supra*, such decision's effectiveness was delayed until November 5, 2010. Meanwhile, the DOC proposed new OPRA rules on October 4, 2010 which contains the exact same exemption from disclosure and EO 47 allows the DOC'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 November 30, 2010 Interim Order because the original Custodian's denial of access to the requested SID records is lawful given the course of events outlined above.

The original Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to respond in writing to the Complainant's OPRA request within the statutorily mandated seven (7) business days. However, the original Custodian's denial of access to the internal documents relating to the December 9, 2007 incident at NSP is lawful pursuant to *N.J.A.C.* 10A:22-2.3, which exempts access to SID's investigations 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). Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original Custodian's delayed response does not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Ms. Fedkenheuer provided the GRC with a legal certification and the unredacted records requested for the *in camera* review on December 3, 2010.[9] Therefore, the Ms. Fedkenheuer timely complied with the Council's November 30, 2010 Interim Order.

2. Although the original Custodian denied access to the Special Investigation Division's administrative investigation report sought in the Complainant's August 1, 2008 OPRA request pursuant to *N.J.A.C.* 10A:1-1.4, PRN 2002-228, July 1, 2002, which was later invalidated by the Court in Slaughter v. Government Records Council, 413 N.J. Super. 544 (App. Div. 2010), the Department of Corrections proposed new OPRA rules on October 4, 2010 that contain the same exemption for the Special Investigation Division's reports and records. Further, Executive Order 47 (Gov. Christie, 2010) allowed the Department of Corrections' proposed exemptions from public access to remain in full force and effect pending their adoption as final rules or until November 15, 2011. The proposed regulation was subsequently adopted as a new rule on February 7, 2011. Therefore, the

Ms. Fedkenheuer did not provide a redaction index since the records were denied in their totality. Ms. Fedkenheuer also did not provide a document index.

original Custodian lawfully denied access to the Special Investigation Division's investigation report responsive to the Complainant's August 1, 2008 OPRA request pursuant to *N.J.A.C.* 10A:22-2.3. As such, the GRC did not conduct the *in camera* review it ordered in the Council's November 30, 2010 Interim Order because the denial of access to the requested records was lawful under OPRA.

3. The original Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to respond in writing to the Complainant's OPRA request within the statutorily mandated seven (7) business days. However, the original Custodian's denial of access to the internal documents relating to the December 9, 2007 incident at Northern State Prison is lawful pursuant to *N.J.A.C.* 10A:22-2.3, which exempts access to Special Investigation Division's investigations 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). Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original Custodian's delayed response does not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Harlynne A. Lack, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

February 21, 2012

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

INTERIM ORDER

November 30, 2010 Government Records Council Meeting

Glenn D. Kassman
Complainant
v.
NJ Department of Corrections
Custodian of Record

Complaint No. 2009-297

At the November 30, 2010 public meeting, the Government Records Council ("Council") considered the November 23, 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 failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007). However, the Custodian's subsequent September 30, 2009 response was timely since it was made within the extended time frame until October 1, 2009.

2. 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).

3. 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 internal records 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 December 9, 2007 incident pursuant to N.J.S.A. 47:1A-1.1.

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

5. 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 30th Day of November, 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: December 3, 2010

[1] The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.
[2] The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.
[3] "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
November 30, 2010 Council Meeting

Glenn D. Kassman[1] **GRC Complaint No. 2009-297**
(on behalf of Joseph Tenaglia)
Complainant

v.

NJ Department of Corrections[2]
Custodian of Records

Records Relevant to Complaint: "Subsequent to an incident that took place in Northern State Prison (NSP) on December 9, 2007, during which my client, inmate Joseph Tenaglia, was assaulted by other inmates, a memorandum or memoranda were issued regarding the incident and, I believe, the use of inmates to assist correction officers in search for contraband. I am requesting that I be provided with copies of any and all internal documents relating to the December 9, 2007 incident at NSP, including, but not limited to the aforementioned memorandum."

Request Made: August 27, 2009
Response Made: September 9, 2009 and September 30, 2009
Custodian: Michelle Hammel
GRC Complaint Filed: October 30, 2009[3]

Background

August 27, 2009

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

September 9, 2009

Custodian's response to the OPRA request. The Custodian responded in writing to the Complainant's OPRA request on the eighth (8th) business day following receipt of such request. The Custodian requested an additional seven (7) business days for which to respond to the Complainant's request.

[1] The Complainant is an attorney representing Joseph Tenaglia.
[2] Represented by DAG Ellen M. Hale, on behalf of the NJ Attorney General.
[3] The GRC received the Denial of Access Complaint on said date.

September 18, 2009

Telephone call from Custodian's Secretary (Wendy Myers) to the Complainant. On the fifteenth (15th) businesss day following receipt of the Complainant's OPRA request, the Custodian's Secretary informed the Complainant that the request could not be completed until October 1, 2009 due to the absence (medical leave) of the Custodian. The Complainant agreed to the additional extension of time to respond to the request. (This conversation was documented as a "note" in OPRA Central.)[4]

September 30, 2009

Custodian's 2nd response to the OPRA request. On the twenty-third (23rd) business day following receipt of the Complainant's OPRA request, the Custodian stated that in response to the portion of the request referring to internal documents, the Complainant should be advised that Special Investigations Division ("SID") records are exempt from disclosure under OPRA for the following reasons:

- In addition to records designated as confidential pursuant to the provisions of N.J.S.A. 47:1A-1 et seq., as amended and supplemented, any other law, regulation promulgated under the authority of any statute or Executive Order of the Governor, resolution of both houses of the Legislature, Executive Order of the Governor, Rules of Court, or any Federal law, Federal regulation or Federal order, may not be released. Information 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 subject to public access.

- 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 is exempt from disclosure under OPRA pursuant to Executive Order 26 (Governor McGreevey).

- The Department of Corrections cannot provide information gathered by the SID with respect to their investigation because to do so might compromise investigative techniques utilized by the Department and/or ongoing investigations.

Additionally, the Custodian stated that there are no records that are responsive to the portion of the Complainant's request for memorandums referring to the use of inmates to assist corrections officers in searching for contraband,.

October 30, 2009

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

- Complainant's OPRA request dated August 27, 2009
- Letter from the Custodian to the Complainant dated September 9, 2009
- Letter from the Custodian to the Complainant dated September 30, 2009

[4] OPRA Central is the automated, online system used by departments of the State to receive, track and respond to OPRA records request from the public.

The Complainant discussed the circumstances of an attack on his client (inmate Joseph Tenaglia). However, those circumstances are not relevant to the adjudication of this Denial of Access Complaint. The Complainant does not agree to mediate this complaint.

November 6, 2009

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

November 13, 2009

E-mail from the Custodian's Counsel to the GRC. The Custodian's Counsel requested an extension of time until November 25, 2009 to complete the SOI.

November 16, 2009

E-mail from the GRC to the Custodian's Counsel. The GRC granted Counsel's request for an extension of time until November 25, 2009 to complete the SOI.

November 24, 2009

E-mail from the Custodian's Counsel to the GRC. The Custodian's Counsel requested an additional extension of time until December 1, 2009 to the complete the SOI.

November 25, 2009

E-mail from the GRC to the Custodian's Counsel. The GRC granted Counsel's request for an additional extension of time until December 1, 2009 to complete the SOI.

December 2, 2009

Letter from GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for a SOI on November 6, 2009 and to date has not received a response. Further, the GRC states that if the SOI is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

December 2, 2009

E-mail from the Custodian's Counsel to the GRC Case Manager (John Stewart). The Custodian's Counsel informed the GRC that the SOI was faxed to the GRC office yesterday to the attention of Frank Caruso.[5] The Custodian's Counsel further informed the GRC that she will fax the SOI to the GRC office again today.

December 2, 2009

E-mail from the GRC Case Manager (John Stewart) to the Custodian's Counsel. Mr. Stewart informed the Custodian's Counsel that Mr. Caruso has been on vacation this week and unable to receive faxes. Additionally, Mr. Stewart informed the Custodian's Counsel that he will await Counsel's faxed SOI today.[6]

[5] Frank Caruso is a Case Manager employed by the GRC. However, Mr. Caruso is not the Case Manager preparing this matter for adjudication.

[6] The SOI was actually sent to the GRC via e-mail.

December 2, 2009

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated August 27, 2009
- Letter from the Custodian to the Complainant dated September 9, 2009 (with an OPRA Central "note" regarding the Complainant's consent to a 3rd extension until October 1, 2009 dated September 18, 2009)
- Letter from the Custodian to the Complainant dated September 30, 2009
- Certification of Michelle Hammel dated December 1, 2009
- Copy of the Council's decision in U'Bay K. Lumumba v. NJ Department of Corrections, GRC Complaint No. 2008-196 (April 29, 2009)

The Custodian did not certify as to her search for responsive records nor the last date upon which records that may have been 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 does certify that she received the Complainant's OPRA request on August 27, 2009 and that request stated the following:

> **"**Subsequent to an incident that took place in Northern State Prison (NSP) on December 9, 2007, during which my client, inmate Joseph Tenaglia, was assaulted by other inmates, a memorandum or memoranda were issued regarding the incident and, I believe, the use of inmates to assist correction officers in search for contraband. I am requesting that I be provided with copies of any and all internal documents relating to the December 9, 2007 incident at NSP, including, but not limited to the aforementioned memorandum."

The Custodian also certifies that on September 30, 2009, after the Complainant consented to two (2) extensions of time for a response (extending until October 1, 2009), she responded to the Complainant denying his request for records because the portion of the request referring to internal documents are Special Investigations Division ("SID") records which are exempt from disclosure under OPRA for the following reasons:

- In addition to records designated as confidential pursuant to the provisions of N.J.S.A. 47:1A-1 et seq., as amended and supplemented, any other law, regulation promulgated under the authority of any statute or Executive Order of the Governor, resolution of both houses of the Legislature, Executive Order of the Governor, Rules of Court, or any Federal law, Federal regulation or Federal order, may not be released. Information 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 subject to public access.

- 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 is exempt from disclosure under OPRA pursuant to Executive Order 26 (Governor McGreevey).

- The Department of Corrections cannot provide you with information gathered by the SID with respect to their investigation because to do so might compromise investigative techniques utilized by the Department and/or ongoing investigations.

Further, the Custodian certifies that she additionally noted in her response that there were no responsive records to the Complainant's request for a memorandum issued subsequent to December 9, 2007 regarding inmates assisting the correction officers with the recovery of contraband.

The Custodian certifies that the records requested were lawfully denied because OPRA provides that it shall not abrogate or erode any executive or legislative privilege or grant of confidentiality 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. Additionally, the Custodian certifies that OPRA also provides that government records may be exempted from access by Executive Order of the Governor. N.J.S.A. 47:1A-9.a. The Custodian certifies that paragraph 4 of the Executive Order 21 (McGreevey 2002) provides in relevant part:

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

Further, the Custodian certifies that paragraph 6 of Executive Order 26 (McGreevey 2002) provides that, "[t]he remaining provisions of Executive Order No. 21 are hereby continued to the extent that they are not inconsistent with this Executive Order." The Custodian also certifies that the Department's proposed amendments provide the following:

> " … Special Investigations 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 … [are exempt from disclosure]." *N.J.A.C.* 10A:1-1.4 through 31-6.13, PRN 2002-228, July 1, 2002.

The Custodian certifies that there has never been a rescinding or modifying order regarding Executive Orders No. 21 and 26 and as such, the Department's proposed

regulations remain in effect pursuant to paragraph 4 of Executive Order 21, paragraph 6 of Executive Order No. 26 and Newark Morning Ledger Co., Publisher of the Star-Ledger v. Division of State Police of the NJ Department of Law and Public Safety, Law Division – Mercer County, Docket No. MER-L-1090-05 (July 5, 2005).

The Custodian concludes by certifying that her denial of the Complainant's OPRA request for "all internal documents" which are SID investigation records was appropriate for the reasons above and because of the Council's decision in Lumumba v. NJ Department of Corrections, GRC Complaint No. 2008-196 (May 2009), in which the GRC affirmed the Department's denial of SID investigation records because of the Department's proposed regulation *N.J.A.C.* 10A:1-1.4 through 31-6.13, PRN 2002-228, July 1, 2002.

Also, the Custodian certifies that there are no records responsive to the Complainant's request for a memorandum issued subsequent to December 9, 2007 regarding inmates assisting the correction officers with the recovery of contraband and thus this request was appropriately denied.

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 also provides that "[t]he provisions of this act … shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to … [OPRA]; any other statute; resolution of either or both House 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.

Executive Order 21 (McGreevey 2002), paragraph 4, provides in relevant part:

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

Executive Order 26 (McGreevey 2002), paragraph 6, provides that, "[t]he remaining provisions of Executive Order No. 21 are hereby continued to the extent that they are not inconsistent with this Executive Order."

N.J.A.C. 10A:1-1.4 through 31-6.13, PRN 2002-228, July 1, 2002 provides that:

> " … Special Investigations 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 … [are exempt from disclosure]." *N.J.A.C.* 10A:1-1.4 through 31-6.13, PRN 2002-228, July 1, 2002.

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 any and all internal documents relating to the December 9, 2007 incident at NSP, including, but not limited to the memorandum issued subsequent to December 9, 2007 regarding the use of inmates to assist correction officers in search for contraband. The Custodian received the OPRA request on August 27, 2009 and responded in writing on September 9, 2009 (eight (8) business days after the Custodian's receipt of the request) requesting an extension of seven (7) business days to respond. On September 18, 2009, the Custodian's Secretary telephoned the Complainant requesting a second (2nd) extension of time to respond until October 1, 2009 due to the Custodian's absence (medical leave) to which the Complainant agreed. The Custodian subsequently responded on September 30, 2009 denying access to the requested internal records which are SID investigative records pursuant to N.J.S.A. 47:1A-1 and the Department's proposed regulations. In the same written response, the Custodian denied access to the requested memorandum issued

subsequent to December 9, 2007 regarding the use of inmates to assist correction officers in search for contraband because such record does not exist.

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. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.[7] Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007). However, the Custodian's subsequent September 30, 2009 response was timely since it was made within the extended time frame until October 1, 2009.

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

[7] It is the GRC's position that a custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

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.

In the Slaughter complaint before the GRC, 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 (July 30, 2008).

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."[8] *Id*. at 555.

Although the GRC does not normally retroactively apply 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. 21, 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, *supra*. 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).

[8] 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).

Notwithstanding the Custodian's assertion that N.J.S.A. 47:1A-9, E.O. 21, 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).[9] 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:

> "[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 any and all internal records regarding the December 9, 2007 incident which are SID investigative records. 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.

[9] On appeal from Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (March 2006).

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[10] 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 any and all internal records regarding the December 9, 2007 incident which are SID investigative records 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 December 9, 2007 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?

[10] Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).

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 failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007). However, the Custodian's subsequent September 30, 2009 response was timely since it was made within the extended time frame until October 1, 2009.

2. 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).

3. 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 internal records 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 December 9, 2007 incident pursuant to N.J.S.A. 47:1A-1.1.

4. **The Custodian must deliver[11] to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 3 above), a document or redaction index[12], as well as a legal certification from the Custodian, in**

[11] 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.

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

accordance with N.J. Court Rule 1:4-4[13], 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.

5. 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 and
Approved By: Catherine Starghill, Esq.
Executive Director

November 23, 2009

[13] "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."