



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
Commissioner

FINAL DECISION

September 25, 2012 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2009-317

v.

City of Plainfield, Police Department (Union)
Custodian of Record

At the September 25, 2012 public meeting, the Government Records Council (“Council”) considered the September 18, 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 this complaint be dismissed because the Complainant withdrew this complaint from the Office of Administrative Law via letter from his legal counsel dated September 4, 2012. Therefore, no further adjudication is required.

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 25th Day of September, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: October 1, 2012



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
September 25, 2012 Council Meeting**

**Richard Rivera¹
Complainant**

GRC Complaint No. 2009-317

v.

**City of Plainfield, Police Department (Union)²
Custodian of Records**

Records Relevant to Complaint:

Copies of:

- 1) Computer-aided dispatching (“CAD”) summary report or similar police report for activities on January 9, 2009 from 4:00 p.m. to 7:00 p.m.
- 2) CAD abstract reports or similar police report for activities on January 9, 2009 from 4:00 p.m. to 7:00 p.m.
- 3) Police daily duty log for January 9, 2009 from 4:00 p.m. to 7:00 p.m. that includes all police officers, supervisors and civilians working during that time and what their assignments were.
- 4) Mobile data terminal transmissions to and from every police terminal for January 9, 2009 from 4:00 p.m. to 7:00 p.m.
- 5) All police radio recordings for January 9, 2009 from 4:00 p.m. to 7:00 p.m.
- 6) All police telephone recordings for January 9, 2009 from 4:00 p.m. to 7:00 p.m.
- 7) All police 911 telephone recordings for January 9, 2009 from 4:00 p.m. to 7:00 p.m.
- 8) CAD summary report or similar police report for activities on January 12, 2009 from 4:00 p.m. to 11:59 p.m.
- 9) CAD abstract reports or similar police report for activities on January 12, 2009 from 4:00 p.m. to 11:59 p.m.
- 10) Police daily duty log for January 12, 2009 from 4:00 p.m. to 11:59 p.m. that includes all police officers, supervisors and civilians working during that time and what their assignments were.

Request Made: November 5, 2009

Response Made: November 12, 2009

Custodian: Laddie Wyatt, City Clerk³

GRC Complaint Filed: November 30, 2009⁴

¹ Represented by Walter Luers, Esq., Law Offices of Walter M. Luers, LLC (Clinton, NJ).

² Represented by David L. Minchello, Esq., Ventantonio & Wildenhain, PC (Warren, NJ).

³ The Custodian who responded to the Complainant’s OPRA request and prepared the Statement of Information was Abubakar Jalloh, Deputy City Clerk. Thus, for purposes of this Denial of Access Complaint, the GRC refers to Mr. Jalloh as Custodian herein.

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

Background

March 27, 2012

Government Records Council's Interim Order. At the March 27, 2012 public meeting, the Government Records Council ("Council") considered the March 20, 2012 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 timely complied with the Council's May 24, 2011 Interim Order by providing the records to the Complainant and the Custodian's certified confirmation of compliance to the Executive Director within deadline to comply with said Order.
2. The Custodian's failure to grant access, deny access, or seek clarification of the Complainant's OPRA request within the additional two (2) week extension of time to do so resulted 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), the evidence of record did not support a conclusion that the Complainant's OPRA request Items No. 1, 2, 3, 8, 9, and 10 represented a substantial disruption of the business of the City of Plainfield Police Department. Moreover, the Custodian failed to bear his burden of proof under N.J.S.A. 47: 1A-6 that he attempted to reach a reasonable solution with the Complainant that accommodates the interests of the Complainant and the agency prior to the denial of the Complainant's request as required by N.J.S.A. 47:1A-5.g. and the Custodian failed to bear his burden of proving that the Complainant's OPRA request Items No. 1, 2, 3, 8, 9 and 10 are exempt from disclosure under OPRA as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1. However, the Complainant's OPRA request Items No. 4, 5, 6, and 7 are invalid under OPRA because they are overly broad and fail to identify specific government records sought, and request Items No. 3 and 10 are exempt from the definition of a government record pursuant to N.J.S.A. 47:1A-1.1 because they sought police daily duty logs, which records necessarily include details regarding surveillance techniques and staffing levels which, if disclosed, could pose a risk to the safety of police personnel as well as civilians employed by the Plainfield Police Department. Finally, the Custodian complied with the Council's May 24, 2011 Interim Order which required him to disclose the records responsive to request Items No. 1, 2, 8 and 9 of the Complainant's OPRA request within five (5) business days from receipt of the Council's Interim Order with appropriate redactions as necessary, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance. 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, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful

violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and the Council's May 24, 2011 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this complaint do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

March 29, 2012

Council's Interim Order distributed to the parties.

April 26, 2012

Complaint transmitted to the Office of Administrative Law ("OAL").

September 4, 2012

Letter from Complainant's Counsel to the Administrative Law Judge and the GRC. Counsel states that this matter has been resolved and the Complainant withdraws this complaint.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint be dismissed because the Complainant withdrew this complaint from the Office of Administrative Law via letter from his legal counsel dated September 4, 2012. Therefore, no further adjudication is required.

Prepared and
Approved By: Karyn Gordon, Esq.
Acting Executive Director

September 18, 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

RICHARD E. CONSTABLE, III
Acting Commissioner

INTERIM ORDER

March 27, 2012 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2009-317

v.

City of Plainfield Police Department (Union)
Custodian of Record

At the March 27, 2012 public meeting, the Government Records Council (“Council”) considered the March 20, 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. The Custodian timely complied with the Council’s May 24, 2011 Interim Order by providing the records to the Complainant and the Custodian’s certified confirmation of compliance to the Executive Director within deadline to comply with said Order.
2. The Custodian’s failure to grant access, deny access, or seek clarification of the Complainant’s OPRA request within the additional two (2) week extension of time to do so resulted 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), the evidence of record did not support a conclusion that the Complainant’s OPRA request Items No. 1, 2, 3, 8, 9, and 10 represented a substantial disruption of the business of the City of Plainfield Police Department. Moreover, the Custodian failed to bear his burden of proof under N.J.S.A. 47: 1A-6 that he attempted to reach a reasonable solution with the Complainant that accommodates the interests of the Complainant and the agency prior to the denial of the Complainant’s request as required by N.J.S.A. 47:1A-5.g. and the Custodian failed to bear his burden of proving that the Complainant’s OPRA request Items No. 1, 2, 3, 8, 9 and 10 are exempt from disclosure under OPRA as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1. However, the Complainant’s OPRA request Items No. 4, 5, 6, and 7 are invalid under OPRA because they are overly broad and fail to identify specific government records sought, and request Items No. 3 and 10 are exempt from the definition of a government record pursuant to N.J.S.A. 47:1A-1.1. because they sought police daily duty logs, which records necessarily include details regarding surveillance techniques and staffing levels which, if disclosed, could pose a risk to the safety of police personnel as well as civilians employed by the Plainfield Police Department. Finally, the Custodian complied with the Council’s May 24, 2011 Interim Order which required him



to disclose the records responsive to request Items No. 1, 2, 8 and 9 of the Complainant's OPRA request within five (5) business days from receipt of the Council's Interim Order with appropriate redactions as necessary, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance. 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, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and the Council's May 24, 2011 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this complaint do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Interim Order Rendered by the
Government Records Council
On The 27th Day of March, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Catherine Starghill, Executive Director
Government Records Council

Decision Distribution Date: March 29, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
March 27, 2012 Council Meeting**

**Richard Rivera¹
Complainant**

GRC Complaint No. 2009-317

v.

**City of Plainfield Police Department (Union)²
Custodian of Records**

Records Relevant to Complaint:

Copies of:

- 1) Computer-aided dispatching (“CAD”) summary report or similar police report for activities on January 9, 2009 from 4:00 p.m. to 7:00 p.m.
- 2) CAD abstract reports or similar police report for activities on January 9, 2009 from 4:00 p.m. to 7:00 p.m.
- 3) Police daily duty log for January 9, 2009 from 4:00 p.m. to 7:00 p.m. that includes all police officers, supervisors and civilians working during that time and what their assignments were.
- 4) Mobile data terminal transmissions to and from every police terminal for January 9, 2009 from 4:00 p.m. to 7:00 p.m.
- 5) All police radio recordings for January 9, 2009 from 4:00 p.m. to 7:00 p.m.
- 6) All police telephone recordings for January 9, 2009 from 4:00 p.m. to 7:00 p.m.
- 7) All police 911 telephone recordings for January 9, 2009 from 4:00 p.m. to 7:00 p.m.
- 8) CAD summary report or similar police report for activities on January 12, 2009 from 4:00 p.m. to 11:59 p.m.
- 9) CAD abstract reports or similar police report for activities on January 12, 2009 from 4:00 p.m. to 11:59 p.m.
- 10) Police daily duty log for January 12, 2009 from 4:00 p.m. to 11:59 p.m. that includes all police officers, supervisors and civilians working during that time and what their assignments were.

Request Made: November 5, 2009

Response Made: November 12, 2009

Custodian: Laddie Wyatt, City Clerk³

GRC Complaint Filed: November 30, 2009⁴

¹ Represented by Walter Luers, Esq., Law Offices of Walter M. Luers, LLC (Clinton, NJ).

² Represented by David L. Minchello, Esq., Ventantonio & Wildenhain, PC (Warren, NJ).

³ The Custodian who responded to the Complainant’s OPRA request and prepared the Statement of Information was Abubakar Jalloh, Deputy City Clerk. Thus, for purposes of this Denial of Access Complaint, the GRC refers to Mr. Jalloh as Custodian herein.

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

Background

May 24, 2011

Government Records Council's Interim Order. At the May 24, 2011 public meeting, the Government Records Council ("Council") considered the May 17, 2011 Executive Director's Findings and Recommendations and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council therefore found that:

1. Because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Starkey v. NJ Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009).
2. Because the evidence of record indicates that the Custodian did not provide the requested records by the extended date to do so and because the Custodian certified in the Statement of Information that no records had been provided to the Complainant as of the date of the submission of the Statement of Information on December 23, 2009, the Custodian's failure to grant access, deny access, or seek clarification of the Complainant's OPRA request within the additional two (2) week extension of time to do so 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).
3. The Complainant's OPRA request Items No. 4, 5, 6, and 7 are extremely similar to the requests in Rivera v. Wall Police Department (Monmouth), GRC Complaint Number 2008-280 (June 2010) and Rivera v. Wall Police Department (Monmouth), GRC Complaint No. 2008-281 (July 2010); the Complainant's request for these Items is invalid under OPRA because they are overly broad and fail to identify specific government records sought. Moreover, because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to conduct research to locate records potentially responsive to the Complainant's request pursuant to the Superior Court's decisions in MAG Entertainment v. Div. of ABC, 375 N.J. Super. 534, 549 (App. Div. 2005), Bent v. Township of Stafford, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builder's Ass'n v. N.J. Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), and the Council's decision in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
4. Request Items No. 1, 2, 3, 8, 9 and 10 identify specific government records sought; the request for such Items is therefore valid under OPRA. *See* MAG Entertainment v. Div. of ABC, 375 N.J. Super. 534, 549 (App. Div. 2005), Bent v. Township of Stafford, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builder's Ass'n v. N.J. Council on Affordable Housing, 390 N.J.

Super. 166 (App. Div. 2007), Burnett v. County of Gloucester, 415 N.J. Super. 506 (App. Div. 2010), and the Council's decision in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

5. The evidence of record does not support a conclusion that the Complainant's OPRA request Items No. 1, 2, 3, 8, 9, and 10 represent a substantial disruption of the business of the City of Plainfield Police Department. *See* Dittrich v. City of Hoboken, GRC Complaint No. 2008-13 (June 2009); Vessio v. New Jersey Department of Community Affairs, Division of Fire Safety, GRC Complaint No. 2007-63 (May 2007); Caggiano v. Borough of Stanhope, GRC Complaint No. 2006-220 (September 2007). Moreover, the Custodian failed to bear his burden of proof under N.J.S.A. 47:1A-6 that he attempted to reach a reasonable solution with the Complainant that accommodates the interests of the Complainant and the agency prior to the denial of the Complainant's request as required by N.J.S.A. 47:1A-5.g.
6. Because the Custodian herein has not submitted any competent, credible evidence that the records requested by the Complainant are in fact part of any ongoing investigation by the City of Plainfield Police Department, the Custodian has failed to bear his burden of proving that the Complainant's OPRA request Items No. 1, 2, 3, 8, 9 and 10 are exempt from disclosure under OPRA as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1.
7. Because request Items No. 3 and 10 sought police daily duty logs, which records necessarily include details regarding surveillance techniques and staffing levels which, if disclosed, could pose a risk to the safety of police personnel as well as civilians employed by the Plainfield Police Department, such records are exempt from the definition of a government record pursuant to N.J.S.A. 47:1A-1.1.
8. **The Custodian shall disclose the records responsive to request Items No. 1, 2, 8 and 9 of the Complainant's OPRA request within five (5) business days from receipt of the Council's Interim Order with appropriate redactions as necessary, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁵, to the Executive Director.⁶ If no records responsive to the request exist, the Custodian shall so certify to the Complainant and provide certified**

⁵ "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."

⁶ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁷, to the Executive Director within the time period set forth above.

9. 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.

May 26, 2011

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

June 1, 2011

Letter from Custodian's Counsel to the GRC. Custodian's Counsel responds to the Council's Interim Order with the following attachments:

- Certification of Abubakar Jalloh, Municipal Clerk
- CAD Summary Report for Activities on January 9, 2009 from 4 p.m. to 7 p.m.
- CAD Reports #9001200 to #9001218
- CAD Summary Report for Activities on January 12, 2009 from 4 p.m. to 7 p.m.
- CAD Reports #9001504 to #9001554

Custodian's Counsel states that redacted records have been provided to the Complainant. Complainant's Counsel further states that the Unit ID number has been redacted from every CAD report, as well as the name of the author of the police report, and that these redactions were made pursuant to McClain v. College Hospital, 99 N.J. 346 (1985), McElwee v. Borough of Fieldsboro, 400 N.J. Super. 388 (App. Div. 2008), N.J.S.A. 47:1A-1.1 and N.J.A.C. 13:1E-3.2(a)(13)(proposed). Complainant's Counsel also states that all personal information regarding victims contained in the "reporting person" section of the CAD reports has been redacted pursuant to N.J.S.A. 47:1A-1.1.

The Custodian legally certifies as to the assertions made in Counsel's letter.

February 6, 2012

E-mail from the GRC to the Complainant. The GRC states that pursuant to a telephone conversation of this date, it requests that the Complainant advise whether all records have been received and whether he is satisfied with the redactions made to the records provided to him by the Custodian on June 1, 2011.⁸

February 13, 2012

E-mail from the GRC to the Custodian. The GRC states that additional information is required in this matter. The GRC states that it received from the City on June 3, 2011 a response to the Council's May 24, 2011 Interim Order, which required that the City disclose a number of records to the Complainant; the GRC reviewed the response and is unable to determine whether the Custodian forwarded a copy of the

⁷ "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."

⁸ The Complainant failed to respond to the GRC's request.

packet to the Complainant. The GRC notes that the Council's Interim Order required that the Custodian provide "certified confirmation of compliance, in accordance with N.J. Court Rule 1:1-4 to the Executive Director." The GRC states that to date, it has not received definitive confirmation that the Complainant was provided with the City's response.

The GRC requests that the Custodian provide certified confirmation of compliance with the Council's May 24, 2011 Interim Order to the Executive Director by February 16, 2012.

February 15, 2012

E-mail from the Custodian to the GRC, attaching a certification. The Custodian certifies that in compliance with the Council's May 24, 2011 Interim Order, he sent a copy of the requested records to the Complainant's Counsel. The Custodian further certifies that he confirmed receipt of the requested records with Complainant's Counsel in a telephone conversation.

Analysis

Whether the Custodian complied with the Council's May 24, 2011 Interim Order?

At its May 24, 2011 public meeting, the Council determined that the Custodian shall disclose the records responsive to request Items No. 1, 2, 8 and 9 of the Complainant's OPRA request within five (5) business days from receipt of the Council's Interim Order with appropriate redactions as necessary, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁹, to the Executive Director.¹⁰

On June 1, 2011, the Custodian provided certified confirmation that he provided the following records responsive to such request items to the Complainant:

- CAD Summary Report for Activities on January 9, 2009 from 4 p.m. to 7 p.m.
- CAD Reports #9001200 to #9001218
- CAD Summary Report for Activities on January 12, 2009 from 4 p.m. to 7 p.m.
- CAD Reports #9001504 to #9001554

The Custodian confirmed that such records were provided to the Complainant via a certification to the GRC on February 15, 2012.

⁹ "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."

¹⁰ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Therefore, the Custodian timely complied with the Council's May 24, 2011 Interim Order by providing the records to the Complainant and the Custodian's certified confirmation of compliance to the Executive Director within deadline to comply with said Order.

Whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under 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 matter before the Council, the Custodian's failure to grant access, deny access, or seek clarification of the Complainant's OPRA request within the additional two (2) week extension of time to do so resulted 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), the evidence of record did not support a conclusion that the Complainant's OPRA request Items No. 1, 2, 3, 8, 9, and 10 represented a substantial disruption of the business of the City of Plainfield Police Department. Moreover, the Custodian failed to bear his burden of proof under N.J.S.A. 47: 1A-6 that he attempted to reach a reasonable solution with

the Complainant that accommodates the interests of the Complainant and the agency prior to the denial of the Complainant's request as required by N.J.S.A. 47:1A-5.g. and the Custodian failed to bear his burden of proving that the Complainant's OPRA request Items No. 1, 2, 3, 8, 9 and 10 are exempt from disclosure under OPRA as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1. However, the Complainant's OPRA request Items No. 4, 5, 6, and 7 are invalid under OPRA because they are overly broad and fail to identify specific government records sought, and request Items No. 3 and 10 are exempt from the definition of a government record pursuant to N.J.S.A. 47:1A-1.1. because they sought police daily duty logs, which records necessarily include details regarding surveillance techniques and staffing levels which, if disclosed, could pose a risk to the safety of police personnel as well as civilians employed by the Plainfield Police Department. Finally, the Custodian complied with the Council's May 24, 2011 Interim Order which required him to disclose the records responsive to request Items No. 1, 2, 8 and 9 of the Complainant's OPRA request within five (5) business days from receipt of the Council's Interim Order with appropriate redactions as necessary, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance. 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, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Whether the Complainant is a prevailing party entitled to an award of prevailing party attorney fees?

OPRA provides that:

“[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:

- institute a proceeding to challenge the custodian's decision by filing an action in Superior Court...; or
- in lieu of filing an action in Superior Court, file a complaint with the Government Records Council...

A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6.

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the court held that a complainant is a “prevailing party” if he/she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct. *Id.* at 432. Additionally, the court held that attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. *Id.*

In Teeters, the complainant appealed from a final decision of the Government Records Council which denied an award for attorney's fees incurred in seeking access to

certain public records via two complaints she filed under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-7.f., against the Division of Youth and Family Services (“DYFS”). The records sought involved an adoption agency having falsely advertised that it was licensed in New Jersey. DYFS eventually determined that the adoption agency violated the licensing rules and reported the results of its investigation to the complainant. The complainant received the records she requested upon entering into a settlement with DYFS. The court found that the complainant engaged in reasonable efforts to pursue her access rights to the records in question and sought attorney assistance only after her self-filed complaints and personal efforts were unavailing. *Id.* at 432. With that assistance, she achieved a favorable result that reflected an alteration of position and behavior on DYFS’s part. *Id.* As a result, the complainant was a prevailing party entitled to an award of a reasonable attorney's fee. Accordingly, the Court remanded the determination of reasonable attorney’s fees to the GRC for adjudication.

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, *supra*, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties.” *Id.* at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney's fees. *Id.* at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

As the New Jersey Supreme Court noted in Mason, Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, *citing* Teeters, *supra*, 387 N.J. Super. at 429; *see, e.g.*, Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), *certif. denied*, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

The Mason Court then examined the catalyst theory within the context of New Jersey law, stating that:

“New Jersey law has long recognized the catalyst theory. In 1984, this Court considered the term “prevailing party” within the meaning of the federal Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C.A. § 1988. Singer v. State, 95 N.J. 487, 495, *cert. denied*, New Jersey v. Singer, 469 U.S. 832, 105 S. Ct. 121, 83 L. Ed. 2d 64 (1984). The Court adopted a two-part test espousing the catalyst theory, consistent with federal law at

the time: (1) there must be "a factual causal nexus between plaintiff's litigation and the relief ultimately achieved;" in other words, plaintiff's efforts must be a "necessary and important factor in obtaining the relief," *Id.* at 494-95, 472 A.2d 138 (internal quotations and citations omitted); and (2) "it must be shown that the relief ultimately secured by plaintiffs had a basis in law," *Id.* at 495. *See also* North Bergen Rex Transport v. TLC, 158 N.J. 561, 570-71 (1999)(applying Singer fee-shifting test to commercial contract).

Also prior to Buckhannon, the Appellate Division applied the catalyst doctrine in the context of the Law Against Discrimination, N.J.S.A. 10:5-1 to -49, and the Americans with Disabilities Act, 42 U.S.C.A. §§ 12101-12213. Warrington v. Vill. Supermarket, Inc., 328 N.J. Super. 410 (App. Div. 2000). The Appellate Division explained that "[a] plaintiff is considered a prevailing party 'when actual relief on the merits of [the] claim materially alters the relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'" *Id.* at 420 (quoting Farrar v. Hobby, 506 U.S. 103, 111-12, 113 S. Ct. 566, 573, 121 L. Ed. 2d 494, 503 (1992)); see also Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (noting that Hensley v. Eckerhart "generously" defines "a prevailing party [a]s one who succeeds 'on any significant issue in litigation [that] achieves some of the benefit the parties sought in bringing suit'" (quoting Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 1938, 76 L. Ed. 2d 40, 50 (1983))). The panel noted that the "form of the judgment is not entitled to conclusive weight"; rather, courts must look to whether a plaintiff's lawsuit acted as a catalyst that prompted defendant to take action and correct an unlawful practice. Warrington, *supra*, 328 N.J. Super. at 421. A settlement that confers the relief sought may still entitle plaintiff to attorney's fees in fee-shifting matters. *Id.* at 422.

This Court affirmed the catalyst theory again in 2001 when it applied the test to an attorney misconduct matter. Packard-Bamberger, *supra*, 167 N.J. at 444. In an OPRA matter several years later, New Jerseyans for a Death Penalty Moratorium v. New Jersey Department of Corrections, 185 N.J. 137, 143-44 (2005)(NJDPM), this Court directed the Department of Corrections to disclose records beyond those it had produced voluntarily. In ordering attorney's fees, the Court acknowledged the rationale underlying various fee-shifting statutes: to insure that plaintiffs are able to find lawyers to represent them; to attract competent counsel to seek redress of statutory rights; and to "even the fight" when citizens challenge a public entity. *Id.* at 153.

After Buckhannon, and after the trial court's decision in this case, the Appellate Division decided Teeters. The plaintiff in Teeters requested records from the Division of Youth and Family Services (DYFS), which DYFS declined to release. 387 N.J. Super. at 424. After the GRC preliminarily found in plaintiff's favor, the parties reached a settlement

agreement leaving open whether plaintiff was a "prevailing party" under OPRA. *Id.* at 426-27.

The Appellate Division declined to follow Buckhannon and held that plaintiff was a "prevailing party" entitled to reasonable attorney's fees; in line with the catalyst theory, plaintiff's complaint brought about an alteration in DYFS's position, and she received a favorable result through the settlement reached. *Id.* at 431-34. In rejecting Buckhannon, the panel noted that "New Jersey statutes have a different tone and flavor" than federal fee-shifting laws. *Id.* at 430. "Both the language of our statutes and the terms of court decisions in this State dealing with the issue of counsel fee entitlements support a more indulgent view of petitioner's claim for an attorney's fee award than was allowed by the majority in Buckhannon ... " *Id.* at 431, 904 A.2d 747. As support for this proposition, the panel surveyed OPRA, Packard-Bamberger, Warrington, and other cases.

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. Under the prior RTKL, "[a] plaintiff in whose favor such an order [requiring access to public records] issues ... may be awarded a reasonable attorney's fee not to exceed \$ 500.00." N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$ 500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA." (Footnote omitted.) Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008).

The Court in Mason, *supra*, at 76, held that "requestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) 'a factual causal nexus between plaintiff's litigation and the relief ultimately achieved'; and (2) 'that the relief ultimately secured by plaintiffs had a basis in law.'" Singer v. State, 95 N.J. 487, 495, cert denied (1984)."

In the matter before the Council, the Council's May 24, 2011 Interim Order required the Custodian to provide the records responsive to request Items No. 1, 2, 8 and 9 of the Complainant's OPRA request within five (5) business days from receipt of the Council's Interim Order with appropriate redactions as necessary. The Custodian provided certified confirmation to the Executive Director that he provided such records to the Complainant on June 1, 2011.

Thus, pursuant to Teeters, *supra*, and the Council's May 24, 2011 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason, *supra*, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party

entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, supra, and Mason, supra. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this complaint do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian timely complied with the Council's May 24, 2011 Interim Order by providing the records to the Complainant and the Custodian's certified confirmation of compliance to the Executive Director within deadline to comply with said Order.
2. The Custodian's failure to grant access, deny access, or seek clarification of the Complainant's OPRA request within the additional two (2) week extension of time to do so resulted 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), the evidence of record did not support a conclusion that the Complainant's OPRA request Items No. 1, 2, 3, 8, 9, and 10 represented a substantial disruption of the business of the City of Plainfield Police Department. Moreover, the Custodian failed to bear his burden of proof under N.J.S.A. 47: 1A-6 that he attempted to reach a reasonable solution with the Complainant that accommodates the interests of the Complainant and the agency prior to the denial of the Complainant's request as required by N.J.S.A. 47:1A-5.g. and the Custodian failed to bear his burden of proving that the Complainant's OPRA request Items No. 1, 2, 3, 8, 9 and 10 are exempt from disclosure under OPRA as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1. However, the Complainant's OPRA request Items No. 4, 5, 6, and 7 are invalid under OPRA because they are overly broad and fail to identify specific government records sought, and request Items No. 3 and 10 are exempt from the definition of a government record pursuant to N.J.S.A. 47:1A-1.1. because they sought police daily duty logs, which records necessarily include details regarding surveillance techniques and staffing levels which, if disclosed, could pose a risk to the safety of police personnel as well as civilians employed by the Plainfield Police Department. Finally, the Custodian complied with the Council's May 24, 2011 Interim Order which required him to disclose the records responsive to request Items No. 1, 2, 8 and 9 of the Complainant's OPRA request within five (5) business

days from receipt of the Council's Interim Order with appropriate redactions as necessary, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance. 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, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and the Council's May 24, 2011 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this complaint do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Prepared By: Karyn Gordon, Esq.
In House Counsel

Approved By: Catherine Starghill, Esq.
Executive Director

March 20, 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

May 24, 2011 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2009-317

v.

City of Plainfield Police Department (Union)
Custodian of Record

At the May 24, 2011 public meeting, the Government Records Council (“Council”) considered the May 17, 2011 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Starkey v. NJ Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009).
2. Because the evidence of record indicates that the Custodian did not provide the requested records by the extended date to do so and because the Custodian certified in the Statement of Information that no records had been provided to the Complainant as of the date of the submission of the Statement of Information on December 23, 2009, the Custodian’s failure to grant access, deny access, or seek clarification of the Complainant’s OPRA request within the additional two (2) week extension of time to do so 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).
3. The Complainant’s OPRA request Items No. 4, 5, 6, and 7 are extremely similar to the requests in Rivera v. Wall Police Department (Monmouth), GRC Complaint Number 2008-280 (June 2010) and Rivera v. Wall Police Department (Monmouth), GRC Complaint No. 2008-281 (July 2010); the Complainant’s request for these Items is invalid under OPRA because they are overly broad and fail to identify specific government records sought. Moreover, because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to conduct research to locate records potentially responsive to the Complainant’s request pursuant to the Superior Court’s decisions in MAG



Entertainment v. Div. of ABC, 375 N.J. Super. 534, 549 (App. Div. 2005), Bent v. Township of Stafford, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builder's Ass'n v. N.J. Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), and the Council's decision in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

4. Request Items No. 1, 2, 3, 8, 9 and 10 identify specific government records sought; the request for such Items is therefore valid under OPRA. *See* MAG Entertainment v. Div. of ABC, 375 N.J. Super. 534, 549 (App. Div. 2005), Bent v. Township of Stafford, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builder's Ass'n v. N.J. Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Burnett v. County of Gloucester, 415 N.J. Super. 506 (App. Div. 2010), and the Council's decision in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
5. The evidence of record does not support a conclusion that the Complainant's OPRA request Items No. 1, 2, 3, 8, 9, and 10 represent a substantial disruption of the business of the City of Plainfield Police Department. *See* Dittrich v. City of Hoboken, GRC Complaint No. 2008-13 (June 2009); Vessio v. New Jersey Department of Community Affairs, Division of Fire Safety, GRC Complaint No. 2007-63 (May 2007); Caggiano v. Borough of Stanhope, GRC Complaint No. 2006-220 (September 2007). Moreover, the Custodian failed to bear his burden of proof under N.J.S.A. 47:1A-6 that he attempted to reach a reasonable solution with the Complainant that accommodates the interests of the Complainant and the agency prior to the denial of the Complainant's request as required by N.J.S.A. 47:1A-5.g.
6. Because the Custodian herein has not submitted any competent, credible evidence that the records requested by the Complainant are in fact part of any ongoing investigation by the City of Plainfield Police Department, the Custodian has failed to bear his burden of proving that the Complainant's OPRA request Items No. 1, 2, 3, 8, 9 and 10 are exempt from disclosure under OPRA as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1.
7. Because request Items No. 3 and 10 sought police daily duty logs, which records necessarily include details regarding surveillance techniques and staffing levels which, if disclosed, could pose a risk to the safety of police personnel as well as civilians employed by the Plainfield Police Department, such records are exempt from the definition of a government record pursuant to N.J.S.A. 47:1A-1.1.
8. **The Custodian shall disclose the records responsive to request Items No. 1, 2, 8 and 9 of the Complainant's OPRA request within five (5) business days from receipt of the Council's Interim Order with appropriate redactions as necessary, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹, to the Executive Director.² If no records**

¹ "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."

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the

responsive to the request exist, the Custodian shall so certify to the Complainant and provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4³, to the Executive Director within the time period set forth above.

9. 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 24th Day of May, 2011

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: May 26, 2011

record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

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
May 24, 2011 Council Meeting**

**Richard Rivera¹
Complainant**

GRC Complaint No. 2009-317

v.

**City of Plainfield, Police Department (Union)²
Custodian of Records**

Records Relevant to Complaint:

Copies of:

- 1) Computer-aided dispatching (“CAD”) summary report or similar police report for activities on January 9, 2009 from 4:00 p.m. to 7:00 p.m.
- 2) CAD abstract reports or similar police report for activities on January 9, 2009 from 4:00 p.m. to 7:00 p.m.
- 3) Police daily duty log for January 9, 2009 from 4:00 p.m. to 7:00 p.m. that includes all police officers, supervisors and civilians working during that time and what their assignments were.
- 4) Mobile data terminal transmissions to and from every police terminal for January 9, 2009 from 4:00 p.m. to 7:00 p.m.
- 5) All police radio recordings for January 9, 2009 from 4:00 p.m. to 7:00 p.m.
- 6) All police telephone recordings for January 9, 2009 from 4:00 p.m. to 7:00 p.m.
- 7) All police 911 telephone recordings for January 9, 2009 from 4:00 p.m. to 7:00 p.m.
- 8) CAD summary report or similar police report for activities on January 12, 2009 from 4:00 p.m. to 11:59 p.m.
- 9) CAD abstract reports or similar police report for activities on January 12, 2009 from 4:00 p.m. to 11:59 p.m.
- 10) Police daily duty log for January 12, 2009 from 4:00 p.m. to 11:59 p.m. that includes all police officers, supervisors and civilians working during that time and what their assignments were.

Request Made: November 5, 2009

Response Made: November 12, 2009

Custodian: Laddie Wyatt, City Clerk³

GRC Complaint Filed: November 30, 2009⁴

¹ Represented by Walter Luers, Esq., Law Offices of Walter M. Luers, LLC (Oxford, NJ).

² Represented by David L. Minchello, Esq., Ventantonio & Wildenhain, PC (Warren, NJ).

³ The Custodian who responded to the Complainant’s OPRA request and prepared the Statement of Information was Abubakar Jalloh, Deputy City Clerk. Thus, for purposes of this Denial of Access Complaint, the GRC refers to Mr. Jalloh as Custodian herein.

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

Background

November 5, 2009

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

November 12, 2009

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the fourth (4th) business day following receipt of such request. The Custodian states that the information requested is voluminous and the Custodian will require more than the statutorily mandated seven (7) business days to provide the requested records. The Custodian states that the Police Department anticipates an additional two (2) weeks to prepare the records requested.

November 18, 2009

Letter from the Complainant to the Custodian. The Complainant states that he did not receive a copy of the Custodian's November 12, 2009 letter by mail but did receive a copy of said letter by fax. The Complainant states that he does not agree to the two (2) week extension requested by the Custodian.

The Complainant further states that this is the second (2nd) request he has made for Plainfield Police Department records and the second (2nd) request for an extension of time to provide said records which he has received at the last minute. The Complainant states that he has submitted hundreds of OPRA requests throughout the State of New Jersey and is familiar with the records he is seeking and the effort it may take for production of same. The Complainant asserts that he has submitted similar requests as the one herein to the Clifton Police Department, which the Complainant contends is similar in size to the City of Plainfield Police Department, and the Clifton Police Department has been able to satisfy the Complainant's request within two (2) days of receipt thereof.

The Complainant also states that any communication or logistical problems with the Plainfield Municipal Clerk's office in transmitting or receiving information from City departments is not the Complainant's fault and he does not believe that he should be denied access to the requested records because of same. The Complainant states that of the ten (10) items on his OPRA request, most if not all are computerized or are accessible in electronic format. The Complainant states that all of these records could have been provided in a timely fashion or at a minimum, the Custodian could have delineated what records were available within the statutorily mandated seven (7) business day response time and which records required more time to provide.

The Complainant states that for these reasons, he does not agree to the Custodian's request for a two (2) week extension of time to provide the requested records. The Complainant states that as a good faith gesture he will agree to the records being provided by November 20, 2009. The Complainant states that if he does not receive the requested records by that date, he will file a Denial of Access Complaint with the

Government Records Council (“GRC”) and will seek a determination that the Custodian has willfully violated OPRA.

November 20, 2009

Letter from the Custodian to the Complainant. The Custodian states that for clarification purposes, the Complainant’s current OPRA request was in fact responded to within the statutorily mandated seven (7) business day time period.

The Custodian states that the Complainant’s OPRA request of ten (10) items comprises police logs, police recordings, police summary reports, police abstract reports and police mobile data terminal transmissions. The Custodian further states that during verbal and written communications with the Complainant, the Custodian has advised the Complainant that the magnitude of the Complainant’s request will require at least a two (2) week search through voluminous files and file locations to recover the records sought. The Custodian states that the Complainant’s request also requires an inordinate amount of time for staff to set aside to complete. The Custodian states that the City of Plainfield Corporation Counsel has stated that some of the records sought may be exempt from disclosure under OPRA. The Custodian further states that after a thorough legal review it is anticipated that the Complainant will be advised of such determination within two (2) weeks.

The Custodian advises the Complainant that N.J.S.A. 47:1A-5.a. allows for custodians to require a deposit for requests requiring excess copying before the request is processed. The Custodian states that his office has begun to process the Complainant’s request without requiring such deposit.

The Custodian further advises the Complainant that N.J.S.A. 47:1A-5.g. states that “if a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.” The Custodian states that his office remains steadfast and cooperative in complying with the Complainant’s OPRA request in a timely fashion. The Custodian also states that a two (2) week extension of time for such a voluminous request is both fair and appropriate.

The Custodian states that although the Complainant deems the request for an extension of time to be a denial of access to the requested records, OPRA does not do so; the Custodian asserts that he has responded to the Complainant’s OPRA request within the required time frame and has requested an extension of time for a voluminous request as permitted by the law. The Custodian states that the State of New Jersey encourages those who feel they have been wrongfully denied access to public records to appeal to the GRC and encourages the Complainant to do so. The Custodian states that although the Complainant is within his rights to file a Denial of Access Complaint with the GRC, the Custodian emphasizes that this is not a denial of access but merely a reasonable request to have sufficient time to gather the records requested.

November 23, 2009

Memorandum from Captain Steven W. Soltys, City of Plainfield Police Division, Information Technology Bureau, to Director Martin Hellwig, recommending that Corporation Counsel review the Complainant's OPRA request. Captain Soltys states that a review of the Complainant's OPRA request finds that the request is overly broad and unclear and does not identify specific government records. Captain Soltys states that he believes that OPRA requires a requestor to clearly identify a specific record sought and provide a description thereof. Captain Soltys also states that request Items No. 3 and No. 10 seek confidential staffing information which could provide staffing patterns and specific schedules for individuals and units within the Police Division.

November 30, 2009

E-mail from the Custodian to Captain Steven Soltys, City of Plainfield Police Division. The Custodian requests that Captain Soltys provide a written response regarding the status of the Complainant's OPRA request dated November 5, 2009 for police records. The Custodian states that the Complainant has since made a complaint with the GRC stating that the City denied his request for records. The Custodian requests Captain Soltys' immediate attention to this matter.

November 30, 2009

Denial of Access Complaint filed with the GRC with the following attachments:

- Complainant's OPRA request dated November 5, 2009
- Letter from the Custodian to the Complainant dated November 12, 2009
- Letter from the Complainant to the Custodian dated November 18, 2009
- Letter from the Custodian to the Complainant dated November 20, 2009

The Complainant states that he faxed the OPRA request to the Custodian on November 5, 2009. The Complainant further states that when he did not receive a response thereto, the Complainant telephoned the Custodian for a status update on November 16, 2009 at 2:45 pm. The Complainant also stated that he spoke to the Custodian, who informed the Complainant that a request for an extension of time was mailed to the Complainant. The Complainant further states that he informed the Custodian that the Complainant did not receive such request for an extension; the Complainant states that the Custodian faxed a copy of such request to the Complainant at 5:25 pm.

The Complainant states that he wrote to the Custodian on November 18, 2009 objecting to the request for an extension of time because the Police Department asked for a similar extension for records that were easily accessible in the past and it was later discovered that the Police did not maintain the record in accordance with the Division of Archives and Records Management Records Retention Schedule.

The Complainant also states that the Custodian wrote to the Complainant on November 20, 2009 reciting OPRA and explaining the requested two (2) week extension of time as a reasonable request to have sufficient time to gather the requested records; however, the Complainant asserts that the Custodian has not stated what if any records

would be disclosed at the end of the two (2) week extension. The Complainant further states that the Custodian has failed to state what records are not maintained by the Police, what records may have been purged, which records are denied, or the cost of copying the responsive records. The Complainant states that the two (2) week extension requested by the Custodian has passed with no further response from the Custodian nor any records being disclosed.

The Complainant states that it appears that the Custodian's office is being misguided by the Police Department, which is unable or unwilling to provide easily retrievable computerized and electronic records in a timely manner.

The Complainant does not agree to mediate this complaint.

December 1, 2009

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

December 17, 2009

Letter from Custodian's Counsel to the GRC. Custodian's Counsel states that the City of Plainfield believes that the Complainant's OPRA request is overly broad, does not specify the records requested, and would substantially disrupt agency operations.

Custodian's Counsel contends that the Complainant's OPRA request is invalid because it fails to specify identifiable government records and would require the Plainfield Police Department to conduct research to identify records which may be responsive to the request. Complainant's Counsel states that the Appellate Division has held that:

"[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying or examination.' N.J.S.A. 47:1A-1." MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005).

Custodian's Counsel asserts that the court further held that "[u]nder OPRA, agencies are required to disclose only 'identifiable government records not otherwise exempt... In short, OPRA does not countenance open-ended searches of an agency's files.'" *Id.* at 549.

Custodian's Counsel further asserts that in Bent v. Township of Stafford, 381 N.J. Super. 30 (App. Div. 2005), the Appellate Division referenced MAG, holding that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents." *Id.* Custodian's Counsel asserts that to qualify as valid under OPRA, a request must reasonably identify a record and not general data.

Custodian's Counsel argues that in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), the Appellate Division cited MAG in stating that "...when a request is 'complex' because it fails to specifically identify the documents sought, then that request is not 'encompassed' by OPRA..." Custodian's Counsel asserts that the court quoted N.J.S.A. 47:1A-5.g. in that "[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency." Custodian's Counsel states that the court further determined that "...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency's need to ... generate new records..."

Custodian's Counsel contends that in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009), the GRC held that "[b]ecause the Complainant's OPRA requests #2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Township of Stafford, 381 N.J. Super. 30 (App. Div. 2005)."

Custodian's Counsel asserts that OPRA does not require custodians to conduct research to satisfy an OPRA request. MAG, *supra*. Custodian's Counsel states that OPRA only requires a custodian to search for identifiable government records. Donato v. Township of Union, GRC Complaint No. 2005-182 (January 2007). Custodian's Counsel further asserts that OPRA requires a custodian to make available only identifiable government records. Bent, *supra*. Custodian's Counsel further asserts that it is the requestor's obligation to identify the records sought with specificity; the request may not be a broad, generic description of documents that requires the custodian to search the agency's files. Bart v. Passaic County Housing Authority, 406 N.J. Super. 445 (App. Div. 2009).

Custodian's Counsel contends that in the present case, the Complainant's request does not provide the specificity necessary to constitute a valid OPRA request. Custodian's Counsel further contends that the Complainant seeks a wide array of documents and recordings without specifically detailing the records sought; for instance, request Items No. 1, 2, 8 and 9 seek computer aided dispatching reports "or similar reports." Custodian's Counsel asserts that this language is too vague to provide a response as it does not articulate what "similar reports" are sought.

Custodian's Counsel further contends that because the request is not specific to an incident or person, the request may include records that are part of an ongoing investigation, which records would be exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1

Custodian's Counsel states that request Items No. 3, 4, 5, 6, 7 and 10 all seek confidential staffing information which would provide staffing patterns and specific

schedules for individual officers and units within the 151-officer Plainfield Police Department. Custodian's Counsel contends that the need to maintain the confidentiality of investigative procedures outweighs the Complainant's need for disclosure of the requested records. McClain v. College Hosp., 99 N.J. 346 (1985).

December 10, 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 Statement of Information on December 1, 2009 and to date has not received a response. Further, the GRC states that if the Statement of Information is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

December 23, 2009

Custodian's SOI with the following attachments:⁵

- Complainant's OPRA request dated November 5, 2009
- Letter from the Custodian to the Complainant dated November 12, 2009
- Letter from the Complainant to the Custodian dated November 18, 2009
- Letter from the Custodian to the Complainant dated November 20, 2009
- Memorandum from Captain Steven W. Soltys to Director Martin Hellwig dated November 23, 2009
- E-mail from the Custodian to Captain Steven W. Soltys dated November 30, 2009
- New Jersey Department of State, Division of Archives and Records Management ("DARM") records retention schedule for municipal police departments.

The Custodian certifies that Items No. 1, 2, 4, 8 and 9 of the Complainant's OPRA request were not found on the records retention schedule established and approved by DARM. The Custodian further certifies that request Items No. 3 and 10 are subject to a records retention period of three (3) years pursuant to the records retention schedule established and approved by DARM. The Custodian further certifies that request Items No. 5, 6, and 7 are subject to a records retention period of 31 days pursuant to the records retention schedule established and approved by DARM. The Custodian certifies that no records responsive have been provided to the Complainant to date.

The Custodian certifies that he received the Complainant's OPRA request on November 5, 2009 and that he forwarded such request to the Police Division for processing on November 6, 2009. The Custodian further certifies that on November 11, 2009, he made a follow up telephone call to the Office of the Police Director to ascertain when the requested records would be made available to the Custodian for disclosure. The Custodian certifies that he was informed that the Complainant's OPRA request was voluminous and that at least two (2) weeks would be needed to fulfill said request.

The Custodian further certifies that he sent a letter to the Complainant dated November 12, 2009 requesting a two (2) week extension of time to disclose the requested

⁵ Additional materials were submitted as part of the SOI which are not relevant to the adjudication of this Denial of Access Complaint.
Richard Rivera v. City of Plainfield Police Department (Union), 2009-317 – Findings and Recommendations of the Executive Director

records. The Custodian also certifies that he received a letter from the Complainant dated November 18, 2009 denying the requested extension of time and threatening to file a complaint with the GRC if the requested records were not immediately provided. The Custodian certifies that he sent a letter to the Complainant dated November 20, 2009 in which the Custodian stated that the City would continue to research the Complainant's OPRA request regardless of the Complainant's threat to file a complaint.

The Custodian further certifies that between November 22, 2009 and November 27, 2009, he made a number of follow-up telephone calls to the Police Division regarding the status of the Complainant's OPRA request. The Custodian also certifies that he sent a memorandum to Captain Steven W. Soltys⁶ on November 30, 2009, demanding a written response on the status of the Complainant's request. The Custodian certifies that he received a letter from Captain Soltys on December 1, 2009 indicating that the Complainant's OPRA request was insufficiently specific and required legal review.

The Custodian certifies that the Complainant threatened to file a complaint if the requested records were not immediately disclosed to him. The Custodian certifies that the Complainant's OPRA request was not clear and responding to such request would disrupt the operations of the police agency.

The Custodian asserts that the records requested by the Complainant deal with police matters that are under the authority of the Plainfield Police Division. The Custodian further asserts that as of December 4, 2009, the Police Division has not provided his office with any of the requested records. The Custodian asserts that he is unable to provide an accurate estimate of the number of pages of responsive records.

The Custodian asserts that the Complainant's OPRA request is very voluminous and concerns police matters outside the purview of the Custodian's office. The Custodian further asserts that in confusion over the Complainant's OPRA request, the Police Division turned the matter over to the City of Plainfield Corporation Counsel for legal review. The Custodian asserts that although access to the requested records was never denied, the Custodian draws the GRC's attention to N.J.S.A. 47:1A-5.g., which states "[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency."

The Custodian states that, additionally, OPRA requires those requesting government records to be specific in such request. The Custodian states that after attempting to reach a reasonable accommodation with the Complainant regarding the voluminous OPRA request herein, the Complainant was adamant about refusing any extension of time requested by the Custodian.

⁶ The Custodian certifies that Captain Soltys oversees the Information Technology Bureau of the Police Division of the City of Plainfield.
Richard Rivera v. City of Plainfield Police Department (Union), 2009-317 – Findings and Recommendations of the Executive Director

January 12, 2010

Letter from Complainant's Counsel to the GRC. Complainant's Counsel states that the Complainant wishes to amend his Denial of Access Complaint to incorporate the following argument. Complainant's Counsel asserts that the Custodian relied principally on MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Township of Stafford, 381 N.J. Super. 30 (App. Div. 2005). Complainant's Counsel asserts that these cases are distinguishable from the matter before the Council.

Complainant's Counsel asserts that in MAG and Bent the court was addressing OPRA concerns that were styled as requests for discovery in litigation. Complainant's Counsel further asserts that the Complainant's request was targeted according to date and time. Complainant's Counsel asserts that the matter herein is analogous to O'Shea v. Stillwater Township, GRC Complaint No. 2007-253 (August 2009) and Paff v. Borough of Roselle, GRC Complaint No. 2007-255 (October 2010), in which the GRC held that requests for the three (3) most recent executive session meeting minutes were sufficiently specific. Complainant's Counsel also states that in Donato v. Jersey City Police Department, GRC Complaint No. 2005-251 (April 2007), Donato's request for the first page of all accident reports for two (2) dates did not even warrant a special service charge, much less constitute an overly broad request.

Complainant's Counsel asserts that the OPRA request herein is nearly identical to the requests made in Rivera v. Town of Guttenberg, GRC Complaint No. 2006-154 (June 2008). Complainant's Counsel states that in that case, the Complainant requested telephone recordings for six (6) dates for time periods ranging from 51 minutes to eleven hours; the GRC did not find those requests, which were identified according to date and time, were overly broad or unclear. Complainant's Counsel contends that the GRC should follow its prior decisions and order the Custodian to disclose the requested records.

Complainant's Counsel states that the records requested do not concern any investigative techniques nor would they jeopardize any investigation. Complainant's Counsel asserts that Custodian's Counsel does not identify what investigations, if any, would be jeopardized by disclosure of the requested records. Complainant's Counsel suggests that the statement of Custodian's Counsel in his letter to the GRC dated December 19, 2009 that the Complainant's request may include documents and information that are part of an ongoing investigation indicates that Custodian's Counsel has not even reviewed the records responsive to the Complainant's request. Complainant's Counsel contends that without such review, Complainant's Counsel finds it difficult to imagine that a good faith basis may be made for not disclosing such records. Complainant's Counsel also contends that, to the extent that the Complainant has requested duty logs, those are public records the disclosure of which would have no effect upon law enforcement.

November 18, 2010

E-mail from the GRC to the Custodian's Counsel. The GRC requests that the Custodian provide a legal certification setting forth all relevant facts that the Custodian believes support his assertion that responding to the Complainant's OPRA request will result in a substantial disruption of the agency's business.

November 30, 2010

Telephone call from the GRC to the Custodian's Counsel. The GRC notes that it requested a certification via e-mail dated November 18, 2010 and to date has not received a response. The GRC grants Custodian's Counsel an extension of time to Monday, December 6, 2010 to provide the requested certification.

December 6, 2010

Telephone call from Custodian's Counsel to the GRC. Custodian's Counsel requests an extension of one week to provide the requested certification. The GRC grants an extension to December 10, 2010 to provide the required certification.

December 9, 2010

E-mail from Custodian's Counsel to the GRC. Custodian's Counsel states that the Custodian will rely upon the arguments set forth in its December 17, 2009 letter in opposition to the Complaint. Custodian's Counsel notes that specifically, the Custodian argued that the Complainant's OPRA requests were overly broad and did not specify the records requested. Custodian's Counsel states that the Custodian will not submit a certification regarding the contention that responding to the Complainant's OPRA requests results in a substantial disruption of the agency's business.

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 provides that:

"[a] government record shall not include the following information which is deemed to be confidential for the purposes of [OPRA] ...:

...

security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software...." N.J.S.A. 47:1A-1.1.

OPRA also provides that:

“[w]henever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section... involves an extraordinary expenditure of time and effort to accommodate the request, the public agency may charge, in addition to the actual cost of duplicating the record, a special service charge that *shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies* ... The requestor shall have the opportunity to review and object to the charge prior to it being incurred. (Emphasis added). N.J.S.A. 47:1A-5.c.

OPRA states that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy therefor ... If the government record requested is temporarily unavailable because it is in use or in storage, the custodian shall so advise the requestor and shall make arrangements to promptly make available a copy of the record. If a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.” N.J.S.A. 47:1A- 5.g.

Additionally, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request... failure to respond shall be deemed a denial of the request* ... If the government record is in storage or archived, the requestor shall be so advised within seven business days after the custodian receives the request. The requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied.” (Emphasis added.) N.J.S.A. 47:1A-5.i.

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

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

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.

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.¹⁵ 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).

Additionally, N.J.S.A. 47:1A-5.i. provides that a custodian must inform the requestor when the requested records will be made available and that failure to provide the records by such date results in a “deemed” denial.

In the matter before the Council, the evidence of record indicates that the Complainant filed an OPRA request on November 5, 2009 seeking copies of the records relevant to this complaint listed above. The evidence further indicates that the Custodian responded to the request in writing on the fourth (4th) business day following receipt of such request. In his response to the OPRA request, the Custodian stated that the information requested is voluminous and the Custodian will require more than the statutorily mandated seven (7) business days to provide the requested records. The Custodian further stated that the Police Department anticipated an additional two (2) weeks to prepare the records requested. In the SOI, the Custodian certified that the Complainant’s OPRA request was not clear and responding to such request would disrupt the operations of the police agency. The evidence of record indicates that the Complainant did not agree to the Custodian’s request for an extension of time.

OPRA provides that “[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.” N.J.S.A. 47:1A-5.g. Here, the Custodian attempted to reach a reasonable solution with the requestor that accommodated the interests of the requestor and the agency by requesting a two (2) week extension of time (until November 26, 2009) to respond to the Complainant’s OPRA requests. OPRA provides for such requests in N.J.S.A. 47:1A-5.i. which states that “[t]he requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied.”

The Council has further described the requirements for a proper request for an extension of time. Specifically, in Starkey v. NJ Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009), the Custodian provided the Complainant with a written response to his OPRA request on the second (2nd) business day following receipt of said request in which the Custodian requested an

extension of time to respond to said request and provided the Complainant with an anticipated deadline date upon which the Custodian would respond to the request. The Council held that “because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g. [and] N.J.S.A. 47:1A-5.i.”

Similarly in this instant complaint, the Custodian provided the Complainant with a written response to his OPRA requests on the fourth (4th) business day following receipt of said request in which the Custodian requested a two (2) week extension of time to respond to said request.

Therefore, because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Starkey, supra.

Moreover, in a letter from the Custodian to the Complainant dated November 20, 2009, the Custodian stated that the magnitude of the Complainant’s request would require at least a two (2) week search through voluminous files and file locations to recover the records sought. The Custodian stated that the Complainant’s request also required an inordinate amount of time for staff to set aside to complete. The Custodian stated that the City of Plainfield Corporation Counsel has stated that some of the records sought may be exempt from disclosure under OPRA and the Custodian further stated that after a thorough legal review it is anticipated that the Complainant will be advised of such determination within two (2) weeks (or by December 4, 2009).

The Custodian’s letter to the Complainant dated November 20, 2009 occurred prior to the expiration of the original two (2) week extension of time requested by the Custodian on November 12, 2009 and can reasonably be understood as a request for a second two-week extension of time to provide the requested records or a lawful denial thereto. Thus, because the Custodian requested a second extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Starkey, supra.

However, the evidence of record indicates that the Custodian did not provide the requested records by the extended date to do so; the Custodian certified in the SOI that no records had been provided to the Complainant as of the date of the submission of the SOI on December 23, 2009.

Therefore, because the evidence of record indicates that the Custodian did not provide the requested records by the extended date to do so and because the Custodian certified in the SOI that no records had been provided to the Complainant as of the date of the submission of the SOI on December 23, 2009, the Custodian’s failure to grant access, deny access, or seek clarification of the Complainant’s OPRA request within the

additional two (2) week extension of time to do so 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).

The Custodian has asserted that the Complainant’s request is invalid under OPRA because it is overly broad, does not specify the records requested, would require the Plainfield Police Department to conduct research to identify records which may be responsive to the request, and is therefore invalid under OPRA. The Custodian states that OPRA requires requests for government records to be specific in such request. New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Township of Stafford, 381 N.J. Super. 30 (App. Div. 2005). *See also* Bart v. Passaic County Housing Authority, 406 N.J. Super. 445 (App. Div. 2009); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Donato v. Township of Union, GRC Complaint No. 2005-182 (January 2007). By way of example, the Custodian states that request Items No. 1, 2, 8 and 9 seek computer aided dispatching reports “or similar reports;” the Custodian asserts that this language is too vague to provide a response as it does not articulate what “similar reports” are sought.

Conversely, the Complainant asserts that the court’s decisions in MAG, *supra*, and Bent, *supra*, are distinguishable from the matter before the Council because in those cases the court was addressing OPRA requests that were styled as requests for discovery in litigation. However, the Complainant asserts that his OPRA request was targeted by date and time. The Complainant contends that this matter is more analogous to O’Shea v. Stillwater Township, GRC Complaint No. 2007-253 (August 2009) and Paff v. Borough of Roselle, GRC Complaint No. 2007-255 (October 2010), in which the GRC held that requests for the three (3) most recent executive session meeting minutes were sufficiently specific, as well as Donato v. Jersey City Police Department, GRC Complaint No. 2005-251 (April 2007), in which the GRC determined that the complainant’s request for the first page of all accident reports for two (2) dates did not even warrant a special service charge, much less constitute an overly broad request. The Complainant argues that the OPRA request herein is nearly identical to the requests made in Rivera v. Town of Guttenberg, GRC Complaint No. 2006-154 (June 2008), where the Complainant requested telephone recordings for six (6) dates for time periods ranging from 51 minutes to eleven (11) hours; the GRC did not find those requests, which were identified according to date and time, were overly broad or unclear. The Complainant contends that the GRC should follow its prior decisions and order the Custodian to disclose the requested records.

“[U]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt.” MAG Entertainment v. Div. of ABC, 375 N.J. Super. 534, 549 (App. Div. 2005). A request that does not identify the particular records sought by name, date, type of record or some other specific identifying characteristic may be found to be invalid.

In MAG, the Division of Alcoholic Beverage Control sought to revoke MAG’s liquor license for various violations. Trying to establish a defense of selective

prosecution, MAG filed an OPRA request with the Division, seeking "**all documents or records ...** that the ABC sought, obtained or ordered revocation of a liquor license for the charge of selling alcoholic beverages to an intoxicated person [who], after leaving the licensed premises, was involved in a fatal auto accident," and "**all documents or records** evidencing that the ABC sought, obtained or ordered suspension of a liquor license exceeding 45 days for charges of lewd or immoral activity." *Id.* at 539-40 (Emphasis added). MAG's request did not identify any specific case by name, date, docket number or any other citation, but instead demanded that:

“the documents or records should set forth the persons and/or parties involved, the name and citation of each such case, including unreported cases, the dates of filing, hearing and decision, the tribunals or courts involved, the substance of the allegations made, the docket numbers, the outcome of each matter, the names and addresses of all persons involved, including all witnesses and counsel, and copies of all pleadings, interrogatory answers, case documents, expert reports, transcripts, findings, opinions, orders, case resolutions, published or unpublished case decisions, statutes, rules and regulations.” *Id.* at 540.

The court found that this was an invalid OPRA request with which the Custodian was not obligated to comply. *Id.* at 553. The court found it very significant that MAG “failed to identify with any specificity or particularity the governmental records sought. MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.” *Id.* at 549. Because MAG failed to identify any particular documents by name, type of document, date range, or any other identifying characteristic, the custodian would have been required

“to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense....Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.” *Id.*

The court therefore found that “MAG's request was not a proper one for specific documents within OPRA's reach, but rather a broad-based demand for research and analysis, decidedly outside the statutory ambit.” *Id.* at 550. See also New Jersey Builder's Ass'n v. N.J. Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007)(holding that a five-page document listing thirty-eight separate requests all of which included a request for “any and all data” failed to specifically identify the documents sought as required by N.J.S.A. 47:1A-5.f.); Bent v. Township of Stafford, 381 N.J. Super. 30 (App. Div. 2005)(finding that a five-part request for the “entire file” of his criminal investigation and “the factual basis underlying documented action and advice to third parties” is not a proper request for public records under OPRA and the information it seeks is beyond the statutory reach of OPRA); Reda v. Township of West Milford, GRC Complaint No. 2002-58 (January 17, 2003)(dismissing a request for annual costs of liability settlements by the Township for each of five years, including costs for “legal defense of said items[.]” because the requestor failed to identify any specific record in the

custodian's possession and holding that OPRA does not require records custodians to conduct research among its records for a requestor and correlate data from various government records).

In the matter before the Council, the Complainant's request sought copies of the following:

- 1) Computer-aided dispatching ("CAD") summary report of similar police report for activities on January 9, 2009 from 4:00 p.m. to 7:00 p.m.
- 2) CAD abstract reports or similar police report for activities on January 9, 2009 from 4:00 p.m. to 7:00 p.m.
- 3) Police daily duty log for January 9, 2009 from 4:00 p.m. to 7:00 p.m. that includes all police officers, supervisors and civilians working during that time and what their assignments were.
- 4) Mobile data terminal transmissions to and from every police terminal for January 9, 2009 from 4:00 p.m. to 7:00 p.m.
- 5) All police radio recordings for January 9, 2009 from 4:00 p.m. to 7:00 p.m.
- 6) All police telephone recordings for January 9, 2009 from 4:00 p.m. to 7:00 p.m.
- 7) All police 911 telephone recordings for January 9, 2009 from 4:00 p.m. to 7:00 p.m.
- 8) CAD summary report or similar police report for activities on January 12, 2009 from 4:00 p.m. to 11:59 p.m.
- 9) CAD abstract reports or similar police report for activities on January 12, 2009 from 4:00 p.m. to 11:59 p.m.
- 10) Police daily duty log for January 12, 2009 from 4:00 p.m. to 11:59 p.m. that includes all police officers, supervisors and civilians working during that time and what their assignments were.

In Rivera v. Wall Police Department (Monmouth), GRC Complaint Number 2008-280 (June 2010), the Complainant's OPRA request sought the following records:

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

The Council determined that the Complainant's requests for Item No. 2 through Item No. 4⁷ of the Complainant's request were overbroad and failed to specifically identify the records sought, and because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to conduct research to locate records potentially responsive to the Complainant's

⁷ The Council ultimately determined that the evidence of record indicated that records responsive to request Item No. 1 did not exist.

request pursuant to the Superior Court's decisions in MAG, *supra*, Bent, *supra*, New Jersey Builders, *supra*, and Schuler, *supra*.

Moreover, in Rivera v. Wall Police Department (Monmouth), GRC Complaint No. 2008-281 (July 2010), the Complainant's OPRA request sought the following records:

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

The Council determined that the Complainant's OPRA request was overly broad and failed to specifically identify the records sought, and because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to conduct research to locate records potentially responsive to the Complainant's request pursuant to the Superior Court's decisions in MAG, *supra*, Bent, *supra*, New Jersey Builders, *supra*, and the Council's decision in Schuler, *supra*.

Complainant's Counsel has asserted that the OPRA request herein is nearly identical to the requests made in Rivera v. Town of Guttenberg, GRC Complaint No. 2006-154 (June 2008). Complainant's Counsel states that in that case, the Complainant requested telephone recordings for six (6) dates for time periods ranging from 51 minutes to eleven (11) hours and notes that the GRC did not find those requests, which were identified according to date and time, were overly broad or unclear. Complainant's Counsel contends that the GRC should follow its prior decisions and order the Custodian to disclose the requested records.

In Rivera v. Town of Guttenberg, GRC Complaint No. 2006-154 (June 2008), the Complainant's OPRA request sought to listen to Guttenberg Police Department telephone recordings for the following dates and times:

- 1) February 19, 2006 1:00 p.m. to 6:00 p.m. (5 hours)
- 2) February 20, 2006 8:00 a.m. to 5:00 p.m. (9 hours)
- 3) February 22, 2006 11:00 a.m. to 10:00 p.m. (11 hours)
- 4) May 1, 2006 1:00 p.m. to 5:00 p.m. (4 hours)
- 5) May 2, 2006 9:00 a.m. to 12:30 p.m. (3 hours, 30 minutes)
- 6) May 4, 2006 11:45 a.m. to 12:36 p.m. (51 minutes)

The Council's decision in Guttenberg is inapplicable to the instant matter. There, the Custodian offered transcriptions of the requested telephone calls, arguing that the Town lacked the ability to provide the requested records in the medium requested, and that transcription of the recordings was necessary to protect privacy interests of the

individuals whose names and addresses were contained in the recordings. The issue addressed by the Council then became whether the proposed special service charge sought by the Custodian was consistent with OPRA. The GRC did not make a decision on the validity of the request because the custodian provided records without regard to the same.

In the matter before the Council, the Complainant's request Items No. 4, 5, 6, and 7 are extremely similar to the requests in Rivera v. Wall Police Department (Monmouth), GRC Complaint Number 2008-280 (June 2010) and Rivera v. Wall Police Department (Monmouth), GRC Complaint No. 2008-281 (July 2010); the Complainant's request for such Items is invalid under OPRA because they are overly broad and fail to identify specific government records sought. Moreover, because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to conduct research to locate records potentially responsive to the Complainant's request pursuant to the Superior Court's decisions in MAG, supra, Bent, supra, New Jersey Builders, supra, and the Council's decision in Schuler, supra.

However, the Complainant's request Items No. 1, 2, 3, 8, 9 and 10 identify specific government records sought by record name, date and time. Request Items No. 1, 2, 8 and 9 seek "CAD...or similar police reports" for a specific date and time. Request Items No. 3 and 10 seek "police daily duty log[s]" for a specific date and time period.

Such request items are substantially similar to the facts presented in Burnett v. County of Gloucester, 415 N.J.Super. 506 (App. Div. 2010). In Burnett, the plaintiff appealed from an order of summary judgment entered against him in his suit to compel production by the County of Gloucester of documents requested pursuant to OPRA, consisting of "[a]ny and all *settlements, releases or similar documents* entered into, approved or accepted from 1/1/2006 to present." Id. at 508. (Emphasis added). The Appellate Division determined that the request sought a specific type of document, although it did not specify a particular case to which such document pertained, and was therefore not overly broad. Id. at 515-16.

Thus, request Items No. 1, 2, 3, 8, 9 and 10 identify specific government records sought; the request for these Items is therefore valid under OPRA. *See* MAG, supra, Bent, supra, New Jersey Builders, supra, Burnett, supra, and the Council's decision in Schuler, supra.

The Custodian has stated that the Complainant's OPRA request is voluminous and would substantially disrupt the operations of the agency. The Custodian draws the GRC's attention to N.J.S.A. 47:1A-5.g., which states "[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency." The Custodian certified in the SOI that after he attempted to reach a reasonable accommodation with the Complainant regarding the OPRA request through an extension of time to provide the requested records, the Complainant refused to agree to any extension of time requested by the Custodian. Although the GRC requested that the Custodian provide a certification in support of his argument that the Complainant's

OPRA requests will substantially disrupt the agency's business, the Custodian declined to do so on December 9, 2010.

It is clear from the evidence of record that the Complainant's OPRA requests herein do not rise to the level of similar requests which the GRC has determined resulted in a substantial disruption of an agency's business.

In Dittrich v. City of Hoboken, GRC Complaint No. 2008-13 (June 2009), the GRC determined that the Complainant's December 3, 2007 fifty (50) page OPRA request was voluminous in nature because the Complainant's OPRA request spanned a number of years and encompassed 800-1,000 separate large files each of which generally contained a minimum of thirty (30) documents but in some cases contained hundreds of pages of documents. The Custodian's timely written response noted that the Complainant's OPRA request was voluminous and fulfilling it would substantially disrupt the service of the agency. The Custodian subsequently attempted to reach a reasonable accommodation of the Complainant's OPRA request. However, the Complainant's responses to the Custodian's attempts to accommodate the Complainant's OPRA request were vague and failed to narrow the scope of the Complainant's OPRA request to a more manageable scale. The GRC determined that because in the Custodian's timely response to the Complainant's OPRA request, the Custodian attempted to reach a reasonable accommodation of the OPRA request with the Complainant regarding the Complainant's voluminous request which would substantially disrupt the agency's operations, and because once it became evident that the parties could not reach an accommodation, the Custodian informed the Complainant that he would have to deny the Complainant's OPRA request, the Custodian has not unlawfully denied the Complainant access to the records requested pursuant to N.J.S.A. 47: 1A-5.g., New Jersey Builders, supra, Vessio v. New Jersey Department of Community Affairs, Division of Fire Safety, GRC Complaint No. 2007-63 (May 2007), and Caggiano v. Borough of Stanhope, GRC Complaint No. 2006-220 (September 2007).

In Vessio, supra, the GRC ruled that, based on the custodian's certification that granting access to all fire safety inspection files from 1986 to 2006 would result in a substantial disruption to the agency's operations, and the custodian's efforts to reach a "reasonable solution" with the complainant that accommodates the interests of the requestor and the agency, and the voluminous nature of the complainant's request, the custodian's denial of access to the requested records was authorized by N.J.S.A. 47:1A-5.i.

Moreover, in Caggiano, supra, the complainant's seven (7) page, fifty nine (59) item request sought access to voluminous records from the Borough of Stanhope. The custodian responded in writing to the complainant within seven (7) business days of receiving the request and alerted the complainant that the custodian required additional time to respond to the voluminous OPRA request. The custodian advised the complainant that she could not reasonably keep up with his ongoing submission of OPRA requests without substantially disrupting the functioning of her office. The evidence of record indicated that the custodian attempted to reach a mutually-agreeable solution to balance the complainant's right to access government records with the custodian's need to manage her job responsibilities without substantial disruption.

The GRC held that, based on the custodian's certification that granting access to the voluminous records requested by the complainant in his seven (7) page, fifty nine (59) itemized request spanning over twelve (12) years, would result in a substantial disruption to the agency's operations, and the custodian's efforts to reach a reasonable solution with the complainant that accommodated the interests of the requestor and the agency, and the voluminous nature of the complainant's OPRA request, the custodian's denial of access was authorized by N.J.S.A. 47:1A-5.i. and consistent with the GRC's decision in Vessio, supra, and New Jersey Builders, supra.

A review of the Complainant's OPRA request in light of the above cases discloses that the Complainant's OPRA request herein is materially different from the requests at issue in Dittrich, supra, Vessio, supra, and Caggiano, supra. The Complainant's ten (10) item request herein seeks seven (7) types of records generated on one date over a three hour time span and three (3) types of records generated on another date over an eight (8) hour time span. The Custodian has provided no evidence to support his contention that responding to the Complainant's OPRA request would substantially disrupt the business of the Plainfield Police Department. Nor has the Custodian provided evidence that he attempted to reach a reasonable solution with the Complainant that accommodates the interests of the Complainant and the agency prior to the denial of the Complainant's request as required by N.J.S.A. 47:1A-5.g.

Thus, the evidence of record does not support a conclusion that the Complainant's OPRA request Items No. 1, 2, 3, 8, 9, and 10 represent a substantial disruption of the business of the City of Plainfield Police Department. *See* Dittrich, supra, Vessio, supra, and Caggiano, supra. Moreover, the Custodian failed to bear his burden of proof under N.J.S.A. 47: 1A-6 that he attempted to reach a reasonable solution with the Complainant that accommodates the interests of the Complainant and the agency prior to the denial of the Complainant's request as required by N.J.S.A. 47:1A-5.g.

The Custodian also contends that because the Complainant's OPRA request is not specific to an incident or person, the request may include records that are part of an ongoing investigation, which records would be exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1.

Conversely, the Complainant states that the records requested do not concern any investigative techniques nor would they jeopardize any investigation. The Complainant asserts that Custodian's Counsel does not identify what investigations, if any, would be jeopardized by disclosure of the requested records and suggests that the statement of Custodian's Counsel in his letter to the GRC dated December 19, 2009 that the Complainant's request may include documents and information that are part of an ongoing investigation indicates that Custodian's Counsel did not review the records responsive to the Complainant's request. Complainant contends that without such review, there is no basis for a good-faith denial of access to the requested records.

Pursuant to OPRA, the Custodian must bear the burden of proving that a denial of access to records requested is supported by law. N.J.S.A. 47:1A-6. The Custodian herein has not submitted any competent, credible evidence that the records requested by the

Complainant are in fact part of any ongoing investigation by the City of Plainfield Police Department. Thus, the Custodian has failed to bear his burden of proving that the Complainant's OPRA request Items No. 1, 2, 3, 8, 9 and 10 are exempt from disclosure under OPRA as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1.

The Custodian has stated that request Items No. 3, 4, 5, 6, 7 and 10 all seek confidential staffing information which would provide staffing patterns and specific schedules for individual officers and units within the 151-officer Plainfield Police Department. The Custodian contends that the need to maintain the confidentiality of investigative procedures outweighs the Complainant's need for disclosure of the requested records. McClain v. College Hosp., 99 N.J. 346 (1985). The Complainant, however, contends that, to the extent that the Complainant has requested duty logs, they are public records the disclosure of which would have no effect upon law enforcement.

OPRA exempts from the definition of a government record security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software. N.J.S.A. 47:1A-1.1.

Item No. 3 of the Complainant's OPRA request sought "[p]olice daily duty log for January 9, 2009 from 4:00 p.m. to 7:00 p.m. that includes all police officers, supervisors and civilians working during that time and what their assignments were." Item No. 10 of the Complainant's request sought "[p]olice daily duty log for January 12, 2009 from 4:00 p.m. to 11:59 p.m. that includes all police officers, supervisors and civilians working during that time and what their assignments were."⁸

Duty logs document the nature of a police officer's daily activities and the amount of time that he devotes to patrol duties. *See, e.g., McElwee v. Borough of Fieldsboro*, 400 N.J. Super. 388, 391 (App. Div. 2008). The Complainant's request for police duty logs sought details of the assignments of police personnel, as well as citizens working for the Plainfield Police Department. Such records necessarily include details regarding surveillance techniques and staffing levels. If disclosed, such information could pose a risk to the safety of police personnel as well as civilians employed by the Plainfield Police Department. The police duty logs sought by the Complainant at request Items No. 3 and 10 are therefore exempt from the definition of a government record pursuant to N.J.S.A. 47:1A-1.1.⁹

⁸ The Council notes that request Items No. 4, 5, 6 and 7, which the Custodian included in this argument, are overly broad and fail to identify specific government records; as such, these requests are invalid under OPRA.

⁹ The New Jersey Department of Law and Public Safety has specifically recognized the exemption to disclosure under OPRA of such records. *See, e.g., proposed N.J.A.C. 13:1E-3-2(a)3*, which provides that "records which may reveal ... an agency's surveillance, security or investigative techniques or procedures or undercover personnel" are not considered government records subject to public access; *see also N.J.A.C. 13:1E-3.2(a)7* which provides that "[t]he duty assignment of an individual law enforcement officer or any personally identifiable information that may reveal or lead to information that may reveal such duty assignment, including, but not limited to, overtime data pertaining to an individual law enforcement officer" is not considered a government record.

Therefore, because request Items No. 3 and 10 sought police daily duty logs, which records necessarily include details regarding surveillance techniques and staffing levels which, if disclosed, could pose a risk to the safety of police personnel as well as civilians employed by the Plainfield Police Department, such records are exempt from the definition of a government record pursuant to N.J.S.A. 47:1A-1.1.

Whether the Custodian's deemed 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. Because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Starkey v. NJ Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009).
2. Because the evidence of record indicates that the Custodian did not provide the requested records by the extended date to do so and because the Custodian certified in the Statement of Information that no records had been provided to the Complainant as of the date of the submission of the Statement of Information on December 23, 2009, the Custodian's failure to grant access, deny access, or seek clarification of the Complainant's OPRA request within the additional two (2) week extension of time to do so 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).
3. The Complainant's OPRA request Items No. 4, 5, 6, and 7 are extremely similar to the requests in Rivera v. Wall Police Department (Monmouth), GRC Complaint Number 2008-280 (June 2010) and Rivera v. Wall Police Department (Monmouth), GRC Complaint No. 2008-281 (July 2010); the Complainant's request for these Items is invalid under OPRA because they are overly broad and fail to identify specific government records sought. Moreover, because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to conduct research to locate records potentially responsive to the Complainant's request pursuant to the Superior Court's decisions in MAG Entertainment v. Div. of ABC, 375 N.J. Super. 534, 549 (App. Div. 2005),

Bent v. Township of Stafford, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builder's Ass'n v. N.J. Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), and the Council's decision in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

4. Request Items No. 1, 2, 3, 8, 9 and 10 identify specific government records sought; the request for such Items is therefore valid under OPRA. *See* MAG Entertainment v. Div. of ABC, 375 N.J. Super. 534, 549 (App. Div. 2005), Bent v. Township of Stafford, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builder's Ass'n v. N.J. Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Burnett v. County of Gloucester, 415 N.J. Super. 506 (App. Div. 2010), and the Council's decision in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
5. The evidence of record does not support a conclusion that the Complainant's OPRA request Items No. 1, 2, 3, 8, 9, and 10 represent a substantial disruption of the business of the City of Plainfield Police Department. *See* Dittrich v. City of Hoboken, GRC Complaint No. 2008-13 (June 2009); Vessio v. New Jersey Department of Community Affairs, Division of Fire Safety, GRC Complaint No. 2007-63 (May 2007); Caggiano v. Borough of Stanhope, GRC Complaint No. 2006-220 (September 2007). Moreover, the Custodian failed to bear his burden of proof under N.J.S.A. 47:1A-6 that he attempted to reach a reasonable solution with the Complainant that accommodates the interests of the Complainant and the agency prior to the denial of the Complainant's request as required by N.J.S.A. 47:1A-5.g.
6. Because the Custodian herein has not submitted any competent, credible evidence that the records requested by the Complainant are in fact part of any ongoing investigation by the City of Plainfield Police Department, the Custodian has failed to bear his burden of proving that the Complainant's OPRA request Items No. 1, 2, 3, 8, 9 and 10 are exempt from disclosure under OPRA as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1.
7. Because request Items No. 3 and 10 sought police daily duty logs, which records necessarily include details regarding surveillance techniques and staffing levels which, if disclosed, could pose a risk to the safety of police personnel as well as civilians employed by the Plainfield Police Department, such records are exempt from the definition of a government record pursuant to N.J.S.A. 47:1A-1.1.
8. **The Custodian shall disclose the records responsive to request Items No. 1, 2, 8 and 9 of the Complainant's OPRA request within five (5) business days from receipt of the Council's Interim Order with appropriate redactions as necessary, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified**

confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹⁰, to the Executive Director.¹¹ If no records responsive to the request exist, the Custodian shall so certify to the Complainant and provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹², to the Executive Director within the time period set forth above.

9. 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: Karyn Gordon, Esq.
In House Counsel

Approved By: Catherine Starghill, Esq.
Executive Director

May 17, 2011

¹⁰ "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."

¹¹ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

¹² "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."